The Principle of Proportionality in Asia, Europe, and North America

A Comparative Perspective between the Rule of Law and States of Emergency

Edited by
Emma A. Imparato, Otto Pfersmann, Giacomo Giorgini Pignatiello

Giappichelli

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Fundamental Rights between the English common law and the principle of Proportionality in the Age of Emergency: the Case of the United States and Japan

Emma A. Imparato

Introduction

The principle of proportionality has become one of the defining features of contemporary constitutional adjudication, providing courts across diverse legal systems with a structured method for balancing competing claims of individual rights and collective interests. Once primarily rooted in European administrative and constitutional traditions, proportionality has now achieved a global presence, shaping the reasoning of constitutional and supreme courts in jurisdictions as varied as Germany, Canada, India, South Korea, South Africa, and Japan. Its diffusion reveals both its conceptual versatility and its normative ambition. Proportionality purports to translate abstract commitments to rights and the rule of law into an operational judicial technique that guides review of state measures in light of necessity, suitability, and the proportionality stricto sensu of their burdens and benefits. This principle, being extremely 'flexible' and lacking predetermined parameters, results—regarding the regulation of fundamental rights—in a significant shift of the centre of competence from the legislature to the judiciary. The latter effectively assigns itself the power to determine the practical management of fundamental rights by means of a review which, in the absence of explicit constitutional criteria to that effect, can only prove to be highly discretionary and variable from case to case.

The present volume explores this doctrinal and comparative evolution, focusing on how proportionality was mobilized during the most recent global pandemic: an unprecedented moment that tested the resilience of constitutional orders and illuminated the ways in which courts mediate the tension between emergency governance and the protection of socio-economic rights. The pandemic's sudden onset and global reach compelled governments to adopt extraordinary measures—lockdowns, curfews, digital surveillance, restrictions on economic activity, and emergency reallocations of public resources—often implemented through executive decrees under conditions of extreme uncertainty. In this context, constitutional and supreme courts became crucial sites for assessing the legality and legitimacy of such measures, navigating between the imperatives of public health, the constraints of legality, and the demand for rights protection. Proportionality, as an analytical framework, was both reaffirmed and reimagined. It functioned as a doctrinal instrument of control over executive discretion, a vehicle for calibrating judicial deference, and, in some cases, a means of articulating the socio-economic dimensions of constitutional justice.

From a comparative perspective, the last state of emergency underscored significant variations in how proportionality is understood and applied across Western and Eastern jurisdictions. In Western constitutional systems, especially those influenced by European and inter-American human rights jurisprudence, proportionality has long served as a canonical method of rights limitation, deeply embedded in constitutional and supranational legal reasoning.

Courts such as the German Federal Constitutional Court, the European Court of Human Rights, and the Supreme Court of Canada have developed a highly structured approach to proportionality. This is characterized by a sequential inquiry into legitimate aims, suitability, necessity, and proportionality in the strict sense. During the pandemic, these courts generally maintained this framework but faced unprecedented evidentiary and institutional challenges; for example, how to evaluate the necessity of restrictions in the face of evolving scientific data, how to assess temporal proportionality when emergency measures were repeatedly renewed, and how to integrate socio-economic considerations, such as the uneven distribution of pandemic burdens. In Eastern jurisdictions, proportionality's role has been more ambivalent, oscillating between constitutional borrowing and localized adaptation. In countries like South Korea and Taiwan, where constitutional courts possess strong traditions of balancing, proportionality was invoked to scrutinize both the scope and the procedural justification of restrictions on movement, assembly, and privacy. In contrast, in jurisdictions with weaker constitutional review or more politically constrained judiciaries, such as certain Southeast Asian or Middle Eastern systems, proportionality was often invoked rhetorically but applied deferentially, serving as a legitimating rather than constraining device. This diversity of applications highlights the relational nature of proportionality. It is not a static formula but a judicial language whose meaning depends on institutional context, constitutional culture, and the distribution of authority between courts and political branches.

A distinctive theme of this volume lies in examining the intersection between proportionality and socio-economic rights during the pandemic. Although proportionality is most commonly associated with the adjudication of civil and political rights, the crisis foregrounded the material and distributive dimensions of constitutional justice. Public-health measures directly affected rights to work, education, housing, and social security, while resource scarcity raised profound questions about equality, access, and the allocation of burdens.

Courts were thus compelled to extend the logic of proportionality beyond the familiar terrain of individual liberty toward the broader field of social and economic entitlements. In some jurisdictions, this led to a nascent form of "social proportionality," whereby courts considered the distributive fairness and social impact of restrictions alongside their formal legality. For instance, some constitutional courts required governments to demonstrate not only that lockdowns were necessary to protect public health, but also that compensatory measures—such as income support or access to digital education—were reasonably proportionate

to the hardships imposed. In other contexts, however, the judicial treatment of socio-economic rights remained limited or indirect, reflecting deeper structural asymmetries where such rights are weakly justiciable or framed as aspirational policy directives. In this light, proportionality review tends to focus narrowly on civil liberties, leaving questions of social inequality to political resolution. The pandemic thus exposed a global fault line in constitutional practice: while proportionality has proven adaptable to emergencies, its capacity to integrate socio-economic justice remains contingent on constitutional text, judicial will, and the broader political economy of rights enforcement.

Beyond doctrinal analysis, this comparative exploration also invites reflection on the institutional and epistemic dimensions of proportionality in times of crisis. Emergencies amplify the asymmetry of information between courts and the executive, compelling judges to rely heavily on governmental data, scientific expertise, and predictive models. This dependency can produce a subtle recalibration of proportionality's logic: the traditional burden of justification may shift from the state to the claimant, and the threshold of judicial skepticism may be lowered in deference to technical expertise. Yet, as the contributions to this volume show, courts also developed innovative ways to assert epistemic authority. Examples of these are: demanding transparency in governmental decision-making, requiring disclosure of scientific advice, and employing procedural proportionality to ensure public deliberation. Such developments illustrate that proportionality, even under conditions of uncertainty, can serve not only as a substantive test of rights limitation but also as a procedural safeguard of accountability and reasoned justification. At the same time, the crisis revealed the fragility of proportionality when confronted with sustained political pressure. In some cases, courts delayed or avoided adjudication of pandemic-related claims, invoking prudential doctrines or emergency exceptions, thereby leaving constitutional questions unresolved. The unevenness of these responses underscores the complex relationship between proportionality, separation of powers, and democratic legitimacy.

The broader comparative lesson emerging from this inquiry is that proportionality operates as both a doctrinal framework and a constitutional ethos, i.e., a mode of reasoning that aspires to rationalize the exercise of public power in light of rights and common goods. Its performance during the pandemic demonstrates its strengths but most importantly, its limits. Proportionality can discipline emergency governance by imposing reasoned justification and by structuring judicial review, but it cannot, on its own, guarantee equitable outcomes or robust protection of socio-economic rights. Its effectiveness depends on institutional design, judicial independence, and the political culture of accountability. The pandemic thus serves as a global laboratory for assessing how constitutional systems reconcile crisis management with the enduring promise of rights. By juxtaposing Western and Eastern experiences, this volume contributes to a more nuanced understanding of proportionality as a transnational legal language—one capable of mediating between universality and context, principle and pragmatism. In doing so,

it aims to deepen comparative constitutional scholarship on the jurisprudence of emergencies. Its goals are also to illuminate the evolving relationship between proportionality and socio-economic justice. However, in the absence of clear criteria established in advance at the constitutional or legal level, this principle may ultimately confer upon the judge the power to widen or restrict the individual's sphere of action in a wholly discretionary manner. The resulting centrality of the judiciary must not come at the expense of the legislative framework; nor may it entail the primacy of jurisdiction over legislation. The latter must remain the instrument through which the fundamental contours of the law are constructed, including, and indeed above all, with a view to safeguarding rights under conditions of collective vulnerability.

By encompassing constitutional experiences from Asia, Europe, and North America, the volume seeks to move beyond Eurocentric accounts and to provide a more inclusive comparative assessment.

The intellectual impulse behind this collective project emerged from a series of scholarly exchanges, most notably during the 10th Asian Constitutional Law Forum held at the University of Hong Kong in December 2024. The editors wish to express their sincere gratitude to all the contributors for their intellectual commitment and generosity, and in particular to Professor Albert H.Y. Chen, whose scholarly guidance and personal support were instrumental in shaping both the spirit and the substance of this volume.

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Otto Pfersmann
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Part I

Asia

Absence of Proportionality Review in Singapore: Protecting Fundamental Rights through a Balancing Approach in Judicial Review

Eugene Kheng Boon Tan [*]

While states and governments are vested with immense power which is generally exercised for the good of their societies, power needs to be controlled and managed, perhaps especially in times of threat and danger. The management and control of power, and, in particular, the endeavour to strike the appropriate balance between affording governments the ability to act swiftly and decisively in the public interest while providing for adequate safeguards against governmental excess, is an intensely difficult undertaking. There is no one model that is correct for all times and all places. How that balance is struck will depend greatly on the fears, hopes and aspirations of the designers of any given constitution. [1]

1. Introduction

This might well be how one might be tempted to view judicial review in Singapore: A David versus Goliath scenario. A brazen, perhaps foolhardy, individual (increasingly, corporate entities as well) boldly alleging that the executive branch of the government had conducted itself in an unlawful manner, breaching a legal standard in its decision-making process or in the implementation of a legislation or a policy. This alleged breach had resulted in the applicant's rights and interests, especially constitutional rights and the right to natural justice, being compromised. [2]

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[1] Sundaresh Menon, Chief Justice of Singapore, "Executive Power: Rethinking the Modalities of Control" (2019) 29 *Duke Journal of Comparative & International Law* 277 at 278.

[2] See *eg*, *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 (CA) (unlawful detention under the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed Sing)); *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 (CA) (legal limits of

In adjudicating on the constitutionality and legality of legislation and executive acts, the role of the judiciary in ensuring the rule of law is critical. In a one-party dominant state that Singapore is, the public (mis-)perception leans towards that of the political branches controlling the levers of powers and dominating the fabric of societal life, including political governance.[3] Although the Singapore Constitution does not explicitly provide the judiciary with the power of judicial review, judicial review in constitutional law and in administrative is an integral part of the legal landscape in Singapore today, reinforcing the commitment to the rule of law and good governance.[4]

Singapore courts recognise the central role of judicial review in constitutional law and administrative law in ensuring that the legislature and the executive do not act beyond the scope of their legal powers in enacting legislation and in administrative actions respectively. Singapore courts subscribe to "the notion [that] a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power".[5] This principle of legality means that when carrying out their public functions and exercising statutory powers, including the discretionary powers granted to them by law, it is essential that public authorities do so legally.

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prosecutorial discretion); *Vijaya Kumar s/o Rajendran and others v Attorney-General* [2015] SGHC 244 (HC) (permit conditions in respect of the Thaipusam religious procession in breach of Article 15 of the Constitution of the Republic of Singapore 1965 (2020 Rev Ed) guaranteeing freedom of religion); *Yong Vui Kong v AG* [2011] 2 SLR 1189 (CA) (whether the court can review the President's clemency power); *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802 (CA) (whether rules of natural justice prevailed when a recreation club expelled a member); *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 (CA) (legality of a preventive detention order on national security grounds under the Internal Security Act (Cap 143, 1985 Rev Ed).

[3] Then Prime Minister Lee Hsien Loong preferred "strong mandate" to "dominance" in describing the People's Action Party's grip on power since 1959: "So yes, we have the people's support, finally the people want us to govern. If you call that dominance, well, we are dominant. But if you say we are a government with a strong mandate and a system where many other views are heard and not suppressed, I think that is a more accurate description of where we are": see edited transcript of Prime Minister Lee Hsien Loong's interview with local media on good politics ahead of the leadership transition, 10 May 2024 at https://www.pmo.gov.sg/newsroom/pm-lee-hsien-loong-english-interview-good-politics-may-2024.

[4] Articles 4 (on the supremacy of the Constitution) and 93 (on judicial power) of the Singapore Constitution are commonly cited to support the basis for judiciary in engaging in judicial review. In *Ng Chye Huey v Public Prosecutor* [2007] 2 SLR(R) 106, the Court of Appeal held that the High Court's power of judicial review was based on its inherent supervisory jurisdiction over inferior tribunals: at [49]. It had existed "historically at common law" and remains "very much a part of our judicial system": at [53]. The High Court's supervisory jurisdiction is part of its original jurisdiction: *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 (CA) at [60]-[79].

[5] Wee Chong Jin CJ in *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 (CA) at [86].

It is not in doubt that the governance requires discretionary power to be vested in the Executive by the Legislature. Nevertheless, it remains a matter for the courts to decide what are the boundaries of the jurisdiction or power that is vested in the Executive. Furthermore, the judiciary also determines whether the Executive had acted within the ambit of that jurisdiction or power. The courts, in the final analysis, are the arbiters of the lawfulness of government powers and actions. [6]

While courts are careful not to second-guess public policy and do grant the executive branch significant latitude in crafting and implementing policies, this does not amount to the executive branch given *carte blanche* discretion. The courts will also ensure that any substantial discretionary power is properly exercised. [7] As Singapore's apex court noted of the *raison d'être* of judicial review: Starting from the premise that all powers have *legal* limits; as such, there must be "recourse to determine whether, how, and in what circumstances those limits [have] been exceeded". [8]

This is congruent with the rule of law, which requires discretionary power to be controlled or regulated. As Peter Cane notes, "Central to the concept of making decisions and rules is choice or 'discretion'… The essence of discretion is choice; the antithesis of discretion is duty. The idea of 'decision-making' implies an element of choice: duty does away with the need to make decisions". [9] In a similar vein, Sedley J in *ex parte Dixon* remarked of the English context: "[p]ublic law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs—that is to say misuses of public power". [10]

As the engine of the rule of law, judicial review enables individuals and corporate entities to challenge and to restrain constitutional infringements and unlawful actions by the government. This includes laws promulgated by Parliament, routine administrative actions, such as the issuance of licences and permits, in which the decision-making process is challenged for unlawfulness. In the process, administrative law values such as lawfulness, fairness, rationality, due process, fair hearing, have a role to play in the public sector for they can improve public decision-making and regulation. This speaks to a system of accountability in government decision-making.

To reiterate, administrative law judicial review in the common law tradition is not about a party aggrieved by the decision or action of a public body challenging

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[6] See *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 (CA) at [90] [106].

[7] *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board* [1997] 1 SLR(R) 52 (HC); *City Developments Ltd v Chief Assessor* [2008] 4 SLR(R) 150 (CA) at [11]-[18] (drawing from the court's earlier observations in *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR(R) 340 (CA) at [70]).

[8] *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 (CA) at [1]. The apex court reiterated that the specific responsibility of pronouncing on the legality of government actions, and hence ensuring legal accountability, falls on the Judiciary: see *Tan Seet Eng* at [90] and [97].

[9] Peter Cane, *Administrative Law*, 4th edition, Oxford, Oxford University Press, 2004 at 185.

[10] *R v Somerset County and ARC Southern Limited ex parte Dixon* [1997] JPL 1030 (EWHC).

the substantive correctness of the decision or action. [11] Rather, in invoking the supervisory jurisdiction of the court in administrative law judicial review, the court is asked to engage in "the review of the decision-making process, but not to review the decision itself". [12] Put simply, the court is asked to review *how* a decision was made, including "the manner in which the power is exercised". [13] In judicial review in administrative law, an aggrieved party may dispute the decision or action on the traditional grounds of illegality, procedural impropriety, or irrationality. [14]

The Singapore judiciary has not shied away from assessing whether an impugned action or decision meets the requirements of "just administrative action". Chief Justice Sundaresh Menon notes the "enduring importance" of controlling executive power, including controlling governmental power of any form, as the "first project of constitutionalism, and it is a challenge that we all must confront". [15]

Yet, it is also necessary to temper the seeming exuberance for judicial review in dealing with executive decisions and actions that a legal person may disagree with. Judicial review is firmly in the realm of law, and not politics. It is not a means to relitigate the merits of governmental actions.

This short essay explores the status of proportionality review in judicial review in Singapore. In Part II, the appeal of and the caution of proportionality is outlined. Part III examines the limited, perhaps even non-existent, role of proportionality review in Singapore. Given that the courts do not view the political branches discretionary power as being unlimited, the calibrated approach of applying the appropriate level of scrutiny in judicial review is the preferred method. In this regard, the balancing approach in constitutional judicial review is also discussed in Part IV. Part V concludes.

2. The Allure and Pitfall of Proportionality

Leyland and Anthony crisply describe proportionality as "the assumption that administrative action ought not go beyond what is necessary to achieve its desired

[11] This would be by appealing against the decision using the appellate route provided by the legislation in question or in common law.

[12] *Re Dow Jones Publishing (Asia) Inc's Application* [1988] 1 SLR(R) 418 (HC) at [20].

[13] *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 (CA) at [99].

[14] In *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 (CA), the Court of Appeal re-affirmed that the court's role in judicial review should be limited to the "usual ambit of judicial review", namely, "illegality, irrationality and procedural impropriety". These traditional grounds of review define the test for the lawfulness of an exercise of administrative discretion: at [63], [99].

[15] Sundaresh Menon, "Executive Power: Rethinking the Modalities of Control" (2019) 29, in *Duke Journal of Comparative & International Law*, 276 at 276.

result (in everyday terms, that you should not use a sledge-hammer to crack a nut) and, in contrast to irrationality, is often understood to bring courts much closer to reviewing the merits of a decision". [16]

In the United Kingdom, in the context of cases involving European Union law and the Human Rights Act 1998 (c 42), even if a law and/or policy pursues a legitimate aim, a key question that the court asks in judicial review is whether the administrative action was proportionate. It is necessary for the court to decide whether the law or policy or decision went further than was necessary in pursuit of the relevant statutory or policy aim, and whether it struck a fair balance between the rights of the individual and the interests of the community. [17]

In this regard, the minimum interference test (viz a proportionate response, which must be no more than what was necessary to accomplish the legitimate purpose in question) is one aspect of proportionality. [18] However, this does not mean that the least intrusive measure must be used by the public authority. Instead, consideration must be given to whether the legitimate aim of the legislation in question can be achieved by a less intrusive measure without significantly compromising it. It may well be that, in appropriate cases, the court will insist on less intrusive means if this would only insignificantly compromise achievement of the aim, but it will not insist upon less intrusive means if recourse to them would significantly compromise achievement of the aim. It is therefore not surprising that proportionality has been argued that it could operate as a free-standing ground of judicial review. Where a court adopts such an intrusive standard of

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[16] Peter Leyland and Gordon Anthony, *Textbook on Administrative Law*, 8th edition, Oxford, Oxford University Press, 2016 at 334.

[17] In *Regina (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 ('*Daly*'), which concerned the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950), ETS No 5 ('the ECHR'), the House of Lords set out the applicable test to determine whether the alleged limitation of a right was 'arbitrary or excessive' under the approach of proportionality (see *Daly* at [27]). In *Daly*, Lord Steyn also acknowledged the material difference between the traditional grounds of judicial review and the approach of proportionality applicable in respect of a review where ECHR rights were at stake. Lord Steyn listed (at [27]) three non-exhaustive differences:

a) first, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker had struck, not merely whether it was within the range of rational or reasonable decisions;
b) second, the proportionality test might go further than the traditional grounds of review inasmuch as it might require attention to be directed to the relative weight accorded to the various relevant interests and considerations; and
c) third, even the heightened scrutiny test developed in *R v Ministry of Defence, ex p Smith* [1996] QB 517 was not necessarily appropriate to the protection of human rights.

[18] For example, in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 (PC, on appeal from Antigua and Barbuda) at 80, Lord Clyde said that, for a measure to be proportionate, "the means used to impair the right or freedom [must be] no more than is necessary to accomplish the objective".

review, it may in appropriate cases substitute its own judgment for that of the public (and proper) authority.

Also note the role that deference and the intensity of review play in any consideration by the court in determining whether the law or policy was proportionate to the legitimate aim. The key question is the appropriate weight to be given to them to the relevant considerations such as the decision-maker's access to special sources of knowledge and expert advice. Even then, there is also the question of whether it would be more appropriate for the legislature or the judiciary to decide how much value to ascribe to those factors, and hence how they should be weighed against one another.

Proponents of proportionality review argue that it is a flexible but structured test which is much better adapted to the task of effective and practical judicial supervision of executive action. As Paul Craig has pointed out, both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context.

The advantage of the terminology of proportionality is that it introduces an element of *structure* into the exercise, by directing attention to factors such as suitability or appropriateness, necessity, and the balance or imbalance of benefits and disadvantage. Ultimately, as Laws J noted, they are about "… the imposition of compulsory standards on decision-makers so as to secure the repudiation of arbitrary power".

3. Proportionality Review in Singapore [19]

One fundamental difference between English public law (briefly discussed above) and Singapore public law is the applicability of proportionality. As a ground of judicial review, proportionality is "not well established" in Singapore. The oft-cited case authority is *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 where the High Court observed:

> This [notion of proportionality] is very much a continental European jurisprudential concept imported into English law by virtue of the UK's treaty obligations. This jurisprudential approach, inter alia, allows a court to examine whether

[19] For a useful, if dated, overview, see ack Tsen-Ta Lee, "According to the Spirit and not to the Letter: Proportionality and the Singapore Constitution", (2014) 8, in *Vienna Journal on International Constitutional Law*, 276-304. See also Marcus Teo, "A Case for Proportionality Review in Singaporean Constitutional Adjudication", (2021), in *Singapore Journal of Legal Studies*, 174, and Alec Stone Sweet and Jud Mathews, "Proportionality and Rights Protection in Asia: Hong Kong, Malaysia, South Korea, Taiwan – Whither Singapore?", (2017) 30, in *Singapore Academy of Law Journal*, 774.

> legislative interference with individual rights corresponds with a pressing social need; whether it is proportionate to its legitimate aim and whether the reasons to justify the statutory interference are relevant and sufficient …
>
> … *Proportionality is a more exacting requirement than reasonableness and requires, in some cases, the court to substitute its own judgment for that of the proper authority*. Needless to say, the notion of proportionality has never been part of the common law in relation to the judicial review of the exercise of a legislative and/or an administrative power or discretion. Nor has it ever been part of Singapore law. [20]

More recently, the High Court in *Xu Yuanchen v Public Prosecutor* noted that the adoption of the proportionality analysis in other jurisdictions did not determine its applicability in Singapore. [21] In *Howe Wen Khong Rocky and others v Attorney-General*, the High Court reiterated that adopting a proportionality doctrine would "contradict the principle of separation of powers, which is well established in Singapore constitutional law". [22] It is clear, until the apex court pronounces otherwise, that in Singapore proportionality does not exist as an independent ground of judicial review in both constitutional law and administrative law. At best, the lack of proportionality of an impugned law or action is but an indicator of or adjunct of irrationality.

The Singapore administrative law cases that engage with proportionality underscores the courts' concern that such a review would take a court into merits adjudication, which is not the function of judicial review under administrative law. In the realm of constitutional law, given that the Singapore courts view proportionality as an exacting requirement, the concern is that the courts would effectively be decision-makers on matters where it has no expertise and would be usurping the powers of the political branches of the state. [23]

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[20] See VK Rajah J in *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 (HC) at [87] (emphasis added). The judge had noted the observations of P. Craig, *Administrative Law*, 5th edition, Sweet & Maxwell, 2003 at 617-638.

[21] *Xu Yuanchen v Public Prosecutor* [2023] 5 SLR 1210 (HC) where the High Court reiterated (at [83]) that the concept of proportionality "has never been part of our constitutional law" (citing *Chee Siok Chin* at [87]).

[22] *Howe Wen Khong Rocky and others v Attorney-General* [2025] SGHC 253 at [67] (agreeing with *Xu Yuanchen* at [84], which also cited *Wham Kwok Han Jolovan v Public Prosecutor* [2021] 1 SLR 476 (CA) at [27]) that "each branch of Government has its own role and space. In that respect, it has been recognised that the separation of powers is a part of the basic structure of the Westminster constitutional model that Singapore has adopted".

[23] In *Chan Hiang Leng Colin and others v Minister for Information and the Arts* [1996] 1 SLR(R) 294 (CA) at [44]: "Once it is accepted that matters of national security are not justiciable, there is very little room (if any) left for any doctrine of proportionality (assuming it exists) to apply, other than the well-established one of irrationality. To apply any higher test than the *Wednesbury* test would necessarily involve the court in a decision on the merits. It would require the court to balance the reasons, pro and con, for Order 405/1994, albeit with 'a margin

In *Chng Suan Tze v Minister for Home Affairs and others and other appeals*, [24] Singapore's apex court observed that the principle of proportionality had not been established as a separate ground for judicial review in Singapore. The court observed that proportionality could be subsumed under the head of irrationality (unreasonableness), such that if a decision "on the evidence is so disproportionate as to breach this principle, then in our view, such a decision could be said to be irrational in that no reasonable authority could have come to such a decision". [25]

Consider, for a moment, though: Where a lack of proportionality is a facet of and demonstrative of unreasonableness, this would suggest that proportionality and reasonableness would often yield the same result. If so, proportionality is not more exacting than reasonableness and functions more as a factor to be considered in determining whether the decision-maker acted irrationality. [26] Nevertheless, the Singapore courts have taken the position that they are not necessarily in the best position to determine whether the impugned decision went no further than necessary to achieve the statutory aim. [27]

This was particularly the case in national security and public safety and public order matters. In *Chan Hiang Leng Colin and others v Minister for Information and the Arts*, the court observed that, "Once it is accepted that matters of national security are not justiciable, there was "very little room (if any) left for any doctrine of proportionality (assuming it exists) to apply … To apply any higher test than the

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of appreciation'. However, this is precisely what the courts are not permitted to do, even with 'a margin of appreciation'…".

[24] *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 (CA) at [108]-[121].

[25] *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 (CA) at [121]. Consider, for a moment, though: Where a lack of proportionality is a facet of and demonstrative of unreasonableness, this would suggest that proportionality and reasonableness would often yield the same result. If so, proportionality might not be more exacting than reasonableness and instead functions more as a factor to be considered in determining whether the decision-maker acted irrationality.

[26] Several English cases have taken the position where the decision-maker demonstrated 'abuse of power' and 'oppression' as indicating the lack of proportionality.

[27] See also extra-judicial remarks of Chan Sek Keong CJ in his *Judicial Review – From Angst to Empathy* (2010) 22 *Singapore Academy of Law Journal* 469 at [27] (footnote omitted): "As I observed in the judgment I delivered [in *Dow Jones Publishing Co (Asia) Inc v Attorney-General* [1989] 1 SLR(R) 637] counsel for the applicant had not suggested what would have been a proper restriction, assuming the doctrine of proportionality applied. Instead of 400 copies, would 500 copies have been proportionate? 750? 1,000? An argument from proportionality on the facts of this case, therefore, faced an uphill struggle. As an aside, it has been pointed out that the doctrine of proportionality in administrative law is also problematic in that it takes the court into merit adjudication, which is not the function of judicial review. To claim, however, as some do, that the outcome of the *Dow Jones Publishing* case necessarily demonstrates judicial apathy to the principle of proportionality is to miss the point that the way judges deal with difficult doctrinal issues is a function of how cases are presented and argued".

Wednesbury test would necessarily involve the court in a decision on the merits. It would require the court to balance the reasons, pro and con, for Order 405/1994, albeit with 'a margin of appreciation'. However, this is precisely what the courts are not permitted to do, even with 'a margin of appreciation', for that would involve a usurpation of power and responsibility that rightly belongs to the Minister". [28]

In the context of equal protection clauses such as Article 12(1) of the Singapore Constitution, the High Court also observed that adopting the principle of proportionality "would necessarily involve a review of the legitimacy of the object of a statute, risking the courts assuming legislative function and acting like a 'mini-legislature', something which the Court of Appeal specifically warned against". [29]

This is particularly the case where there may be no independent criteria by which the impugned decision is determined to be legally correct such as whether it was rational or otherwise. A strong and clear case is needed since irrationality involves judicial interference with a decision-maker's latitude concerning judgment, discretion, and policy. [30] In contrast, as noted earlier, proportionality analysis in the UK involves careful consideration of whether limitations on rights imposed by executive or legislative action bear a rational relation with the object of the action, and, if so, whether the limitations restrict rights as minimally as possible. [31-32]

4. Calibrating the Appropriate Level of Scrutiny in Judicial Review

Although proportionality review is not established in Singapore, the Singapore courts have in the past two decades applied and articulated more distinctly the need for varying degrees of judicial scrutiny of legislation and executive actions

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[28] [1996] 1 SLR(R) 294 (CA) at [44]. *Cf.* the court's excessive deference to the Minister's exercise of discretion in the context of "public safety, peace and good order" under the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed) in *Re Wong Sin Yee* [2007] 4 SLR(R) 676 (HC).

[29] *Howe Wen Khong Rocky and others v Attorney-General* [2025] SGHC 253 at [89].

[30] Irrationality encompasses a whole range of conduct. But the threshold for a finding of *Wednesbury* unreasonableness is a high one, which should not be equated as unattainable. In other words, it is not enough for a decision to be unreasonable but also manifestly unreasonable.

[31] *R (SB) v Headteacher and Governors of Denbigh High School* [2007] 1 AC 100 (HL) at [29], [31] and [68]; *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420 (HL). Earlier, in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 (PC), proportionality entailed a three-limbed analysis of the infringement of the rights in question.

[32] On the four-limb proportionality test, see *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 (HL) at [20]. However, the English courts have applied proportionality assessments unevenly since *Bank Mellat v HM Treasury (No 2)*.

which impinge upon a person's fundamental liberties. Thus, while proportionality review is not favoured in Singapore, the level of scrutiny exercised by a Singapore court engaged in judicial review varies with the subject matter of the decision in question. To reiterate, the degree and extent of scrutiny that is applied by the court must be sensitive to the true nature of the legal question that is raised. In other words, the intensity of review varies contextually, according to the nature and gravity of what is at stake. This, in turn, will depend critically on the nature and purpose of the enabling legislation in question.

Even if the discretion conferred upon a decision-maker by statute is wide, that does not mean that the discretionary power exercisable is unlimited. Such discretion must be exercised in a manner that promotes the policy and objects of the statute under which it is conferred, exercised in good faith and in the interests of good administration.

All things being equal, in Singapore's jurisprudence, a more exacting or intrusive standard of review is required where it concerns a fundamental right or an important interest, with the intensity of review influenced by the extent of the interference with the right or interest. Without it being yet articulated as such, the concept of a "sliding scale" of review, depending on the nature and gravity of the case and the fundamental liberties at stake, is integral to judicial review in Singapore. [33]

This may entail that the decision-maker justifying that a restrictive measure should prevail against a right. Thus, even for matters falling within the category of high policy, the Singapore courts can and have inquired whether the impugned decision was made within the scope of the relevant legal power or duty and arrived at in a legal manner. This approach of calibrating the appropriate level of scrutiny was applied earlier in several cases. [34] It is now not in doubt that a calibrated approach in judicial scrutiny is what the Singapore courts embark on in

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[33] In the UK, in 1987, Lord Bridge, in *R v Secretary of State ex p Bugdaycay* [1987] AC 514 (HL), introduced the concept of "anxious scrutiny", implying a more intrusive review in cases involving the right to life or other basic rights. Note that Lord Bridge's "anxious scrutiny" did not intend to apply a more intrusive version of *Wednesbury* unreasonableness. Instead, this represented one of many attempts to rationalise a more flexible approach to *Wednesbury* unreasonableness. By 2000, the UK courts recognised the concept of a "sliding scale" of rationality review depending on the nature and gravity of the case. At the same time, the UK's Human Rights Act 1998 (which came into force in 2000) required judges to apply a test of "proportionality", derived from the European Court of Human Rights. However, a sliding scale approach only works if one has measurable standards to which they can be applied; otherwise, it is a matter less of sliding scales than of "slithering about in grey areas" (to quote Andrew Le Sueur, "The Rise and Ruin of Unreasonableness?" (2005) 10, in *Judicial Review*, 32 at [27]-[41].

[34] For example, *Lee Hsien Loong v Review Publishing Co Ltd and another and another suit* [2007] 2 SLR(R) 453 (HC) and *Yong Vui Kong v Attorney-General* [2011] 1 SLR 1 (HC) (affirmed by the Court of Appeal in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189). In *Yong Vui Kong* (HC), Steven Chong J noted (at [63]) that there would be a judicial remedy available if the requisite procedures under the clemency process were not complied with. In such circumstances, the question of deference to the Executive's discretion simply did not arise.

judicial review that involves a fundamental liberty. [35]

To reiterate, this conception of the core principle of legality is a cornerstone of judicial review and the rule of law. As Wee CJ affirmed in the landmark case of *Chng Suan Tze v Minister for Home Affairs*: "In our view, the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power". [36]

Although *Chng* was legislatively overruled specifically on the standard of review for internal security detention cases and the subjective test reinstated, the pronouncements in *Chng* on the principle of legality remain good law. They provide the legal basis for scrutinising matters typically regarded as "high policy" where the legal challenge concerns whether the impugned decision was made within the scope of the relevant legal power or duty and arrived at in a legal manner.

In reviewing an allegation that the decision-maker had acted lawfully, the courts scrutinise the public authority's decision and actions in a calibrated, objective manner. Any derogation from a guaranteed constitutional right is examined to determine whether a proper balance has been struck. This includes the court examining whether the Executive has asked the right questions in the decision-making process.

In examining whether a public authority's action was irrational or unreasonable, a calibrated approach taken by a court should not be confused with the applicability of proportionality analysis in Singapore. [37] The calibrated approach, exemplified by *Vijaya Kumar s/o Rajendran v Attorney-General*, entails a robust approach to rights adjudication in the context of balancing Article 15(1) freedom of religion rights against Article 15(4) restrictions. [38] The grant of a permit with conditions relating to the playing of musical instruments during the Thaipusam festival was "clearly linked to legitimate public order considerations". [39]

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[35] *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809. For further analysis, see Thio Li-ann, "Rightism, Reasonableness and Review: Section 377A of the Penal Code and the Question of Equality – Part One" (2022) 34, in *Singapore Academy of Law Journal*, 180.

[36] [1988] 2 SLR(R) 525 (CA) at [86].

[37] There appears to be similarities between the calibrated approach and proportionality analysis in the focused and structured analysis, balancing the competing rights and interests, and granting the public authority due deference in matters falling within their domain expertise (also known as according the "margin of appreciation"). Both forms of review seek to enhance the clarity and predictability of review, while also maintaining the vital appeal/review distinction. However, neither has the capacity to deliver fully on these benefits. Both reviews may be moderated by curial deference considerations or the need to protect fundamental rights.

[38] *Vijaya Kumar s/o Rajendran v Attorney-General* [2015] SGHC 244.

[39] *Vijaya Kumar s/o Rajendran v Attorney-General* [2015] SGHC 244 at [35]. The High Court did not find that the police considering the religious nature of the application for a permit for a Thaipusam procession, with stipulated musical restrictions, to be irrational in the *Wednesbury* sense, arbitrary or an irrelevant consideration: at [47]-[48]. On the contrary, the

What is reasonable is to be contextually assessed. For instance, the court considered that the Thaipusam religious procession was in fact treated more favourably than other religious processions in so far as the police discretion to enforce the relevant regulation was applied in a "more nuanced fashion" as religious hymns could be sung during the procession and music broadcast from three points near the temples. Furthermore, the Thaipusam procession could be distinguished from the Chingay and St Patrick's Day processions as there were distinct factors justifying differential treatment. The Thaipusam procession was religious in nature and brought out "a higher order of public order concerns" as it took place "on a larger scale in a different location and had a much longer route and duration. It was not irrational for the court to draw a distinction between religious processions and secular or cultural parades like Chingay and St Patrick's Day, which posed a lesser public order concern. Tay Yong Kwang J pointed out that history and current events in Singapore and globally gave "ample justification" to the police to pay special attention to events involving a religious element, which might spur hostility from third parties or disorder by trouble-making participants. These were relevant considerations. Further, there were legitimate concerns about "Singapore's history of racial riots and its multi-religious make-up. In granting the permit with restrictions, the police had also made appropriate assessments of ground conditions in relation to crowds and traffic. [40]

The court also found that the authorities had adopted a "calibrated approach" to the playing of music during Thaipusam, which showed that the police had "due regard" for the applicants' Article 15 rights which it sought to balance against "the exigencies of public order". The court rejected the argument that the correct legal test was to take as a starting point the "complete liberty" for Hindus to participate in Thaipusam with musical accompaniment, supplemented by targeted restrictions to address specific public order concerns. [41] Similarly, it cannot be the case that any derogation, no matter how harsh, would pass constitutional muster.

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grant of a licence for a Thaipusam procession was an exception to the general policy of the police not to grant permits for religious foot processions: at [43]. The need for express police authorisation for the playing of music and musical instruments in public processions was required under reg 8(2)(c) of the Public Order Regulations 2009 (S 487/2009) remained applicable for all religious processions 'due to communal sensitivities and the potential for communal disturbance and strife': at [43].

[40] *Vijaya Kumar s/o Rajendran v Attorney-General* [2015] SGHC 244 at [43]-[44], [47], and [49].

[41] *Vijaya Kumar s/o Rajendran v Attorney-General* [2015] SGHC 244 at [37]-[38]. The "balancing" exercise carried out by the court came to the following findings (in [35]-[38] of the judgment): "…the police has shown legitimate public order concerns and that their measures were directed at preserving public order"; "… the police was entitled to factor in the potential for communal disturbances and strife and determine that the music conditions would "go a long way in averting the potential for such disturbances and strife". This was undoubtedly a judgment call which required an intimate understanding of all circumstances and a fair prediction of what could possibly happen during an event spreading over three

This calibrated approach advocates a proceduralist approach to judicial review by examining what the public authority considered in arriving at the various measures it could take and how the legal rights of the affected parties were addressed during the decision-making process. This calibrated approach is evident in administrative law judicial review. The constitutional equivalent is also known as the balancing approach.

Regardless of the intensity of the review, it is crucial that the court does not substitute its views for those of the public body. The court does not and must not assume the role of the decision-maker. Where the substantive decision-maker stipulated under a statute is the Executive, there is no basis for the court to step into the Executive's shoes and usurp its decision-making power on a matter which is purely a matter of discretion rather than obligation. [42]

The court's task, fundamentally, is and remains one of review of the legality of the impugned decision. Thus, judicial restraint is necessary. This safeguards the court's proper role and ensure that the court does not usurp, however inadvertently, the role of the decision-maker prescribed by law. Moreover, constitutional principles like the separation of powers, rule of law, and democratic accountability are given effect to. Put simply, in such an approach, the courts take fundamental rights reasonably but not valorising them, balancing an individual's rights against competing norms and interests.

5. Balancing Approach: Balancing a Right against Permitted Restrictions

Although proportionality review has not been applied in Singapore, the courts have adopted the balancing approach to ensure that the political branches of government do not act unlawfully when restricting fundamental liberties that are

kilometres and lasting some 26 hours at the fringe of the city centre"; "The police, which would have access to ground intelligence, is in a far better position than the court to determine what is necessary for public order and safety; "Insofar as the music conditions imposed under reg 8(2)(c) of the Regulations were in furtherance of the government's policy of preserving public order, I accepted the respondent's arguments that the subject matter of the decision or legislation concerned complex polycentric considerations such as social policy and public order and the court was not the correct authority to adjudicate on such matters. The court should therefore refrain from reviewing the merits of decisions taken in such matters"; "It should be noted that the police's measures served only to confine the extent to which music could be used during the Thaipusam procession and not to prohibit it altogether. The police had not imposed reg 8(2)(c), the constitutionality of which was not challenged by the applicants, in blanket fashion. Instead, it had nuanced its approach over time in response to dialogue with the Hindu community".

[42] See *Asia Development Pte Ltd v Attorney-General* [2020] 1 SLR 886 (CA) at [21].

permitted under the Constitution. In determining whether a derogation to a fundamental liberty passes constitutional muster (and hence, not unconstitutional), the court cannot ignore the fact that a fundamental liberty is involved. As such, a blanket ban aligned with the recognised derogation provided in the constitutional provision may not pass constitutional or administrative muster. However, neither does the court assume that the fundamental liberty is absolute.

An approach that seeks to determine if there was due regard for the fundamental liberty in question and how it was balanced against permitted restriction can help ensure that the rights guaranteed are not illusory. This approach is reflective of the exhortation that in balancing a right against a recognised exception, "neither can be defined in such a way that renders the other otiose". [43] Similarly, as fundamental rights are not absolute, they cannot operate as trumps and overriding basic constitutional principles like the separation of powers, rule of law and democracy.

It is problematic judicial reasoning if a recognised exception is used as a categorical trump against the fundamental liberty in question or for a fundamental liberty to trump over core values in a society. In such an instance, it can be said that there is no genuine balancing of competing rights, interests, or values.

In the balancing exercise, the courts are essentially asked to weigh and balance the dictates of a public good and the centrality of fundamental rights/constitutional rights. The values sought to be balanced should therefore not be seen to be conflicting. They probably compete at best: it is not a case of one being superior to the other. Context matters immensely—trite as it may sometimes be.

The court weighs the need to prevent a violation of a public policy/good/interest (e.g., public order) against the need to give effect to the claimed constitutional right. The Judiciary, as the guardian of the Constitution, has the power to decide after taking account of a variety of considerations. Obviously, the courts will have to endeavour to set clear criteria by which they weigh the various considerations. If vague criteria are stipulated, the resulting approach may have a veneer of objectivity but will in substance be arbitrary and unclear.

Where the court finds that the claimed heads of public policy concerns exist (e.g., public order), it then has to balance the claimed right against the concern not to violate the public policy imperative which has been established. Often, this entails that the court first determines the weight to be accorded to the values underlying the claimed right and the countervailing public policy.

It has been suggested, extra-judicially and not speaking directly to public law issues, that the court applies three objective criteria, namely, rational connection, salience, and magnitude of infringement. [44] The criterion of "rational connection"

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[43] *Attorney-General v Shadrake Alan* [2011] 2 SLR 445 (HC) at [57].

[44] The three criterion is adapted from Menon CJ's speech "Taming the Unruly Horse: The Treatment of Public Policy Arguments in the Courts," delivered in Kota Kinabalu, 19 February 2019; available online at https://www.supremecourt.gov.sg/Data/Editor/Documents/Public%20Policy%20Lecture%20-%2019Feb2019.pdf.

requires that greater weight be attached to public policies, which are rationally or directly connected to the issue being determined. For instance, a policy that bears directly on public order should be given greater weight in the context of a constitutional challenge alleging breach of religious freedom rights.

The criterion of "salience" calls for the court to place greater weight on public policies or values that emanate from the applicable statutory regime. For instance, in *Vijaya Kumar*, the applicable statutory regime required the court to have due regard to both the public order requirements and to the devotees' interests in having the religious procession with music to be played.

The criterion of "magnitude of infringement" means that the greater the degree to which the public policy would be violated if the claimed right were given effect, the less willing the court should give effect to that right. Conversely, the greater the degree to which the values underlying the claimed right would be advanced if it were given effect, the more willing the court should give effect to it.

The increasing reference to and use of the balancing metaphor in constitutional adjudication in Singapore is a step in the right direction. This was clearly manifested, for example, in the Court of Appeal's approach in *Wham Kwok Han Jolovan v Public Prosecutor*, which was about Article 14 rights (freedom of speech, assembly and association). [45] The apex court in this case had set out the three-step framework for determining whether a legislation impermissibly derogates from an individual's Article 14 rights, a similar approach to religious freedom rights in *Vijaya Kumar*. [46] In this connection, the court will, exercising due deference and cognizant of its constitutional role as the guardian of the Constitution, determine if an appropriate/calibrated balance had been struck between the right and restriction (the competing interests at stake).

In the final analysis, it is imperative to appreciate that a balance must be found

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[45] *Wham Kwok Han Jolovan v Public Prosecutor* [2021] 1 SLR 476 (CA). See Alec Sweet Stone, "Intimations of Proportionality? The Singapore Constitution and Rights Protection - *Wham Kwok Han Jolovan and Public Prosecutor*" [2021] in *Singapore Journal of Legal Studies*, 231 (argument that the court in this case developed and deployed a rudimentary, if yet incomplete, form of proportionality review). *Cf.* Thio Li-ann, "Of Variable Standards of Scrutiny and Legitimate Legal Expectations: Article 12(1) and the Judicial Review of Executive Action" [2022] in *Singapore Journal of Legal Studies*, 95.

[46] *Wham Kwok Han Jolovan v Public Prosecutor* [2021] 1 SLR 476 (CA) at [29]-[32]). First, it must be assessed whether the legislation restricts the constitutional right in the first place. It may be possible that the legislation does not restrict the constitutional right so as to trigger the second and third steps of the analysis. Second, if the legislation is found to restrict the right guaranteed by Article 14, it must be determined whether the restriction is "necessary or expedient" in the interests of one of the enumerated purposes under Art 14(2)(b) of the Constitution. Third, the court must analyse whether, objectively, the derogation from or restriction of the constitutional right falls within the relevant and permitted purpose for which, under the Constitution, Parliament may derogate from that right. This must be established by showing a nexus between the purpose of the legislation in question and one of the permitted purposes identified under Art 14(2)(b) of the Constitution).

between the competing rights and interests at stake. The idea of achieving an appropriate balance between a constitutional right and a constitutionally permitted derogation is not at all novel in Singapore law.

Balancing, as purportedly used in much older cases, was probably more formalistic. Judicial reasoning paid lip service to the competing values without seriously enquiring whether the derogation from the fundamental liberty in question was not only permitted by the Constitution but also justified. Such a formalistic mode of judicial reasoning often did not adequately identify, value, and weigh the rights and interests that were at stake. This casual use of the balancing metaphor is perhaps driven by relatively excessive judicial deference. However, more recently in the last two decades, the Singapore courts increasingly articulate in more detail the balancing exercise undertaken in constitutional adjudication and affording due deference to the political branches.

6. Conclusion

Proportionality review tends to be valorised in both common law and civil law jurisdictions as an important public law standard for determining whether fundamental and human rights have been infringed upon. Undoubtedly, proportionality review requires a fine-grained analysis and comparison of a measure that allegedly results in the infringement of a right against the attainment of a state interest pursued by that impugned measure.

Singapore has steadfastly maintained the distinction between reviewing the legality and merits of an impugned decision. In administrative law, the courts do not substitute their decision for that of the lawful decision-maker. The focus of the courts is the decision-making *process*. In other words, *how* the impugned decision was made. In this regard, the courts are underscoring that in judicial review of administrative action, their role is a supervisory one; they are not exercising the appellate jurisdiction.

In constitutional law judicial review, the Singapore courts are cautious about making judgment calls on areas where they lack institutional capacity (power to make the impugned decision is vested in another governmental branch) or institutional competency (where the decision-maker has the necessary skills, knowledge and resources to carry out a function or task required of it). Thus, substantive review is limited to reviewing for irrationality. Moreover, the courts have applied this ground of review in a deferential or restrained manner, noting that they are not necessarily in the best position to determine whether the impugned decision went no further than necessary to achieve the statutory aim.

As a ground of judicial review, proportionality is not well established in Singapore. However, despite the lack of proportionality review, the Singapore courts have demonstrated that it can still hold the political branches accountable

through its calibrating the appropriate level of scrutiny of governmental actions and the balancing approach of fundamental rights against permitted restrictions. The courts recognise the need for searching or anxious scrutiny when fundamental rights are at stake. It would be fair to conclude that what Singapore has now in ensuring legality of impugned legislation and administrative action is probably more nuanced than irrationality, but less intrusive than proportionality review. What follows is the secure foundation that executive decisions and actions must sit on—legality, legitimacy, and the rule of law.

Making the Law on State of Emergency in Vietnam: How the Proportionality Principle Work?

Dat Tien Bui [*] and Tuan Minh Dang [**]

Emergency law is intrinsically tied to the need to limit numerous constitutional rights in temporary but harsh ways. International human rights law has taken into consideration control over the state's derogation from rights in states of emergency by reasoning a list of non-derogable rights and recommending the application of the principle of proportionality. Based on this framework, the authors suggest a way to develop Vietnam's emergency law from the perspective of constitutional rights limitation. First, emergency law should be developed on the basis of three sources that protect human rights: the constitution, the legislation, and legal interpretation. Second, the four steps of the proportionality principle should be carefully considered when evaluating limitations on rights in the emergency law.

1. Limitation on constitutional rights in the state of emergency: The role of the proportionality principle

1.1. State of emergency: The necessity of special limitations on constitutional rights

It is commonly acknowledged worldwide that restriction or limitation on a certain human right means that the state does not allow beneficiaries of this right to exercise it at the absolute level. [1] A constitutional right is perceived as a legal principle; accordingly, its realization targeted at the greatest extent possible is acknowledged and applied depending on specific circumstances. [2] The level of

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[1] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge University Press, 2012, 102.

[2] Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers, Oxford,

protection of constitutional rights is often limited. If the state does not create subconstitutional norms to limit the scope of application of a certain constitutional right, its beneficiaries can exercise it at the absolute level in principle; in other words, it is not restricted.

The majority of constitutional rights are non-absolute, which means that they are implicitly targeted at an ideal standard. Nevertheless, every state must use subconstitutional norms to impose a particular limitation on the realization of those rights. Constitutional rights limitation at a particular level is generally a democratic state's regular needs under normal circumstances. Thus, subconstitutional legal documents often set out stable long-term limitations on relative rights. [3]

In states of emergency, especially wars or severe epidemics, a need for special constitutional rights limitations arises in many countries, leading to the state's derogation from rights. Thus, "derogation from rights is state jurisdiction prescribed by law, allowing the suspension of certain individual rights under special circumstances such as the state of emergency or war". [4]

International human rights treaties often include emergency provisions. Among those, the International Covenant on Civil and Political Rights (ICCPR) introduces the notion of "public emergency that threatens the life of the nation". [5] According to the Siracusa principles on the rights limitation and derogation provisions in the ICCPR (hereinafter referred to briefly as the Siracusa principles), a public emergency that threatens the life of the nation is a situation in which a nation must face special, ongoing, or forthcoming dangers that threaten its life. This threat impacts the entire population and all or a part of the national territory as well as endangers population integrity, political independence or territorial integrity, or the maintenance of fundamental functions by vital institutions in order to guarantee and protect rights recognized by the Covenant. Civil conflict and turmoil that do not have severe and urgent effects on the life of the nation, or are mere economic difficulties, will not fulfil the standards for derogation from rights. [6]

Clarendon Press, 2002, 47-9. In Vietnam, several rights tend to be considered principles (i.e., the right to be presumed innocent is called presumption of innocence; see Đào Trí Úc, *Nguyên tắc suy đoán vô tội – nguyên tắc hiến định quan trọng trong Bộ luật Tố tụng hình sự Việt Nam năm*, 2015 (Presumption of innocence, an important constitutional principle in the 2015 Criminal Procedure Code of Vietnam), Tạp chí Kiểm sát (Procuracy Journal), volume 2/2017, 37).

[3] For instance, it is not unusual for a state to set marriage age (marriage rights limitation) or issue visas to foreigners (limitation on the right to freedom of movement).

[4] Oren Gross and Fionnuala N´ı Aolain, *Law in Times of Crisis: Emergency powers in theory and practice*, Cambridge University Press, 2006, 257.

[5] Article 4(1) of the ICCPR. The European Convention on Human Rights and the American Convention on Human Rights also use similar expressions.

[6] Para. 39-41, Siracusa principles on the rights limitation and derogation provisions in the ICCPR.

1.2. Derogation from rights: a type of rights limitation in temporary, limited but harsh manners in states of emergency

Derogation from rights is a special case of limitation on rights. According to international human rights law, it is tied to a country's state of emergency. [7] It includes limited and temporary measures in states of emergency under the ICCPR. [8] While rights limitation measures are typically adopted at any time, derogation from rights is a form of rights limitation that operates in a temporary, limited manner in states of emergency. [9]

While the ICCPR reserves Article 4 for provisions on derogation from civil and political rights, the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) generally integrates derogation from rights into provisions on the restriction of rights. [10] In the category of economic, social and cultural rights, only the right to strike and the right to work are often derogable compared with the relatively broad scope of derogable civil and political rights. [11] A comparsion between these two major convenants on human rights indicates that derogation from certain civil and political rights in states of mergency is legitimate and essential whereas that from economic, cultural, and social rights even in states of emergency tends to be less welcome. According to Manisuli Ssenyonjo, "the absence of a clause allowing derogation in times of public emergency in the ICESCR indicates that the Covenant generally continues to apply in times of emergency included not only by armed conflict, but also by natural disaster or any other type of emergency, and as a minimum, states cannot derogate from the Covenant's core obligations". [12] The following reasons can justify this absence:

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[7] See Article 4 of the ICCPR; the United Nations Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), 2001).

[8] "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin" (Clause 1, Article 4 of the ICCPR).

[9] Amrei Müller, "Limitations to and Derogations from Economic, Social and Cultural Rights" (2009) 9, in *Human Rights Law Review*, 557-600.

[10] "No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent" (Clause 2, Article 5 of the ICESCR).

[11] Müller, *Limitations to and Derogations from Economic, Social and Cultural Rights*, 601.

[12] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights: An Examination of State Obligations*, in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law*, Edward Elgar, 2010, 38.

firstly, it is due to the nature of economic, social and cultural rights; secondly, Article 4 of the ICESCR contains a general clause about rights limitation; thirdly, Article 2(1) of the ICESCR allows states to fulfil obligations rather flexibly. [13]

1.3. Control over derogation from rights in states of emergency

Although derogation from rights is accepted in states of emergency only for a short time, it can affect a range of fundamental rights. It tends to be widely applicable and harsher than ordinary rights limitation. [14] Derogation from rights in emergency act is capable of limiting more rights in comparison with other acts. Normally, a few relative rights are limited in an act, while an emergency act often limits a large number of relative rights in a harsh and widespread manner. International experience indicates that states typically limit rights to a fair trial in states of emergency. [15] Nonetheless, the current situation reveals the state of emergency involving epidemics, [16] leading to derogation from a series of fundamental individual rights. [17] Furthermore, happenings in many nations illustrate that states of emergency can be a screen for human rights infringement. [18] Consequently, international human rights law has posed plenty of barriers to nations' derogation from rights in comparison with ordinary rights limitation as analysed below.

Firstly, derogation from rights is merely limited and temporary

Derogation from rights is intrinsically merely applied in a limited manner in special cases. Meanwhile, general rights limitation measures are often adopted under normal circumstances. Derogation from rights is also intrinsically temporary whereas general rights limitation measures are typically implemented for long term, even with no determined ending time. Many of them always exist in the ordinary life of society; thus, no implementation of those becomes exceptional. [19]

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[13] *Ibid.*, 66; P. Alston and G. Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights", in *Human Rights Quarterly*, 1987, 217.

[14] See the analysis of derogation from the right to strike in Ovunda V.C. Okene, "Derogations and Restrictions on The Right to Strike under International Law: The Case of Nigeria" (2009) 13, in *International Journal of Human Rights*, 552 558.

[15] Gross and Aolain, *Law in Times of Crisis: Emergency powers in theory and practice*, 267.

[16] Like the Covid-19 pandemic.

[17] Like the right to privacy, the right to freedom of movement, the right to health, the right to nondiscrimination, the right to work, mandatory vaccinations, etc. See Amnesty International, *Responses to Covid-19 and States' Human Rights Obligations: Preliminary Observations*, 2020.

[18] Sarah Joseph, "Human Rights Committee: General Comment 29", (2002) 2, in *Human Rights Law Review*, 81, 98.

[19] For example, the right to freedom of movement is limited through the visa regime.

Secondly, international human rights law and national laws identify and interpret a large number of non-derogable rights

The ICCPR also lists several rights that states may never derogate from. In other words, there are always no valid reasons for limiting the following rights in states of emergency: the right to life, prohibition of torture, cruel, inhumane and degrading treatment, prohibition of slavery and servitude, prohibition of imprisonment because of inability to fulfil contractual obligation, some in the category of principles of fair trial, recognition as a person before the law, and freedom of thought, conscience, and religion. [20] In addition to the list by the ICCPR, institutions with the function of interpreting international human rights instruments such as the United Nations Human Rights Committee (UNHRC) and the European Court of Human Rights (ECtHR) have increasingly expanded the scope of non-derogable civil and political rights. Their interpretations identify the core of the right which cannot be suspended in states of emergency.

Non-derogable rights are distinguishable from absolute rights. These two concepts overlap in that absolute rights, which are not restricted under any normal circumstances, cannot indisputably be suspended in states of emergency. The distinction between these is that non-derogable rights tend to have more extensive scope than absolute rights. Therefore, it can be seen that derogation from rights is harder to be adopted than ordinary rights limitation since the scope of non-derogable rights is broader than that of absolute rights.

Thirdly, it is essential that derogations from constitutional rights in states of emergency comply with the principle of proportionality

In the process of making emergency law in many nations, [21] constitutional rights limitations in emergency acts still follow the principle of proportionality, which is the general principle of rights limitation. This principle is considered an integral element of due process of law. [22] Rights limitation in emergency acts even has to satisfy tougher requirements than ordinary rights limitation. First, the need for rights limitation must be especially urgent. Plenty of constitutional rights are difficult to be restricted under normal circumstances, but the limitation will be considered to be legitimate and essential in states of emergency. Secondly, rights limitation in states of emergency must be on the basis of clear regulations (usually emergency act or national disaster act). Thirdly, emergency law must be adopted in conformity with the state's official emergency declaration. Finally, the States

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[20] Rights specified in Article 6, 7, 8 (Clause 1 and 2), 11, 15, 16 and 18 (under Clause 2, Article 4 of the ICCPR).

[21] Often through acts of the National Assembly.

[22] Dat Tien Bui, "Due process doctrine and human rights protection: International and Vietnamese experience" (Học thuyết trình tự công bằng và việc bảo vệ quyền con người: Kinh nghiệm quốc tế và Việt Nam), in *Journal of Legislative Studies*, No. 11/2015, 68, 71.

Parties to the ICCPR must be informed by the UN of a nation's state of emergency. [23]

2. The inadvertent migration of the proportionality principle to the Vietnamese constitutional law [24]

In the volume '*Proportionality in Asia*', Po Jen Yap and other authors have identified three models of proportionality analysis applied by Asian *courts*: (i) Structured proportionality (South Korea, Taiwan, Hong Kong); (ii) Anemic and *ad hoc* proportionality (Japan, Thailand, Malaysia, Indonesia); (iii) Doctrinal equivalents of proportionality (Bangladesh, Philippines). [25] In contributing to this discussion, this article proposes a fourth model of *inadvertent* migration of proportionality, as being reflected in the *ex-ante* proportionality-like review in Vietnamese *lawmaking*.

The 2013 Vietnamese Constitution can be characterized as a mixed constitution, incorporating rivaling ideological frameworks (Confucianism, socialism, liberalism, and universalism), which are most evident in its articulation of constitutional rights. [26] In this context, the introduction of a human-rights-limitation clause in Article 14(2) [27] is an indicator of the influence of the universalist constitutional paradigm, in which human rights protection is of top priority. Comparatively, this clause also exemplifies a common approach to restricting rights within the framework of international human rights law. [28] The core components of Article 14(2) seem to draw inspiration from Article 29(2) of Universal Declaration of Human Rights 1948 in the sense that it stipulates (i) law as the manifestation of rights restriction, (ii) for the certain purposes of "securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality,

[23] Clause 3, Article 4 of the ICCPR.

[24] This section is drawn from the published article: Dat T. Bui and Tien-Duc Nguyen, T*he inadvertent migration of proportionality and the role of ex-ante constitutional review in the Vietnamese lawmaking process. The Theory and Practice of Legislation*, Issue 1, Volume 13, 2025.

[25] Po Jen Yap (ed.), *Proportionality in Asia*, Cambridge University Press, 2020.

[26] Bui, "Vietnam's Mixed Constitution and Human Rights", at 295, 309; Tien-Duc Nguyen and Pasquale Viola, "Constitutional Rights in Socialist East Asia" (2022) 40 in *Nordic Journal of Human Rights* 306, 315-316.

[27] Article 14(2) can be translated as follows: 'Human rights and citizen's rights shall only be restricted by law in necessary circumstances for the reasons of national defence, national security, social order and security, social morality, and public health'.

[28] In numerous legal systems, the proportionality doctrine could develop along with or without a human-rights-limitation clause in the Constitution. This means the proportionality doctrine can be mainly based on case law and scholarly works.

public order and the general welfare in a democratic society". [29] This clause is deemed as a feature of universal constitutional design, a partial departure from the conception of 'rights regulated by the state' in the socialist constitutional design. [30] Studies on the due process doctrine in Vietnam suggest that the spirit of Article 14(2) of the 2013 Constitution partially echoes the notion of substantive due process, as theorised in the U.S. constitutional law. [31]

Nevertheless, it is important to note that in the Vietnamese context, the notion of human-rights-limitation principle differs from and should not be equated with the universal understanding of the proportionality principle. The primary aim of Article 14(2) is to elevate the threshold for state interference with human rights, rather than adoption of a four-step structured proportionality analysis. This is evidenced by the legislative intent during the constitutional amending process in 2013.

State power abuse and rights violations were one of the chief concerns that drove the overhaul of the 1992 Constitution. [32] This Constitution, while inclusive of a bill of rights, lacked a robust mechanism to prevent administrative bodies from overstepping their authority due to its simple phraseology. [33] These bodies in many cases enacted sub-laws that circumvented constitutional rights without a clear connection to a specific law. Nor did they provide any reasonable justification, leading to arbitrary and unpredictable limitations on individual freedoms. Prominent Vietnamese scholars such as Que Hoang, Hao Vo, criticised that the absence of the human rights-limitation principle was a major flaw in the 1992 Constitution, which undermined the very purpose of constitutional rights and created an environment of legal uncertainty. [34] As a result, there were strong calls for the new Constitution

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[29] Dat T Bui, "A Quest for Due Process Doctrine in Vietnamese Law: From Soviet Legacy to Global Constitutionalism" (2021) 9 in *The Chinese Journal of Comparative Law*, 178, 192.

[30] Bui, "Vietnam's Mixed Constitution and Human Rights", at 309.

[31] *Ibid.*

[32] For example, see: Jack Tsen-Ta Lee, *The Doctine of Proportionality in Interpreting Constitutional Rights: A Comparison between Canada, the United Kingdom and Singapore and Implications for Vietnam ('Thuyet can xung trong van de giai thich cac quyen hien dinh: So sanh giua Canada, Lien hiep Anh voi Singapore va nhung goi y cho Viet Nam')*, 2012 at 355.

[33] Trần Ngọc Đường, "Những thành quả và hạn chế về nhận thức lý luận và thực tiễn qua 20 năm thực hiện Hiến pháp năm 1992 [Achievements and limitations in theoretical and practical awareness after 20 years of implementing the 1992 Constitution]" (*Tạp chí Cộng sản*, 8 July 2013) https://www.tapchicongsan.org.vn/web/guest/gop-y-du-thao-sua-oi-hien-phap-nam-1992?p_p_auth=rqrr2Mcx&p_p_id=49&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&_49_struts_action=%2Fmy_sites%2Fview&_49_groupId=20182&_49_privateLayout=false accessed 26 August 2024.

[34] Que Thi Kim Hoang, "The Limitation on Human and Citizens' Rights and Freedoms and the Amendment of the 1992 Constitution" [Gioi ha: n quyen va tu do cua con nguoi, cong dan va nhung van de dat ra trong sua doi, bo sung Hien phap 1992] in Thai Hong Pham and others (eds), "The Amendment of the 1992 Constitution" [Sua doi, bo sung Hien phap 1992: Nhung van de ly luan va` thuc tien] (Hong Duc Publishing House 2012) 116; Hao Tri Vo,

to include a rights-restriction clause to put a cap on the exercise of state power and honor basic rights and freedom in a democratic society. [35]

Even though constitution drafters seemed to accept the rationale for rights-limitation clause, [36] the making of the Constitution saw elements of the proportionality doctrine to be little discussed. An account to explain the absence of the proportionality doctrine during the constitution drafting process is that, since this doctrine is often associated with judicial power, Vietnamese constitution drafters intentionally rejected this doctrine as a means to grant the court authority to judge the exercise of state power. This view moves closer in line with Bui's argument that an activist judiciary is seen as ill-suited to Vietnamese politico-legal context, and therefore, poses "a threat to the political elite's preferences". [37] Perhaps, from constitution-drafters' perspective, the NA and its legislative process, coupled with a draft rights-limitation clause, were considered a sufficient safeguard, alternative to judicial review, to ensure that state actions align with constitutional rights. In return, it would reinforce the fundamental principle of parliamentary sovereignty.

However, the landscape would be quite different if it was a deliberate rejection of the principle on the one hand, or a complete lack of familiarity with it on the other. If proportionality is to follow a strong, interventionist court, at least there should have been certain discussion on the merits of proportionality. In fact, no recorded discussions addressed the potential value of proportionality in shaping the human rights limitation clause.

An alternative explanation for this lacuna is that the proportionality doctrine was never in the picture. In many of its Statements, the Drafting Committee on Constitutional Amendment went to some length to discuss and justify the grounds for restricting rights. While the Committee emphasised the legality and reasonable objectives for restricting rights, the necessity and balancing elements were almost missing in those discussions. [38] Notably, this was not exclusive to the

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"Improving Constitution-Making Techniques for Chapter V of the 1992 Constitution" [Hoan thien ky thuat lap hien doi voi Chuong V Hien phap 1992] in Thai Hong Pham and others (eds), "The Amendment of the 1992 Constitution" [Sua doi, bo sung Hien phap 1992: Nhung van de ly luan va` thuc tien] (Hong Duc Publishing House 2012) 139.

[35] Phat Nhu Nguyen (ed.), *Một Số Vấn Đề Lý Luận và Thực Tiễn Cơ Bản về Sửa Đổi Hiến Pháp ở Việt Nam Hiện Nay [Some Basic Theoretical and Practical Issues on Constitutional Amendments in Vietnam Today]*, (NXB Khoa học xã hội [Social Sciences Publishing House) 2012), 48-49.

[36] Chu, 'The 2013 Constitution and the Implementation of International Treaties on Human Rights in Vietnam ('Hien phap 2013 voi viec thuc thi cac dieu uoc quoc te ve quyen con nguoi cua Viet Nam')' 17, 24; Hoang, 'New Institutions of Human Rights in the 2013 Constitution ('Nhung che dinh moi ve quyen con nguoi trong Hien phap 2013')'50 212-3; Nguyen, 'The Institution of Human Rights and Fundamental Citizens' Rights in the 2013 Constitution: Important Amendments ('Che dinh quyen con nguoi, quyen co ban cua cong dan trong Hien phap nam 2013: Van de sua doi va nhung diem moi co ban')'50, 53.

[37] Ngoc Son Bui (n 19) 336-337.

[38] See e.g., Drafting Committee on Constitutional Amendment, 'Report No. 287/BC-UBDTSĐHP on Explaining, Receiving and Revising the Draft Amendment to the 1992

works of the Committee. The authors' literature review shows that the term "proportionality" ("tuong xung") or "balancing" ("can bang") barely surfaced in the academic works published in Vietnam during 2012-2013 in connection to the constitutional overhaul. Paradoxically, in a 2012 edited volume by Nghi Huu Pham and Khanh Nguyen Bui, two members of the Drafting Sub-Committee on Citizens' Rights, Human Rights Chapter, German jurist Rainer Grote authored two book chapters on German and European constitutional jurisprudence respectively, in which, he took considerable effort to underscore the importance of the proportionality principle.[39] Besides this foreign author's work, the term of "proportionality" or "balancing" was conspicuously absent from the chapters of Vietnamese authors. Although some of Grote's ideas appeared in a book edited by Luu Chu Uong, one of the key constitution-drafters, the principle of proportionality was mentioned superficially, lacking any in-depth analysis.[40] This might suggest that neither the constitution-makers nor the scholars were swayed by the proportionality doctrine at the time of amending the Constitution. This lack of awareness or interest could stem from various factors, such as limited exposure to international legal developments or a focus on domestic legal traditions. This observation is confirmed by the authors' interviews with scholars who were directly involved in the constitution drafting process.[41] It is, therefore, reasonable

Constitution Based on Public Opinion' (2013); Drafting Committee on Constitutional Amendment, 'Report No. 315/BC-UBDTSĐHP on Explaining, Receiving and Revising the Draft Amendment to the 1992 Constitution Based on Public Opinion' (2013); Drafting Committee on Constitutional Amendment, 'Report No. 321/BC-UBDTSĐHP on Explaining, Receiving and Revising the Draft Amendment to the 1992 Constitution Based on Public Opinion' (2013); Drafting Committee on Constitutional Amendment, 'Report No. 322/BC-UBDTSĐHP on Explaining, Receiving and Revising the Draft Amendment to the 1992 Constitution Based on Public Opinion' (2013).

[39] Rainer Grote, 'Những Thách Thức Chủ Yếu Trong Việc Soạn Thảo Một Đạo Luật Quốc Gia về Quyền Con Người - Kinh Nghiệm Các Nước Liên Minh Châu Âu [Key Challenges in Drafting a National Human Rights Law - Experience of European Union's Countries]' in Nghi Huu Pham and Khanh Nguyen Bui (eds), *Sửa đổi, bổ sung chế định quyền con người, quyền và nghĩa vụ cơ bản của công dân và các chế định khác trong Hiến pháp 1992 [Amending and supplementing the human rights, basic rights and obligations of citizens and other regulations in the 1992 Constitution]* (NXB Khoa học xã hội [Social Sciences Publishing House) 2012) 140-143; Rainer Grote, 'Sự Bảo vệ Của Hiến Pháp Đối Với Các Quyền Con Người và Quyền Cơ Bản ở Châu Âu [Constitutional Protection of Human and Fundamental Rights in Europe]' in Nghi Huu Pham and Khanh Nguyen Bui (eds), *Sửa đổi, bổ sung chế định quyền con người, quyền và nghĩa vụ cơ bản của công dân và các chế định khác trong Hiến pháp 1992 [Amending and supplementing the human rights, basic rights and obligations of citizens and other regulations in the 1992 Constitution]* (NXB Khoa học xã hội [Social Sciences Publishing House) 2012) 194-207.

[40] Luu Chu Uong (ed.), *Những Vấn Đề Lý Luận và Thực Tiễn Sửa Đổi, Bổ Sung Hiến Pháp Năm 1992 [Theoretical and Practical Issues of Amending and Supplementing the 1992 Constitution]* (NXB Chính trị Quốc gia [National Political Publisher] 2014) 274.

[41] Informal interviews were conducted by the authors. For privacy reasons, the informants remain anonymous.

to conclude that the constitution-makers did not intentionally embed proportionality as an inherent element of the rights-restriction clause.

Regardless of the lack of awareness or of interest, the adoption of the human-right-limitation clause exemplifies a symbolic adherence to the texts of international human rights, rather than a genuine interest in the proportionality doctrine. Only from 2015 onwards, the proportionality principle has garnered more attention in the academic circle, with a growing number of publications directly addressing it. [42] As suggested in this article, the proportionality analysis has gradually emerged as a normative framework in evaluating the constitutionality of a bill during the legislative process.

The constitutional entrenchment of rights-limitation formula is dynamic. After the 2013 Constitution came into effect, claims for preventing arbitrary limitations on human rights based on unreasonable, disproportionate, unconstitutional grounds have been gradually invoked by multiple actors in the quality assessment of bills. [43] Article 14(2) has been mainly a tool for the National Assembly to

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[42] See e.g., Giang Linh Nguyen (ed.), *Cơ Sở Lý Luận và Thực Tiễn về Hạn Chế Quyền Con Người ở Việt Nam Hiện Nay [Theoretical and Practical Basis of Human Rights Restrictions in Vietnam]* (NXB Khoa học xã hội [Social Sciences Publishing House) 2021); Hoa Van To, 'Tư Tưởng Hạn Chế Quyền Con Người và Nội Dung Nguyên Tắc Hạn Chế Quyền Cơ Bản Hiến Định Theo Hiến Pháp Năm 2013 [The Ideology of Restricting Human Rights and the Content of the Principle of Restricting Fundamental Constitutional Rights under the 2013 Constitution]' [2018] Tạp chí Luật học [Hanoi Law Review]; Dat Tien Bui, 'Hiến Pháp Hóa Nguyên Tắc Giới Hạn Quyền Con Người: Cần Nhưng Chưa Đủ' [2015] Tạp chí Nghiên cứu Lập pháp [Journal of Legislative Studies]; Tuan Minh Dang and Mai Quynh Le, 'Giới hạn quyền con người, quyền công dân tại Việt Nam: Nguyên tắc hiến pháp và vấn đề thực thi [Limitations of human rights and civil rights in Vietnam: Constitutional principles and implementation issues]' [2020] Tạp chí Khoa học Kiểm sát; Dat Tien Bui, 'Nhận Diện Các Mô Thức Giới Hạn Quyền Con Người Trong Pháp Luật Việt Nam [Identifying Patterns of Human Rights Limitations in Vietnamese Law]' [2018] Tạp chí Nghiên cứu Lập pháp [Journal of Legislative Studies]; Dat Tien Bui, 'Nguyên Tắc Giới Hạn Quyền Con Người : Ý Nghĩa, Nhu Cầu Giải Thích và Định Hướng Áp Dụng [Principle of Limitation of Human Rights: Meaning, Need for Explanation and Application Orientation]' [2017] Tạp chí Nghiên cứu Lập pháp [Journal of Legislative Studies]; Quan Van Nguyen, 'Tiêu Chí Hạn Chế Quyền Con Người vì Lý Do Trật Tự Công Cộng Trong Pháp Luật Một Số Nước [Criteria for Restricting Human Rights for Reasons of Public Order in the Laws of Some Countries]' [2018] Tạp chí Nghiên cứu Lập pháp [Journal of Legislative Studies]; Duc Tien Nguyen, 'Giới Hạn Quyền Con Người Trong Công Ước Nhân Quyền Châu Âu và Gợi Mở Cho Việt Nam' (2018) 360 Tạp chí Nhà nước và Pháp luật [State and Law Review]; Quang Hong Truong, 'Thực Tiễn Thi Hành Nguyên Tắc Hạn Chế Quyền Con Người, Quyền Công Dân Của Hiến Pháp Năm 2013 [Practical Implementation of the Principle of Restricting Human Rights and Civil Rights of the 2013 Constitution]' [2021] Tạp chí Luật học [Hanoi Law Review].

[43] See: Dat T. Bui, 'The Constitutionalization of the Principle on Human Rights Limitation: Necessary but Insufficient ('Hien phap hoa nguyen tac gioi han quyen con nguoi: can nhung chua du')' (2015) Legislative Studies Journal 3; Tuan Minh Nguyen and others, *Legitimate Limitations on Human Rights, Citizens' Rights in International Law and Vietnamese Law*

supervise the Government in Law Project proposals and regulation making, so that the Government's power must abide by the constitutional principle of human-rights-limitation. This provision has been a lever provoking the discussion on the serious reception of the proportionality principle as well as the proportionality doctrine into Vietnamese law. Hence, in this light, the global principle of proportionality has migrated into Vietnam is an unwitting consequence of the human rights limitation clause, rather than a fully informed and sensible reception of the constitution makers. Although the human-rights-limitation clause constitutes only one of the four pillars required for an effective constitutional review mechanism, [44] its constitutional standing represents a significant step towards the reception of the proportionality doctrine as well as a genuine constitutional review mechanism in the future. In this context, the introduction of the human-rights-limitation clause in the 2013 Vietnamese Constitution has inadvertently given rise to the migration of the proportionality principle into Vietnamese constitutional law.

3. Making emergency law in Vietnam: Some comments and suggestions from the perspective of constitutional rights limitation C

Three sources that protect human rights in making emergency law

Emergency law is typically analyzed in terms of three sources that protect human rights: the constitution, legislation, and legal interpretation. All of them must be based on provisions and interpretations of international human rights law.

The constitution

According to the 2013 Vietnamese Constitution, the National Assembly has jurisdiction over emergency provisions. [45] The Standing Committee of the National

('Gioi han chinh dang doi voi cac quyen con nguoi, quyen cong dan trong phap luat quoc te va phap luat Viet Nam') (Hong Duc Publishing House 2015); Giang Linh Nguyen and others, *Theoretical and Practical Foundations for Human Rights Limitation in Vietnam Today (Co so ly luan va thuc tien ve han che quyen con nguoi o Viet Nam hien nay)* (Social Sciences Publisher 2022).

[44] The four pillars are: (i) constitutional recognition of basic rights and freedoms; (ii) constitutional recognition of a human rights-limitation principle; (iii) effective adjudication on limitations on rights; and (iv) application of theories in assessing the reasonableness/constitutionality of limitations on rights (See: Dat T. Bui, "A Quest for Due Process Doctrine in Vietnamese Law: from Soviet Legacy to Global Constitutionalism" (2021) 9, in *Chinese Journal of Comparative Law* 178, 200).

[45] "Decide on the issue of war and peace, emergency provisions, and other special measures to guarantee national defense and security" (Clause 13, Article 70 of the 2013 Constitution).

Assembly has jurisdiction over emergency declaration.[46] The President has jurisdiction to "order general mobilization or local mobilization and proclaim or abolish states of emergency in conformity with the resolution of the Standing Committee of the National Assembly"; he can also "declare or abolish states of emergency nationwide or locally when a session of the Standing Committee of the National Assembly cannot be held".[47] The government has jurisdiction to "execute the order of general mobilization or local mobilization, the order of emergency declaration and other necessary measures to protect the nation as well as ensure the safety of life and property of the People".[48] In general, the Constitution of Vietnam contains only provisions on jurisdiction over emergency declarations and their abolition. Provisions on specific issues will be specified in subconstitutional documents.

In addition, principles on human rights limitations are recognized in Clause 2, Article 14 of the Constitution (2013), laying the foundation for control over rights limitation in general[49] và derogation from rights in states of emergency in particular. As regards states of emergency, the constitution sets more demanding standards in ownership rights limitation. In accordance with it, the state can "requisition property of organizations and individuals with compensation based on the market value" in "strictly necessary situations for national defense and security or for the sake of the nation, and in *states of emergency* and natural disaster prevention and control".[50] Furthermore, the state can requisition land "to perform national defense and security tasks in war, *states of emergency* and natural disaster prevention and control" in "strictly necessary situations prescribed by law".[51] Overall, the constitution stipulates that ownership rights limitation such as requisitions in states of emergency must have "strictly necessary" reasons in comparison with "necessary" ones in other circumstances. It can be seen that the Constitution (2013) has laid significant foundations for the limitation of constitutional rights in the making of emergency law.

The legislation

Up to now, Vietnam has not promulgated any emergency law; instead, it has

[46] "Decide to execute general mobilization or local mobilization as well as proclaim and abolish states of emergency nationwide or locally" (Clause 10, Article 74 of the 2013 Constitution).

[47] Clause 5, Article 88 of the 2013 Constitution.

[48] Clause 3, Article 96 of the 2013 Constitution.

[49] "Human and civil rights can only be limited in necessary circumstances for national defense and security, social order and safety, social morality, and public health in accordance with the law". See more analysis in Bùi Tiến Đạt, Hiến pháp hóa nguyên tắc giới hạn quyền con người: cần nhưng chưa đủ (Constitutionalizing the principle of human rights limitation: necessary but insufficient), Tạp chí Nghiên cứu lập pháp (Journal of Legislative Studies), No. 6/2015.

[50] Clause 3, Article 32 of the 2013 Constitution (the words italicized due to the author's purpose of emphasis).

[51] Clause 4, Article 54 of the 2013 Constitution (the words italicized due to the author's purpose of emphasis)

passed the Emergency Ordinance 2000.[52] The Government has issued Decree 71/2002, which specifies the implementation of several articles of this ordinance in the event of major disasters and dangerous epidemics. Moreover, in the area of prevention of infectious diseases, the Act on Prevention and Control of Infectious Diseases 2007 prescribes states of emergency involving epidemics;[53] and the Act on National Defense 2018 prescribes states of emergency involving national defense.[54] It can be seen that the Emergency Ordinance 2000 is a general emergency law while the Act on Prevention and Control of Infectious Diseases 2007 is a special act on the state of emergency involving epidemics. An overall look at the aforementioned legal documents reveals that Vietnam has established emergency legislation. Nevertheless, in the forthcoming time, it is essential to establish better legislation in two directions. The first is to complete emergency law in conformity with international human rights law and international experience. Secondly, on that basis, it is necessary to transpose the Emergency Ordinance 2000 into law, thereby helping to address inconsistencies in scattered regulations concerning states of emergency.

Legal interpretation

The legal framework of legal interpretation is directly tied to case law, decisions, interpretations and guidance of international conventions on human rights.[55] With an abundant and diverse source of case law, the States Parties to the European Convention on Human Rights (ECHR) or the American Convention on Human Rights (ACHR) have another important legal framework to supplement the constitution, the legislation, and international conventions. As Vietnam is a State Party to the ICCPR và ICESCR, interpretations of the UN institutions such as the United Nations Human Rights Committee (UNHRC)[56] play a significant role despite their primary function of recommendation.

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[52] This ordinance is considered secret. See the Ministry of Public Security, Report assessing impacts and administrative procedures of the Bill on Protection of State Secrets (http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=717&TabIndex=2&TaiLieuID=2875)

[53] According to the present law, "the Standing Committee of the National Assembly puts forward a resolution to proclaim the state of emergency at the Prime Minister's suggestion; in case an immediate session of the Standing Committee of the National Assembly cannot be held, the President orders emergency declaration" (Clause 2, Article 42 of the Act on Prevention and Control of Infectious Diseases (2007)).

[54] According to Article 18 of the present law, jurisdiction over declaration and abolition is similar to provisions of the Act on Prevention and Control of Infectious Diseases 2007.

[55] For instance, the United Nations Human Rights Committee interpretes ICCPR and ICESCR; the European Court of Human Rights interpretes the European Convention on Human Rights; the American Court of Human Rights interpretes the American Convention on Human Rights.

[56] I.e. the United Nations Human Rights Committee, General Comment No. 29: States of Emergency (Article 4); Office of High Commissioner for Human Rights, CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) 2000).

The application of the principle of proportionality in rights limitation in making emergency law

In General Comment No. 29 about Article 4 of the ICCPR (states of emergency), the United Nations Human Rights Committee (UNHRC) states that although derogation from rights in states of emergency differs from rights limitation in normal circumstances, these two measures need to be designed in compliance with the principle of proportionality, [57] as both of them originate from the principles of human rights limitation. Major conventions on human rights [58] all place much emphasis on the role of the principle of proportionality in derogation from rights. The Inter-American Commission on Human Rights (IACHR) highlights fundamental requirements of the principle of proportionality; specifically, 'limitation must be necessary for general security, compliant with just demands of a democratic society, and proportionate to legitimate purposes'. [59]

Under the ICCPR, derogation from rights even needs to satisfy stricter criteria in comparsion with ordinary rights limitation: (1) It is a state of emergency that threatens the life of the nation; (2) The state must officially proclaim the state of emergency; (3) Derogation from rights must originate from the need for emergency of the situation; (4) Derogation measures are not contradictory to the state's other obligations in accordance with international laws; (5) Derogation measures are nondiscriminatory. [60]

The principle of proportionality gives a four-step test to evaluate whether rights limitation is proportionate or constitutional. [61] Failing to meet standards in any step, the measure will become unconstitutional due to excessive infringement of constitutional rights.

Step 1: Rights limitation measures must have legitimate purposes (aims)

Legitimate purposes for limiting rights cannot be arbitrary; instead, they must originate in democratic values, commonly embodied in the protection of others' rights and public interests. [62] It is noteworthy that although protecting human rights is always legitimate, not all public interests are. [63] A public interest is considered

[57] The United Nations Human Rights Committee, General Comment No. 29: States of Emergency (Art. 4), para. 4.

[58] The ICCPR, the European Convention on Human Rights, the American Convention on Human Rights.

[59] Inter-American Commission Report, OEA/Ser. L/V/II.116, para. 55.

[60] Clause 1, Article 4 of the ICCPR.

[61] Francisco J. Urbina, "A Critique of Proportionality" (2012) 57, in *American Journal of Jurisprudence*, 49, p. 49.

[62] See: Barak, *Proportionality: Constitutional Rights and Their Limitations*, 251.

[63] See above, p. 255.

legitimate if it aims at important social objectives and later "a social platform which recognizes constitutional importance and the need for human rights protection". [64] Public interests include the following factors: the existence of the state as a democracy, national security, public order, crime prevention, child protection, public health, tolerance and protection of human sentiments, constitutional principles and other interests not tied to the category of human rights. [65] Limitations on rights without legitimate purposes or aims violate the right, the first step of the principle of proportionality, and are thus considered unconstitutional.

In Vietnam, Clause 2, Article 14 of the Constitution (2013) is the constitutional principle on rights limitation in general and derogation from rights in states of emergency in particular. Strikingly, the Constitution (2013) allows ownership rights to be limited only in states of emergency in "strictly necessary" situations. [66] This provision implicitly sets a higher standard for legitimate aims when the state seeks to limit constitutional rights in states of emergency.

It can be said that emergency acts typically have little difficulty satisfying the standard of the first step, as measures derogating from certain constitutional rights are essential and legitimate in addressing the problems that "threaten the life of the nation". Nonetheless, it is necessary to determine precisely which rights limitation is legitimate. The Siracusa principles stress that rights-limiting measures to protect public health must directly aim to prevent disease or provide care for the sick. [67]

Step 2: Rights limitation measures must be compatible with the targeted purposes

This step requires rights limitation measures to have a rational connection with với targeted purposes. [68] Those without a rational connection are considered unconstitutional.

In states of emergency involving epidemics, limitations on the right to freedom of movement are considered rational; nevertheless, measures limiting access to information can be considered to have no rational connection to the purpose of epidemic control. Therefore, the Committee on Economic, Social and Cultural Rights (CESCR) of the Office of the United Nations High Commissioner for Human Rights (OHCHR) has interpreted the core obligation of comparable priority of the right to health as guaranteeing education and access to information concerning public health problems. [69]

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[64] See the opinion expressed by Judge Barak (the Israeli Supreme Court) in CA 6821/93 United Mizrahi Bank Ltd. v Migdal Cooperative Village [1995] IsrLR 1.

[65] Barak, *Proportionality: Constitutional Rights and Their Limitations*, 254, 266, 269, 276.

[66] Clause 3, Article 32, and Clause 4, Article 54 of the Constitution (2013).

[67] United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 1985), para. 25.

[68] Barak, *Proportionality: Constitutional Rights and Their Limitations*, 303.

[69] Office of High Commissioner for Human Rights, CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), para. 44.

Step 3: Rights limitation measures to achieve purposes must be necessary

The requirement of necessity requires that rights limitation measures be the best available to achieve the purpose. The chosen one is supposed to be necessary when it is the least restrictive means in comparison with others while still fulfilling the aim. [70] That right limitation is not the best measure among the alternatives and is considered to be unconstitutional.

In states of emergency involving epidemics, limitations on the right to freedom of movement are considered legitimate and rational; however, it is essential to assess which level of limitation is necessary thoroughly. The state usually proposes a large number of options with different levels of rights limitation to select. To satisfy the standard of the third step, it is mandatory to select the least restrictive measure limiting the right to freedom of movement that effectively supports epidemic control.

Step 4: There needs to be a fair balance between the benefits and the harms of limitations on rights

This step is the most significant as it is the last. Even though a wide range of rights limitation measures can meet the three standards in the aforementioned three steps, they fail to satisfy the one in the last step after careful consideration. Another reason why this step is of the utmost importance is that it can answer the challenging question of the benefit–harm balance. It requires a balance between the benefits gained from and the harms caused by the limitation of rights. [71] Excessive or disproportionate rights limitation may be effective in achieving the targeted aims; nonetheless, the harms done by rights limitation cannot be more considerable than the benefits obtained. [72]

The Bill (Law Project) on the State of Emergencies

The Ordinance on the State of Emergencies 2000 will be replaced by the upcoming Act on the State of Emergencies 2025. [73] Politically, this upgrade (from Ordinance to Act) is in line with the policies of the Communist Party of Vietnam, which emphasises that the National Assembly shall regulate important issues. [74]

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[70] Barak, *Proportionality: Constitutional Rights and Their Limitations*, 317.

[71] *Ibid.*, 340.

[72] In the Covid-19 pandemic, many scholars have warned nations to consider the question of benefit—harm balance carefully when implementing measures affecting people's rights (i.e. Ahmed Mushfiq Mobarak, Zachary Barnett-Howell, Poor Countries Need to Think Twice about Social Distancing, 2020 - https://foreignpolicy.com/2020/04/10/poor-countries-social-distancing-coronavirus/).

[73] Planned to be passed in Dec 2025.

[74] The Resolution No. 27-NQ/TW dated November 9, 2022 of the Sixth Plenum of the

Constitutionally and legally, the upgrade aims to fix the problem that limitations on human rights can be provided by the ordinance of the National Assembly Standing Committee (but not the National Assembly). This is because Article 14(2) of the 2013 Constitution is intended to prohibit human rights limitations imposed by infra-act documents. [75]

We can see the influence of the 2013 Constitution on the making of the Bill, particularly the human rights limitation principle. To some extent, the spirit of the proportionality principle can be found in some documents of the Bill Project. For example, the Ministry of National Defence's Report on Assessment of Administrative Procedures (regarding this Bill) provides an evaluation that 'administrative procedures of the Bill can be set only in the case of a pressing need, an optimal measure of several options'. [76] As usual, this is a kind of *ex-ante* constitutional review in the Vietnamese law-making process. [77]

4. Conclusion

Emergency law is always tied to the need to limit numerous constitutional rights in temporary but harsh ways. International human rights law has considered control over the state's derogation from rights in states of emergency by listing a set of non-derogable rights and recommending the application of the principle of proportionality. In Vietnam, emergency law should be developed based on three sources that protect human rights (the constitution, the legislation, and legal interpretation), and its constitutionality needs to be reviewed through the four steps of the principle of proportionality. The 2013 Constitution contains important provisions to facilitate the reform of this law.

13th Central Committee of the Communist Party of Vietnam on continuing to build and improve the Socialist Rule-of-law State of Vietnam in the new period has set out the important task of "correctly and clearly identifying the agencies competent to promulgate legal normative documents, minimizing the use of the Ordinance format to issue legal normative documents; and maximizing the codification of important national issues under the authority of the National Assembly's decision into laws (acts)".

[75] Vietnamese Government, Proposal of the Bill on the state of Emergencies (To trinh Du an Luat Tinh trang khan cap), 2025.

[76] Ministry of National Defence, Report on Assessment of Administrative Procedures of the Bill (no. 245/BC-BQP, 15 Jan 2025), p. 2.

[77] Dat T. Bui and Tien-Duc Nguyen, *The inadvertent migration of proportionality and the role of ex-ante constitutional review in the Vietnamese lawmaking process*, The Theory and Practice of Legislation, Issue 1, Volume 13, 2025.

Emergency, Proportionality, and Constitutional Adjudication: The High Court of Australia and the Covid-19 Pandemic

Giacomo Giorgini Pignatiello [*]

1. Pandemic Challenges and the Role of Proportionality in Australian Constitutional Law

The global health emergency triggered by the outbreak of Covid-19 has represented an extraordinary stress test for constitutional systems worldwide, compelling governments to recalibrate the balance between public power and individual rights under conditions of profound uncertainty. [1] Far from being merely a biomedical crisis, the pandemic exposed latent structural tensions concerning the allocation of authority, the scope of executive discretion, and the resilience of legal safeguards designed for ordinary times. [2] As in other liberal democracies, Australia was confronted with the challenge of reconciling the need for prompt and effective public health measures with the imperative of preserving fundamental rights, including those social and economic interests that, although often implicit or institutionally mediated, form an essential component of democratic citizenship. [3] The pandemic therefore provides an illuminating vantage point from

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[1] A. Vedaschi (ed.), *Governmental Policies to Fight Pandemic*, Brill, Leiden, 2024.

[2] A. Vedaschi, C. Graziani, "Post-pandemic constitutionalism: COVID-19 as a game-changer for "Common Principles"?", in *U. Pa. J. Int'l L.*, 44(4), 2023, 815 ff.

[3] B. Bennett, I. Freckelton, G. Wolf, "Covid-19 and the Future of Australian Public Health Law", in *Adelaide Law Review*, 43(1), 2022, 403 ff.; M. Rizzi, T. Tulich, *All Bets on the Executive(s)! The Australian Response to COVID-19*, in J. Grogan, A. Donald (eds), *Routledge Handbook of Law and the COVID-19 Pandemic*, Routledge, Abingdon, 2022, 457 ff.; A. Stone, J. Forrest, *Australia's Distinctive COVID-19 Response*, in A. Vedaschi (ed.), *Governmental Policies*, cit., 589 ff. For a quantitative analysis of the pandemic measures adopted across the national territory of Australia, see: B. Bennett, J. Duffy, D. Kelly, "Lockdown Laws: Location, Regulatory Change and the Rule of Law in Australia during the Covid-19 Pandemic", in *U. Qld. L.J.*, 2025.

which to interrogate the constitutional parameters that shape the permissible limits of state power in moments of collective vulnerability.

The Australian constitutional order displays several distinctive features that render its pandemic response particularly significant for comparative constitutional analysis. Unlike many Western jurisdictions, Australia does not possess a comprehensive national Bill of Rights. The protection of fundamental rights relies predominantly on a combination of structural constitutional principles, implied rights developed through judicial interpretation, and statutory safeguards enacted at the state and federal levels. [4] Moreover, Australia's rigid form of federalism distributes competencies between the Commonwealth and the States in a manner that both empowers and constrains regulatory action in times of emergency. [5] This institutional configuration places the High Court of Australia in a central and delicate position: as the ultimate interpreter of the Constitution, the Court is tasked with overseeing the boundaries of legislative and executive authority while, at the same time, navigating the absence of an explicit catalogue of rights. [6] During the pandemic, this role proved especially consequential, as Courts in Australia were frequently asked to assess the validity of extraordinary measures—including border closures, movement restrictions, and limits on economic activity—under constitutional heads of power that were never designed with public health crises in mind. [7]

Within this framework, the principle of proportionality emerged as a key doctrinal tool in evaluating the constitutionality of emergency measures. Although proportionality has long been employed in various constitutional systems as a

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[4] R. Dixon, "An Australian (partial) bill of rights", in *Int'l. J. Const. L.*, 14(1), 2016, 80 ff.; S. Stephenson, *Rights Protection in Australia*, in C. Saunders, A. Stone (eds), *The Oxford Handbook of the Australian Constitution*, Oxford University Press, Oxford, 2018, 905 ff.; M. Groves, J. Boughey, D. Meagher (eds), *The Legal Protection of Rights in Australia*, Hart, Oxford, 2019.

[5] A. Dolcetti, L. Scaffardi, "Australian Federalism after the Covid-19 pandemic", in *DPCE online*, 1, 2025, 167 ff. For a broader perspective on Australian federalism, see: G. Appleby, N. Aroney, T. John (eds), *The Future of Australian Federalism*, Cambridge University Press, Cambridge, 2012; S. Crennan, *Federation*, in C. Saunders, A. Stone (eds), *The Oxford Handbook of the Australian Constitution*, cit., 78 ff.

[6] K.E. Foley, "Australian Judicial Review", in *Wash. U. Glob. Stud. L. Rev.*, 6, 2007, 281; M. Stubbs, "A Brief History of the Judicial Review of Legislation under the Australian Constitution", in *Fed. L. Rev.*, 40(2), 2012, 227 ff.; R. Woods, "Rights Review in the High Court and the Cultural Limits of Judicial Power", in *Fed. L. Rev.*, 41(3), 2013, 585 ff.; M. Taggart, *"'Australian Exceptionalism' in Judicial Review"*, in *Fed. L. Rev.*, 36(1), 2019.

[7] M. Rizzi, T. Tulich, *All Bets on the Executive(s)! The Australian Response to COVID-19*, in J. Grogan, A. Donald (eds), *Routledge Handbook of Law and the COVID-19 Pandemic*, Routledge, London, 2022, 457 ff.; T. Tulich, S. Murray, "Executive Accountability and Oversight in Australia during the COVID-19 Pandemic", in *Mich. St. Int'l L. Rev.*, 30, 2022, 283 ff.; E. Hicks, "Proportionality and Protracted Emergencies: Australia's COVID-19 Restrictions on Repatriation Rights Compared", in *Sydney L. Rev.*, 45, 2023, 77 ff.

structured method for scrutinising limitations on rights, its position in Australian constitutional law has traditionally been contested and comparatively underdeveloped. The High Court's ambivalent relationship with proportionality reflects a broader tension between the desire for analytical transparency and the fear that such a standard may open the door to judicial policymaking. Nonetheless, the Court engaged with proportionality reasoning to determine whether governmental action was reasonably adapted to legitimate public purposes. These decisions invite reflection on the extent to which proportionality may be evolving into a more stable feature of Australian constitutional review.

The present chapter proceeds by first reconstructing the evolution of proportionality in Australian public law, tracing its emergence from implied freedoms jurisprudence to its structured formulation. On this basis, the analysis turns to pandemic-related case law, examining how courts deployed proportionality to assess emergency measures. The chapter concludes by critically evaluating the implications of this jurisprudence for the future role of proportionality within a constitutional system that relies on indirect and institutional mechanisms of rights protection.

2. The Principle of Proportionality in Australian Public Law

The principle of proportionality occupies an increasingly central position in contemporary constitutional adjudication, particularly in jurisdictions influenced by German and broader European legal thought. Although originally developed within civil law systems, proportionality has become a key analytical framework for courts confronting tensions between public power and individual rights. In its canonical structure—suitability, necessity, and proportionality stricto sensu—it provides a systematic methodology for evaluating whether limitations on rights or freedoms can be justified in light of legitimate governmental objectives. [8] This

[8] On the principle of proportionality in contemporary constitutional law, see: E. Crawford, *Proportionality*, in R. Wolfrum (ed.), *Max Planck Encyclopedias of International Law*, Oxford University press, Oxford, 2011; A. Barak, *Proportionality*, Cambridge University Press, Cambridge, 2012; M. Klatt, M. Meister, *The Constitutional Structure of Proportionality*, Oxford University Press, Oxford, 2012; M. Cohen-Eliya, I. Porat, *Proportionality and Constitutional Culture*, Cambridge University Press, Cambridge, 2013; R. Alexy, "Constitutional Rights and Proportionality", in *Revus*, 22, 2014, 51 ff.; G. Huscroft, B.W. Miller, G. Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, Cambridge University Press, Cambridge, 2014; V.C. Jackson, M.V. Tushnet (eds), *Proportionality. New Frontiers, New Challenges*, Cambridge University Press, Cambridge, 2017; N. Petersen, *Proportionality and Judicial Activism*, Cambridge University Press, Cambridge, 2017; D. Duarte, J. Silva Sampaio (eds), *Proportionality in Law. An Analytical Perspective*, Springer, Cham, 2018; J. Bomhoff, *Proportionality*, in J.M. Smits *et al.* (eds), *Elgar Encyclopedia of Comparative Law*, Edward Elgar, Cheltenham, 2023, 255 ff.

framework has proven especially valuable in moments of crisis, when restrictive measures tend to expand and courts are called upon to reconcile public interests with constitutional guarantees. Understanding how the proportionality test travelled, evolved, and ultimately took root in Australian public law is therefore essential for analysing its role during the pandemic and its broader implications for socio-economic rights.

2.1. From Implied Freedoms to Structured Proportionality: The Evolution of Constitutional Reasoning in the High Court of Australia

The High Court of Australia long resisted the explicit adoption of proportionality, preferring more traditional common law tools such as reasonableness review and narrower conceptions of judicial scrutiny. Beginning in the 1990s, however, new judicial approaches emerged, linked to the recognition that the Constitution contains implied structural limitations on legislative and executive power. The implied freedom of political communication, articulated in landmark cases such as *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, compelled the Court to develop tools capable of assessing whether legislation unjustifiably burdened constitutionally protected communicative activity. [9]

In *Nationwide News* and *Australian Capital Television*, the High Court articulated the implied freedom of political communication through reasoning that, while not yet systematised, clearly reflected proportionality-based arguments, accompanied by significant divergences among the Justices. In *Nationwide News*, the majority (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ) reasoned that the criminal offence of bringing the Industrial Relations Commission into disrepute imposed an impermissibly wide and indiscriminate burden on political communication, extending well beyond what was necessary to protect the authority and proper functioning of the institution. The provision was criticised for its lack of tailoring, as it criminalised even reasonable and good-faith criticism, thereby failing an implicit requirement of necessity and balance between legislative purpose and constitutional freedom. By contrast, Dawson J dissented, rejecting the very existence of an implied freedom of political communication and therefore denying any role for proportionality analysis; McHugh J, while accepting the implication, was more cautious and grounded invalidity in the excessive breadth of the provision rather than in a general balancing exercise.

Similar proportionality concerns emerged in *Australian Capital Television*,

[9] See the observations of Fitgerald, who had already advocated a reciprocal contamination between the principle of proportionality and Australian constitutionalism: B.F. Fitzgerald, "Proportionality and Australian Constitutionalism", in *U. Tas. L. Rev.*, 12, 1993, 263 ff.

where the majority scrutinised whether the near-total ban on paid political advertising was reasonably appropriate and adapted to the legitimate aim of promoting electoral equality and preventing corruption. The Court held that the ban imposed a disproportionate burden on political communication, particularly affecting minor parties, independents and interest groups, and that less restrictive alternatives were available. Dissents were again significant: Dawson J maintained his rejection of the implied freedom and warned against judicial intrusion into legislative choices, while McHugh J dissented on proportionality grounds, accepting the legitimacy of the legislative objective and concluding that the chosen means fell within Parliament's discretion.

Collectively, these cases reveal an early and contested use of proportionality reasoning in Australian constitutional law, with sharp disagreement not only about the weight to be accorded to legislative purposes, but also about the legitimacy of proportionality itself as a constitutional method of adjudication.

This early fragmentation was addressed in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, [10] in which the High Court revisited and reformulated the implied freedom of political communication, giving it a more structured doctrinal foundation and clarifying the role of proportionality within Australian constitutional adjudication. The case arose from a defamation action brought by the former Prime Minister of New Zealand, David Lange, against the Australian Broadcasting Corporation in relation to a broadcast criticising his political conduct. The ABC relied on the implied freedom as a defence. Sitting as a unanimous Court, the Justices reaffirmed the existence of the implied freedom but rejected its characterisation as a personal right, instead defining it as a constitutional restriction on legislative and executive power. Crucially, the Court articulated a revised two-limb test that institutionalised proportionality reasoning: first, whether the law effectively burdens freedom of communication about government or political matters; and second, whether the law is reasonably appropriate and adapted to serve a legitimate end compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. In applying this test, the Court emphasised that proportionality does not entail open-ended balancing of interests, but rather an assessment of the fit between means and ends, including considerations of suitability and necessity. The Court concluded that the common law of defamation, once modified to incorporate an expanded defence of qualified privilege for political communication, satisfied this standard and did not impose a disproportionate burden on political discourse. Notably, *Lange* was decided without any dissenting opinions, a deliberate choice by the Court to resolve the fragmentation evident in *Nationwide News* and *Australian Capital Television*. The unanimous judgment thus consolidated

[10] For a doctrinal commentary on the decision: A. Lynch, "Unanimity in a Time of Uncertainty: The High Court Settles Its Differences in Lange v Australian Broadcasting Corporation", in *Griffith L. Rev.*, 6, 1997, 211 ff.

proportionality as a disciplined and restrained method of constitutional reasoning, while simultaneously circumscribing its scope in order to preserve parliamentary autonomy and institutional stability within the Australian constitutional order.

Following *Lange*, the High Court maintained continuity in the use of proportionality reasoning in cases concerning the implied freedom of political communication, while revealing persistent disagreements over the intensity and structure of the test. In *Coleman v Power* (2004) 220 CLR 1, the Court considered the validity of a Queensland offence criminalising the use of insulting words in a public place, applied to political protest speech. A majority accepted that the law burdened political communication, but divided sharply on proportionality: McHugh, Gummow, Hayne and Kirby JJ held that, properly construed, the provision was limited to words provoking violence and was therefore reasonably appropriate and adapted, whereas Gleeson CJ and Callinan J emphasised legislative purpose and public order, adopting a deferential proportionality assessment; Kirby J, by contrast, applied a more searching analysis, stressing the necessity of narrow tailoring when political communication is at stake.

In *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [11] the Court upheld amendments to the Commonwealth Electoral Act imposing stricter party registration requirements, including minimum membership thresholds. While reaffirming the *Lange* test, the majority adopted a relatively restrained conception of proportionality, focusing on the legitimacy of the objective—maintaining the integrity and stability of the electoral system—and accepting that the burdens imposed on political communication were indirect and proportionate. Dissents by McHugh and Kirby JJ criticised this approach as insufficiently attentive to necessity and less restrictive alternatives, warning against excessive deference to Parliament in the electoral domain.

A more substantive and rights-protective proportionality analysis emerged in *Roach v Electoral Commissioner* (2007) 233 CLR 162,[12] concerning the constitutionality of blanket prisoner disenfranchisement. A majority (Gleeson CJ, Gummow, Kirby and Crennan JJ) held that voting is a central element of representative democracy and that the impugned law imposed a disproportionate burden on political participation, as it lacked a rational and proportionate connection to legitimate penal objectives. Here, proportionality reasoning moved closer to an explicit evaluation of necessity and adequacy in balance, with particular emphasis on the severity of the restriction. Dissenting Justices (Hayne, Heydon and Callinan JJ) rejected this more robust proportionality review, insisting on parliamentary supremacy in defining the franchise and cautioning against importing rights-based balancing into Australian constitutional law.

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[11] M. Head, "The High Court and Australia's New Electoral Laws: Mulholland v Australian Electoral Commission", in *U. W. Syd. L. Rev.*, 10, 2006, 172 ff.

[12] D. Brown, "The Disenfranchisement of Prisoners: Roach v Electoral Commissioner & Anor—Modernity v Feudalism", in *Alt. L.J.*, 32(3), 2016, 13 ff.

Taken together, these cases demonstrate continuity with *Lange* in anchoring proportionality to the structure of representative government, but also reveal an evolving and contested spectrum of proportionality—from deferential "reasonable adaptation" to more intensive scrutiny—shaped by judicial disagreement over constitutional method and institutional competence.

McCloy v New South Wales (2015) 257 CLR 178 [13] represents a doctrinal turning point in Australian constitutional law because it fundamentally redefined both the concept and the method of proportionality analysis in cases concerning the implied freedom of political communication. [14] The plurality (French CJ, Kiefel, Bell and Keane JJ) reconceptualised proportionality not as a free-standing balancing of competing interests, but as a structured justification analysis comprising three cumulative stages: suitability, necessity, and adequacy in balance. Suitability requires a rational connection between the impugned measure and its legitimate purpose; necessity demands that there be no reasonably practicable alternative means that would achieve the same objective with a lesser burden on political communication; and adequacy in balance entails an evaluative judgment as to whether the importance of the law's purpose justifies the extent of the burden imposed. This final stage does not involve abstract value balancing, but rather a contextual assessment of whether the burden is excessive relative to the constitutional significance of the objective pursued.

The case itself concerned the validity of New South Wales electoral funding laws imposing caps on political donations, banning donations from property developers, and setting aggregate expenditure limits. Applying the newly articulated framework, the plurality concluded that the measures were suitable and necessary to address corruption and its appearance, and that they were adequate in balance given the central constitutional importance of electoral integrity. Nevertheless, the significance of *McCloy* lies less in the outcome than in its methodological reorientation. Structured proportionality was presented as enhancing transparency, coherence and constraint in constitutional adjudication by requiring courts to articulate explicitly the justificatory steps underlying their conclusions. This reconceptualisation was not universally accepted. In dissent, Gageler and Nettle JJ rejected structured proportionality as an illegitimate importation of a rights-based

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[13] A. Twomey, "McCloy v New South Wales: Developer donations and banning the buying of influence", in *Syd. L. Rev.*, 37(2), 2015, 275 ff.; M. Watts, "Reasonably Appropriate and Adapted: Assessing Proportionality and the Spectrum of Scrutiny in McCloy v. New South Wales", in *U. Qld L. J.*, 35, 2016, 349 ff.

[14] With regard to the specific Australian legal context in which the principle of proportionality has taken root, it has been observed that: "Structured proportionality needs to be understood as a new gambit in this long running struggle for legitimacy created by the Court conducting judicial review on the basis of an implied right, in highly contested political contexts, and in tension with traditions of parliamentary supremacy and strict legalism", E. Douek, "All out of Proportion: The Ongoing Disagreement about Structured. Proportionality in Australia", in *Fed. L. Rev.*, 47(4), 2019, 556.

methodology foreign to the Australian constitutional tradition, arguing instead for a more textually and structurally confined inquiry focused on whether a law impermissibly alters the system of representative government. Despite these objections, *McCloy* established structured proportionality as the authoritative test for implied freedom cases, reshaping subsequent jurisprudence and providing the conceptual foundation upon which later decisions explicitly built.

Much has been written in the scholarly literature on the difficulty of transplanting the civil law–derived principle of proportionality into the Australian constitutional order. With regard to the peculiarities of the Australian legal order, it has been argued that: "The notable and exceptional absence of a bill of rights in the Australian Constitution means that the 'principal responsibility for rights-the task of determining their identity, scope, and limits' is assigned to the legislature. Indeed, the framers of the Constitution consciously rejected an American-style bill of rights because checks on legislative action were seen as undemocratic. More so than in other countries, then, the role for the Australian judiciary in the actualisation of rights is merely supervisory". [15] This is because: "The new [Australian] federation emerged from a society that inherited rather than rejected British intellectual tradition. This included the British tradition's faith in political institutions and responsible and representative government". [16] This is why: "The culture of legalism that Australia's system of political constitutionalism has supported - means that Australian courts tend to apply those proportionality considerations with a great degree of deference". [17]

Especially in their dissenting opinions, several Justices of the High Court (most notably Gageler and Nettle JJ) have consistently highlighted the numerous obstacles to transplanting structured proportionality into the Australian constitutional context. It has been argued, in particular, that structured proportionality operates as a "one-size-fits-all" test, namely a standardised sequence of questions to be addressed in a predetermined order. The first two stages—and especially the second—have been characterised as "rigid", "prescriptive" and "unqualified". Such uniformity and rigidity are said to sit uneasily with the case-based, incremental method traditionally associated with the common law. [18] Moreover,

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[15] E. Douek, *All out of Proportion*, cit., 562.

[16] E. Hicks, "Proportionality and Protracted Emergencies: Australia's COVID-19 Restrictions on Repatriation Rights Compared", in *Syd. L. Rev.*, 45, 2023, 92.

[17] *Ibid.*, 94.

[18] In this regard, it has been maintained that: "Arguments about the differences between common law and civil law systems tend to have been overstated. While there are some important differences between the two systems, Australia's common law tradition does not provide a convincing objection to the adoption of proportionality reasoning … the flexibility of both proportionality and the common law system mean that structured proportionality can be modified to apply in the Australian context in a way that is consistent with the common law tradition", A. Carter, "Moving beyond the Common Law Objection to Structured Proportionality", in *Fed. L. Rev.*, 49, 2021, 93.

the conception of structured proportionality, derived from Alexy's theory of the optimisation of principles, is regarded as difficult to reconcile with the enduring legalism [19] and positivism that have long characterised Australian constitutionalism. [20] It was observed that: "Australian constitutional law is not fertile ground for the doctrine of structured proportionality. Structured proportionality developed in the context of constitutional rights adjudication and requires courts to engage in substantive, values-based reasoning". [21]

By contrast, part of the literature has emphasised that that the use of structured proportionality in the Australian constitutional discourse: "Can provide lawyers and judges with useful doctrinal, discursive and empirical lessons in the resolution of open-ended constitutional questions",[22] and that this; "Can have important *democratic* benefits—in promoting a weaker, more democratically 'responsive' model of judicial review on certain morally and politically charged questions". [23] In response to criticisms of judicial activism directed at the Australian High Court for its use of proportionality as an overly indeterminate concept, it has also been argued that: "Judicial deference in the context of the freedom, then, is not only an abdication of responsibility but a fundamental failure to understand the underlying rationale for the exercise of the power in the first place". [24]

Subsequently, *Murphy v Electoral Commissioner* (2016) 261 CLR 28 arose from a challenge by electors and micro-party candidates to the 2016 amendments to the Commonwealth Electoral Act 1918 abolishing group voting tickets for Senate elections and introducing optional preferential voting above the line. The plaintiffs argued that the new system, by increasing the complexity of voting and the likelihood of exhausted ballots, undermined the constitutional requirement that Senators be "directly chosen by the people" (ss 7 and 24). The High Court majority rejected the claim, holding that the Constitution does not entrench any particular voting method and that the reform enhanced, rather than impaired, voter choice by eliminating party-controlled preference harvesting. Significantly, the Court refused to apply the structured proportionality test developed in

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[19] J. Goldsworthy, *Australia: Devotion to Legalism*, in Id. (ed.), *Interpreting Constitutions: A Comparative Study*, Oxford, 2006, 106 ff.

[20] For a detailed reconstruction of the criticisms directed at the transplantation of structured proportionality into Australian constitutional law, together with corresponding arguments highlighting the possible overcoming of those objections, see: A. Carter, "Moving beyond the Common Law Objection to Structured Proportionality", in *Fed. L. Rev.*, 49, 2021, 73 ff.

[21] M. Wesson, "The Reception of Structured Proportionality in Australian Constitutional Law", in *Fed. L. Rev.*, 49, 2021, 378.

[22] R. Dixon, "A New Australian Constitutionalism? Constitutional Purposes, Proportionality and Process Theory", in *Sydney L. Rev.*, 46, 2024, 472.

[23] *Ibid.*, 473.

[24] E. Douek, *All out of Proportion*, cit., 560.

McCloy, emphasising that it was specific to the implied freedom of political communication and not a general standard for assessing electoral laws. Instead, the reasoning relied on institutional deference: Parliament may choose among electoral systems so long as the law remains compatible with representative government, without courts engaging in optimisation or balancing of alternatives. Keane J (dissenting) and, in part, Gordon J focused on the practical burdens imposed on voters, stressing that complexity and ballot exhaustion risked diluting effective choice, and implicitly questioned whether the measures went further than reasonably necessary, thereby articulating concerns closely aligned with proportionality reasoning that the majority deliberately declined to adopt.

The subsequent cases of *Brown v Tasmania* (2017) 261 CLR 328, *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171, and *Comcare v Banerji* (2019) 267 CLR 373 all proceed within the doctrinal architecture established by *McCloy*, confirming its authority while revealing continuing disagreement over the intensity and implications of structured proportionality review. [25]

In *Brown v Tasmania* (2017) 261 CLR 328, [26] the High Court further applied and refined the structured proportionality framework introduced in *McCloy*, extending its use to legislation regulating public protest and political expression in the context of environmental and industrial disputes. The case arose from a challenge to Tasmanian laws criminalising conduct that interfered with forestry operations, including protests on private land that obstructed logging activities. The plaintiffs contended that these provisions impermissibly burdened the implied freedom of political communication by restricting lawful advocacy and public protest on matters of significant political concern, particularly environmental policy. A majority of the Court (Gleeson CJ, Kiefel, Bell, Nettle and Gordon JJ) applied the *McCloy* structured proportionality test, assessing suitability, necessity, and adequacy in balance. At the suitability stage, the Court recognised that the legislation had a legitimate objective in protecting business operations and public safety and that the restrictions were rationally connected to this goal. At the necessity stage, however, the majority found that the law was broader than

[25] In this regard, part of the literature has observed that: "In his recent judgments on the implied freedom of political communication, Justice Edelman has offered an important modification of the original vision of proportionality offered in *McCloy*, a modification which draws on common law notions and traditions as offering important guidance in the calibration of structured proportionality in various cases … It would have the capacity to maintain the benefits of proportionality-style reasoning in promoting doctrinal consistency and transparency, while at the same time inviting appropriate attention to context in the application of the relevant test", *ibid.*, 455.

[26] A. Carter, "Brown v Tasmania: Proportionality and the Reformulation of the Lange Test", in *Pub. L. Rev.*, 29(1), 2018, 11 ff.; I. Duldig, J. Tran, "Proportionality and Protest: Brown v Tasmania", in *Adel. L. Rev.*, 39, 2018, 493 ff.; P. Emerton, M. O'Sullivan, "Private rights, protest and place in "Brown v Tasmania"", in *Monash U. L. Rev.*, 44(2), 2018, 458 ff.; J. Basten, "Understanding Proportionality Analysis", in *Sydney L. Rev.*, 43(1), 2021, 119 ff.

reasonably required to achieve its objectives; it captured a wide range of non-disruptive protest activities and imposed criminal sanctions that were disproportionate to the harms targeted. At the adequacy-in-balance stage, the Court concluded that the burden on political communication—particularly regarding advocacy for environmental protection—was excessive relative to the legislative aim, rendering the law invalid to the extent that it prohibited conduct constituting legitimate political expression. The dissenting Justices (Kiefel CJ, Bell and Keane JJ) accepted the existence of the implied freedom and structured proportionality in principle but applied the test more deferentially. They emphasised parliamentary judgment in designing regulatory measures, suggesting that the indirect and context-specific burdens on political communication did not outweigh the legitimate objectives of safety and property protection. *Brown v Tasmania* thus demonstrates the operationalisation of structured proportionality in regulating protest and public advocacy, highlighting the capacity of the test to scrutinise both the breadth and the intensity of legislative burdens.

In *Clubb v Edwards* and *Preston v Avery* (2019) 267 CLR 171, the High Court applied the structured proportionality framework established in *McCloy* to statutory restrictions on political protest in public space, thereby providing a further illustration of both the consolidation and the internal contestation of proportionality reasoning in Australian constitutional law. The cases concerned challenges to Victorian and Tasmanian legislation establishing "safe access zones" around abortion clinics, within which certain forms of protest, communication and conduct were prohibited. The plaintiffs argued that these exclusion zones impermissibly burdened the implied freedom of political communication by restricting the ability to convey moral and political opposition to abortion in traditional public forums. A majority of the Court (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) accepted that the laws burdened political communication but upheld their validity under the *McCloy* test. The Court identified the protection of the safety, dignity, privacy and psychological wellbeing of women accessing lawful medical services, as well as the protection of clinic staff, as legitimate objectives compatible with the system of representative and responsible government. At the stage of suitability, the majority found a rational connection between the creation of fixed buffer zones and the prevention of harassment, intimidation and distress. At the necessity stage, the Court rejected the argument that existing criminal or public order laws constituted reasonably practicable, less restrictive alternatives, emphasising the evidentiary basis demonstrating the inadequacy of those measures to address the specific harms targeted. At the final stage of adequacy in balance, the majority concluded that the burden on political communication was limited in scope, content-neutral, and geographically confined, and that it was justified by the considerable weight of the interests protected. The dissents underscore the continuing unease with the evaluative dimension of structured proportionality. Gageler J, dissenting, accepted that the legislation pursued legitimate ends but expressed concern at the adequacy-in-balance stage, warning that the creation of

exclusion zones in public places risked unduly diminishing opportunities for political communication on contentious moral issues. Edelman J, in a separate dissent, questioned whether the restrictions were truly necessary and cautioned against treating proportionality as a vehicle for broad judicial value judgments insufficiently anchored in constitutional structure. *Clubb v Edwards; Preston v Avery* thus confirms the centrality of structured proportionality after *McCloy*, while simultaneously illustrating how disagreement now tends to focus less on the existence of proportionality as a method, and more on the depth and legitimacy of its final, most evaluative stage.

In *Comcare v Banerji* (2019) 267 CLR 373,[27] the High Court was required to apply the structured proportionality framework articulated in *McCloy* to a context markedly different from electoral regulation or public protest, namely the political expression of public servants. The case arose from the termination of employment of a Department of Immigration officer who, under a pseudonym, posted a large number of tweets critical of government immigration policy and senior ministers. The employee challenged the decision on the ground that the relevant provisions of the *Public Service Act 1999* (Cth) and the Australian Public Service Code of Conduct impermissibly burdened the implied freedom of political communication.

A majority of the Court (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) accepted that the statutory scheme burdened political communication, but held that the burden was justified under the structured proportionality test. Applying the *McCloy* framework, the Court identified the legitimate purpose of the provisions as maintaining an apolitical, impartial and effective public service capable of serving successive governments and retaining public confidence. At the suitability stage, the majority found a clear rational connection between restricting partisan political expression by public servants and preserving institutional neutrality. At the necessity stage, the Court rejected the argument that narrower or less restrictive alternatives—such as limiting the restrictions to senior officials or public statements made in an official capacity—would achieve the same objective with a significantly reduced burden. At the final stage of adequacy in balance, the majority emphasised that the burden was confined to a defined class of persons who voluntarily accepted conditions of employment that limited their political expression, and that the restriction did not extinguish political communication generally, but regulated it in a specific institutional context.

Importantly, *Comcare v Banerji* illustrates the adaptability of structured proportionality to institutional settings in which constitutional values may legitimately justify significant constraints on political communication. The Court stressed that proportionality analysis must be sensitive to context and to the

[27] S. Morris, S. Sorial, "Balancing public servants' responsibilities with the implied freedom of political communication: What can we learn from Banerji?", in *Monash U. L. Rev.*, 48(1), 2022, 17 ff.

constitutional function of the institution concerned, thereby reinforcing the view that structured proportionality is not synonymous with heightened rights protection in every case. Gageler J, concurring in the result, reaffirmed his earlier scepticism toward structured proportionality as a general methodology, but accepted that, even on a more limited structural analysis, the restrictions were compatible with the system of representative and responsible government. The decision thus confirms both the entrenchment of *McCloy*'s framework and its capacity to accommodate deferential outcomes, underscoring that structured proportionality in Australian constitutional law operates as a justificatory tool rather than as an automatic vehicle for invalidating legislative or executive action. [28]

The consolidation, through these decisions, of the use of structured proportionality within the Australian constitutional order has led part of the literature to argue that: "If proportionality reflects an idea of rights as fundamental moral principles, giving effect to an 'objective order of values' irrespective of the expression of those principles in positive law, then its application in Australian constitutional law is an entirely novel and potentially transformative idea both in method and substance", [29] and it was noted that in Australia: "New constitutionalism involved greater reliance by courts on constitutional values and notions of proportionality as well as, some might argue, implicit commitments to judicial representation reinforcement". [30]

3. The Role of Proportionality in Australian Courts' Oversight of Pandemic Emergency Measures

The outbreak of the Covid-19 pandemic confronted the Australian federation with unprecedented constitutional and administrative challenges. In the absence of a national Bill of Rights and within a system characterised by a strict division of powers between the Commonwealth and the States and Territories, emergency management relied primarily on ordinary statutory frameworks conferring broad discretionary authority on health ministers and executive agencies. These frameworks enabled far-reaching interventions—such as interstate border closures, internal lockdowns, vaccination mandates, and restrictions on movement—that significantly reshaped the relationship between individual rights and public power. Against this backdrop, the High Court was called upon to clarify the constitutional

[28] On the implications of the principle of proportionality as a legal instrument that requires state powers (including Parliament and Courts) to justify limitations on fundamental rights, see: M. Cohen-Eliya, P. Iddo, "Proportionality and the Culture of Justification", in *Am. J. Comp. L.*, 59(2), 2011, 463 ff.

[29] A. Stone, "Proportionality and Its Alternatives", in *Fed. L. Rev.*, 48, 2020, 134.

[30] R. Dixon, *A New Australian Constitutionalism?*, cit., 455.

parameters within which governments could operate and to assess the extent to which implied freedoms and structural guarantees continued to constrain executive discretion during prolonged emergencies.

From a constitutional perspective, the pandemic triggered a renewed focus on the interaction between public health regulation and the implied freedom of political communication, as well as on the broader principle that legislative and executive measures must bear a rational relationship to their stated aims to remain within constitutional boundaries. Although Australian constitutional law does not recognise rights in a substantive sense, the Court has consistently interpreted institutional guarantees and structural principles as imposing limits on governmental power. This approach has made proportionality an increasingly central analytical tool. During the pandemic, the High Court's jurisprudence demonstrated both the flexibility and the limits of proportionality analysis in contexts where the executive invokes urgent and evolving public health considerations.

3.1. Proportionality in Action: High Court and State Courts' Decisions

During the Covid-19 pandemic, the High Court of Australia was called upon to adjudicate constitutional challenges arising from unprecedented public health measures. These cases provided a unique context for examining the application of proportionality reasoning beyond its traditional domain in implied freedoms, demonstrating the Court's capacity to assess the balance between emergency legislative objectives and constitutional guarantees.

In *Palmer v Western Australia* (2021) 95 ALJR 229,[31] the High Court confronted a constitutional challenge arising directly from the Covid-19 pandemic and, in doing so, clarified the role of proportionality reasoning in the context of emergency public health measures. The case originated from Western Australia's Quarantine (Closing the Border) Directions issued under the Emergency Management Act 2005 (WA), which, from 5 April 2020, prohibited entry into the State by non-exempt travellers to curb the spread of Covid-19. The plaintiff, Clive Palmer, argued that these Directions—and the statutory provisions authorising them—impermissibly burdened the constitutional guarantee in section 92 of the Constitution that "trade, commerce, and intercourse among the States … shall be absolutely free." The High Court upheld the validity of both the Directions and

[31] N. Bartlett, ""Palmer v Western Australia": Revisiting statutory powers and constitutional limitations", in *U. Tas. L. Rev.*, 40(1), 2021, 6 ff.; T. Manousaridis, ""Palmer v Western Australia": A critique of the high court of Australia's approach to constitutional review of executive exercises of power", in *Sydney L. Rev.*, 44(2), 2022, 295 ff.; A. Suraweera, "Palmer v Western Australia: Pandemic Border Closures and Section 92 of the Australian Constitution", in *Sydney L. Rev.*, 44(2), 2022, 311 ff.

the empowering provisions of the Act, finding unanimously that they did not infringe section 92 when properly construed, including in their application to an emergency constituted by a plague or epidemic.

Although the challenge was dismissed, *Palmer* is notable for the majority's explicit endorsement of structured proportionality as an analytical tool to assess whether a burden on a constitutional freedom is "reasonably necessary" to achieve a legitimate, non-discriminatory purpose. A majority comprising Kiefel CJ, Keane and Edelman JJ recognised that, where a law imposes a differential burden on interstate movement, it must be justified through a three-stage structured proportionality test: (1) whether the burden is suitable to achieve a legitimate purpose; (2) whether it is necessary—in the sense that no less burdensome reasonably available alternative exists; and (3) whether there is an adequate balance between the importance of the purpose and the gravity of the burden imposed. The Court concluded that the burden on interstate intercourse resulting from Western Australia's border closure was suitable and necessary to prevent the entry and community transmission of Covid-19 and, despite being severe, was justified by the competing constitutional interest in protecting health and life during a pandemic.

Importantly, *Palmer* marked the first occasion on which the High Court applied structured proportionality to a constitutional freedom—here under section 92—outside of the implied freedom of political communication. While the ultimate conclusion was reached unanimously on the validity of the border measures, the judgments reflect underlying judicial disagreement about the methodological role of structured proportionality in Australian constitutional law. In particular, Justices Gageler and Gordon (albeit part of the unanimous outcome on validity) expressed reservations about adopting structured proportionality beyond the relatively confined context of political communication cases, preferring to assess whether a law was "reasonably necessary" without engaging in a fully articulated multi-stage analysis. This ongoing methodological debate underscores that, even when proportionality reasoning is invoked, its normative reach and intensity remain contested within the High Court's constitutional jurisprudence.

Extending this discussion beyond constitutional freedoms, state courts across Australia were also called upon to review public health measures that impacted socio-economic rights and personal liberties. In these cases, although the courts were constrained by statutory rather than constitutional frameworks, they nevertheless applied reasoning closely analogous to structured proportionality to assess whether emergency measures were justified in light of their objectives and consequences.

Notably, in *Kassam v Hazzard; Henry v Hazzard* [2021] NSWSC 1320, the Supreme Court of New South Wales considered challenges to Public Health Orders issued under s7 of the *Public Health Act 2010* (NSW), which required certain categories of workers—including those in health, aged care, education, and construction—to be vaccinated to attend their workplaces. The plaintiffs argued that

the Orders impermissibly restricted their freedom of movement, right to earn a livelihood, and bodily integrity, framing these as fundamental personal and economic rights. While the Court did not engage with a formal constitutional proportionality framework as developed by the High Court in *Palmer*, it applied reasoning closely analogous to structured proportionality, carefully examining whether the measures were suitable to achieve the legitimate objective of protecting public health, whether they were necessary in the sense that no less restrictive alternatives could achieve the same end, and whether the burden imposed on individuals was proportionate to the anticipated public health benefits. The Court emphasised that the statutory powers conferred on the Minister were intended to permit precisely such interventions in circumstances of serious public health risk, and it concluded that, although the Orders imposed consequential limitations on workers' economic and professional activities, these burdens were justified in light of the compelling aim of preventing the spread of Covid-19 and safeguarding community health.

Comparable reasoning was observed in Victorian and Queensland cases, where courts assessing the validity and compatibility of emergency measures under the Charter of Human Rights and Responsibilities Act 2006 (Vic) [32] and the Human Rights Act 2019 (Qld) [33] undertook detailed proportionality-type assessments. In

[32] Supreme Court of Victoria (Common Law Division), November 2, [2020] VSC 722. In this case, the Supreme Court of Victoria (Common Law Division) considered a judicial review challenge to the legality of the Covid-19 curfew imposed in metropolitan Melbourne under the Public Health and Wellbeing Act 2008 (Vic). The plaintiff argued that the curfew was unlawful on the basis of improper exercise of power, unreasonableness, and unjustified limitations on human rights protected by the Charter of Human Rights and Responsibilities Act 2006 (Vic). The Court held that the authorised officer had exercised her statutory powers independently and lawfully, and that the curfew fell within the scope of the emergency powers conferred by the Act. No jurisdictional error or legal unreasonableness was established. While the Court accepted that the curfew limited the rights to freedom of movement and liberty, it found that those limitations were justified under the Charter. In particular, the Court concluded that the measures were proportionate to the legitimate objective of protecting public health during a serious pandemic. The application was therefore dismissed.

[33] Supreme Court of Queensland, 27 febbraio 2024, [2024] QSC 2. The Supreme Court of Queensland delivered judgment in consolidated judicial review proceedings concerning mandatory Covid-19 vaccination directions issued to Queensland Police Service and Queensland Ambulance Service employees. The applicants challenged the lawfulness of the directions on statutory and human-rights grounds. The Court held that the Commissioner of Police failed to give proper consideration to relevant human rights before issuing the vaccination directions, contrary to section 58 of the Human Rights Act 2019 (Qld), and thus declared those directions unlawful. In respect of the ambulance service, the court found that the Director-General had not established that his direction was a lawful and reasonable direction within the terms of employment and declared it of no effect. Although the directions limited the right not to undergo medical treatment without full, free and informed consent, the Court concluded that such limitation was justified and therefore complied with the proportionality requirement in section 13 of the Human Rights Act in the context of the pandemic emergency.

all of these cases, the courts generally demonstrated a significant degree of deference to legislative and executive judgment, acknowledging the extraordinary and rapidly evolving nature of the public health crisis. Across the state-level jurisprudence, there were no formal dissenting opinions recorded, as decisions were typically delivered by single judges at first instance or on uncontentious appeal, and the proportionality assessments largely focused on statutory compliance rather than on independent recognition of socio-economic rights.

Collectively, these state-level decisions illustrate the operationalisation of proportionality reasoning in Australian jurisdictions during the pandemic. Although socio-economic rights are not constitutionally entrenched, courts nonetheless applied a structured, reasoned analysis to determine whether legislative and executive measures imposing significant burdens on work, mobility, and personal autonomy were justified by the pressing public health objectives of the emergency. This demonstrates the adaptability of proportionality reasoning beyond constitutional freedoms, providing a coherent framework for balancing individual and collective interests in a crisis context.

4. Proportionality in Australia: Concluding Reflections on Its Promise and Constraints

The deployment of proportionality within Australia's constitutional framework illustrates both its promise as a structured instrument of judicial reasoning and the limits imposed by a minimalist rights architecture. Historically, proportionality did not emerge as a discrete doctrinal test in its own right. Prior to *McCloy v New South Wales* [2015] HCA 34, the High Court applied what was essentially a two-stage "reasonably appropriate and adapted" test under *Lange v Australian Broadcasting Corporation* and its progeny, asking whether a law effectively burdened a constitutional guarantee and whether it was reasonably appropriate to achieve a legitimate purpose. This earlier formulation implicitly involved proportionality reasoning but did not articulate distinct analytical limbs. In *McCloy*, however, the Court explicitly embraced structured proportionality in the context of the implied freedom of political communication, introducing a tripartite framework: (1) suitability (rational connection to the objective), (2) necessity (absence of less restrictive alternatives), and (3) adequacy in balance (weighing the importance of the public purpose against the extent of the restriction). This evolution reflects a clearer, more coherent adoption of proportionality principles, analogous to European models, and marks a significant doctrinal development.

During the Covid-19 pandemic, the High Court applied proportionality to assess the legitimacy of public health measures, including interstate travel restrictions, lockdowns, and vaccination mandates. In cases such as *Palmer v Western Australia* [2021] HCA 5, the Court evaluated whether measures were rationally

connected to their objectives, whether less intrusive alternatives were available, and whether the overall balance of benefits and burdens justified the encroachment on individual freedoms. Proportionality thus provides a transparent, principled method for legitimating executive action, ensuring that extraordinary interventions are reasoned, coherent, and accountable.

Yet, the approach remains limited: socio-economic rights in the Australian constitutional system are largely unenumerated. Compared with Canada, the United States, or the United Kingdom, where proportionality reasoning extends more broadly into social and welfare domains, Australia's constitutional framework constrains the principle's practical effect.

Nevertheless, the increasing use of proportionality by Australian courts reflects both its normative appeal and its structural constraints within the domestic constitutional framework. On the one hand, proportionality offers a flexible and context-sensitive analytical structure that facilitates transparent judicial reasoning, enables courts to articulate and weigh competing interests, and enhances the intelligibility of decisions involving complex trade-offs between individual freedoms, political freedoms, and public necessity. On the other hand, its operation in Australia remains largely procedural and legitimatory, often stopping short of imposing stringent substantive limits on governmental power. In the absence of comprehensive constitutional rights protection, proportionality may function less as a rights-enforcing standard than as a justificatory technique, with its adaptability risking doctrinal elasticity and judicial deference to broad claims of necessity.

Ultimately, proportionality operates within a constitutional system that privileges political decision-making and affords the High Court a comparatively constrained role in the absence of a constitutional bill of rights. Yet, by adopting a more substantively oriented approach, the Court could use proportionality to engage in a meaningful dialogue with other Supreme and Constitutional Courts at a global level, [34] drawing on comparative insights to enhance judicial scrutiny and gradually foster a more transformative evolution of Australia's constitutional system.

[34] E. Arcioni, J. Gordon, *An Ongoing Engagement: The Australian High Court and Foreign Case Law*, in T. Groppi, M.-C. Ponthoreau, I. Spigno (eds), *Judicial Bricolage. The Use of Foreign Precedents by Constitutional Judges in the 21st Century*, Hart, Oxford, 2025, 15-38.

All Rights in Proportion? The Case of Taiwan

Chien-Chih Lin *

Introduction

In many countries across the globe, the principle of proportionality has become the most dominant judicial review standard partly because its flexibility, neutrality, and abstractness transcend national differences and accommodate local traits. [1] Notwithstanding the ubiquity of proportionality, its prevalence in Asia is actually more limited than one might think. Indeed, Taiwan is one of the few Asian countries in which apex courts regularly invoke proportionality. [2] Since 1996, when the Taiwan Constitutional Court (TCC) first explicitly applied the principle, it has developed into an indispensable component of the TCC's toolkit. Proportionality in Taiwan, as in many other countries, consists of four subtests addressing legitimacy, suitability, necessity, and balancing. [3] In general, when invoking proportionality to scrutinize the constitutionality of a law, the TCC examines whether the law survives the four subtests in sequence: First, does the law serve a proper, important policy objective (i.e., the legitimacy subtest)? Second, are the law's proposed measures rationally connected to its stated policy objectives (i.e., the suitability subtest)? Third, is any derogation of rights by the law minimally restrictive (i.e., the necessity subtest)? And fourth, does the law strike a fair balance between rights protection and public interest such that the law at issue is not unacceptably harsh on the individual (i.e., the balancing subtest)?

In examining the last two subtests, studies have suggested that despite the

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[1] A. Marketou, *Local Meanings of Proportionality*, Cambridge University Press, Cambridge, 2021. D.M. Beatty, *The Ultimate Rule of Law*, Oxford University Press, Oxford, 2004.

[2] P.J. Yap, *Proportionality in Asia: Joining the Global Choir*, in P.J. Yap (ed.), *Proportionality in Asia*, Cambridge University Press, Cambridge, 2020, 1-22.

[3] See, e.g., A. Barak, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge University Press, Cambridge, 2012.

variances among apex courts in their application of the proportionality principle, many if not most of these courts rely more heavily on the necessity subtest than on the balancing subtest. [4] The Supreme Court of Canada, for example, usually ends its proportionality analysis when a law fails the necessity subtest. [5] In Taiwan over the last three decades, most impugned laws have survived the first two subtests only to encounter the stricter demands imposed by the last two subtests. Most laws that have failed to satisfy the proportionality have failed to pass one of these two subtests. Although the TCC, when striking down a law, has historically relied more on the necessity subtest than on the balancing subtest, the court in recent years has been invoking the balancing subtest with growing frequency. Another point worth noting is that, in some proportionality cases, the TCC departs from the traditional sequence of the proportionality subtests, integrates them, or invokes only a subset of them. [6]

In the rest of this paper, I discuss the TCC's application of the proportionality principle to rights cases, with a special emphasis on the distinction between civil-political rights and socioeconomic rights. In Section I, I focus on these rights categories as they apply to specific subjects involved in the TCC's proportionality cases. I demonstrate that, in contrast to conventional wisdom, the TCC has frequently invoked the proportionality principle in socioeconomic rights cases, as well as in civil and political rights cases. In Section II, I draw on the data from the previous section in order to explore whether proportionality, as invoked by the TCC, has expanded or restricted socioeconomic rights in Taiwan. It is often said that courts are relatively conservative when invoking the proportionality principle in ways that expand socioeconomic rights because these rights are thought to occupy a domain better suited to control by the political branches than by judiciaries. In Section III, I analyze two distinct outcomes of proportionality: its contributions both to the rigor of judicial reasoning in the Taiwanese legal system and to the constitutional literacy of the general public in Taiwan. In Section IV, I tackle what is perhaps the most difficult aspect of proportionality: the state of exception—that is, to what extent, if any, proportionality should constrain a government in a time of emergency. This issue, one can imagine, has been subject to fierce debates in Taiwan. I provide concluding remarks in Section V.

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[4] A.S. Sweet, J. Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach*, Oxford University Press, Oxford, 2019.

[5] T. Steiner, A. Lang, M. Kremnitzer, *Comparative and Empirical Insights into Judicial Practice: Towards an Integrative Model of Proportionality*, in M. Kremnitzer, T. Steiner, A. Lang (eds), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice*, Cambridge University Press, Cambridge, 2020, 542-611.

[6] T. Steiner, A. Lang, M. Kremnitzer, *supra* note 5.

1. All Rights in Proportion?

Notwithstanding (or perhaps because of) the global spread of proportionality, the principle has faced myriad criticisms. One is that proportionality may be more appropriate for cases involving civil and political rights than socioeconomic rights. Studies of apex courts around the world have given voice to this criticism. For instance, Stephen Gardbaum opines that many apex courts—notably the German Federal Constitutional Court, the South African Constitutional Court, and the European Court of Human Rights—are reluctant to apply proportionality in cases regarding socioeconomic rights and in cases involving potential horizontal effects. [7] Niels Petersen, in his study of the German Federal Constitutional Court, the South African Constitutional Court, and the Canadian Supreme Court, argues that all three apex courts rely heavily on proportionality in cases concerning the constitutionality of criminal procedures—an area of law that falls under the category of civil and political rather than socioeconomic rights. [8] Mark Tushnet notes that some apex courts refrain from relying on proportionality analyses when the impugned law being considered is complexly tied up with socioeconomic matters involving "allocation funds both within defined budgets and across budgets": in such cases, proportionality, as a legal tool, simply lacks the conceptual depth to permit a sufficiently comprehensive analysis of the matter at hand. [9]

But what about Taiwan? We know that the TCC relies on proportionality subtests, but does it do so in cases involving socioeconomic rights rather than civil and political rights? To answer this question, we should first develop a basic understanding of constitutional rights in Taiwan. The country's bill of rights can be found in Articles 7 through 24 in Chapter II of the Constitution of the Republic of China (the ROC Constitution). These articles enshrine 13 fundamental rights and stipulate 2 fundamental duties belonging to the Taiwanese people. Among the 13 rights are most of those universally recognized by constitutional democracies around the world (e.g., the right to equal protection, the right to due process of law, the freedom of expression, the freedom of religious belief, the freedom of association, the right to work). Article 22 contains the bill of rights' catch-all clause, which the TCC has cited when justifying its decisions recognizing rights that are not explicitly entrenched in the ROC Constitution. Among these new

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[7] S. Gardbaum, *Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?*, in V.C. Jackson, M. Tushnet (eds), *Proportionality: New Frontiers, New Challenges*, Cambridge University Press, Cambridge, 2017, 221-247.

[8] N. Petersen, *Proportionality and Judicial Activism*, Cambridge University Press, Cambridge, 2017.

[9] M. Tushnet, *Making Easy Cases Harder*, in V.C. Jackson, M. Tushnet (eds), *Proportionality: New Frontiers, New Challenges*, Cambridge University Press, Cambridge, 2017, 303-321.

rights are the freedom to marry, information privacy, and the right to self-name. Article 23, insofar as it requires that any rights restrictions accruing from a law be necessary for the law's contributions to public interests, provides the textual basis for the TCC's application specifically of the necessity subtest—and generally of the proportionality principle—to disputes involving the constitutionality of laws. [10]

Statistically, as of September 2025, 524 of the TCC's 864 decisions have involved rights cases, and in 144 of these 524 decisions, the TCC has invoked the proportionality principle. Some of these cases have covered multiple rights issues.

Figure 1. – **TCC proportionality decisions by subject matter**

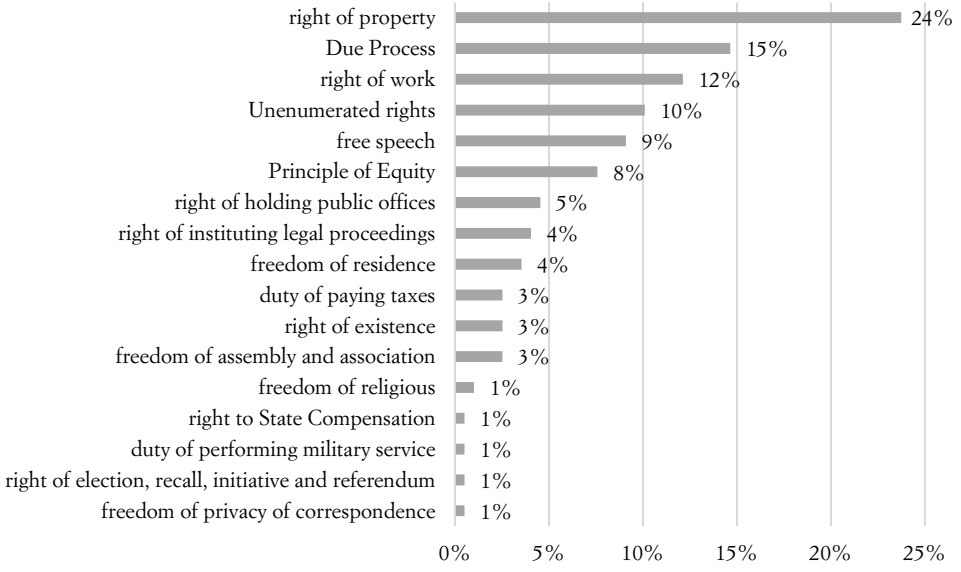

Figure 1 presents the statistical spread of these "rights and duties" subject matters in the proportionality decisions rendered by the TCC. From the statistical spread, we can clearly see that the TCC has applied proportionality to cases involving not only civil and political rights but also socioeconomic rights.

The very first decision in which the TCC invoked proportionality was *Interpretation No. 414* (1996). The two general issues at hand in this case were freedom

[10] Article 23 of the Constitution: "All the freedoms and rights enumerated in the preceding Articles shall not be restricted by law except by such as may be necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare".

of expression and property rights. More specifically, the justices had to determine whether the government could pre-vet television pharmaceutical advertisements prior to their broadcast. Article 66(1) of the Pharmaceutical Affairs Act provided that pharmaceutical manufacturers had to submit their as-yet-unaired TV advertisements to health authorities for approval. After acknowledging that the government has an important role to play in protecting public health and that this role includes ensuring the accuracy of pharmaceutical advertising, the TCC upheld the regulation as proportionate without further elaboration. Notably, although this was the first time the TCC had ever invoked proportionality, its meaning was left undefined in the decision. Nor, in this case, did the justices perform the four subtests in sequential order. Instead, the justices simply urged the government to reconsider and revise the pre-vetting requirement in light of the principle of proportionality. The declassified minutes of this decision show that, behind closed doors, the justices actually paid scant attention to proportionality: the focus of their discussion concerned whether or not the law should treat advertisements as a particular type of commercial speech.

A much later decision, *Interpretation No. 810* (2021), demonstrates how the TCC evolved in its application of proportionality. According to Article 12(1) of the Government Procurement Act, winning tenderers of government procurement contracts must either employ a certain percentage of indigenous people or pay substitution fees based on the difference between the number of required indigenous employees and the number of actual indigenous employees, with the difference multiplied by the monthly minimum wage for the number of months the contract is in place. These calculations do not take into account the amount of the procurement. In the case heard by the TCC, the petitioner was a tenderer who, having failed to hire the minimum mandatory number of indigenous workers, faced a substitution fee of roughly US$100,000, even though the procurement amount that he stood to gain was only US$50,000. Unhappy with the situation, he petitioned the TCC, arguing that the government requirement was unreasonable and irrational. Upon considering the arguments in the case, the TCC first pointed out that it had already upheld the impugned provision in a former decision: *Interpretation No. 719* (2014) stated that the provision *per se* did not violate either property rights or the proportionality doctrine. [11] In its 2021 decision, the TCC reiterated that the disputed provision has the aim of promoting the employment of indigenous people by means of a preferential measure to be taken by the winning bidder. The TCC determined that the aim of the law (i.e., the socioeconomic improvement of the island's native population) is significantly in the public interest and that the means for achieving the aim (i.e., the affirmative-action requirements and the substitution fees) are effective. However, the TCC this time concluded that the disputed provision suffered from two major failings: it

[11] Judicial Yuan Interpretation No. 719 (2014), https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310900.

overlooked not only the sizes of procurement amounts but also—and very importantly—the possibility that the non-employment of indigenous people by a winning tenderer might be attributable to factors beyond the tenderer's control. For these reasons, the disputed provision unreasonably infringed upon the property rights of tenderers and was thus inconsistent with the proportionality doctrine set forth in Article 23 of the ROC Constitution.

Due process has accounted for the second most prominent rights cases in which the TCC has practiced proportionality-based jurisprudence. This statistical fact seems to be consistent with the practices of many other top courts around the world. One reason for the prominence of due-process cases in proportionality-based jurisprudence is because the criminals tend to be underrepresented in the political process. In most of the due-process cases heard by the TCC, its justices have relied on proportionality either to invalidate impugned laws or "to read in" certain preconditions that effectively limit the scope of the laws. A recent example of this tendency is *Judgment 112-Hsien-Pan-12* (2023). The core issue in the case was the admissibility of out-of-court statements made by witnesses in the presence of police. Were such statements admissible as evidence and, if so, under what circumstances? Article 159-3 of the Criminal Procedure Code lists the circumstances in which a witness statement made to a prosecutor or a police officer may be admitted as evidence even though the statement will have entailed no cross-examination of relevant actors in a court of law. [12] The petitioners argued that this article was unconstitutional as it deprived them of due process. Invoking the proportionality doctrine, the TCC attempted to strike a balance between the critical public interest of truth-finding and the equally critical right of due process. To this end, the TCC upheld the disputed provision but limited its scope: the provision was constitutional only insofar as (1) the accused in a criminal procedure could exercise the right of defense in substantive ways and (2) such a statement was neither the only evidence nor the major evidence in the criminal case at hand. Hence, the TCC read into the impugned article two additional requirements that saved it from nullification.

Freedom of expression is another domain to which the TCC has frequently applied proportionality. The prevalence of this domain is understandable because it often conflicts with—and thus must be made proportionate to—other fundamental rights or interests, such as privacy, reputation, and national security. The

[12] Article 159-3 of the Criminal Procedure Code: "Statements made in the investigation stage by a person other than the accused to the public prosecuting affairs official, judicial police officer, or judicial policeman may be admitted as evidence, if one of the following circumstances exists in trial and after proving the existence of special circumstances indicating its reliability and its necessity in proving the facts of criminal offense: (1) The person died; (2) The person has lost his memory or has been unable to make a statement due to physical or emotional impairment; (3) The person cannot be summoned or has failed to respond to the summons due to the fact that he is staying in a foreign country or his whereabouts are unknown; (4) The person has refused to testify in court without justified reason".

TCC's recent *Judgment 113-Hsien-Pan-3* (2024), which addressed a conflict between speech and reputation, is a classic example in this domain. The petitioners took issue with Article 309(1) of the Criminal Code, which stipulated that public insults are punishable by short-term imprisonment or a fine. Two main criticisms were leveled at the article: (1) criminal punishments are not the least restrictive means by which to protect a person's reputation, and (2) the disputed provision would have a chilling effect on the freedom of expression. The TCC first noted that government could rightly limit the protections accorded to the freedom of expression if the speech in question undermined either the rights of an individual or the interests of the public. The TCC then argued that government, in general, should not preoccupy itself with protecting a person's subjective feelings because such feelings are, by definition, unverifiable. Only a person's social reputation and a person's foundational human dignity are appropriate spheres in which government should be able to impose constraints on freedom of expression. The TCC ruled that the criminal punishment of such speech has a deterrent effect on speech generally but that this effect does not violate the *ultima ratio* principle in law. However, to meet the requirement of proportionality in sentencing, the TCC declared that prison sentences for these speech violations should apply only to cases in which the convicted parties were found guilty of severe public insult, such as online or digitally transmitted insults that cause continuous, accumulative, and viral harm to the victims. In conclusion, the TCC declared that the impugned provision was proportionate and did not violate the freedom of expression insomuch as (1) the insulting speech covered by the provision was speech that exceeded what a person could reasonably tolerate and (2) an offender's freedom of speech in public-insult cases is, in general, less worthy of protection than the victim's reputation. Indeed, this is not the first time the TCC applied proportionality to the context of defamation. In 2000, the TCC encountered exactly the same issue and delivered *Interpretation No. 509*: the justices maintained that, so long as law distinguishes libel from slander and imposes various penalties in accordance with these distinctions, the punishment of defamation can serve as a "necessary" tool for preventing the "violation of others' freedoms and rights" and, to this extent, is "consistent with the proportionality principle in Article 23 of the Constitution". [13]

Another example is *Interpretation No. 744* (2017). The case, involving prior restraint imposed on commercial speech, specifically concerned the Statute for Control of Hygiene and Safety of Cosmetics, which required that all cosmetic firms submit the content of their advertisements to the government for pre-distribution approval. Cosmetic firms failing to adhere to this requirement would be fined. The petitioner, a cosmetic firm that had been fined a small sum (US$1,000), challenged the constitutionality of this requirement. The TCC considered the

[13] Judicial Yuan Interpretation No. 509 (2000), https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310690.

arguments of the various parties and concluded that, because cosmetic advertisements pose neither a direct nor an immediate threat to people's health, it is difficult to argue that the pre-distribution censoring of such advertisements is a reasonable way to prevent direct, immediate, threats to people's health. In other words, the censorship satisfied no compelling public interest, as there existed no direct, necessary connection between the censorship at issue and the well-being of consumers. Furthermore, the TCC noted three contextual points having a considerable bearing on the case. First, the national health authority already required any cosmetic containing drug ingredients to list them on all label leaflets and packages. These lists had to include not only the names of the ingredients but also amounts, precautions for use, and licensing numbers. Second, the Statute for Control of Hygiene and Safety of Cosmetics authorized authorities to conduct such inspection measures as spot checks and sampling and to revoke the licenses and prohibit the importation, manufacture, and sale of any cosmetics found to be harmful. Third, this same statute included provisions punishing firms whose cosmetic advertisements promoted products likely to be harmful to human health. According to the TCC, all these other measures already in place further justified its position that the prior restraint being challenged in the case indeed served no compelling public interest. Ultimately, the justices ruled that the prior restraint should be null and void immediately because it violated two key provisions in the ROC Constitution: Article 23's proportionality principle and Article 11's freedom-of-expression guarantee.

My goal in analyzing the above cases is not to take a stab at enumerating the ways in which the TCC has employed proportionality in every domain of constitutional rights. Rather, a basic finding herein is that, as Figure 1 illustrates, the TCC has applied the proportionality principle to socioeconomic rights cases no less frequently than to civil and political rights cases. The question that I now turn to is whether the application of the proportionality principle to the former rights domain (i.e., socioeconomic rights) leads to the actual protection of these rights.

2. Proportionality and Socioeconomic Rights

Fundamental to human dignity and empowerment, socioeconomic rights usually cover entitlements to such essentials as food, housing, education, healthcare, and social protections. Labor rights and—not uncontroversially—property rights also fall under this category. Obvious and subtle differences have surfaced regarding the application of proportionality to socioeconomic rights in comparison with civil and political rights. Kai Möller has argued that, despite its global reach, proportionality is usually invoked by courts only for civil and political rights, not socioeconomic rights, because any governmental restrictions on socioeconomic rights "will always further the legitimate goal of saving resources

and will always be suitable and necessary to the achievement of that goal". [14]

Although many tops courts are indeed reluctant to apply proportionality to socioeconomic rights, this is not the case in Taiwan. For example, as of September 2025, the TCC has invoked proportionality in 24 right-to-work cases. *Interpretation No. 749* (2017) is a particularly telling case. It centered on Article 37(3) of the Road Traffic Management and Penalty Act, which revoked—for a period of three years—professional licenses belonging to any taxi driver convicted of assault, theft, and other specified crimes. A group of taxi drivers whose professional licenses had been revoked under the law challenged the constitutionality of the "revocation" provision on the grounds that it violated their right to work and their right to equal protection.

In its decision, the TCC presented a number of conclusions. First, the court argued that, in general, restrictions on the right to work should encompass a range of degrees of stringency, with each level of stringency depending on the nature of the matter concerned. To satisfy the proportionality principle, restrictions relating to criminal record and other *subjective* employment-choice conditions (as opposed to *objective* conditions such as age) (1) must aim at furthering an important public interest and (2) must do so by means that are substantially related to that interest. However, the TCC cited statistical evidence that people who had been convicted of some crimes listed in the disputed provision were not highly likely to commit those crimes again in a way that would involve their taxi-driving profession. In other words, not all the crimes listed in the disputed provision were equally or even significantly dangerous to passengers, so that convictions for the committal of these crimes did not, from a statistical perspective, warrant the nullification of professional licenses. Drawing on these empirical facts, the TCC held the challenged provision to be unconstitutional because it failed the proportionality doctrine's necessity subtest: the limitations that the provision imposed on these drivers' right to work were not minimally restrictive. [15]

The TCC has invoked proportionality in socioeconomic rights cases outside the right-to-work domain. *Interpretation No. 766* (2018), for example, involved the right to life, enshrined in Article 15 of the ROC Constitution. At the center of the case was the National Pension Act. One of its provisions (Article 18-1) prescribed, *inter alia*, that the government would issue insurance benefits monthly starting the month after a citizen's application for pension payments received government approval, not the month after the citizen satisfied the eligibility criteria associated with these payments. This distinction between application approval

[14] K. Möller, *The Global Model of Constitutional Rights*, Oxford University Press, Oxford, 2012. But see K.G. Young, *Proportionality, Reasonableness, and Economic and Social Rights*, in V.C. Jackson, M. Tushnet (eds), *Proportionality: New Frontiers, New Challenges*, Cambridge University Press, Cambridge, 2017, 248-272.

[15] Judicial Yuan Interpretation No. 749 (2017), https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310930.

and qualification satisfaction was important because a person might meet the criteria for receiving insurance benefits yet never apply for them. In this case, the petitioner was a man whose spouse had died in June 2010: her death qualified the petitioner for a survivor's pension; however, he did not apply for it until January 2012. He claimed that this delay was the fault of the Labor Insurance Bureau: the administrative body, he argued, had failed to inform him that there was an application process necessary for receiving a survivor's pension. The petitioner concluded that, as a result of this alleged bureaucratic failure, the survivor's pension payments to which he was rightly entitled should be traced back not to February 2012 but to July 2010, when the petitioner satisfied all the pension-payment criteria. When the Kaohsiung High Administrative Court dismissed his appeal, he petitioned the TCC.

The TCC's decision first recognized that legislators rightly exercise considerable discretion when instituting governmental programs such as this social insurance system. With the discretion, legislators can address a slew of matters ranging from the limits of state resources to demographic changes. And by assessing these matters, legislators can design a social insurance system whose eligibility requirements and monetary payments are both just and sustainable. However, the government has a responsibility to protect people's right to claim social insurance benefits. If the benefits are critical to the survival of pensioners (i.e., the pensioners' right to life), governmental restrictions on this right should submit to strict scrutiny: the purpose of any such restriction must be the protection of an important public interest, and the proposed means for achieving this purpose must be substantially effective. The government, in defending its policies before the justices, cited three reasons why payments of survivors' pensions should begin the month after the government has approved an application for pension payments rather than the month after citizens satisfy the eligibility criteria for the payments: (1) the high degree of complexity characterizing the eligibility criteria requires a review-and-approval process; (2) the task of determining at what precise point in time a person first satisfied the eligibility criteria would be prohibitively difficult for the Labor Insurance Bureau; and (3) the establishment of earlier pension-payment months would entail a significant spike in government expenditures, thus threatening the affordability and sustainability of the entire social insurance system. None of the three arguments was convincing to the TCC. Regarding the first and second cited reasons, the TCC argued that any eligibility-related difficulties associated with the tracing of back payments were far from being an important public interest: they were strictly administrative matters that the government should deal with and overcome. As for the third cited reason, the affordability of the social insurance system, though it likely was an important public interest, was ill served by a policy that not only would reduce pension payments by a mere few months but also would achieve these meagre savings by unreasonably restricting a person's constitutionally protected right to life. Compared with the stability of survivors' lives, the application-approval requirement seemed petty.

Therefore, the TCC declared that the impugned provision violated the proportionality doctrine and the petitioner was entitled to the requested back payments.

Interpretation No. 767 (2018) involved another socioeconomic right: the right to health. Article 13(9) of the Drug Injury Relief Act excluded from the law's net of protections from those patients having common and foreseeable adverse drug reactions. Soon after taking the drug Amikin (the brand name for a powerful, last-resort antibiotic), the petitioner developed severe hearing impairment and a moderate physical handicap. Her subsequent application for drug injury relief was denied because of the said provision in the Drug Injury Relief Act. She responded by petitioning the TCC. In its ruling, the court acknowledged that it had been applying a relatively loose standard of scrutiny when reviewing the constitutionality of social-policy laws, given their involvement in polycentric resource-allocation issues. Essentially, the TCC maintained that legislators should enjoy considerable discretion in crafting laws that pertain to the state's financial capacity, the country's effective use of resources, and other actual conditions concerning limited resources. The court went on to note that many aspects of drug injury relief (e.g., compensation, eligibility, exemptions) fall under the category of social-policy legislation. The disputed provision, in particular, directly addressed two issues concerning limited resources. One was the financial balance sheet of the drug injury relief fund: the fund needed to avoid deficits. The other issue had to do with potential shortages of effective pharmaceuticals: health authorities sought to avoid a situation where domestic manufacturers and importers of pharmaceuticals refused to have any dealings with drugs that, though proven to have real curative effects, had been linked to acceptable levels of serious but "common and foreseeable" adverse reactions. The TCC concluded that, because these two aims of the disputed provision could reasonably be regarded as legitimate and because the provision helped to achieve these aims without incurring significant unreasonableness, the provision satisfied the principle of proportionality; that is, the provision was not constitutionally unsound in withholding drug injury relief from individuals who had suffered common and foreseeable adverse drug reactions. [16]

In all of the above decisions concerning socioeconomic matters, the TCC incorporated proportionality analyses into its judicial-review practices. Moreover, in many of these decisions, the TCC did so using a looser standard of scrutiny than would be normal in civil and political rights cases. We should bear in mind that this looser standard of scrutiny does not necessarily indicate judicial submission to the legislative branch; the TCC invoked proportionality to preserve and even expand socioeconomic rights. Thus, although proportionality, when harnessed by the TCC in socioeconomic rights cases, is not completely toothless, the court's justices tend to be more deferential to the legislative branch in these cases

[16] Judicial Yuan Interpretation No. 767 (2018), https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310948.

than in civil and political rights cases. Owing to this finding, conventional wisdom, which claims that proportionality plays little or no role in the field of socioeconomic rights, might merit a reappraisal.

3. Repercussions of Proportionality

Vicki Jackson has pointed out that the more reliant a court is on proportionality, the more effective the court will be not only as a protector of constitutional rights but also as a bastion of judicial reasoning and democracy in general. She has argued that proportionality can help a court discern limitations on freedoms, assess the constitutionality of these limitations, and do so with greater sensitivity to entrenched biases. [17] In other words, the adoption or greater use of proportionality in apex courts may have spillover effects on matters ranging from those that are strictly judicial to those that are broadly social. Although Jackson has based these conclusions on her assessment of the US judiciary, they are, as I will show, applicable to Taiwan.

Since 1996, when the TCC began invoking the proportionality principle, the court's judgments have become significantly more precise and significantly better structured. In fact, prior to the 1990s, TCC justices intentionally drafted judgments that were vague and rather poorly organized. One reason for this curious habit was likely a structural feature of the TCC: all judgments required concurring opinions from a supermajority of the justices; that is, each and every sentence in a judgment required the agreement of at least two-thirds of the attending justices. To meet this rigid threshold, the TCC had to cultivate a collective way of reasoning that was open to diverse and even opposing views. Thus it was that the justices tended to imbue their judgments with abstract, equivocal wording and structure. [18] The decision-making threshold, however, was not the only factor responsible for spawning this deliberate obscurity. Before the introduction of proportionality, the TCC lacked an operable standardized test for scrutinizing possible breaches of constitutional rights. The absence of such a test prompted the justices to reason on an *ad hoc* basis, resulting in unpredictable, inconsistent arguments. Moreover, the justices rarely modulated the intensity of their judicial review according to the subject matters of cases or the identities of the litigating parties. Thus, since 1996, TCC justices have grown much more conscientious of

[17] V. Jackson, "Constitutional Law in an Age of Proportionality", in *Yale Law Journal*, 124, 2015, 3094-3196.

[18] M.S. Kuo, H.W. Chen, "Constitutional Review 3.0 in Taiwan: A Very Short Introduction of Taiwan's New Constitutional Court Procedure Act", in *International Journal of Constitutional Law Blog*, Jan. 7, 2022, at: http://www.iconnectblog.com/2022/01/constitutional-review-3-0-in-taiwan-a-very-short-introduction-of-taiwans-new-constitutional-court-procedure-act/.

the critical role played by interpretive methods in rights cases requiring judicial review. [19] In fits and starts, the justices have developed a somewhat complicated, nuanced standard of review. It combines proportionality with stratified review standards, and tailors the intensity of judicial scrutiny in a given case to the rights, restrictions, and litigating parties therein. [20]

The TCC's adoption of proportionality has enhanced the awareness and literacy of Taiwanese society regarding legal matters. Nowadays, the term 'proportionality' is a popular catchword not only among lawyers and government officials but among lay people, as well. For instance, in March 2024, the death of a one-year-old boy in Taipei triggered widespread public anger directed at the alleged perpetrators: two caretakers who were subsequently found to be guilty of child abuse. In the course of the investigation, police arrested a social worker from the Child Welfare League Foundation on suspicion that she had engaged in forgery and was guilty of negligent homicide in the case of the boy's death. The arrest of the social worker immediately sparked protests from critics who argued that the legal system was, in her case, violating both the presumption of innocence principle and—of relevance to the present study—the proportionality principle. [21] This invocation of proportionality by people outside legal and governmental circles epitomizes just how prevalent the term and the accompanying concept are in Taiwanese social discourse. Given that the proportionality principle rests on the intuitive, easy-to-understand assumption that excessively punitive laws are bad (or, to put the matter idiomatically, "one should not shoot at sparrows with cannons"), there should be little surprise that proportionality, as a legal concept, has become familiar to many Taiwanese.

4. Proportionality and the State of Emergency

In discussing the Taiwanese judiciary's application of proportionality to rights cases, I have argued that the principle has become a central litmus test by which the TCC determines the constitutionality of rights constraints, be they in a civil and political context or a socioeconomic one. This fact should not suggest, however, that proportionality is a judicial-review tool of unlimited scope and power.

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[19] J.Y. Hwang, "Development of Standards of Review by the Constitutional Court from 1996 to 2011: Reception and Localization of the Proportionality Principle", in *National Taiwan University Law Journal*, 42(2), 2013, 215-258.

[20] Hwang, *supra* note 21; S.P. Hwang, "The Principle of Proportionality in the Trend of "Hierarchicalization": Critical Remarks on the Current Developments in Constitutional Review", in *Academia Sinica Law Journal*, 19, 2016, 1-52.

[21] C.C. Wu, *Child Abuse Case: Social Worker's Liabilities*, Taipei Times, Mar. 22, 2024, https://www.taipeitimes.com/News/editorials/archives/2024/03/22/2003815284.

For instance, is proportionality applicable to rights cases in a time of national crisis?

According to Article 2.3 of the Additional Articles (constitutional amendments in Taiwan),[22] the President of Taiwan has the power to issue emergency decrees, which may suspend the validity of certain laws. Despite the plain wording of this provision, post-authoritarian presidents of Taiwan have been reluctant to declare a state of emergency owing to the grave abuses of power that had occurred during the country's authoritarian period. The chief justification for these abuses at the time was a series of emergency decrees bestowing considerable unchecked power on the central government. The last time the government promulgated an emergency decree was in 1999, when the Chi-Chi Earthquake devastated central Taiwan, killing 2,415 people and injuring more than 11,000. The then president of Taiwan, Lee Teng-hui, promulgated an emergency decree on the grounds that it was necessary for averting imminent catastrophe via the provision of immediate and appropriate emergency relief. Accompanying the emergency decree was an administrative directive that, among other things, offered government compensation only to those households registered in officially recognized areas of devastation and only to those people who actually resided in the households.

The administrative directive incurred the ire of legislators and citizens who challenged the directive's constitutionality. The result was two notable judgments by the TCC: *Interpretation No. 543* (2002) and *Interpretation No. 571* (2004). In the former, the issue in question concerned the prerequisites, procedures, and supplementary regulations stemming from an emergency decree. The legislators questioned to what extent, if any, an emergency decree and its supplementary regulations could bypass legal principles normally deemed essential to the rule of law. The TCC made it clear that an emergency decree was an exception to the principle of separation of powers, which, in normal times, endows the parliament with the power to legislate on behalf of the people and endows the executive branch with the power to execute laws responsibly. The TCC continued that, although an emergency decree could temporarily replace or alter existing laws, it should always unerringly observe the principle of proportionality.[23] In other words, a state of emergency is not a carte blanche for governmental abuse of powers; the TCC can and will declare an emergency decree to be unconstitutional if it disproportionately violates constitutional rights.

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[22] Article 2.3 of the Additional Articles of the ROC Constitution: "The president may, by resolution of the Executive Yuan Council, issue emergency decrees and take all necessary measures to avert imminent danger affecting the security of the State or of the people or to cope with any serious financial or economic crisis, the restrictions in Article 43 of the Constitution notwithstanding".

[23] Judicial Yuan Interpretation No. 543 (2002), available at https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310724.

In the case leading to the latter judgment (*Interpretation No. 571*), the petitioner, notwithstanding the fact that the earthquake completely destroyed his half-built house, was denied government compensation because his residence at the time of the earthquake had been outside the devastated areas. He thus challenged the constitutionality of the administrative directive concerning household registration on the grounds that it violated the equal protection clause of the ROC Constitution. In their 2004 ruling, the TCC argued that the point of the government's "immediate relief is to help the victims, not to compensate them for the loss of property." The TCC went on to note that the government's rejection of certain applications for relief in no way constituted a "restraint on the property and rights of the people".[24] Consequently, the TCC maintained, there was no need to subject the impugned directive to proportionality tests so long as it survived the scrutiny of equal protection, which it did. This reasoning, however, was not unanimously embraced by all the justices. In his dissenting opinion, Justice Yang Jen-Shou criticized the majority opinion for jumping to the conclusion that proportionality tests were unnecessary so long as the differences in subsidies were reasonable and consistent with substantive equality. Justice Yang insisted that, without scrutinizing the elements of proportionality in the case, one could not rigorously assess the reasonableness of differences in relief subsidies: the justices embracing the majority opinion should have examined whether the subsidies had been both necessary and proportionate to the damages. The majority opinion seemed to suggest that proportionality should play no role in assessing a directive made during a time of emergency. Nonetheless, because the Chi-Chi Earthquake is, as of 2025, the only instance in which a post-authoritarian government has promulgated an emergency decree, it is unclear whether the TCC ruling in this case has become precedent.

There are other recent historical instances in which Taiwan's presidents have considered, but eventually refrained from, issuing an emergency decree. One such instance occurred at the outbreak of the Covid-19 pandemic. Throughout the pandemic, and despite decades of exclusion from the World Health Organization, Taiwan demonstrated remarkable success in containing the spread of the coronavirus. This success was doubly impressive given the country's close proximity to and economic ties with China, which of course was the epicenter of the pandemic. In 2020, when Covid-19 was spreading globally, some Taiwanese legislators proposed that then President Tsai promulgate an emergency decree in response to the health crisis. President Tsai rejected this proposal on the grounds that the country's existing laws were sufficient for combatting Covid-19.[25] One

[24] Judicial Yuan Interpretation No. 571 (2004), available at https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310752.

[25] W.C. Chang, *Taiwan's Fight against Covid-19: Constitutionalism, Laws, and the Global Pandemic*, Verfassungsblog, Mar. 21, 2020, https://verfassungsblog.de/taiwans-fight-against-covid-19-constitutionalism-laws-and-the-global-pandemic/.

of the more important laws in this respect was the Communicable Disease Control Act, [26] which authorizes the government to impose on the population a variety of compulsory measures, such as examinations, immunizations, and quarantines. [27] Interestingly, years earlier, the law's powers of broad authorization had been challenged, prompting the TCC to address the issue in *Interpretation No. 690* (2011). [28] Applying the four subtests in their proper sequence, the TCC first argued that the law's provisions stipulating compulsory quarantine had the central aim of safeguarding the life and health of citizens from the threat of contagious diseases. The means for achieving this aim—compulsory quarantine—entailed a significant expansion of government powers including the power to detain people suspected of having been exposed to a contagious disease and the power to require that they undergo medical treatments designed to reduce the spread of the contagion. The TCC ruled that the aim of the law was legitimate and that, according to the suitability and necessity tests, no less restrictive alternative was possible during a pandemic: compulsory quarantine was necessary and effective. Moreover, because the lengths of quarantines varied depending on the pathogeny, pathway, incubation period, and seriousness of the contagious disease at hand, the absence in the law of any prescribed length of time for quarantines was not unreasonable: the lengths of quarantines are variable and should thus be determined by disease control authorities at the time of a pandemic, not by legislators making predictions about hypothetical circumstances. Finally, the TCC argued that compulsory quarantine, though it deprived citizens of their personal freedom, did so to protect their life and health in extraordinary and extenuating circumstances that justified the restrictions. In sum, the TCC ruled that compulsory quarantine is a reasonable and necessary method for protecting important public interests and does not violate the principle of proportionality.

5. Conclusion

In contrast to conventional wisdom, the TCC since 1996 has frequently applied the proportionality principle to cases involving socioeconomic rights. In

[26] W.C. Chang, C.Y. Lin, *Taiwan: Democracy, Technology, and Civil Society*, in V.V. Ramraj (ed.), *Covid-19 in Asia: Law and Policy Contexts*, Oxford University Press, Oxford, 2021, 43-56.

[27] Article 48 of the Communicable Disease Control Act: "Competent authorities may, for case confirmation, detain persons who have been in contact with patients with communicable diseases or who are suspected of being infected; if necessary, they may be ordered to move to a designated place for necessary measures such as examination, immunization, medication, control of certain designated areas, or isolation".

[28] Judicial Yuan Interpretation No. 690 (2011), https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310871.

many of these decisions, the impugned laws failed to survive the gauntlet of proportionality subtests. That is, proportionality in Taiwan has served to expand the protections afforded to socioeconomic rights. However, the doctrine has not been universally applied in such rights cases. For example, the TCC has disregarded or only superficially invoked the doctrine in emergency-powers cases. Strictly speaking, this is not a flaw in proportionality *per se*, but a reflection of judicial deference in extraordinary situations. In conclusion, my central finding here boils down to one simple idea: alleged governmental violations of socioeconomic rights are not immune from proportionality tests in Taiwan. This empirically and statistically verifiable assertion represents more of a marginal correction than a full-blown rejection of the conventional wisdom concerning the scope of proportionality in rights matters.

Of 'Birds' and 'Cages': Figurations of the Principle of Proportionality in China

Johannes Rossi *

The principle of proportionality is gradually gaining ground within the Chinese legal landscape. As the COVID-19 pandemic necessitated emergency measures, the Supreme People's Court has been a central site in shaping the nation's legal response. Through its application to socio-economic rights within a distinctly configured institutional setting, both the progress and challenges of proportionality balancing in China have become evident. Whereas the formal integration of the principle strengthens legal discourse, it proves conducive to flexible governance by law, while its normative ambition remains limited.

1. Introduction

Catastrophes ranging from economic crises and terrorism to pandemics, [1] evoking declarations of war in the *état de siège*, and vested in full powers, justifying the derogation of law during "China's War on Terrorism" [2] and the "People's War against COVID-19", [3] the "war against corruption", [4] or protracted

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[1] V. Ramraj (ed.), *COVID-19 in Asia: Law and Policy Contexts*, Oxford University Press, New York, 2021; T. Meng, "Emergency Laws in China: Their Formation, Present Situation and Future", in *Social Sciences in China*, 32, 3, 2011, 104-119.

[2] M. Wayne, "Inside China's War on Terrorism", in *Journal of Contemporary China*, 18, 59, 2009, 249-261; X. Wei, "A critical evaluation of China's legal responses to cyberterrorism", in *Computer Law & Security Review*, 47, 2022, 105768.

[3] Echoing deafeningly the tracing of justification by G. Agamben, *State of Exception*, University of Chicago Press, Chicago, 2005, 15-22; see also J. Jiang, "A Question of Human Rights or Human Left? – The 'People's War against COVID-19' under the 'Gridded Management' System in China", in *Journal of Contemporary China*, 31, 136, 2021, 491-504.

[4] T. Gong, S. Wang, H. Li, "Sentencing Disparities in Corruption Cases in China", in *Journal of Contemporary China*, 28, 116, 2019, 245-259, 245.

campaigns against poverty, demand not only discipline but economic development and social welfare. Emergencies serve as a litmus test for the balancing act between individual and public interest taking place within socio-economic rights, and pose challenges as they shift standards and rebalance the scales of justice. At the same time, responses to crises in the "risk society" [5] expand increasingly to the preventive stage in "permanent states of emergency" [6] as the necessities of the "precaution state" [7] cast an increasingly long shadow over fundamental rights protection. [8] In the rise of authoritarian legalism globally, China seems to be at the forefront of the development of "global technological law". [9]

The tension between the gears of state power and individual spaces of freedom is negotiated in the People's Republic of China (hereafter "China" or "PRC") increasingly in legal forms. [10] While to date a constitutional court does not exist in the PRC, and the principle of proportionality (*bili yuanze* 比例原則) [11] has not yet gained the consolidated constitutional standing it has in other legal systems, nonetheless, it is en route to gain further ground with the ongoing judicial reform and an ensuing "juridification" of governance under the leadership of the Communist Party of China (CPC) constructed on the *yifa zhiguo* 依法治国 (en. governing the country by law) platform. [12] Under the logic of the state of

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[5] U. Beck, *Risikogesellschaft: auf dem Weg in eine andere Moderne*, Suhrkamp, Frankfurt a.M., 1986.

[6] A. Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, Hart, Oxford, 2018.

[7] Similarly the German "Vorsorgestaat", see E. Forsthoff, *Rechtsfragen der leistenden Verwaltung*, Kohlhammer, Stuttgart, 1959.

[8] In this direction, see C. Sunstein, *Laws of Fear: Beyond the Precautionary Principle*, Cambridge University Press, Cambridge, 2005, 13-106; on the integration of proportionality and precautionary principle, see M. Friedman, A. Sangiuliano, "Proportionality and precaution", in *Global Constitutionalism*, 2025, 1-22.

[9] See U. Mattei, G. Liu, E. Ariano, "The Chinese Advantage in Emergency Law", in *Global Jurist*, 21, 1, 2021, 1-58, 2.

[10] And this extends to the juridification of exceptional circumstances, see J. deLisle, *States of exception in an exceptional state: emergency powers law in China*, in V. Ramraj, A. Thiruvengadam (eds), *Emergency Powers in Asia: Exploring the Limits of Legality*, Cambridge University Press, Cambridge, 2010, 342-390.

[11] Believed to be introduced to China in its contemporary form during his speech at China University of Political Science and Law by Koichi Aoyagi (青柳幸一), *Jiben Quanli De Qinfan He Bili Yuanze* (基本權利的侵犯和比例原則) [The Infringement of Basic Civil Rights and Grundsatz der Verhältnismässigkeit], in *Bijiaofa Yanjiu* (比較法研究) [Journal of Comparative Law], 1, 1988, 34; see on the reception from Germany also: L. Xie, *Wissenschaftliche Rezeption der Rechtsprechung des BVerfG in China*, in M. Jestaedt, A.-B. Kaiser, A. Nußberger, A. Voßkuhle (eds), *A View From Outside. Liber Amicorum of the 75th Anniversary of the Federal Constitutional Court*, Mohr Siebeck, Tübingen, 2026, forthcoming (provided to the author pre-publication).

[12] S. Trevaskes, "A Law Unto Itself: Chinese Communist Party Leadership and Yifa zhiguo in the Xi Era", in *Modern China*, 44, 4, 2018, 347-373; W. Ji, "The Judicial Reform in China:

emergency, the principle experiences a profound reconfiguration beyond its conventional function as admonition of individual rights and presage of judicial (over-)reach.

Two institutions are taking initiative to advance the principle of proportionality in the PRC. At the statutory level, the use by the Supreme People's Court (SPC) [13] signals its wider adoption. At the constitutional level, the National People's Congress (NPC) has incorporated it into its toolkit for the internal review of legislation. Despite certain limitations, the SPC has been one of the central sites for shaping the legal response to the pandemic, which had to grapple with the impact of measures from lockdowns, digital surveillance, restrictions on economic activity, to the allocation of public resources. [14]

The study of the Chinese engagement with the principle of proportionality, particularly in the context of the pandemic and socio-economic rights, offers three main insights along the following inquiry. First, by looking at the employment of the principle in the PRC (2.1.), its place in the mechanisms of Chinese "flexible" legal governance is clarified. Second, in the institutional location of its adoption (2.2.), it shows how China deals with the inherent issues of this principle for the relationship of "divided" state branches between its elevation to the constitutional level and adoption in adjudication. Third, particularly apparent during the pandemic and in the context of socio-economic rights (3.), these points explicate the transformation, purposes, and limits of the principle of proportionality in China.

2. Reconfiguring Proportionality: Emergency and Effectivity

2.1. The Principle of Proportionality as a Tool for "Flexible Governance"

Conventionally, the principle of proportionality requires a state to exercise its power rationally and reasonably towards achieving a permissible goal without

The Status Quo and Future Directions", in *Indiana Journal of Global Legal Studies*, 20, 1, 2013, 185-220.

[13] On this institution extensively: S. Finder, "The Supreme People's Court of the People's Republic of China", in *Journal of Chinese Law*, 7, 1993, 145-224; S. Finder, "How China's Supreme People's Court Supports the Development of Foreign-Related Rule of Law", in *China Law and Society Review*, 8, 1-2, 2023, 62-118.

[14] T. Liu, Z. Ma, "A study of Chinese law on restricting personal liberty for public health protection: taking the COVID-19 epidemic as the entry point", in *Frontiers of Public Health*, 13, 2025, 1670119; P. Renninger, "The "People's Total War on COVID-19": Urban Pandemic Management Through (Non-)Law in Wuhan, China", in *Washington International Law Journal*, 30, 1, 2020, 63-115.

unduly encroaching on protected rights of the individual. [15] These rights may also be mediated through public interests, such as public health, welfare, or national security, where the state in turn ought to restrict the rights of some for the benefit of the many. Its purpose thus is to arrive at the highest possible relative protection for all competing rights in a certain situation, [16] as this ensures the optimal protection of fundamental constitutional rights, usually as a constraint imposed on the other state branches by the judiciary.

2.1.1. Ornithology and Conservation: Proportionality in the Constitutional Environment

Rooted in long conceptual traditions of distributive and deliberative justice, [17] its essence is illustrated by the German idiom to "not use cannons to shoot at sparrows". [18] To that end, the proportionality of a measure is commonly assessed with consideration to the *legitimacy* of its aims, the *suitability* of the employed measures towards their achievement, and its *necessity*, i.e. choosing the least invasive one in the choice of multiple, equally suitable measures. Additionally, the measure has to be proportional *stricto sensu*, meaning the effects have to be measured against the objective sought. Means and ends, harm and benefit have to be balanced, usually in the sense of a "prohibition of excessive measures" (de. Übermaßverbot).

Parallel to the German idiom, a confucian proverb jokes: 杀鸡焉用牛刀 (*sha ji yan yong niudao*; en. "Why use an ox-cleaver to kill a chicken?"). [19] Likewise,

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[15] E. Crawford, "Proportionality", in *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2011, para 1.

[16] It is to be noted, that this may prove exceptionally difficult in absence of clear standards for balancing and the incommensurability of rights, see T. Endicott, *Proportionality and Incommensurability*, in G. Huscroft, B. Miller, G. Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, Cambridge University Press, Cambridge, 2014, 311-342. Nonetheless, the principle has embarked on a triumphant journey globally due to its flexibility and rationalization of legal decisionmaking.

[17] E. Engle, "The History of the General Principle of Proportionality: An Overview", in *The Dartmouth Law Journal*, 10, 2012, 1-11.

[18] See the use of "Die Polizei soll nicht mit Kanonen auf Spatzen schießen" by F. Fleiner, *Institutionen des deutschen Verwaltungsrechts*, J.C.B. Mohr, Tübingen, 1911, 323; further on this metaphor: T. Henne, "Mit Kanonen auf Spatzen schießen", in *Deutsches Verwaltungsblatt*, 2002, 1094 f.

[19] Originally: 割鸡焉用牛刀 (*geji yan yong niudao*; en. "Why use an ox-cleaver to kill a fowl?"), Confucius, Lunyu Book 17 (論語·陽貨); see also Confucius, The Analects (Lun yü), trans. D.C. Lau, Penguin Books, London, 1979, 143; a similar understanding regarding the relation of punishment and crime: "When punishment fits the crime, it is dignified; when it exceeds the crime, it is despised. When rank matches virtue, it is honored; when it does not, it is despised" (*Gu xing dang zui ze wei, budang zui ze wu. Jue dang xian ze gui, budang xian ze jian.* 故刑當罪則威，不當罪則侮。爵當賢則貴，不當賢則賤。), *Xunzi* (荀子·君子).

Chinese statecraft has long been familiar with the measurement of official acts according to their relative (cost) effectiveness, as encapsulated in the legalist technique of "killing the chicken to scare the monkey" (*sha ji jing hou* 杀鸡儆猴).[20] The classification of birds ("hawks", "crows", "sparrows", and "ostriches")[21] and other beasts (such as "monkeys", "tigers", or "flies")[22] under Chinese law serves the selection of appropriate measures. A typology of weaponry follows the "ornithology", so as to conserve the constitutional environment by excluding tools that are excessive and thus would also likely disrupt the socio-legal ecosystem. The situational functionalization of legal discretion here may be referred to as "flexible governance".[23]

The principle of proportionality is generally accepted in administrative litigation, emerging out of the tension between Art. 1 and Art. 74 PRC Administrative Litigation Law (ALL).[24] Notions of it are latently visible in criminal law,[25] where the proportionality of leniency or severity in punishment in relation to the crime is stipulated (cf. Art. 5 PRC Criminal Law).[26] Further administrative documents recognize the principle as guidance in action, e.g. requiring police conduct to "not be excessive".[27] The relevance of proportionality balancing

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[20] Conceptually based on historical anecdotes, see J. Petersen, Y. Pines (eds), *Han Feizi, The Art of Statecraft in Early China*, Vol. 2, Brill, Leiden, 2024, 656; Sima Qian (司馬遷), *Shiji* (史記) [Records of the Grand Historian], juan 64, Sima Rangju liezhuan (司馬穰苴列傳) [The Biography of Sima Rangju]. Woodblock print edition. Digital scan via Chinese Text Project, https://ctext.org/shiji/si-ma-rang-ju-lie-zhuan.

[21] S. Liu, "Cage for the Birds: On the Social Transformation of Chinese Law, 1999-2019", in *China Law and Society Review*, 5, 2020, 66-87.

[22] N. Huhe, J. Chen, Y. Chen, "Flies, Tigers, and the Leviathan: Anti-Corruption Campaigns and Popular Political Support in China", in *Japanese Journal of Political Science*, 23, 3, 2022, 193-208.

[23] J. Hu, J. Rossi, "Control through the State of Exception: Opposition, Surveillance, and Fragmentation under Chinese Digital Authoritarianism", in *Verfassung und Recht in Übersee*, 57, 4, 2024, 610.

[24] *Zhonghua renmin gongheguo xingzheng susong fa (2017 xiuzheng)* (中华人民共和国行政诉讼法(2017修正)) [The Administrative Litigation Law of the People's Republic of China (2017 Amendment)], CLI.1.297380(EN) (PKULaw.com).

[25] S. Wang, "On Development of Criminal Law in the People's Republic of China", in *Verfassung und Recht in Übersee*, 43, 3, 2010, 292-303; and adherence to the principle is called for, see T. Jiang, "Value Judgments in Criminal Law Interpretation", in *Social Sciences in China*, 44, 4, 2023, 22-38, 32.

[26] See further J. Chen, *Chinese Law: Context and Transformation*, Brill Nijhoff, Leiden, 2008, 359, 367 ff.

[27] *Zhonghuarenmingongheguo renmin jingcha shiyong jingxie he wuqi tiaoli* (中华人民共和国人民警察使用警械和武器条例) [Regulations of the People's Republic of China on Use of Police Implements and Arms by the People's Police], 16 January 1996, CLI.2.13904(EN) (PKULaw.com).

under the Chinese Civil Code has been an ongoing debate. [28]

The constitutional basis for these rules geared towards minimal infringement and the root for the further growth of the principle of proportionality from administrative to constitutional principle [29] born out of the rule-exception relation between fundamental rights and limits may be found in Art. 33 Constitution of the People's Republic of China (hereafter "PRC Constitution") [30] in combination with Art. 5 and especially Art. 51 PRC Constitution. [31]

2.1.2. Judicial Birdwatching

And indeed, courts in China are adopting proportionality as a technique. Already in the *Huifeng Case*, the Supreme People's Court employs the technical reasoning of proportionality to argue that a penalty with a legitimate purpose, which is suitable to achieve this goal, is illegal as there are other less harsh penalties available and thus unnecessarily harmful. [32] Overall, the application of the principle remains under construction. [33]

The positive dimension of this development is acknowledged, [34] but the lack of

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[28] Just see A. Stone Sweet, C. Bu, D. Zhuo, "Breaching the Taboo? Constitutional Dimensions of the New Chinese Civil Code", in *Asian Journal of Comparative Law*, 18, 3, 2023, 319-344, 334 ff.

[29] Following the developments in Germany, see L. Xie, *Wissenschaftliche Rezeption der Rechtsprechung des BVerfG in China*, in M. Jestaedt, A.-B. Kaiser, A. Nußberger, A. Voßkuhle (eds), *A View From Outside. Liber Amicorum of the 75th Anniversary of the Federal Constitutional Court*, Mohr Siebeck, Tübingen, 2026, forthcoming.

[30] *Zhonghuarenmingongheguo Xianfa* (中华人民共和国宪法) [Constitution of the People's Republic of China] of 4 April 1982 as amended on 11 March 2018, accessible in English at: http://en.npc.gov.cn.cdurl.cn/constitution.html

[31] See S. Koutznatzis, "Verfassungsvergleichende Überlegungen zur Rezeption des Grundsatzes der Verhältnismäßigkeit in Übersee", in *Verfassung und Recht in Übersee*, 44, 1, 2011, 32-59, 55 f.; Men Zhongjing (门中敬), *bili yuanze de xianfa diwei yu guifan yiju – yi xianfa yiyi shang de kuanrong linian wei fenxi shijiao* (比例原则的宪法地位与规范依据—以宪法意义上的宽容理念为分析视角) [The Constitutional Position and Norm Basis of the Principle of Proportionality—Taking the Concept of Tolerance in Constitutional Sense as the Analysis View], in *Faxue Luntan* (法学论坛) [Legal Forum], 5, 2014, 94-102.

[32] *Heilongjiang sheng ha'erbin shi guihua ju su heilongjiang huifeng shiye fazhan youxian gongsi xingzheng chu fen jiufen an* (黑龍江省哈爾濱市規劃局訴黑龍江匯豐實業發展有限公司行政處罰糾紛案) [Planning Bureau of Harbin Municipality, Heilongjiang Province v. Huifeng Industrial Development Co. Ltd.] (Supreme People's Court 2000); later also for example: Guo Jianjun v. Zhuji City Land and Resources Bureau [Shao Zhong Xing Zhong Zi No. 37] decision (Shaoxing Intermediate People's Court on 25 November 2008).

[33] S. Xiao, "State-centric proportionality analysis in Chinese administrative litigation", in *International Journal of Constitutional Law*, 21, 2, 2023, 461-487.

[34] Liu Quan (刘权), *Xingzheng panjue zhong bili yuanze de shiyong* (行政判决中比例原则

stronger legislative encouragement stalls a wider impact. Furthermore, courts are generally not to judge directly on the infringements on fundamental rights. [35] More specifically, although constitutional norms may be considered and mentioned in the justification, [36] they must not be cited as legal basis of judgements. [37]

Still, the balancing of interests on the sub-constitutional level grants discretionary powers. And while these are exercised within certain institutional boundaries, they are legal channels empowering the judiciary, and in their elasticity allow judges to substantially (trans-)form the law. Here a first reconfiguration of the principle of proportionality takes place.

的适用) [The Application of the Proportionality Principle in Administrative Judgments], in *Zhongguo Faxue* (中国法学) [China Legal Science], 3, 2019, 84-104, 85-86; Jiang Hongzhen (蒋红珍), *Bili yuanze shiyong de fanshi zhuanxing* (比例原则适用的范式转型) [Paradigm Shifts in the Application of the Proportionality Principle], in *Zhongguo Shehui Kexue* (中国社会科学) [Social Sciences in China], 4, 2021, 106-127, 125.

[35] R. Heuser, "What "Rule of Law"? The Traditional Chinese Concept of Good Government and Challenges of the 21st Century", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 64, 2004, 723-734, 728; B. Ahl, "Normative oder semantische Verfassung? Der Diskurs in der Volksrepublik China um die Vereinbarkeit des Sachenrechtsgesetzes mit der Verfassung", in *Verfassung und Recht in Übersee*, 41, 2008, 477-509, 483.

[36] In the sense of an "interpretation in conformity with the constitution", see Shangguan Piliang (上官丕亮), *Dangxia zhongguo xianfa sifa hua de lu yu fangfa* (当下中国宪法司法化的路与方法) [Ways of and Approaches to Judicial Enforcement of Constitution in Present China], in *Xiandai Faxue* (现代法学) [Modern Law Science], 2, 2008, 3-16; Zhang Xiang (张翔), *Liang zhong xianfa anjian – cong hexianxing jieshi kan xianfa dui sifa de keneng yingxiang* (两种宪法案件—从合宪性解释看宪法对司法的可能影响) [On the Possible Influence of Constitutional Interpretation on Justice], in *Zhongguo Faxue* (中国法学) [China Legal Science], 3, 2008, 110-116; Xie Libin (谢立斌), *Lun fayuan dui jiben quanli de baohu* (论法院对基本权利的保护) [Protection of Basic Rights through Courts], in *Faxuejia* (法学家) [The Jurist], 2, 2012, 32-42; Huang Hui (黄卉), *Hexianxing jieshi jiqi lilun tantao* (合宪性解释及其理论探讨) [The Interpretation and Theoretical Review on the Constitutionality], in *Zhongguo Faxue* (中国法学) [China Legal Science], 1, 2014, 285-302.

[37] Art. 3-5, 6 *Zuigao renmin fayuan guanyu caipan wenshu yinyong falü, fagui deng guifanxing falü wenjian de guiding* (最高人民法院关于裁判文书引用法律、法规等规范性法律文件的规定) [Provisions of the Supreme People's Court on Citation of Such Normative Legal Documents as Laws and Regulations in the Judgments], CLI.3.122772(EN) (PKULaw.com); the attempts to establish constitutional review were quickly rolled back, see on the Qi Yuling saga: *Qi Yuling su Chen Xiaoqi deng yi qinfan xingmingquan de shouduan qinfan xianfa baohu de gongmin shou jiaoyu de jiben quanli jiufen an* (齊玉苓訴陳曉琪等以侵犯姓名權的手段侵犯憲法保護的公民受教育的基本權利糾紛案) [Qi Yuling v. Chen Xiaoqi et al.: Dispute over Infringement of a Citizen's Basic Right to receive Education Protected by Constitution Through infringement of Right of Name], 23.08.2001, in *Zuigao Renmin Fayuan Gongbao* (最高人民法院公报) [Supreme People's Court Gazette], 5, 2001; *Zuigao renmin fayuan guanyu feizhi niandi yiqian fabu de youguan sifa jieshi di qi pi de jueding* (最高人民法院关于废止2007年底以前发布的有关司法解释(第七批)的决定) [Decision of the Supreme People's Court on Abolishing the Relevant Judicial Interpretations (the Seventh Batch) Promulgated before the End of 2007], CLI.3.111685(EN) (PKULaw.com).

2.1.3. Caging Theriomorphous Proportionality

In the practice of administrative decision and judicial review, employing the principle of proportionality is a means to balance competing and sometimes conflicting interests and rights. [38] Constitutional actors may use the language of proportionality as one manifestation of the "rule of law" to reason within constitutional politics. [39] Constitutional questions become increasingly questions of proportionality. [40] The "globalization of the principle of proportionality" seems to be advancing steadily, [41] although experiencing a profound transformation during that process where it is reshaped from human rights protection to "justify illegal government actions and advance authoritarian projects". [42]

In the wake of judicial reform in China, the interest in advancing constitutional review and establishing more "scientific" standards in that respect has continuously grown. [43] Possibly, "localization" of the principle of proportionality may be expected to a greater extent for the future. [44] Arguably, Chinese state power has

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[38] W. Cui, J. Cheng, D. Wiesner, "Judicial Review of Government Actions in China", in *China Perspectives*, 1, 2019, 35-44.

[39] Aristotle, *Nicomachean Ethics (Book V)*; A. Stone Sweet, J. Matthews, *Proportionality Balancing and Global Constitutionalism*, in "Columbia Journal of Transnational Law", 47, 2008, 72-164, 161.

[40] L. Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, in V. Jackson, M. Tushnet (eds), *Defining the Field of Comparative Constitutional Law*, Westport, Connecticut/London, 2002, 3-34, 18.

[41] J. Saurer, "Die Globalisierung des Verhältnismässigkeitsgrundsatzes", in *Der Staat*, 51, 1, 2012, 3-33.

[42] S. Xiao, "Counter Currents to the Globalization of Proportionality", in *Wisconsin International Law Journal*, 41, 2, 2024, 145-186, 148, see also pp. 175 ff.; S. Xiao, "State-centric proportionality analysis in Chinese administrative litigation", in *International Journal of Constitutional Law*, 21, 2, 2023, 461-487, 485-486.

[43] Mei Yang (梅扬), *Bili yuanze de shiyong fanwei yu xiandu* (比例原则的适用范围与限度) [Application Scope and Limits of the Principle of Proportionality], in *Faxue Yanjiu* (法学研究) [Chinese Journal of Law], 2, 2020, 57; Liu Quan (刘权), *Bili yuanze shiyong de zhengyi yu fansi* (比例原则适用的争议与反思) [The Application of Proportionality Principle: Controversies and Reflections], in *Bijiaofa Yanjiu* (比較法研究) [Journal of Comparative Law], 5, 2021, 172, 185; implicitly, noting the global importance of proportionality in constitutional review: Yan Dongfeng (严冬峰), *Bei'an shencha jueding de chutai beijing he zhuyao neirong jiedu* («备案审查决定» 的出台背景和主要内容解读) [The Background of the R&R Decision's Promulgation and an Explanation of Its Main Contents], in *Zhongguo Falü Pinglun* (中国法律评论) [China Law Review], 1, 2024, 199-211.

[44] J. Li, "A Study on Proportionality: Comparative Perspectives, and Prospects in China", in *International Journal of Social Science Research and Review*, 8, 1, 2025, 218-232, 226; A. Marketou, *Local Meanings of Proportionality*, Cambridge University Press, Cambridge, 2021; and it has been a topic of high-level dialogue between German and Chinese scholars in constitutional law, see Friedrich-Ebert-Stiftung China, *The 10th Sino-German Forum on Constitutional Law*

imposed the objective upon itself to operate "proportionally", [45] and to lock public power into an "institutional cage" (*zhidu de longzi* 制度的笼子), [46] be it for legitimacy, stability, effectivity or any other or all of the above considerations.

Rather than strengthening courts by allowing the proportionality test to significantly constrain executive power though, the SPC functionalizes it towards executive effectivity. In the *Liu Chunhong Case*, the SPC upheld a procedurally unlawful land requisition decision due to public interest considerations. [47] So as to not "risk big things for the sake of small ones" (*yin xiao shi da* 因小失大) the court held that nullifying the decision would waste substantial social resources, which were already invested, undermine the credibility of the government and infringe upon the rights of third parties to which new land use rights were already granted. Proportionality is transformed here from "right-centered" to "efficient-development-oriented" account where under Art. 74 ALL, which contains a prohibition to strike down an illegal act if that would entail significant damage to public interest or national security, a "cost-benefit-analysis" reigns. [48]

This use as a technique of governance is especially prevalent in emergencies. Under the pressure of the spreading coronavirus coinciding with the inability to prosecute every transgressor, a pivot towards stricter measures and heavy penalties [49] was combined with the "selective" application of the law, so as to deter the

– *the Principle of Proportionality in German and Chinese Law*, 09.09.2019, accessible online at: https://china.fes.de/e/the-10th-sino-german-forum-on-constitutional-law-the-principle-of-proportionality-in-german-and-chinese-law.html.

[45] C. Huang, D. Law, *Proportionality Review of Administrative Action in Japan, Korea, Taiwan, and China*, in F. Bignami, D. Zaring (eds), *Research Handbook in Comparative Law and Regulation*, Edward Elgar, Cheltenham, 2014, 25.

[46] *Xi Jinping: ba quanli quan jin zhidu de longzi li* (习近平:把权力关进制度的笼子里) [Xi Jinping: Hold power in the institutional cage], *Xinhua* (新华) [Xinhua], 22 January 2013, https://www.chinadaily.com.cn (https://perma.cc/552A-ZAUQ); see further: Xu Yijun (徐贻军) - He Deping (何德平), *Zhidu de longzi* (制度的笼子) [Institutional Cage], Zhongxin chubanshe (中信出版社) [CITIC Press], Beijing, 2016.

[47] *Liu chunhong su yunansheng kunmingshi xishanqu renmin zhengfu tudi zhengshou jiufen zaishen an* (劉春洪訴雲南省昆明市西山區人民政府土地徵收糾紛再審案) [Liu Chunhong v. The People's Government of Xishan District, Kunming Municipality, Yunnan Province] (Supreme People's Court 2018).

[48] E. Pils, *Assessing Evictions and Expropriation in China: Efficiency, Credibility and Rights*, in *Land Use Policy*, 58, 2016, 437-444; S. Xiao, *Counter Currents to the Globalization of Proportionality*, in *Wisconsin International Law Journal*, 41, 2, 2024, 145-186, 178; positively, noting the shortcomings of conventional proportionality analysis in regard to "welfare-maximizing measures": Y. Chang, Xin Dai, "The limited usefulness of the proportionality principle", in *International Journal of Constitutional Law*, 19, 3, 2021, 1110-1134; against this "culture of calculation" for a "culture of justification", see A. Peters, "A plea for proportionality: A reply to Yun-chien Chang and Xin Dai", in *International Journal of Constitutional Law*, 19, 3, 2021, 1135-1145.

[49] For Example the "heavy penalty-ism" of *Zuigao renmin fayuan*、 *zuigao renmin jianchayuan*

masses from transgression by publicly "disciplining a handful of exemplars". [50] While the selective or "flexible" application of law is at odds with legal transparency, predictability, and certainty, it is one core mechanism of authoritarian legality and becomes especially prominent under exceptional circumstances, [51] where "deterrence" remains a salient objective of the Chinese legal system. [52] Similarly, adjudication in cases related to terrorism tends to brush over proportionality. [53] Chinese scholars note the need for more respect for the principle of proportionality under the judicial process to avoid arbitrariness and over-criminalization, and excessive overreach of state power into basic rights. [54]

In spite of such calls, framed in the language of the state of emergency, the fight for survival against an existential enemy, the scales tilt significantly in favor of public interest over individual rights. [55] Here the principle of proportionality as normative constitutional grammar seems to reach its limits. Surely, it may bring

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、*gong'anbu*、*sifabu yinfa*《*guanyu yifa chengzhi fanghai xinxingguanzhuangbingdu ganran feiyan yiqing fangkong weifa fanzui de yijian*》*de tongzhi* (最高人民法院、最高人民检察院、公安部、司法部印发《关于依法惩治妨害新型冠状病毒感染肺炎疫情防控违法犯罪的意见》的通知) [Notice by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Justice of Issuance of the Opinions on Punishing Illegal and Criminal Activities that Hinder the Prevention and Control of the COVID-19 Epidemic], 06.02.2020, CLI.3.339217(EN) (PKULaw.com); H. Fu, *Pandemic Control in China's Gated Communities*, in C. Loh (ed.), *How COVID-19 Took Over the World: Lessons for the Future with Comparative Perspectives from Health, Politics, and Socio-Economics*, Hong Kong University Press, Hong Kong, 2023, 169-194.

[50] Q. Liu, "Kill the Chicken to Scare the Monkey": Heavy Penalties, Excessive COVID-19 Control Mechanisms, and Legal Consciousness in China, in *Law & Policy*, 45, 3, 2023, 292-310, 293; E. Pils, *Rule-of-Law Reform and the Rise of Rule by Fear in China*, in W. Chen, H. Fu (eds), *Authoritarian Legality in Asia: Formation, Development and Transition*, Cambridge University Press, Cambridge, 2020, 90-113; cf. J. Shklar, *Liberalism of Fear*, in S. Hoffmann (ed.), *Political Thought and Political Thinkers*, The University of Chicago Press, Chicago, 1998, 3-20.

[51] See for further details: J. Hu, J. Rossi, "Control through the State of Exception: Opposition, Surveillance, and Fragmentation under Chinese Digital Authoritarianism", in *Verfassung und Recht in Übersee*, 57, 4, 2024, 608-626.

[52] S. Liu, "Cage for the Birds: On the Social Transformation of Chinese Law, 1999-2019", in *China Law and Society Review*, 5, 2020, 66-87.

[53] X. Wei, "A critical evaluation of China's legal responses to cyberterrorism", in *Computer Law & Security Review*, 47, 2022, 105768.

[54] Liu Renwen (刘仁文), *Zhongguo fankong xingshi lifa de miaoshu yu pingxi* (中国反恐刑事立法的描述与评析) [On China's Anti-Terrorism Criminal Legislation], in *Faxuejia* (法学家) [The Jurist], 4, 2013, 45-55, 48, 51; pointing to unstable application effects instead, see Chen Peng, "The Formation and Structure of the Statutory Reservation of Fundamental Rights in the Chinese Constitution", in *Social Sciences in China*, 46, 2, 2025, 4-21.

[55] Feng Xu, Qian Liu, *China: Community Policing, High-Tech Surveillance, and Authoritarian Durability*, in V. Ramraj (ed.), *COVID-19 in Asia: Law and Policy Contexts*, Oxford University Press, New York, 2021, 27-42; F. Schneider, "COVID-19 Nationalism and the Visual Construction of Sovereignty during China's Coronavirus Crisis", in *China Information* 35, 2021, 301-24.

about a formalization in the justification of judicial decisions. But where it ends up justifying severe measures, sometimes because they may indeed be not only effective but proportionate in the narrow sense, its formal persuasive power is inherently limited in satisfying the hopes of a considerable number of citizens (and officials) that prioritize (specific, differing) outcomes. [56]

Inevitably, law and politics intertwine where balancing decisions are made, as such decisions are inseparable from the fact, that, ultimately, they have to be in favor of one right, one interest over another, independent of their specific arithmetic relation. Through its embeddedness in the Party-State and judicial dependence, [57] the discretion resulting out of the flexibility of the principle is entrenched, and where the law itself is transformed into a "bird" [58] again and with it "theriomorphous" [59] proportionality is "caged", or rather repurposed to serve the objectives of flexible governance. This flexible governance is more oriented towards necessity than doctrinal strictness. The purpose of the legal form here is translating situational politics into acceptance for regulations by taking away some of the more obvious legal arbitrariness through rationalization and signaling uniformity while consolidating the primacy of state reason. This outcome-oriented nature of legitimacy in authoritarian legality is what makes it both contentious and responsive.

In short, the principle of proportionality has been reshaped to facilitate the effectiveness of measures rather than to impose constraints upon them. It is invoked, but selectively, arguably with the purpose of legitimizing instead of limiting state measures.

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[56] E. Michelson, B. Read, *Public Attitudes toward Official Justice in Beijing and Rural China*, in M. Woo, M. Gallagher (eds), *Chinese Justice: Civil Dispute Resolution in Contemporary China*, Cambridge University Press, Cambridge, 2011, 169-203, 197; Y. Li, *The Judicial System and Reform in Post-Mao China*, Ashgate, Surrey, 2014, 141; Y. Feng, Q. Cao, "Popularised Judiciary in Rural China: Paternalistic Approaches and Enchanted Legal Consciousness", in *Hong Kong Law Journal*, 44, 2014, 651-75; M. Gallagher, *Authoritarian Legality in China: Law, Workers, and the State*, Cambridge University Press, Cambridge, 2017; X. He, Jing Feng, "Unfamiliarity and Procedural Justice: Litigants' Attitudes toward Civil Justice in Southern China", in *Law & Society Review*, 55, 2021, 104-138; Z. Liu, *Urteilsfindungsmethoden chinesischer Gerichte – zur Ausrichtung und Wirkung der Methode der Fallentscheidung*, in Y. Bu (ed.), *Juristische Methodenlehre in China und Ostasien*, Mohr Siebeck, Tübingen, 2016, 193-222.

[57] L. Ling, "The Chinese Communist Party and People's Courts: Judicial Dependence in China", in *The American Journal of Comparative Law*, 64, 1, 2016, 37-74; L. Ling, "The "Production" of Corruption in China's Courts: Judicial Politics and Decision Making in a One-Party State", in *Law & Social Inquiry*, 37, 4, 2012, 848-877.

[58] S. Lubman, *Bird in a Cage: Legal Reform in China after Mao*, Stanford University Press, Stanford, 1999.

[59] But rather in the sense of its (potential) metamorphosis into a "beast" to be tamed by the CPC. See on this concept in theology, E. Martin, *Flügel und Hörner. Gottes Tiergestaltigkeit im Alten Testament*, Kohlhammer, Stuttgart, 2023, 11-20.

2.2. Implementation between Authoritarian Legality and the "Division of Power"

A second reconfiguration of the principle of proportionality occurs in the relationship between the state branches. The wide discretionary power contained in proportionality balancing, even without the power to review legislation, is usually cause for concern in the legislative. [60] But rather than serving competence creeping and presaging overbearing "judicialization", significant institutional power shifts are prevented in the PRC by divorcing constitutional review from the judiciary and maintaining parliamentary (with that rather: party) sovereignty.

In the absence of a constitutional court and judiciary powers to conduct constitutional review of legislation, the constitutionality of legislation is assessed through the "Recording and Review" (*bei'an shencha* 备案审查) [61] mechanism. Within this system, based on and established under Art. 67 PRC Constitution, Art. 28-33 Law on Oversight by the Standing Committees of People's Congresses, [62] and Art. 110-113 Legislation Law, [63] the Standing Committee of the National People's Congress (NPCSC) at its top and its Legislative Affairs Commission (LAC) may use this system to correct legislative conflicts. The NPCSC has focused on the consistency of measures taken with the principle of proportionality (containing the subtests of suitability, necessity, and balancing) and formulated constitutional review standards (such as pertaining to purpose, reasonable connection of means and purpose, manifest unnecessity, value of legal interests) which contain a clarification on its use. [64]

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[60] A. Stone Sweet, J. Mathews, *Proportionality Balancing and Constitutional Governance*, Oxford University Press, Oxford, 2019, 44 ff., 127 ff., 161.

[61] See further C. Wei, "Toward a More Rigorous Mechanism for Resolving Legislative Conflicts: Unpacking China's Transitional "Mini Law" on the "Recording and Review" Process", in *Verfassungsblog*, 24.06.2024, online accessible at: https://verfassungsblog.de/toward-a-more-rigorous-mechanism-for-resolving-legislative-conflicts/.

[62] *Zhonghua renmin gongheguo geji renmin daibiao dahui changwuweiyuanhui jiandu fa 2024 xiuzheng* (中华人民共和国各级人民代表大会常务委员会监督法(2024修正)) [Law of the People's Republic of China on the Supervision of Standing Committees of People's Congresses at Various Levels (2024 Amendment)], CLI.1.5234445(EN) (PKULaw.com).

[63] *Zhonghua renmin gongheguo lifafa 2023 xiuzheng* (中华人民共和国立法法(2023修正)) [Legislation Law of the People's Republic of China (2023 Amendment)], CLI.1.5159701(EN) (PKULaw.com).

[64] *Quanguo renmin daibiao dahui changwu weiyuanhui guanyu wanshan he jiaqiang bei'an shencha zhidu de jueding* (全国人民代表大会常务委员会关于完善和加强备案审查制度的决定) [Decision of the Standing Committee of the National People's Congress on Improving and Strengthening the System of Recording and Review] (issued 29 December 2023), Art. 11 (6); See Quanguo renda changweihui fazhi gongzuo weiyuanhui fagui bei'an shencha shi bian (全国人大常委会法制工作委员会法规备案审查室 编) [Recording and Review Office of the Legislative Affairs Commission of the NPC Standing Committee, ed.], *"Fagui, sifa jieshi bei'an shencha gongzuo banfa" daodu* (《〈法规、司法解释备案审查工作办法〉导读》) [A Guide to

This institutional setting under the Chinese "division of power" (*quanli fengong* 权力分工)[65] system determines its constitutional impact to a large extent. That there is judicial interpretation without constitutional review,[66] takes off the edge in many cases. As constitutional review is left to the NPC's internal LAC refocuses the system on legality of state action and consistency of measures rather than high-level constitutional invalidation. Especially in situations of emergency legislation and exceptional restrictions this significantly limits external avenues for redress and leaves wide discretion for flexible but unitary state measures.

The issue of a looming judicialization of politics, the suspicion of a transgression of law into politics, whereby judicial institutions threaten to encroach upon a majoritarian legislature, juridifying the political space and ultimately removing it from the competence of other branches, is less pressing where the institutions are working jointly in the party-state. Nonetheless, also in the system of the division of powers, boundaries of competence must be respected and are objects of institutional power competition, and are therefore no less fiercely contested than elsewhere.

More than the issue for the division of powers arising out of the collision of individualized guarantees of constitutional rights and the democratic majoritarian will represented in legislation,[67] the state of emergency and authoritarian legality birth a challenge to the internal logic of the principle of proportionality. The process of constitutionalization from merely organic statutes to the protection of fundamental rights inherently develops towards a situation where the state in its form as legislator is both competent to limit fundamental rights and simultaneously

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the "Working Measures for the Recording and Review of Regulations and Judicial Interpretations"], Zhongguo minzhu fazhi chubanshe (中国民主法制出版社) [China Democracy and Legal System Publishing House], Beijing, 2020, 99; Chen Qian (陈乾), *Bei'an shencha zhongde bili yuanze shiyong wenti yanjiu* (备案审查中的比例原则适用问题研究) [Research on the Application of the Principle of Proportionality in R&R], in *Bei'an Shencha Yanjiu* (备案审查研究) [Journal of Regulations Filing and Review], 3, 2023, 11-19, 12; Yan Dongfeng (严冬峰), *Bei'an shencha jueding de chutai beijing he zhuyao neirong jiedu* (《备案审查决定》的出台背景和主要内容解读) [The Background of the R&R Decision's Promulgation and an Explanation of Its Main Contents], in *Zhongguo Falü Pinglun* (中国法律评论) [China Law Review], 1, 2024, 199-211, 206.

[65] As opposed to "separation of powers" (*sanquandingli* 三权鼎立). See Du Qiangqiang (杜强强), *Yi xing heyi yu woguo guojia quanli peizhi de yuanze* (议行合一与我国国家权力配置的原则) [The Combination of Legislative and Executive Powers and the Horizontal Allocation of National Powers in China], in *Faxuejia* 法学家 [The Jurist], 33, 1, 2019, 1-14; Further on the compound structure of state powers in the PRC: Du Qianqqiang 杜强强, *Woguo xianfa shang de yi xing fuhe jiegou* (论我国宪法上的议行复合结构) [The Compound Structure of the Legislative-Executive Relationship in Chinese Constitutional Law], in *Faxue Yanjiu* (法学研究) [Chinese Journal of Law], 45, 4, 2023, 40-55, 46 f.

[66] On the restrained nature of judicial interpretation here, see also W. Li, "Judicial Interpretation in China", in *Willamette Journal of International Law and Dispute Resolution*, 5, 1, 1997, 87-112.

[67] C. Möllers, *The Three Branches: A Comparative Model of Separation of Powers*, Oxford University Press, Oxford, 2013, 128 ff.

bound by them. To deal with this contradiction in the process of constitutionalization, the principle of proportionality offers a language for formal rationalization to mediate between fundamental rights and legislative objectives. These periods of upheaval where a redetermination of the relation between fundamental rights and legislation is necessary, thus coincide with the establishment of constitutional review bodies. [68] At first, proportionality serves especially as a form-oriented promise for rationality, predictability, and legal certainty, stabilizing behavioral expectations. [69]

Parallel to the path of the principle of proportionality from police law to a principle inherent in the constitution, its relevance is growing in China. The fact that a certain degree of restraint prevails in the constitutional review mechanism, and that the balancing exercise generally favors the restrictive objective, does not necessarily render it invalid. [70] However, asserting the primacy of collective interests risks hollowing out fundamental rights protection. [71]

Divorced from constitutional review, the SPC incorporates the principle of proportionality into its guidance to lower instance courts. [72] In doing so, it signals its dissemination to professionalize, standardize, and unify adjudication, while steering it towards national policy goals, particularly under conditions of urgency. Insofar, the adoption of proportionality serves both as a process of formalization and as a substantive re-centering around public interest considerations where deemed necessary. At the same time, it loses much of its critical potential due to the non-judicialization of constitutional review of legislation. The principle thus becomes more strongly oriented towards effectivity and stability than towards rights-based constraint.

In summary, the development of proportionality as a constitutional principle in China is advancing from statutory balancing to constitutional review, at least insofar as the implementation of the division of power system allows for the adoption of a constitutional discourse that does not undermine its unity. The divorce of constitutional review of legislation and judicial review of government actions allows for flexibility in judicial guidance disseminating into lower courts, especially in urgent matters, without looming long-winding legislative revisions or the cassation of

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[68] See J. Saurer, "Die Globalisierung des Verhältnismässigkeitsgrundsatzes", in *Der Staat*, 51, 1, 2012, 28 f.

[69] See M. Borowsky, "The Structure of Formal Principles - Robert Alexy's "Law of Combination"", in *ARSP Beiheft*, 119, 2010, 19, 25 ff.; N. Luhmann, "Positivität des Rechts als Voraussetzung einer modernen Gesellschaft", in *Jahrbuch für Rechtssoziologie und Rechtstheorie*, 1, 1970, 175.

[70] Instead, also the Japanese Supreme Court applies its powers with restraint, see S. Koutznatzis, "Verfassungsvergleichende Überlegungen zur Rezeption des Grundsatzes der Verhältnismäßigkeit in Übersee", in *Verfassung und Recht in Übersee*, 44, 1, 2011, 43 f.

[71] R. Heuser, "Gegenwärtige Lage und Entwicklungsrichtung des chinesischen Rechtssystems. Eine Skizze", in *Verfassung und Recht in Übersee*, 38, 2, 2005, 137-153, 147 f.

[72] On the Guiding Case system, see B. Ahl, "Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's Court", in *The China Quarterly*, 217, 2014, 121-139.

legislation by the judiciary, i.e. juridification without judicialization. Thereby discretionary power of judges may be used to satisfy national political goals. [73]

3. Socio-Economic Rights and Transformation

3.1. Legitimacy through Proportionality and Socio-Economic Rights

Conventionally, proportionality has been applied most assertively in the context of "freedom rights". [74] Socio-economic rights on the other hand are not as strongly anchored in many constitutional orders, and their protection is more often deemed a question of distribution to be determined by political considerations. The counterpart to proportionality as a prohibition of overreach (de. Übermaßverbot), is its manifestation as prohibition of underreach (de. Untermaßverbot), where the state is under the duty to protect against fundamental right infringements, particularly in the context of socio-economic rights. [75] The judicial restraint exercised in reviewing their implementation often amounts to a mere rationality review.

This works, because under normal circumstances of liberal doctrine in contrast to overreaching into liberties, "over-fulfilling" social rights would be rather unusual where states are struggling with continuous resource scarcity. Regulating markets and providing welfare, e.g. in the form and with the purpose of public health protection and employment, on the other hand, posed serious challenges globally during the pandemic. [76]

Where under different circumstances courts had been timid to apply the proportionality principle to socio-economic rights, its reconfiguration under the Chinese legal order makes its extension beyond freedom rights a logical step. Where the Chinese constitutional order is structurally oriented toward performance,

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[73] T. Gong, S. Wang, H. Li, *Sentencing Disparities in Corruption Cases in China*, in *Journal of Contemporary China*, 28, 116, 2019, 245-259, 247; S. Trevaskes, *China's Death Penalty: The Supreme People's Court, the suspended death sentence and the politics of penal reform*, 483.

[74] Noting the principle also in China to be bound to "freedom rights" in that sense, L. Xie, *Wissenschaftliche Rezeption der Rechtsprechung des BVerfG in China*, in M. Jestaedt, A.-B. Kaiser, A. Nußberger, A. Voßkuhle (eds), *A View From Outside. Liber Amicorum of the 75th Anniversary of the Federal Constitutional Court*, Mohr Siebeck, Tübingen, 2026, forthcoming.

[75] On the difficulties regarding standards, see K.G. Young, *Proportionality, Reasonableness, and Economic and Social Rights*, in V. Jackson, M. Tushnet (eds), *Proportionality: New Frontiers, New Challenges*, Cambridge University Press, Cambridge, 2017, 248-272.

[76] C. Radavoi, O. Quirico, "Socioeconomic rights in the age of pandemics: Covid-19 large-scale lockdowns have exposed the weakness of the right to work", in *Journal of Human Rights*, 21, 1, 2022, 73-90.

provision, and public interest, it goes beyond the use of proportionality as safeguard against excessive interference, utilizing its potential for the implementation of these constitutional rights, not by justifying limits but rationalizing effectivity.

Ensuring economic growth and security constitutes an important source of legitimacy for the Chinese constitutional order as a whole, [77] as manifested in the pronounced socio-economic rights catalogue of the PRC Constitution. The right to work plays an important role in that regard, [78] while property rights in China are characterized by a pronounced social function. [79] As duty of the "whole national governance system" and not only constitutional review organs and judicial organs these "social rights" require active state involvement beyond the duty to protect negative liberties. [80]

The turn towards public policy reflects the logic of rights that impose positive constitutional obligations on the state. These obligations extend beyond protection against interference and constraints on public power, shifting the constitutional balance toward provision and enablement as an integral element of rights realization. [81] That as the goal-oriented construction of public goods is "engineered" [82] the scales heavily shift in favor of state reason is hardly surprising. Their progressive realization is the promise of the developmental state,[83] even as internal tensions become particularly visible in emergency situations.

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[77] L. Xie, "The Binding Force of the Chinese Constitution as a Source of Legitimacy", in *European-Asian Journal of Law and Governance*, 1, 2012, 62-74, 66 ff.; and a threat to it, intertwined with corruption in the past, may threaten the whole order, see A. Chen, "Socio-economic Polarization and Political Corruption in China: A Study of the Correlation", in *The Journal of Communist Studies and Transition Politics*, 18, 2, 2002, 53-74; H. Yang, D. Zhao, "Performance Legitimacy, State Autonomy and China's Economic Miracle", in *Journal of Contemporary China*, 24, 91, 2015, 64-82.

[78] Extends with Freedom of Association, and Property especially also to private enterprise, see L. Xie, "Verfassungsstellung des Privatunternehmers in China – eine historische Betrachtung", in *Zeitschrift für Chinesisches Recht*, 30, 1, 2023, 5-13, 11 ff.; Cf. also T. Daintith, "The constitutional protection of economic rights", in *International Journal of Constitutional Law*, 2, 1, 2004, 56-90; H. Xie, "The Hierarchy of Distribution in Private Law", in *Social Sciences in China*, 45, 2, 2024, 29-48,

[79] D. Deng, "A National Governance Perspective on the Transformation of Rural Property Rights: The Chinese Experience", in *Social Sciences in China*, 39, 1, 2018, 50-64,

[80] Anchored in constitutional provisions, such as Art. 42-46 and 14, 19, 21, 22, 89, 107 PRC Constitution, see L. Han, "A Systemic Interpretation of Social Rights in the Chinese Constitution", in *Social Sciences in China*, 44, 4, 2023, 4-21.

[81] E.g. through "amorphous invocations of *apriorism*" and a "softened, deferential evidentiary stance" by courts in ambiguous contexts, see M. Friedman, A. Sangiuliano, "Proportionality and precaution", in *Global Constitutionalism*, 2025, 1-22, 5.

[82] On such modes of governance thinking, see D. Wang, *Breakneck: China's Quest to Engineer the Future*, W.W. Norton & Company, New York, 2025.

[83] And to this end the judiciary plays a "constructive role", see also R. Peerenboom, "Economic and Social Rights: The Role of Courts in China", in *San Diego International Law Journal*, 12, 2011, 303-331, 331.

3.2. Legalizing Transformation

Here the material legitimation of socio-economic rights and the formal legitimation of proportionality get into a symbiotic relationship enabling legalistic governance, translating political objectives into justifications of action. In their transformative potential, they simultaneously function as gateways for social governance and fix-points for rights realization. This is visible also where such rights are mediated through criminal law cases, in which the weighing of interests in determining the severity of punishment continues to play a role, alongside administrative and regulatory sanctions.

Emergency regimes contain an inherently progressive temporal dimension. As an emergency persists, the state is expected to continuously accumulate knowledge and develop an increasingly precise assessment of both the crisis and its management. The longer the measures remain in place, the higher the justificatory cost becomes. In this sense, the crisis gradually normalizes itself where it is continuously re-evaluated.

Ultimately, this logic of the state of emergency, the constant (re-)evaluation of cases to flexibly determine the intensity of the response through law, permeates China's authoritarian legality at large. Not only does the control framework differ across legal orders operating under the same general principle, but the dual nature of this control framework, the rationalization in the principle of proportionality becomes apparent, not necessarily as facilitating an increase in substantive rights protection, but facilitation of state power in legal form. Under the veil of fundamental rights protection, we can see the formalization of state power shimmer. What is proportional becomes legal, and proportionality is increasingly defined by effectiveness in achieving state objectives. In that the reconfiguration of the principle from limit to legitimation, the repurposing from the orientation towards less government interference to being conducive to more governmental action is complete.

4. Conclusion

The principle of proportionality is on a trajectory of growing influence in the Chinese legal system. In this development and within the necessities of authoritarian constitutionalism and legality, the principle is shaped by the conditions in the PRC. While its elevation from administrative constraint to sectorial clause to general principle holds opportunities for judicial professionalization and standardization conducive to formal justice possibly increasing assent to and stability of governance under the leadership of the CPC, expectations regarding its substantial contribution to the protection of fundamental rights should be modest. Theoretical elements of the State of Exception permeate the PRC legal system, where the flexible application of the law extends to the flexible application of

proportionality balancing. The underlying frictions emerge wherever interests demand reconciliation, most vividly in existential issues of socio-economic rights, sometimes channeled and refracted through criminal law, as became prominently visible during the COVID-19 pandemic. Overall, the principle takes shape first as a formalization of power and lends its functional legitimacy to flexible governance through law. Secondly, the theoretical push and practical necessities of the state of emergency reshape the principle of proportionality in China as they recenter it around material effectivity of public objectives. In China, the principle of proportionality, particularly in the context of socio-economic rights, takes on a dual role; as formal justification and substantive constitutional claim on the one hand, and as juridical veil and techno-governmental tool for control in the Chinese legal "cages" on the other. Surrendering normative ambition, itself appears to be a bird confined by institutional necessities and state reason.

The Diverse Applications of the Principle of Proportionality in the Korean Constitutional Court

Chung Taiuk *

1. Introduction

Although the Korean Constitution does not expressly mention proportionality, the principle has become central to modern constitutional review in Korea, mirroring its global spread. [1]

Proportionality plays a major role in protecting fundamental rights and constraining the abuse of state power. Yet its content and method of application vary across legal systems. This chapter examines how the Korean Constitutional Court has developed and applied proportionality, with the aim of contributing to comparative understanding.

In Korean law broadly, proportionality appears in many contexts. Most generally, it describes fair relations between harm and compensation, crime and punishment, merit and reward, and the equivalence that underpins exchange. In this sense, it operates as a general legal principle across civil law, criminal law, and the law of associations. [2]

This chapter, however, focuses not on proportionality as a general legal virtue, but on constitutional proportionality—the principle used to safeguard

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[1] For general discussions, see Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge University Press, 2012; for an Asian overview, see Po Jen Yap (ed.), *Proportionality in Asia*, Cambridge University Press, 2020, including Yoon Jin Shin, *Proportionality in South Korea*, ch. 8. See also David Beatty, *The Ultimate Rule of Law*, Oxford University Press, 2004.

[2] The idea has deep roots in both East and West. Aristotle treated proportionality as a principle of justice—distributive (by merit), corrective (by damages), and exchange (by equivalence) (Nicomachean Ethics, Book 5). In ancient China, Xunzi wrote: "When punishment fits the crime, it is dignified; when it exceeds the crime, it is despised. When rank matches virtue, it is honored; when it does not, it is despised" (《荀子·君子》: "故刑當罪則威，不當罪則侮。爵當賢則貴，不當賢則賤。").

fundamental rights and protect the constitutional order. In Korea, constitutional proportionality has been developed primarily by the Constitutional Court.[3] Established with the 1987 democratic Constitution, the Constitutional Court made proportionality the backbone of rights adjudication through a four-stage test influenced by German public law: (1) legitimate aim, (2) suitability of means, (3) necessity (least-restrictive means or minimization of harm), and (4) proportionality in the strict sense (balancing of legal interests). In this rights-protective setting, Korean doctrine often labels the principle as the prohibition of overreach (*Übermaßverbot*).

Over time, the Court has developed variations of this framework in several ways:

- A lenient overreach test. In some settings the Court applies a lighter-touch review that emphasizes whether the measure is necessary to achieve the legislative purpose without marching through every step of the strict four-stage analysis.
- Practical concordance (*praktische Konkordanz*). Where fundamental rights conflict, the Court emphasizes harmonious interpretation within the balancing stage, seeking to optimize the competing rights so that each can be realized as far as possible. This principle is also received from German constitutional scholarship.
- Prohibition of underreach (*Untermaßverbot*). Also drawing on German jurisprudence, the Court recognizes the state's duty to provide a minimum level of protection for life and safety. In Korea, this has been used particularly in reviewing social-rights measures, such as minimum-livelihood guarantees.
- Proportionality for constitutional guardianship. The Court has also applied proportionality—especially the balancing of legal interests—to protect the constitutional order in cases involving the dissolution of unconstitutional political parties and presidential impeachment.

In short, proportionality in Korea is diverse and far-reaching. The sections that follow examine key applications of individual variants of the principle. Particular attention is given to social rights, with a proposal for an integrated framework that encompasses both civil-political and social rights. The chapter also considers

[3] The Constitution contains no explicit clause on proportionality; the closest textual basis is Article 37(2), which permits restrictions on freedoms and rights by law only when necessary for national security, public order, or public welfare, and forbids any violation of their essential content. This provision is commonly read to imply the prohibition of excessive restriction (overreach). Whether the text directly supports the complementary prohibition of insufficient protection (underreach) is less clear. Still, several social-rights provisions point in that direction—for example, free compulsory education (Const. Art. 31(3)); promotion of employment, adequate wages, and a minimum wage system (Const. Art. 32(1)); the right to a life worthy of human dignity (Const. Art. 34(1)); and state protection for those unable to maintain a livelihood (Const. Art. 34(5)).

proportionality in states of emergency, focusing on recent controversies surrounding martial-law declarations and impeachment. The overarching claim is that, in Korean constitutional law, proportionality is best understood as a principle of moderation in public power—a legal commitment to reducing suffering and cruelty.

2. Developments in the Principle of Proportionality

A. Prohibition of Overreach

The Constitutional Court first articulated proportionality in a four-stage framework in the Land Transaction Permit System case. The Korean Constitution authorizes the State to impose necessary restrictions and obligations to ensure the efficient and balanced use, development, and preservation of national land, which underpins citizens' production and livelihood (Const. Art. 122). In response to rapid increases in unearned income and widening inequality driven by real-estate speculation, the Land Transaction Permit System sought to channel transactions toward genuine end-users. Advocates of economic freedom challenged the system's constitutionality.

Addressing the limits of state power, the Court invoked the prohibition of overreach: [4]

> "The principle of prohibition of overreach sets the limits of state action. It requires a legitimate purpose, appropriate means, minimization of harm, and a balance of legal interests (the public interest protected must outweigh the private interest restricted, such that the burden is reasonably acceptable). A failure on any of these grounds renders the measure unconstitutional".

Applying this standard, the Court held that the permit system was a suitable legislative response to curb speculative transactions and soaring land prices and therefore did not violate proportionality (the prohibition of overreach).

A clearer conceptual definition of four sub-criteria followed in the National Tax Basic Act case. The provision at issue prioritized the State's tax claims over mortgages established within one year after the tax-payment deadline, prompting a property-rights challenge. While upholding the law, the Court set out a structured four-step test for the prohibition of excessive legislation: [5]

> "The prohibition of excess sets the fundamental limits the State must observe when restricting fundamental rights through legislation.

[4] Constitutional Court, 22 Dec. 1989, 88헌가13.

[5] Constitutional Court, 3 Sept. 1990, 89헌가95.

– Legitimate purpose: the objective must be compatible with the Constitution and legal order.

– Appropriate means: the means must effectively advance that purpose.

– Minimization of harm (necessity): even if appropriate, the legislature must choose a less restrictive form or method so that the restriction is limited to the minimum necessary.

– Balancing of legal interests (strict proportionality): the public interest protected by the legislation must outweigh the private interest infringed.

Only when these requirements are satisfied can legislative action be deemed legitimate, thereby protecting the people's rights. This requirement—rooted in the duty of tolerance—holds an unwavering position today as a firm principle derived from the rule of law. Article 37(2) of the Constitution reflects this as well".

In its early jurisprudence, the Court often assessed the four elements comprehensively rather than step-by-step. Over time, however, it moved toward a sequential analysis, examining each sub-criterion in turn. The following sections review some decisions under each element of the four-stage test.

1) Legitimacy of Purpose

The legitimacy of purpose asks whether a law that restricts fundamental rights pursues an objective recognized as legitimate within the constitutional and legal order. The Korean Constitution identifies national security, public welfare, and the maintenance of public order as general objectives that can justify rights restrictions (Const. Art. 37(2)). Because these categories are broad, it is uncommon for a statute to fail at this first step.

Crime against Chastity under the Former Criminal Act

A rare exceptions is the former Criminal Act provision punishing "sexual intercourse obtained by deceiving a woman under the pretense of marriage or by other deceptive means," classified under "crimes against chastity." The Court held the provision unconstitutional for lack of a legitimate aim: [6]

"For a woman to decide for herself whether to have sexual relations with a man and then demand his punishment on the ground that her decision was mistaken is to deny her own right to sexual self-determination. Furthermore, 'the offense of adultery under false pretenses' stigmatizes all women who have sexual relations with multiple men as 'habitual fornicators' and excludes them from legal protection. By limiting protection to 'non-habitual fornicators,' the law effectively imposes on women a patriarchal and moralistic sexual ideology grounded in male-superior notions of chastity".

[6] Constitutional Court, 26 Nov. 2009, 2008헌바58.

In short, the statute's purpose—preserving women's "chastity" or "purity"—could not be accepted as a constitutionally legitimate objective in a modern liberal order committed to gender equality. The provision therefore failed at the legitimacy-of-purpose stage of proportionality review.

2) Appropriateness of the Means (Suitability)

The appropriateness of the means requires that a law restricting fundamental rights employ measures that are effective and suitable to achieve its stated purpose. Although this element can be analyzed on its own, the Court often reviews it together with other requirements.

Driving-school sanctions under the former Road Traffic Act

The former Act authorized revocation or up to one year's suspension of a driving school's registration if the "rate of traffic accidents among graduates" exceeded a threshold set by Presidential Decree. The Constitutional Court held that suspending or revoking a school's registration merely because graduates caused accidents—without any showing of fault by the school—was not an appropriate means of ensuring road safety. [7]

> "Traffic accidents are inherently accidental and have diverse causes. While some may reflect poor driving skills, others—such as drowsy or drunk driving—are not directly related to driving skills. The provision at issue automatically imposes legal responsibility on the academy for accidents caused by its trainees, regardless of any cause attributable to the academy, thereby exceeding the scope of self-responsibility the academy should bear. … This provision is inappropriate as a means to achieve its legislative purpose and unnecessarily restricts the freedom of business and occupation of driving academies".

3) Minimality of Infringement (Necessity)

In the Korean Court's four-step review, minimality of infringement is often the pivotal criterion. In practice, analysis here frequently overlaps with the subsequent balancing of legal interests. Minimality can be broken down into sub-questions, including: (i) whether less restrictive means are available to achieve the same aim; (ii) whether the scope of application is unnecessarily broad; and (iii) whether transitional or mitigating measures exist to soften the impact. Below, I address the first two.

1) Less Restrictive Means

The minimality requirement condemns measures that burden rights more than necessary when equally effective, less restrictive alternatives exist.

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[7] Constitutional Court, 21 July 2005, 2004헌가30.

Leaflet distribution to North Korea

In response to leaflet campaigns conducted by North Korean defectors and anti-North groups—efforts that drew threats and gunfire from the North—the National Assembly criminalized the distribution of leaflets across the border. The Constitutional Court held that criminal penalties were excessive because ordinary police-administration measures could address the risks, thereby violating the principle of minimal infringement. [8]

> "Measures based on the Police Officers' Performance of Duties Act can constitute less intrusive means of achieving the legislative purpose of the challenged provision, as compared with its blanket prohibition and punishment. … The State's power to punish should be limited to the minimum necessary and only where there is a clear risk to an important legal interest. … Extending criminal punishment—even to simple attempts—so that punishment is imposed where no actual harm or danger has occurred is excessive".

2) Overbreadth of Scope

Minimality also asks whether the reach of a restriction is unnecessarily wide relative to its aim.

Uniform reduction of civil-service retirement benefits

Under the former Civil Servants Pension Act, retirement allowances were reduced for any official who, while in office, received a sentence of imprisonment or heavier punishment. The Court found the scheme excessively intrusive because it applied uniformly, regardless of the crime's type, nature, or culpability. As the Court's reasoning shows, it considered minimality and balancing together: [9]

> "If the law requires that public officials—who would already be removed from office simply because they received a sentence of imprisonment or heavier—also have their retirement benefits, the foundation of their livelihood, reduced, then the law undeniably overemphasizes the public interest at the expense of the private interests harmed. … In particular, the law here uniformly stipulates grounds for reducing retirement benefits, regardless of whether the offense was anti-state or job-related, intentional or negligent, or unscrupulous. Thus, while the provision contributes only minimally to the public interest of encouraging diligent service, the harm to private interests may be significant".

Balancing of Legal Interests (Proportionality in the Strict Sense)

The final stage asks whether the benefits of the rights restriction outweigh the

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[8] Constitutional Court, 26 Sept. 2023, 2020헌마1724.

[9] Constitutional Court, 29 Mar. 2007, 2005헌바33.

harms imposed. Although often described as the core of proportionality, this weighing is not a strict mathematical exercise. Moreover, as noted, the Court frequently evaluates minimality and balancing together.

Revisiting the leaflet-distribution case

Having already found criminalization to violate minimality, the Court further determined that the harm to freedom of expression outweighed any speculative gains in security or inter-Korean relations: [10]

> "It is difficult to conclude that banning leaflet distribution will significantly reduce North Korea's hostile actions and ensure the safety of residents in border areas, or that it will cultivate an atmosphere conducive to peaceful reunification and thereby advance the nation's mission. … By contrast, the restriction on freedom of expression imposed by this provision is very serious. At the individual level, freedom of expression is a means for the free manifestation of personality and for rational, constructive opinion-formation and the pursuit of truth. At the national and societal level, it is a fundamental right essential to the existence and development of a democratic state and society".

B. Lenient Principle of the Prohibition of Overreach

The classic four-step proportionality test—aim, suitability, minimality (necessity), and strict balancing—strongly protects fundamental rights and tightly limits state intervention. The Constitutional Court, however, has recognized contexts in which full, strict scrutiny is not required. While retaining the prohibition-of-overreach framework, the Court applies a lenient review in domains where individual-rights protection is less crucial and the legislature's policy-making role warrants respect. In particular, when testing minimality, the Court sometimes asks only whether the measure lies within the bounds of legislative discretion, rather than whether less restrictive alternatives exist. This approach frequently yields deference to state regulation and is common in fields where individual rights are largely shaped by statute.

Commercial advertising (medical advertising)

A leading example is the Court's approach to commercial speech, especially medical advertising. The Court upheld a former provision of the Medical Service Act that criminalized advertisements "likely to mislead consumers, such as guaranteeing therapeutic efficacy," holding the restriction constitutional: [11]

> "Although medical advertising is commercial speech and thus falls within the

[10] Constitutional Court, 26 Sept. 2023, 2020헌마1724.

[11] Constitutional Court, 27 Oct. 2005, 2003헌가3.

protection of freedom of expression, it differs from political and civic expression of ideas and knowledge. Moreover, freedom to pursue an occupation is less central to personal development and individuality than freedom to choose one's occupation. Accordingly, when assessing whether the provision violates the prohibition of overreach, it is appropriate to relax the minimal-infringement inquiry to whether the restriction is 'within the scope necessary to achieve the legislative purpose,' rather than demanding proof that no less restrictive alternative could achieve the goal or that the restriction is the absolute minimum necessary".

Insult offense under the Criminal Act (general expression)

This lenient approach has also appeared in the regulation of expression more generally. The Court rejected a constitutional challenge to the insult provision of the Criminal Act, emphasizing legislative discretion in setting penal responses: [12]

"When a value judgment that denigrates a person's character is publicly expressed, that person's social value is impaired, and with it the person's capacity to live and develop as a member of society. Given that insults can now spread easily through modern media and information-communications technology, the potential harm is greater than in the past and recovery more difficult. Choosing criminal punishment to impose strict accountability for such acts—rather than lesser sanctions such as fines—is not plainly arbitrary and cannot be deemed outside the scope of legislative discretion over the state's power to punish".

Procedural shaping of the right to trial

As mentioned earlier, this lenient approach is widely used in the area of fundamental rights that depend on the right to legislate, a prime example of which is the right to a trial. It upheld a former Criminal Procedure Act rule requiring dismissal of an appeal if written grounds were not filed within a set period after notice of receipt of the trial record, holding that it did not infringe the constitutional right to a trial: [13]

"To guarantee the right to a trial 'by law' under Article 27(1) of the Constitution, specific formulation by the legislature is inevitable, and broad legislative discretion is recognized. Even so, when enacting such legislation, the prohibition of overreach under Article 37(2)—which sets the basic limits on legislative action that restricts fundamental rights—must be observed, albeit in a lenient sense".

Electoral sanctions (ban on candidacy)

The lenient approach is also applied to the review of fundamental rights in the political sphere. On the issue of electoral regulation, the Court upheld a five-year

[12] Constitutional Court, 30 June 2011, 2009헌바199.

[13] Constitutional Court, 25 Nov. 2004, 2003헌마439.

ban on candidacy for persons fined 1 million KRW or more for election offenses under the former Public Official Election Act, giving broad leeway to the legislature at the minimal-infringement stage: [14]

> "When enacting a law that restricts the right to run for office for a certain period following conviction for election crimes, the types of punishments covered and the length of the restriction are crucial policy choices. These are matters for the legislature, which must weigh many factors—national history, political culture, the electoral environment, and the level of electoral culture. … To reform electoral practices marked by overheating, corruption, and illegality and to establish fair elections, stronger sanctions against election fraud may be necessary. … It is difficult to conclude that the means adopted by the legislature as the standard for limiting the right to be elected are excessive or exceed the scope of legislative discretion; the provision therefore does not violate the principle of minimal infringement".

C. Principle of Practical Concordance

The Constitutional Court has refined proportionality by developing a method for conflicts of fundamental rights within the four-step review. Where two rights collide, the Court first asks whether one right enjoys priority. If not, it examines whether the legislation optimizes both rights—preserving their essential content to the greatest extent possible so as to maintain constitutional unity. Korean practice refers to this as the principle of practical harmony, closely aligned with the German doctrine of practical concordance (*praktische Konkordanz*). It can be viewed as a sophisticated extension of proportionality because it operationalizes a multi-faceted, fine-grained balancing of legal interests.

Press corrections and freedom of the press

The Court applied this approach to the statutory right to request a correction (or rebuttal) in periodicals when it was challenged as infringing freedom of the press: [15]

> "In cases where two fundamental rights conflict, a harmonious solution must be sought so that both rights can function and be effective to the fullest extent possible, thereby maintaining the unity of the Constitution. Ultimately, the question is whether the purpose of the correction-request system is justified under the prohibition of overreach, and whether the means chosen and the degree of restriction on freedom of the press maintain an appropriate proportionality in relation to personal rights".

The Court then upheld the correction/rebuttal regime, detailing safeguards designed to avoid impairing the essence of press freedom:

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[14] Constitutional Court, 17 Jan. 2008, 2004헌마41.

[15] Constitutional Court, 16 Sept. 1991, 89헌마165.

> "First, … by limiting the subject of rebuttal to statements of fact, it preserves freedom of the press regarding value judgments and opinions.
>
> Second, … it narrows the scope for exercising the right by allowing refusal of publication where the petitioner lacks a legitimate interest, where the requested content is clearly contrary to fact, or where the purpose is mere commercial advertising.
>
> Third, … it limits the time to exercise the right—14 days for daily newspapers or news agencies and one month for other periodicals—thereby preventing the press from remaining in prolonged uncertainty.
>
> Fourth, … the number of letters of correction article cannot exceed the number of letters of the contested original article.
>
> Fifth, … by requiring arbitration before the Press Arbitration Commission, it ensures an opportunity for autonomous resolution between the parties.
>
> In addition, … the correction is issued in the name of the petitioner, not the press organization, so as not to directly damage the press's reputation and credibility".

In conclusion the Court ruled that "although the right to request a correction imposes some restriction on freedom of the press, by minimizing the scope of counter-arguments it seeks to balance the legal interests on both sides".

Further applications [16]

- Non-smoking designations: the right to be free from smoking vs. the right to smoke. [17]
- Union shop agreements: freedom of association/union organization vs. workers' freedom not to associate. [18]
- Ban on disclosing private conversations: privacy of communications vs. freedom of expression. [19]
- Mandatory university councils at private universities: participatory rights of university members vs. freedom of private-school management. [20]

D. Principle of Prohibition of Arbitrariness (Equality)

This equality-guaranteeing principle can be viewed as a variation of proportionality.

The Korean Constitution secures equality as a fundamental right: "All citizens are equal before the law. No one shall be discriminated against in any area of

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[16] Kang Ilshin, "Principle of Practical Concordance as a Judicial Review Criteria", in *Korean Lawyers Association journal*, 68(5), 2019, 42-68.

[17] Constitutional Court, 26 Aug. 2004, 2003헌마457.

[18] Constitutional Court, 24 Nov. 2005, 2002헌바95.

[19] Constitutional Court, 30 Aug. 2011, 2009헌바42.

[20] Constitutional Court, 28 Nov. 2013, 2007헌마1189.

political, economic, social, or cultural life on the basis of sex, religion, or social status" (Const. Art. 11(1)). It also embeds equality commitments across specific domains: education ("All citizens shall have the right to equal education according to their abilities," Const. Art. 31(1)); labor ("Women shall enjoy special protection in their work, and shall not be subject to unfair discrimination in employment, wages, or working conditions," Const. Art. 32(4)); and family ("Marriage and family life shall be entered into and maintained on the basis of individual dignity and equality of the sexes, and the State shall guarantee this," Const. Art. 36(1)).

Building on the classical maxim—treat equals equally and unequals differently—the Constitutional Court has developed a principle of prohibition of arbitrariness to structure equality review. The Court applies two levels of scrutiny: a stricter standard where the Constitution expressly protects the equality interest or where discrimination significantly restricts fundamental rights, and a more lenient standard in areas of broad legislative discretion. In effect, the stricter standard resembles the full, four-stage prohibition-of-overreach analysis; the more lenient standard parallels the lenient prohibition-of-overreach.

Veterans' bonus points in civil-service exams (struck down)

The first prominent application of this refined framework concerned additional points for male military-service veterans in civil-service examinations. Provisions of the Act on Support for Veterans granted male applicants an extra 5% or 3% of the maximum score in each subject. The Court held that this scheme violated equality, the right to hold public office, and occupational freedom. It announced that strict review would apply in equality cases of this type: [21]

> "The bonus-point system must be subject to strict review criteria. Strict review requires not only assessing whether there is reasonable justification under the principle prohibiting arbitrariness, but also applying the principle of proportionality—that is, examining whether a strict proportional relationship exists between the purpose and means of the discriminatory measure".

Applying that standard, the Court analyzed the legitimacy of purpose, the appropriateness of the differential treatment, and the proportionality of the discrimination, and concluded that the bonus-point system unreasonably discriminated against women, thus violating equality.

Tie-break preference for persons of national merit (upheld)

By contrast, the Court applied strict proportionality yet upheld provisions of the Act on the Preferential Treatment and Support of Persons with Meritorious Service to the Nation, etc., which give priority to persons of national merit and their

[21] Constitutional Court, 23 Dec. 1999, 98헌마363.

surviving family members when applicants tie in national and public-school recruitment exams. After reviewing legitimate purpose, suitability, the necessity of differential treatment, and balancing, the Court found the scheme constitutional: [22]

> "The purpose of the tie-breaking clause in this case is … to foster patriotism and contribute to the development of a democratic society. … Such a legislative purpose is justified as reflecting the intent of Article 32(6) of the Constitution or as promoting the public welfare in Article 37(2). … The clause supports persons of national merit and their bereaved families in securing public office and is thus appropriate as a policy tool. … Where candidates tie and one is eligible for employment protection under the merit system, giving priority to the tie constitutes a form of discrimination that least infringes the fundamental rights of general applicants, viewed in terms of discriminatory effect. … The public interest pursued—compensation for services rendered and special sacrifices made for the nation and its people—accords with a duty to compensate and outweighs the petitioner's private interest, namely the relative disadvantage they may suffer in recruitment".

Strict equality review under the prohibition of arbitrariness closely resembles the four-stage prohibition of overreach used for civil-rights protection. One difference, however, concerns the third step: both frameworks enforce proportionality, but they focus on different mechanisms of harm—classification-based harm in equality, and measure-based harm in overreach.

E. Principle of Prohibition of Underreach

The Constitutional Court has developed the prohibition of underreach as the counterpart to the prohibition of overreach. Whereas overreach limits excessive state interference with rights, underreach sets minimum standards of protection that the State must affirmatively provide.

The principle grows out of the State's duty of protection to secure life and safety. While liberty rights typically require restraint by the State, the duty of protection obliges proactive measures to prevent harms caused by third parties or natural hazards.

First articulation (traffic-accident prosecutions)

The Court first applied underreach in connection with the duty to protect fundamental rights in a challenge to the Act on Special Cases Concerning the Settlement of Traffic Accidents. Under that Act, if a victim's losses were covered by automobile insurance, prosecutors could not bring criminal charges even where gross negligence put life at risk or caused serious injury. A victim who suffered brain damage after a drowsy-driving crash argued that the non-prosecution decision violated the prohibition of underreach and his procedural rights.

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[22] Constitutional Court, 29 June 2006, 2005헌마44.

In clarifying the doctrine, the Court emphasized institutional limits and a minimum-measures test: [23]

> "Where the State has an obligation to take active measures to guarantee fundamental rights, the extent to which it fulfills that duty lies within the legislature's discretion, to be determined in light of the nation's political, economic, social, and cultural conditions and its finances. The Court's review is therefore limited. … From the perspective of separation of powers, the Court examines whether the State has taken at least the minimum appropriate and effective protective measures to safeguard citizens' legal interests—the so-called prohibition of underreach. … In other words, the Court may find a violation only where the State has taken no protective measures at all, or where the measures taken are clearly and utterly inadequate to protect the legal interest".

Social rights (minimum livelihood)

Korea's Constitution, unlike those of Germany or the United States, includes public-assistance guarantees. Article 34(1) provides that "All citizens shall have the right to a life worthy of human beings," and Article 34(5) mandates state protection for those unable to support themselves due to disability, illness, old age, or other reasons. In reviewing such social-rights measures, the Court applies a standard functionally akin to underreach—even where it does not use the term explicitly.

The Constitutional Court set out this view in a case on subsistence benefits brought under the Constitution's public-assistance clauses, focusing on the Ministry of Health and Welfare's "1994 Subsistence Protection Standard" in the Livelihood Protection Program. The question was whether that 1994 standard infringed the constitutional rights to pursue happiness and to a life worthy of human dignity: [24]

> "Whether the State's livelihood protection meets the objective minimum required by the Constitution ultimately turns on whether the State has taken the minimum steps necessary to guarantee citizens a 'life worthy of human beings.' … In setting the specific level of subsistence protection, the State must consider a complex array of factors. … Determining that level is ... entrusted to the broad discretion of the competent political branches—the legislature, or the executive acting under legislative delegation. Accordingly, when courts review whether the State has fulfilled its constitutional duty to guarantee a life of human dignity, a violation can be found only where the State has enacted no legislation at all on subsistence protection, or where the content of the legislation is so manifestly unreasonable that it clearly exceeds the bounds of constitutionally permissible discretion …".

As these decisions show, underreach review in social-rights cases heavily emphasizes legislative discretion, making findings of unconstitutionality comparatively rare. (Further discussion follows in the section on social rights.)

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[23] Constitutional Court, 26 Feb. 2009, 2005헌마764.

[24] Constitutional Court, 29 May 1997, 94헌마33.

Environmental rights and election-campaign noise

The Korean Constitution explicitly guarantees environmental rights: all citizens have the right to a healthy and pleasant environment, and the State and citizens shall endeavor to preserve it (Const. Art. 35(1)), with content and exercise defined by statute (Const. Art. 35(2)). In a case challenging the Public Official Election Act for failing to set maximum output or usage times for loudspeakers used during campaigns, residents alleged violations of their right to a quiet environment. The Act did limit campaign period, locations, number of loudspeakers, and methods of use, but set no decibel or hourly caps.

The Court held that this omission did not amount to a legislative failure under the duty of protection, given the existing structure of limits: [25]

> "Even if the infringement of environmental rights here is not trivial, a violation of the duty to protect amounts to a violation of fundamental rights only where the harm from election noise exceeds the tolerable burden on mental and physical well-being and, in some cases, threatens fundamental interests such as life or bodily integrity. Otherwise, Constitutional Court intervention is unwarranted. … In elections—where the democratic will of the people must be fully expressed—the inconvenience caused by loudspeaker campaigning is a matter for tolerance. Accordingly, limiting loudspeaker use to one unit (or group of units) during a limited campaign period, and restricting vehicle-mounted loudspeakers to one, constitutes the minimum necessary measure in light of the legislature's enforcement capacity".

F. Proportionality for Constitutional Guardianship

Beyond its roles in concrete norm control and constitutional complaints, the Constitutional Court of Korea also exercises jurisdiction to protect the constitutional order itself. Two representative functions are (i) the dissolution of unconstitutional political parties and (ii) impeachment trials. In party-dissolution cases, the Court applies proportionality in a manner consonant with the protection of civil liberties—essentially, the prohibition of overreach. In impeachment, the Court develops proportionality's balancing dimension to weigh the benefits of constitutional protection against the harms that removal would entail. Taken together, these practices show that proportionality can serve as a guardian-of-the-Constitution principle, including in states of emergency.

1) Dissolution of Unconstitutional Political Parties

Korea, like Germany, couples a multi-party liberal democracy with a militant/defensive democracy that bars parties threatening the democratic order. Article 8(1) of the Constitution guarantees party formation and pluralism; Article 8(2) requires democratic purposes, organization, and activities; and Article 8(4)

[25] Constitutional Court, 27 Dec. 2019, 2018헌마730.

provides that if a party's aims or activities are contrary to the basic democratic order, the Government may petition the Constitutional Court to dissolve it, and the party is dissolved by the Court's judgment.

To date, Korea has one dissolution judgment. In 2013, the Government sought the dissolution of the Unified Progressive Party, alleging a conspiracy in support of North Korea, as well as primary-election fraud and violence. In 2014, the Constitutional Court, by a vote of 8-1, ordered dissolution; the party's five proportional-representation seats were forfeited.

In this unprecedented case, the Court explicitly applied proportionality, by analogy to the prohibition of overreach. It emphasized necessity (minimal impairment) and balancing: [26]

> "Generally, the principle of proportionality is one of the standards our courts use in reviewing the constitutionality of laws or other public powers. In party-dissolution adjudication, however, the Constitutional Court's decision to dissolve a political party constitutes an exercise of state power that can infringe the party's freedom. Accordingly, the Court must carefully consider whether dissolution comports with proportionality. … Mandatory dissolution fundamentally restricts the freedom of party activity, a core political right under our Constitution. The Court must therefore adhere to proportionality as reflected in Article 37(2). … Only where there are no alternative means to remedy the party's unconstitutionality, and only where the social benefits of dissolution exceed the social costs of restricting party freedom and the corresponding constraints on democratic society, may dissolution be constitutionally justified".

2) Presidential Impeachment

Impeachment has become a central constitutional mechanism in Korea's presidential system, particularly since democratization in 1987. The Constitutional Court has consistently framed its analysis in proportionality terms: the President's legal violations must so harm the constitutional order that the benefit of removal outweighs the national costs of ousting a directly elected head of state.

- Roh Moo-hyun (retained). The National Assembly voted to impeach President Roh in 2004 (not 2002). The Court found that his interview urging support for the ruling party breached the Public Official Election Act's neutrality duty but concluded that the harms of removal far outweighed the gravity of the violation. [27]
- Park Geun-hye (removed). In 2016-2017, the Court held that persistent abuses of power by close associates, tolerated and facilitated by the President, gravely infringed the Constitution and justified removal. [28]
- Yoon Seok-yeol (removed). In 2024-2025, following an attempted declaration

[26] Constitutional Court, 19 Dec. 2014, 2013헌다1.

[27] Constitutional Court, 14 May 2004, 2004헌나1.

[28] Constitutional Court, 10 Mar. 2017, 2016헌나1.

of martial law, the National Assembly impeached President Yoon. The Court upheld removal, holding that the harms caused by illegally mobilizing the military far exceeded the harms of removal. [29]

The Yoon decision's concluding passage underscores proportionality's guardian function:

> "[The President's] violations of the Constitution and laws in this case betray the people's trust and constitute serious illegality that cannot be tolerated from the perspective of protecting the Constitution. [The President's] violations have had a significant negative impact and ripple effect on the constitutional order. Therefore, the benefit to constitutional protection from removing [the President], who derives authority from direct democratic legitimacy, is so great as to outweigh the national loss resulting from removal".

3. Proportionality and Social Rights

We have seen how the Korean Constitutional Court deploys proportionality in diverse ways. This diversity reflects the need to protect individual rights while sustaining constitutionalism. The Court is generally attentive to civil and political rights and aims to protect them faithfully. By contrast, social and economic rights receive comparatively less protection, and the Court's use of proportionality in this domain is less consistent. The following sections examine how social rights are protected in practice.

1. Social-Rights Provisions in the Korean Constitution

The Korean Constitution contains detailed social-rights provisions. From the first Constitution of 1948—influenced by the 1919 Weimar Constitution—Korea has retained and progressively strengthened these guarantees through successive amendments. Unlike post-war Germany, which replaced explicit social-rights clauses with the Social State principle in its Basic Law, Korea has preserved and elaborated textual social rights.

The Constitution's catalogue of fundamental rights begins with human dignity, then sets out liberty rights, political rights, and claim rights, followed by social rights. Articles 31-36 enumerate social rights—education, the three labor rights, social security, environmental rights, and housing—among others. Because these provisions differ in content and function, modes of constitutional protection also differ.

- Where protection requires affirmative state measures or benefits, the Court applies the prohibition of underreach to ensure a minimum core of protection.

[29] Constitutional Court, 4 Apr. 2025, 2024헌나8.

- Where the issue involves elements of individual freedom or choice, the Court tends to use the prohibition of overreach with its four-stage test (aim, suitability, necessity/minimality, strict balancing).
- Where the dispute centers on differential treatment within the same domain, the Court applies equality-based proportionality under the prohibition of arbitrariness, with stricter or more lenient review depending on the right affected and the breadth of legislative discretion.

2. Right to Education

Although the right to education is primarily a social right, it also contains elements of freedom and equality. Accordingly, the Constitutional Court applies proportionality differently depending on the aspect at issue.

(1) Free Compulsory Education and Underreach Review

Article 31(2) of Korean Constitution imposes a duty to provide elementary education and other education as prescribed by law, and Article 31(3) declares that compulsory education shall be free. The Constitution, however, does not define the precise scope of "free" compulsory education. Treating this as a matter of state support, the Constitutional Court has reviewed it under the prohibition of underreach.

The Court has held that free compulsory education must cover items essential to the substantive and equal realization of compulsory education—e.g., tuition and admission fees; human and material resources (schools, teachers); operating and maintenance costs; and necessary capital investment. It also includes costs that are indispensable to ensuring substantive equality in receiving compulsory education. However, whether to include additional items lies within the legislature's policy discretion, taking account of fiscal capacity and overall income levels. On the specific controversy over school meals, the Court concluded that they are not necessarily included within the scope of free education. [30]

(2) Learner Choice and Overreach Review

The right to education also protects students' freedom to choose how they learn; in this sense, it has a liberty component. Here the Court applies the four-stage prohibition of overreach.

With respect to the 10 p.m. cap on operating hours for private academies and tutoring centers, the Court upheld the regulation. It reasoned that the rule did not ban private instruction as such; it merely limited late-night hours to protect adolescents' health and leisure and to support school education. The restriction therefore did not exceed what was necessary, and the public interests—students'

[30] Constitutional Court, 24 Apr. 2012, 2010헌바164.

health and an improved educational environment—outweighed the private interests of the tutoring industry. The provision thus did not violate the prohibition of overreach. [31]

(3) Equal Educational Opportunity and Equality-Based Proportionality

Article 31(1) of Korean Constitution guarantees that "All citizens shall have the right to equal education according to their abilities," underscoring the equality dimension of the right to education. The Court therefore applies proportionality within equality review to strike down discriminatory barriers to opportunity.

It held unconstitutional admissions guidelines at national universities that excluded applicants who had passed the Qualification Examination (rather than graduating from a regular school), finding that such rules violated the right to equal educational opportunity. Equal access must be afforded to all with the requisite academic ability, and selection must rest on reasonable criteria. [32]

3. Right to Work

Although the right to work is primarily a social right, it also contains elements of freedom and equality. The Constitutional Court therefore applies different strands of proportionality depending on the issue.

(1) Minimum Wage: Underreach and Overreach Review

First, the right to work can be assessed under the prohibition of underreach. The Labor Standards Act provides the general statutory framework for protecting workers and, within that framework, the Minimum Wage Act merits particular attention. Korea enacted the Minimum Wage Act in 1986, and the 1987 Constitution expressly provides for a minimum-wage system (Const. Art. 32(1)). A Minimum Wage Commission within the Ministry of Employment and Labor sets the minimum wage annually. Employers who pay below the minimum wage—or who lower existing wages on the ground that a minimum wage has been set—are subject to criminal penalties.

Substantively, the minimum wage functions both as a wage floor and as an instrument of livelihood protection. To date, however, the Constitutional Court has not been asked to decide whether an annual minimum-wage notice violates the prohibition of underreach for being set too low. Instead, litigation has largely come from employers, who argue that the minimum wage infringes freedom of contract and other liberty interests. In response, the Constitutional Court has applied the four-stage prohibition of overreach and has held that the minimum wage does not unconstitutionally infringe employers' economic freedom. [33]

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[31] Constitutional Court, 29 Oct. 2009, 2008헌마454.

[32] Constitutional Court, 28 Dec. 2017, 2016헌마649.

[33] Constitutional Court, 27 Dec. 2019, 2017헌마1366.

This situation underscores the two-sided nature of the State's role and shows that a single measure may call for review on both fronts: the prohibition of underreach and the prohibition of overreach.

(2) Freedom of Association (Union Formation): Overreach Review

The right to work also has a liberty component, including the freedom to form labor unions. Where restrictions target this freedom, the Court employs the four-stage prohibition of overreach.

In a challenge to labor-union laws requiring submission of a union-establishment report to the administrative agency (with rejection if statutory requirements are unmet), workers argued that the rejection mechanism invited unjust state interference. The Court disagreed, holding that a limited review of formation requirements serves the legitimate aim of preventing abusive organizations and protecting union activity, and that the regulation satisfied legitimacy of purpose, suitability, minimal infringement, and balancing. [34]

(3) Equality for Foreign Industrial Trainees (Migrant Workers): Equality-Based Proportionality

The Ministry of Labor once excluded foreign industrial trainees from several Labor Standards Act protections. Even under a lenient arbitrariness standard—recognizing broad legislative discretion—the Court found the exclusions unconstitutional, holding that denying trainees protections afforded to general workers (e.g., retirement benefits, priority payment of wage claims, annual paid leave, and pregnancy protections) was unreasonable discrimination violating equality. [35]

4. Social Security Rights

Social security is commonly divided into social insurance and public assistance. In public assistance, the Constitutional Court reviews the State's duty to provide benefits through the lens of social rights. Where individual contributions are involved (as in social insurance), the Court often analyzes restrictions under liberty/property doctrines. In both settings, equality is a recurrent concern when alleged discrimination among beneficiaries is at issue.

(1) Public Assistance and the Prohibition of Underreach

The Court applies the prohibition of underreach to public-assistance measures. As discussed earlier, in challenges to the minimum cost of living under the National Basic Livelihood Security framework, [36] the Court held that legislation is

[34] Constitutional Court, 29 Mar. 2012, 2011헌바53.

[35] Constitutional Court, 30 Aug. 2007, 2004헌마670.

[36] Constitutional Court, 29 May 1997, 94헌마33; reaffirmed 28 Oct. 2004, 2002헌마328.

unconstitutional only where (i) no law exists at all or (ii) its content is so manifestly arbitrary or unreasonable that it clearly exceeds the Constitution's permissible discretion. This approach acknowledges a minimum state obligation while broadly respecting legislative discretion, which in practice has made judicial improvement of social-security levels cautious and limited. [37]

A similar underreach posture appears in pension litigation. In a case concerning retired civil servants with disabilities, the Court recognized the State's duty to guarantee an objective minimum standard of living but assessed that minimum by considering the full bundle of existing benefits and burden reductions. It held that excluding disability benefits from retirement allowances for injuries incurred on duty did not violate the minimum-guarantee principle, given the broader legal framework of protections. [38]

Consistent with this deferential stance, as of 2024 the Court has not declared unconstitutional any public-assistance measure on the ground that benefits were insufficient.

(2) Social Insurance and the Property-Right Lens

In social insurance (e.g., pensions, health insurance), beneficiary contributions introduce a significant property dimension. Accordingly, measures such as reductions are often reviewed similarly to property-rights restrictions.

The Court has recognized that the right to receive public-official pensions, including retirement benefits, is a property right. It struck down a provision requiring reduction of retirement benefits and allowances solely because a public official (or former official) received a sentence of imprisonment or heavier punishment for employment-related reasons, holding that such reductions impermissibly infringed property rights—retirement benefits being the foundation of livelihood. [39]

(3) Equality Among Beneficiaries

Equality is a defining feature of social-security adjudication. Even while the Court broadly respects distributional discretion, it scrutinizes unreasonable discrimination in defining beneficiary status.

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[37] By comparison, South Africa's Constitution embeds explicit social-rights standards and the Constitutional Court has elaborated a reasonableness test. In Grootboom Case, it emphasized that state measures should: facilitate realization of the right; be comprehensive, coherent, and well-organized; allocate adequate financial and human resources; balance short-, medium-, and long-term needs; be rationally planned and implemented; be transparent and effectively communicated; and prioritize the urgent needs of the most vulnerable. Government of the Republic of South Africa v. Grootboom, 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

[38] Constitutional Court, 24 Nov. 2011, 2010헌마510.

[39] Constitutional Court, 29 Mar. 2007, 2005헌바33.

In recognizing Vietnam War veterans affected by Agent Orange, the Court applied equality review (prohibition of arbitrariness) to invalidate a statutory clause that denied benefits to the bereaved family members of veterans who died without registering during their lifetimes. Compensation for victims and their families constitutes just recompense for sacrifices made in national service. Distinguishing among those who died of Agent-Orange-related illnesses based solely on whether they applied for registration before death was held unreasonable. [40]

5. Right to Housing

The right to housing is an essential social right recognized in the Korean Constitution. Article 35(3) provides that "the State shall endeavor to ensure that all citizens enjoy comfortable housing through housing development policies and other means". Unlike other social-rights clauses, which speak in the language of an individual "right," the housing clause frames a state duty to endeavor. This goes beyond the approaches in Germany or the United States, but falls short of South Africa's explicit rights formulation. [41]

Applying the prohibition of underreach, the Constitutional Court has addressed claims demanding a universal housing entitlement (e.g., "one home per household" regardless of income or assets). The Court acknowledged a minimum state obligation with respect to housing but distinguished between (i) protecting low-income households and (ii) guaranteeing housing for all citizens. It pointed to existing institutional mechanisms—such as housing benefits under the National Basic Livelihood Security Act and the supply of public rental housing under the Housing Act and the Rental Housing Act—as measures that secure a decent standard for low-income citizens. It ultimately held that the State has no constitutional duty to provide universal housing on the terms the petitioners sought. [42]

6. Environmental Rights

As noted, the Korean Constitution expressly provides environmental rights: all citizens have the right to a healthy and pleasant environment, and the State and citizens shall endeavor to preserve it (Const. Art. 35(1)), with the content and exercise determined by statute (Const. Art. 35(2)). The Constitutional Court treats environmental rights as social rights and typically applies the prohibition of underreach.

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[40] Constitutional Court, 28 June 2001, 99헌마516.

[41] Compare South African Constitution (1996) Art. 26: (1) everyone has the right of access to adequate housing; (2) the State must take reasonable measures, within available resources, to achieve progressive realization; and (3) no one may be evicted without a court order after considering all relevant circumstances, and arbitrary evictions are prohibited.

[42] Constitutional Court, 19 Nov. 2013, 2013헌마754.

A recent landmark concerned the State's climate-change obligations. In March 2020, youth petitioners and civil-society groups challenged the government's greenhouse-gas reduction targets, initially under the Framework Act on Low Carbon, Green Growth and later under the Framework Act on Carbon Neutrality (2022) and the First National Carbon Neutrality and Green Growth Basic Plan (Apr. 2023). A central question was the constitutionality of the annual reduction-target pathway within the mid- to long-term targets. In 2024, nearly four and a half years after filing, the Court issued its decision. [43]

The Constitutional Court held that the Carbon Neutrality Framework Act failed to provide quantitative standards for 2031-2049 and therefore could not effectively ensure gradual, continuous reductions toward 2050 carbon neutrality. By shifting an excessive mitigation burden to future generations and failing to adopt minimum necessary protective measures commensurate with the climate risk, the scheme violated the prohibition of underreach. [44]

The Court did not immediately strike down the law. Instead, it provisionally maintained its effect until 28 Feb. 2026 and directed the National Assembly to remedy the constitutional defects by that date. The expectation is that the unconstitutional elements will be revised to better protect the fundamental rights of future generations.

4. A Framework for an Integrative Understanding of the Principle of Proportionality

The principle of proportionality has become the most common—and most important—tool in Korean constitutional law. It also faces serious criticisms.

Proportionality is built on comparative balancing among competing values. Critics question whether there is any objective way to weigh incommensurable interests. Others argue that balancing public and private interests may weaken fundamental rights, and that proportionality gives judges wide discretion, risking judicial arbitrariness and quasi-legislative decision-making that challenges representative democracy.

These objections are familiar from Western constitutional debates, where proportionality first took shape. The Korean Constitutional Court has not addressed them directly in theory. In practice, however, it proceeds on the view that proportionality can be applied flexibly to detect both excessive interference (overreach)

[43] It was Asia's first climate-rights judgment of this kind. Comparable developments include the German Federal Constitutional Court's 2021 ruling on the Climate Protection Act (BVerfGE 157, 30) and the ECtHR Grand Chamber's 2024 judgment in Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (App. No. 53600/20).

[44] Constitutional Court, 29 Aug. 2024, 2020헌마389.

and insufficient protection (underreach), which fits the judiciary's role of checking government power.

A larger debate in Korea concerns the relationship between overreach and underreach, and thus the relative protection of civil and social rights. For civil and political rights, the Court rigorously applies the four-stage test (legitimate aim, suitability, minimality, strict balancing). For social rights, it invokes the prohibition of underreach but has not developed detailed sub-criteria. As a result, the Court appears highly responsive to civil-rights claims, but more deferential to legislative discretion in social-rights cases.

The Court also distinguishes between "norms of conduct" and "norms of control" when applying underreach. Constitutional norms defining social rights assign different roles to the branches: the political branches must strive to realize optimal conditions; the judiciary polices only the outer limits of that effort. Thus, on the minimum standard of living, the Court has stated: the legislature and executive should ensure, as far as possible, that all citizens enjoy a dignified life beyond the material minimum; courts will strike down a law only if there is no legislation at all, or if existing measures are so egregiously unreasonable that they plainly exceed constitutional discretion. [45]

Korean scholars have been critical of this approach and seek alternative frameworks for social-rights protection. [46] A prominent direction is an integrated understanding of civil and social rights, in line with international human rights law, which stresses the interrelationship, indivisibility, and interdependence of rights. [47] This approach recognizes the duties to respect, protect, and fulfill across all rights. [48]

This perspective moves beyond the old dichotomy that civil rights require only state restraint while social rights require state provision. In truth, all fundamental rights have both negative and positive dimensions. Civil rights need infrastructure for meaningful enjoyment (e.g., language education and broad internet access to make freedom of expression real in the digital age). Social rights must be delivered without stigma and with attention to vulnerable groups (e.g., at the compulsory-education level, universal free school meals avoid stratifying students by income). [49]

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[45] Constitutional Court, 29 May 1997, 94헌마33.

[46] For a detailed discussion, see Kyu Hwan Choe, *Social Rights Jurisprudence*, PhD diss., Korea University, Seoul, 2014.

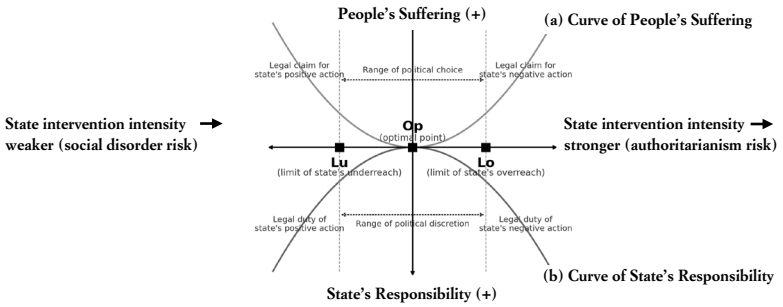
[47] Craig Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights", in *Osgoode Hall L.J.*, 27 (4), 1989, 769-878.

[48] This was proposed by Asbjørn Eide, who served as a special rapporteur on the UN subcommittee in 1987, reflected in the 1997 Maastricht Guidelines (Art. 6), and codified in South Africa's Constitution (1996) Art. 7(2). It builds on Henry Shue's typology of state duties—avoid depriving, protect, aid (Henry Shue, *Basic Rights*, 2nd ed., Princeton UP, 1996, 52).

[49] In this respect, I am critical of the Court's refusal to include school meals within the scope of free compulsory education (see Constitutional Court, 24 Apr. 2012, 2010헌바164).

The diagram (below) sketches, in a single frame, the relationship between people's basic needs and the State's responsibilities—across all rights (liberty and social rights alike). It depicts the total demand for protection on the people's side and the total load of action on the State's side, rather than any single, itemized right or duty.

Figure 2. – **Cross-Axis Diagram: State Intervention, People's Suffering, and Responsibility**



Reading the chart

As the people's representative, the State must pursue conditions for optimal coexistence. The optimal point (Op) marks the common good. The State discharges its mandate along two directions:

- Positive (active) action: building and operating systems that prevent harm and enable cooperative life.
- Negative (restraining) action: avoiding excess that would itself injure the community.

Too much intervention raises the risk of authoritarianism; too little produces disorder. Either way, people suffer.

The chart treats suffering from over-intervention and suffering from underprotection as normatively symmetric (the two curves are mirror images). That symmetry signals that liberty-rights infringements and social-rights failures deserve equal constitutional concern. In many liberal states, including Korea, policy has tended to weight harms from over-intervention more heavily. If so, the diagram suggests that Korea's rights-protection architecture should be adjusted toward a more balanced system of human dignity that harmonizes freedom rights and social rights.

Where does politics end and law begin?

How far the State should go—either actively or by self-restraint—is a difficult judgment. In representative democracy, elected government has delegated

authority to choose among reasonable options; this is the domain of political discretion.

- Political accountability zone (Lu-Lo). Within this band, choices are primarily for political judgment. If citizens conclude the government is not carrying out its mandate adequately, they may impose political responsibility—ordinarily at the next election (or via recall where applicable).
- Legal accountability zone (beyond Lu and Lo). When the State abuses power or fails so badly that it exceeds the bounds of discretion, citizens may demand legal responsibility. That can mean complaints, prosecutions, discipline, impeachment, or judicial review of unlawful measures—pre-eminently constitutional adjudication.

Bidirectional control by proportionality

- For active State measures, courts apply the prohibition of overreach.
- For State inaction or insufficient protection, courts apply the prohibition of underreach.

Judicial review polices the limits; it does not select the "best" policy inside the political-discretion band. In the diagram, Lu marks the minimum line the State must not fall below (limit against underreach), and Lo marks the maximum line the State must not cross (limit against overreach).

This same structure applies when the Constitutional Court protects the constitutional order itself—e.g., party dissolution and impeachment. The Court asks whether less drastic tools exist and whether the net effect of the remedy strengthens the Constitution, again enforcing underreach and overreach limits rather than optimizing politics.

5. The Principle of Proportionality in States of Emergency

This final section considers how the proportionality principle operates in emergencies under Korean constitutional law.

In an emergency, the State's duty is at its highest. Emergencies are political, economic, or social crises that ordinary governance cannot easily manage. Swift and active state action may be essential, but there is also a strong need to prevent abuses of power. For that reason, emergencies invite strict proportionality review from both directions: the State's positive action must not be excessive (overreach), and its failure to act must not fall below the minimum required (underreach).

Constitutionally, emergency responses can be grouped into three levels:

1. Ordinary governance using existing legislation and administration.

2. Constitutional emergency powers, where the executive may issue orders with the force of law under special constitutional provisions (a form of "constitutional dictatorship").
3. Extra-constitutional rule, where the government acts beyond the Constitution (an "extra-constitutional dictatorship").

The second and third categories concern the invocation of emergency powers. Some systems have treated these as "political questions" and excluded judicial review. In Korea's pre-1987 authoritarian period, martial law was used to extend or entrench power and was often insulated from courts under the political-question doctrine. Since democratization in 1987, however, courts have recognized that even martial law is subject to judicial limits on abuse. In the recent Yoon Seok-yeol matter, the Constitutional Court held that the President's martial-law declaration violated the Constitution and therefore supported his impeachment.

In that impeachment case, proportionality was the decisive analytic tool. The Constitutional Court applied it twice: (1) to assess the validity of declaring martial law, and (2) to assess the necessity of removal from office. The earlier section addressed (2). Here, the focus is on (1)—proportionality review of martial law as the emergency measure itself.

Martial law is a constitutionally recognized emergency power—essentially a form of constitutional dictatorship based on military mobilization. The Korean Constitution provides:

> "When it is required to cope with a military necessity or to maintain public safety and order by mobilization of the armed forces in time of war, armed conflict, or similar national emergency, the President may proclaim martial law under the conditions prescribed by Act" (Const. Art. 77(1)).

Thus, to proclaim martial law, there must be a war, armed conflict, or comparable national emergency, and a need to mobilize the military. On December 3, 2024, when President Yoon proclaimed martial law, the evening was peaceful. What existed was sharp political confrontation between the Government and an opposition-controlled National Assembly.

President Yoon labeled this political conflict a national emergency. He advanced three reasons:

1. the Assembly had paralyzed state affairs by abusing impeachment to suspend high officials of the Government;
2. it had attacked the Government and enacted harmful laws that undermined the national interest; and
3. it had cut the Government's budget proposal so deeply that ordinary administration could not function.

He further linked the opposition's actions to a peninsula security crisis and branded the opposition as pro-North.

He then declared: [50]

> "Dear fellow citizens, I am declaring a state of emergency martial law to protect the free Republic of Korea from the threats of the North Korean communist forces, to eradicate the shameless pro-North anti-state forces that plunder the freedom and happiness of our people, and to safeguard the free constitutional order".

The measures that followed showed an extra-constitutional character. The proclamation suspended even the National Assembly's activities. Troops and police were sent into the Assembly, activities of political parties and associations were banned, arrests of opposition leaders and former justices were attempted, and the National Election Commission was seized.

Given these steps, proportionality was essential to the constitutional assessment. As noted, the Constitutional Court made proportionality the centerpiece of its legal analysis of the martial-law proclamation in Yoon's impeachment case. President Yoon also invoked proportionality to defend his actions.

In my reading, both sides relied on the two-sided structure of proportionality: the prohibition of underreach and the prohibition of overreach.

The President's defense

1. Underreach (duty to protect)

The President argued that the Assembly had become a "den of criminals, was practicing legislative despotism, and sought to overthrow liberal democracy, thereby creating a national crisis that endangered the people's freedom and safety". On this view, failing to proclaim martial law would itself have violated the State's duty to protect; martial law was a necessary protective measure. [51]

2. Overreach (least-restrictive means/harm)

He further contended that his martial law was merely cautionary—a "warning" or "appeal-type" declaration aimed not at military seizure but at alerting the public to the opposition's alleged anti-state conduct. Deploying troops at the Assembly, he claimed, was to maintain order in anticipation of crowds, not to paralyze the legislature. He emphasized that he avoided casualties and exercised power in a way that did not exceed the public benefit sought. [52]

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[50] The Korea Herald, *Full text of South Korean President Yoon Suk Yeol's emergency martial law declaration*, Dec. 3, 2024, https://www.koreaherald.com/article/10012293, accessed 14 Oct. 2025.

[51] See the Korea Herald text cited above.

[52] The Straits Times, *Full text of South Korean President Yoon Suk Yeol's address to the nation on Dec 12*, https://www.straitstimes.com/asia/east-asia/full-text-of-south-korean-president-yoon-suk-yeols-address-to-the-nation-on-dec-12, accessed 17 Oct. 2025.

The Constitutional Court's response

The Court rejected both strands. [53]

1. No underreach trigger

The Court accepted that the President's subjective view of opposition overreach could be noted, but found the objective situation far from a national emergency requiring martial law. The Government could veto aggressive legislation; impeachment filings were being reviewed by the Constitutional Court; the 2025 budget cut of 4.1 trillion KRW was not extraordinary when compared with 2023 (4.7 trillion) and 2022 (13.8 trillion); and the Government could still submit supplementary budgets. In short, constitutional self-correction was functioning. The State's duty to protect the people's life and safety did not require martial law.

2. Clear overreach

The Court held that the President's measures exceeded constitutional limits. Troops invaded the Assembly; arbitrary arrests of politicians, judges, and journalists were attempted; and even the election authority was targeted. These actions surpassed the boundaries set by the Constitution and the Martial Law Act and amounted to grave abuse of power. The Court noted less intrusive, constitutional alternatives: for example, using the referendum power where appropriate, or seeking party dissolution under Article 8(4) if the opposition truly threatened the democratic order. Compared with these options, martial law was not necessary and grossly disproportionate: the benefits were speculative, while the harm—to constitutional democracy—was severe. The fact that the episode ended within two hours without casualties was due to public resistance and the military's reluctance; it does not credit the President with a lawful or restrained use of emergency powers.

Emergency review thus proceeds on both axes. Courts ask whether the State faced a situation that demanded protection (underreach), and, if so, whether the means chosen were strictly necessary and proportionate (overreach). In the Yoon case, the answer was no on both counts: the duty to protect did not require martial law, and the measures taken were excessive.

6. Conclusion

This chapter has traced how the principle of proportionality has developed in Korean constitutional adjudication and how central it has become to Korean constitutionalism.

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[53] Constitutional Court, 4 Apr. 2025, 2024헌나8.

In both Korea and Germany, the roots of proportionality lie in the *Rechtsstaat*—the rule-of-law state. As David Beatty argues, proportionality is indeed the ultimate rule of law. His account—linking proportionality to the modern legal ideals of liberty, equality, and fraternity—highlights the principle's integrative character. [54]

If the mission of law is to control power, proportionality fits that mission well. It sets limits on both the positive and negative exercises of state power. When people are harmed by social or natural forces, proportionality can require the State to act; when state action itself risks harming people, proportionality requires restraint.

At bottom, proportionality compares the harms and benefits associated with state action or inaction. This immediately raises hard questions: What are the ultimate standards for weighing harms and benefits? Can we make commensurable values that are very different in kind? These questions cannot be resolved scientifically or reduced to objective numbers. Still, constitutionalism insists that they be addressed constitutionally.

Any assessment of harms and benefits under proportionality should follow the constitutional weight of the interests at stake. The principle should not be used to magnify self-regarding preferences or to protect surplus advantages of entrenched groups. What deserves first attention are the urgent hardships of the vulnerable and the risks of assaults on constitutionalism.

In this sense, Judith Shklar's "liberalism of fear" [55] and her call to put cruelty first [56] are instructive. Proportionality should mark the outer limits that prevent our legal order from intensifying the fear or deepening the despair of those struggling in a harsh world. In doing so, it safeguards the basics of constitutionalism. Seen from this angle, human rights can be vindicated through proportionality as a means of reducing suffering and cruelty. [57] My wish is that Korea's experience with proportionality will stand as a concrete contribution to humanity's shared commitment.

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[54] David Beatty, *The Ultimate Rule of Law*, Oxford University Press, 2004.

[55] Judith Shkar, *Liberalism of Fear*, in Stanley Hoffmann(ed.), *Political Thought and Political Thinkers*, The University of Chicago Press, 1998, 3-20.

[56] Judith Shklar, *Ordinary Vices*, The Belknap Press of Harvard University Press, 1984.

[57] I believe that further developing Shklar's theory of rights can move us in that direction. For Shklar's account of rights, see Judith Shklar, "Rights in the Liberal Tradition", in *Political Studies*, 71(2), 2023, 279-294.

Proportionality's Potential in the Philippines [*]

Paolo Tamase [**] and Bryan Dennis Tiojanco [***]

1. Proportionality in the Philippines

In recent decades, proportionality analysis has emerged as a "general principle of law," adopted by many constitutional courts and international tribunals. [1] Philippine courts have applied the principle rudimentarily in criminal and labor law, [2] but have not adopted its structured method of constitutional rights analysis. Unlike the sequential stages of legitimacy, suitability, necessity, and *strictu sensu* review used by many courts worldwide, Philippine jurisprudence lacks a formalized proportionality test.

This judicial practice persists despite statutes from the last decade that impose proportionality as the relevant standard in two key areas: data privacy and regulatory burden. The Data Privacy Act of 2012 and later statutes such as the Community-Based Monitoring System Act of 2019, the Internet Transactions Act of 2023, and the Ease of Paying Taxes Act of 2024 all set proportionality as the standard test in privacy regulation. Meanwhile, both the Ease of Doing Business and Efficient Government Service Delivery Act of 2018 and the New Government Procurement Act of 2024 effectively set proportionality as the test of overregulation.

Why has proportionality failed to take root in the Philippines? How can we reconcile it with established Philippine approaches? We address these questions by examining the rights-based review system in the country, [3] identifying

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[*] This paper substantially draws upon Bryan Dennis Tiojanco and Ronald Ray San Juan, *Importing Proportionality through Legislation: A Philippine Experiment*, in Po Jen Yap (ed.), *Proportionality in Asia*, Cambridge University Press, 2020.

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[1] Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, Yale LJ, Vol. 124(4), 2015.

[2] See Tiojanco and San Juan (n. 1).

[3] For a sociological explanation, see *ibid.*

openings for proportionality, and explaining its failed launch and renewed promise within this mixed civil and common law legal system.

2. Rights-Based Review in the Philippines

When legislative rules clash with individual rights, Philippine courts often frame the issue as one of substantive due process. Their overarching framework for this is the 'tiers of scrutiny' analysis that evolved from Footnote Four of the 1938 U.S. Supreme Court decision *United States vs. Carolene Products*.[4] This framework features the strict scrutiny, intermediate scrutiny, and rational basis tests—or their equivalents—which assess the reasonableness of a legislative measure against the importance of the right at stake.

The rational basis test demands merely that the governmental means employed 'reasonably relates to the legislative purpose'.[5] It generally applies to economic regulation[6] and equal protection claims,[7] except when the classification is suspect or fundamental rights are involved. Because of the high level of deference given to lawmakers, this level of scrutiny often results in the law or rules being upheld.[8]

Intermediate scrutiny requires that the governmental means serve an 'important governmental objective and is substantially related to the achievement of such objective'.[9] Courts apply the test in equal protection cases involving 'quasi-suspect' classifications such as gender.[10] Of the three tiers of review, Philippine courts have applied this test the least, given its narrow scope.

The rational basis and intermediate scrutiny tests mirror the legitimacy and suitability stages of proportionality test.

Strict scrutiny, the most stringent of the three tests, requires a compelling (rather than substantial) governmental interest and the absence of any less restrictive

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[4] 304 US 144 (1938), *cited in* White Light Corp. v. City of Manila, *supra* n. 46, at 462.

[5] Central Bank (now Bangko Sentral ng Pilipinas) Employees Association v. Bangko Sentral ng Pilipinas, 487 Phil 531, 583-584 (2004) (hereinafter Bangko Sentral).

[6] White Light Corporation v. City of Manila, G.R. No. 122846, January 20, 2009 (hereinafter White Light).

[7] Cf. Association of Small Landowners in the Philippines v. Secretary of Agrarian Reform, G.R. Nos. 78742, 79310, 79744, and 79777, July 14, 1989, 175 SCRA 343.

[8] *See*, *e.g.*, Ermita-Malate Hotel & Motel Operators v City of Manila, GR No L-24693, 31 July 1967 (regulation of motels); British American Tobacco v Camacho, GR No 163583, 20 August 2008 (tax legislation).

[9] *Ibid.*

[10] White Light. Ang Ladlad LGBT Party v. COMELEC, GR No 190582, 8 April 2010 (citations omitted).

means of achieving it. [11] It applies when fundamental rights such as freedom of thought or political participation are at stake, [12] or when a classification burdens suspect classes like race or religion. [13] The Supreme Court has applied strict scrutiny in cases involving the right to travel of minors, [14] religious freedom, [15] and even a generalized right to liberty. [16]

All three tiers of review in Philippine constitutional law contain elements of a structured proportionality test, *i.e.*, legitimacy, suitability, and necessity. Strict scrutiny shares the most elements: beyond the legitimacy and suitability stages, it uses the least-restrictive means test, which resembles the necessity stage. A closer look also shows that the suitability stage, *i.e.*, the determination of rational connection between a governmental measure and its stated goal, is intrinsic to every tier of scrutiny.

Yet even strict scrutiny reaches only up to the necessity stage. Absent in any analysis, as compared to the structured proportionality test, is the proportionality *strictu sensu* stage, which balances the purpose of the law against the harm to the protected right.

The absence of proportionality *strictu sensu* does not prevent courts from balancing under the tiers of scrutiny tests. While the three-tier review is essentially a means-end test, it still weighs individual rights against governmental interests. Results differ depending on the test applied because each tier assigns a different weight to a constitutional right and the government measure. Under the rational basis test, constitutionality is presumed considering that a lower-tier right is at stake. Under strict scrutiny, which implicates fundamental rights, there is no such presumption.

The Philippine three-tier review and its equivalent in free speech cases resemble the proportionality test in two ways. First, they contain elements of the legitimacy, suitability, and necessity stages. Second, they involve 'balancing' of a constitutionally protected right against a social or state interest. (Barak posits that legitimacy, suitability, and necessity stages do not involve balancing [17] but instead are forms of means-end analysis).

The balancing in the three-tier review, however, differs from the structured proportionality test. Aside from the lack of formal stages, Philippine balancing is

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[11] White Light.

[12] *Ibid.*

[13] SPARK v. Quezon City, GR No 225442, August 8, 2017 (hereinafter SPARK).

[14] *Ibid.* The implication is that in consideration of fundamental rights, in this case the right to travel, a classification previously considered as 'not suspect' may be elevated as suspect classification.

[15] Imbong v. Ochoa, GR No 204819, 8 April 2014.

[16] White Light.

[17] Cf. Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations*, 246, 315, 2012.

open-ended. This results in judicial doctrines that seem at odds with each other despite dealing with similar state interests and governmental means. [18]

The expanded judicial power under the Philippine Constitution may partly explain this open-endedness. [19] The judicial power to determine 'grave abuse of discretion' by the government gives courts considerable discretion to take on otherwise political issues. This is counterbalanced by the constitutional requirement that '[n]o decision shall be rendered by any court without expressing therein clearly and distinctly the facts and the law on which it is based'. [20] Arguably, structured proportionality analysis better satisfies this requirement by making judicial reasoning more transparent. [21]

True to both the strict scrutiny and the balancing-of-interests test, judicial analysis stops at the least-restrictive-means test. Once another measure which attains the same result with lesser impairment of a right is found, courts hold the measure unconstitutional. This categorical approach relegates 'balancing' to an ornament in the application of a tier of scrutiny. It does not consider that while there may be less restrictive means to reach the same result, it may not be feasible if its costs are too high. Thus, balancing in the Philippines lacks the optimization character [22] of proportionality, depriving it of the pragmatism that an ideal structured proportionality test provides.

3. Openings for Proportionality and Missed Opportunities

Privacy rights analysis in the Philippines is a good entry point for proportionality *strictu sensu*. Most privacy cases subscribe to the principle that the more intrusive a government measure, the stronger the justification required. In *Ayer v Capulong*, [23] the Supreme Court acknowledged that a movie on the life of Enrile, a government official who gained prominence during Martial Law, would be a permissible intrusion into his privacy in so far as it was 'reasonably necessary to

[18] For illustrative cases, see Tiojanco and San Juan (n. 1).

[19] Const, art VIII s 1: 'The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government'.

[20] Const, Art. VIII, s 14.

[21] See Zoltán Pozsár-Szentmiklosy, *The Formal and Substantive Functions of the Principle of Proportionality*, 56 Acta Juridica Hungarica, 191-198, 2015.

[22] See Robert Alexy, *A Theory of Constitutional Rights*, OUP, 2010.

[23] GR No 82380, 29 April 1988.

keep that film a truthful historical account.' In *Morfe v Mutuc* (1968), [24] the Court upheld the mandatory filing under the *Anti-Graft and Corrupt Practices Act of 1960* of a true detailed and sworn statement of assets and liabilities, including (1) a statement of the amounts and sources of income, (2) the amounts of personal and family expenses, and (3) the amount of income taxes paid for the next preceding calendar year. The Court considered these disclosures reasonable for public officers. The 1987 Philippine Constitution has since elevated this disclosure requirement to constitutional status. [25]

Privacy rights analysis has become more pragmatic, now factoring in facts other than incommensurable values. In *Social Justice Society v Dangerous Drugs Board*, [26] the constitutionality of mandatory drug testing for candidates, students, officers, employees, and certain criminal suspects, among others, was put in issue. Applying the standard of reasonable expectation of privacy, the Supreme Court engaged in proportionality reasoning to balance the state's interest to curtail the proliferation of dangerous drugs against the rights of the citizens to privacy. The Court weighed the extent of intrusion the law would have to different classes of people against the privacy expectations of each class. While recognizing that mandatory drug testing infringes on the rights of all individuals to privacy, the Court upheld testing for students, officers, and employees, but invalidated it for candidates and criminal suspects.

Privacy rights analysis therefore provides a good starting point for integrating pragmatic balancing of competing values. The reasonable expectation of privacy test cries out for a factual resolution of the issue. As in *Social Justice Society*, courts using this test weigh privacy expectations differently for each category of persons. In other words, in privacy rights analysis, Philippine courts go beyond the necessity stage and perform *ad hoc* balancing that is sensitive to factual context, necessarily sketching what Mark Tushnet describes as the 'external limit' of a constitutional right. [27] *Social Justice Society*, however, failed to determine the level of allowable intrusion for each group subject to the mandatory drug test. This could have been the best example of proportionality reasoning if not for this shortcoming.

With modest refinements, contemporary privacy rights analysis combined with strict scrutiny could evolve into a Philippine variant of structured proportionality.

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[24] GR No L-20387, 31 January 1968.

[25] Const, Art. XI s 17 ('A public officer or employee shall, upon assumption of office and as often thereafter as may be required by law, submit a declaration under oath of his assets, liabilities, and net worth …').

[26] GR Nos 157870, 158633 & 161658, 3 November 2008.

[27] Cf. Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law*, 84-85, Elgar Advanced Introduction series, 2014.

a. Legislation via the Data Privacy Act

The *Data Privacy Act of 2012* (DPA) adopted the concept of proportionality, offering courts the opportunity to apply the structured proportionality test. The DPA is the country's first general privacy law on personal data. Likely a product of the *de jure* Brussels effect—given the country's considerable business process outsourcing industry—the DPA was modeled on the European Union's *Data Protection Directive*, as shown by their common terminology and principles.[28] In line with the law's declared policy to 'protect the fundamental right to privacy of communication',[29] the DPA rests on three general data privacy principles governing the processing of personal information: transparency, legitimate purpose, and proportionality.[30]

The DPA details what these three general principles entail. The processing of personal information must be relevant to, and must not exceed, its declared purpose.[31] The personal information may be retained only as long as necessary to fulfill the purposes for obtaining the data or to establish, exercise, or defend legal claims, or as provided by law.[32] It must be adequate but not excessive given the purposes of data collection and processing.[33] Proportionality thus sets the standard for assessing any intrusion into data privacy. By elaborating the general principles, the DPA invites courts to adopt proportionality analysis in data privacy cases. The specific requirements shift the focus from normative analysis to factual assessment of intrusiveness into data privacy. Over time, courts could extend this form of analysis to the other facets of privacy.

More than a decade after the DPA's enactment, the Supreme Court has yet to apply structured proportionality in data privacy litigation. In *Azarraga v Jalbuna*,[34] the Court assessed whether a lawyer breached professional ethics by violating the DPA when he secured a copy of the complainant's marriage contract from the Philippine Statistics Authority. Supposedly, the lawyer obtained the document to show that the complainant committed bigamy—an immoral act that may indicate lack of fitness to be appointed as a legal guardian. The Court recognized proportionality as the proper standard but fell short of the meticulous reasoning typical of proportionality analysis:

> Finally, proportionality as required under paragraph (c) of Section 11 entails that the personal information sought must be *necessary for purposes for which it is*

[28] See Anu Bradford, *The Brussels Effect: How the European Union Rules the World*, OUP, 2020.

[29] DPA, s 1.

[30] DPA, s 11.

[31] DPA, s 11(c).

[32] DPA, s 11(e).

[33] DPA, s 11(d).

[34] AC No 13678, 22 February 2023.

> *to be used*. Paragraph (d) adds that it must be *adequate and not excessive in relation to the purposes* for which they are collected and processed. Paragraph (e), also contemplating proportionality, requires that the personal information must only be retained by the lawyer for as long as necessary for the fulfillment of the purposes for which the information was obtained. (Emphasis in the original).

Zoleta v Investigating Staff[35] concerned an Assistant Ombudsman who was being investigated for fixing cases. He invoked the DPA to argue that the investigator's discovery of his mobile phone number, which tied him to the case-fixing, was personal information that could not be accessed. The Court affirmed the investigator's authority to process personal information and once again recognized proportionality as the relevant standard to test its lawfulness, yet failed to apply the proportionality test:

> Personal information must be processed for specified and legitimate purposes determined and declared before, or as soon as reasonably practicable after collection. The [investigator], or any other office, body, or authority with a similar mandate, which would necessarily process personal information or data, still bears responsibility of following the rules and regulations laid out in the DPA and its [Implementing Rules and Regulations]. Personal data must be processed lawfully and fairly, with strict adherence to the principles of general data privacy: transparency, legitimacy, and proportionality. Processing of personal data must be proportionate, adequate, and not excessive to the purpose for which the data was processed'.

The Court was thus presented with two opportunities to evaluate the lawfulness of data processing by using proportionality analysis under the DPA. Instead of engaging in a structured examination of the facts surrounding the intrusion, however, it confined itself to short, one-paragraph recitals of the General Data Privacy Principles under the DPA. It was merely implied, therefore, that the use of personal information in these cases was proportional.

b. States of Emergency

Another possible opening for proportionality is in states of emergencies. The Constitution sets specific requirements for the exercise of the President's 'commander-in-chief' powers: the declaration of martial law, the suspension of *habeas corpus*, and the calling out of the armed forces to suppress lawless violence.[36] It also gives the Supreme Court the power to 'determine the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ [of *habeas corpus*] or the extension thereof.'[37] This breaks from previous

[35] GR No 258888, 8 April 2024.

[36] Const Art. VII, s 18.

[37] *Ibid.*

constitutions, which were silent on the judicial power to review these executive actions, and vests the Supreme Court with a fact-finding power usually reserved for lower courts. [38]

The Local Government Code likewise grants broad emergency powers. Local chief executives are authorized to '[c]arry out such emergency measures as may be necessary during and in the aftermath of man-made and natural disasters and calamities'. [39] Many invoked this authority during the COVID-19 pandemic to justify quarantine measures, lockdowns, and similar restrictions that would normally breach the constitutionally guaranteed freedom of movement. [40]

Both sets of emergency measures would present opportunities for courts to employ proportionality analysis, as in other jurisdictions. Neither the Constitution nor the Local Government Code sets a specific standard, but the Supreme Court has described the President's commander-in-chief powers as 'graduated' powers, [41] suggesting that lesser emergencies warrant less extraordinary intervention. This is consistent with the Constitution's drafting history, which shows that its framers contemplated a similar graduated approach: [42]

> MR REGALADO: As a matter of fact, the former President outlined the steps and we have put them here as follows: (1) When it is only imminent danger, although, of course, he did not use that term, he can already call out the Armed Forces just to prevent or suppress violence; (2) if the situation has worsened and there is a need for stronger measures, then aside from merely calling out the Armed Forces he goes into the suspension of the privilege of the writ; (3) but if both measures calling out the Armed Forces and the suspension of the privilege of the writ still prove unavailing in the face of developments and exacerbated situation, this time he goes to the ultimate which would be martial law.

Meanwhile, local emergency measures are textually premised on their being 'necessary' to meet a given calamity. As in privacy, a structured proportionality analysis would provide courts a transparent method for justifying why a higher graduated power or emergency measure is justified in light of an underlying emergency.

In either case, courts have resisted applying proportionality analysis. Judicial review of the President's exercise of commander-in-chief powers has been highly deferential. For the 'calling-out' power, the most benign option, the Court has long refused to review the factual basis and merely considers whether the President gravely abused his discretion and acted arbitrarily. [43] The Court ventures

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[38] See Const Art. VIII, s 5(2).

[39] Local Gov't Code, ss 444(b)(1)(vii), 455(b)(1)(vii) & 465(b)(1)(vii).

[40] Const Art. III, s 5 ('liberty of abode' and 'right to travel').

[41] David v Macapagal-Arroyo, GR No 171396, 3 May 2006.

[42] RCC No 042, 29 July 1986.

[43] Integrated Bar of the Philippines v Zamora, GR No 141284, 15 Aug 2000.

beyond arbitrariness when reviewing the exercise of the more serious powers—the suspension of *habeas corpus* and martial law—given the Constitution's textual commitment of fact-finding power to it, but its most recent case law still lays a deferential test: '1) actual rebellion or invasion; 2) public safety requires it; the first two requirements must concur; and 3) there is probable cause for the President to believe that there is actual rebellion or invasion'. [44] The highest of the commander-in-chief's graduated powers are thus at best assessed for suitability or necessity, but not for proportionality.

The absence of structured proportionality is even more apparent in the judicial review of local emergency measures. The Court only rules upon whether a measure was genuinely premised on a disaster or calamity. [45] It does not examine the proportionality of the response. No petition challenging the COVID-19 emergency measures of local chief executives has yet been decided by the Supreme Court.

4. Proportionality's Failed Launch

Why has proportionality failed to launch in the Philippines despite these openings and even the DPA's legislative push? Our view is that American influence pervades both adjudication and legal education to the point that the legal community finds it difficult to receive non-American transplants. [46]

The reliance on American approaches began with the U.S. Supreme Court's decision in *Kepner v U.S.*, decided when the Philippines was under American sovereignty, which held that courts interpreting the Philippine Bill of Rights must seek guidance from U.S. case law. [47] The Philippine Supreme Court quickly adopted *Kepner*, [48] ensuring the steady import of American constitutional doctrine. *Kepner* notably introduced asymmetric appeals in double jeopardy law in the Philippines, one which was unfamiliar to the country, which until then had been under a Spanish-style symmetric appeals regime. [49]

Even a century after *Kepner*, the Philippine Supreme Court continues to adopt

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[44] Lagman v Medialdea, GR No 231658, 04 July 2017.

[45] Kulayan v Tan, GR No 187298, 03 July 2012.

[46] Bryan Dennis Gabito Tiojanco, *Constitutional Rights in the Philippines: Forces of Transnational Convergence*, in Rehan Abeyratne, Ngoc Son Bui, and Mara Malagodi (eds), *Asian Comparative Constitutional Law vol.4 – Constitutional Rights*, Oxford, Hart Publishing, 2026.

[47] 195 U.S. 100, 121-125 (1904), *followed in* Serra v. Mortiga, 204 U.S. 470 (1097).

[48] Alzua v. Johnson, G.R. No. 7317, 21 Phil. 308, 31 January 1912; Smith, Bell & Co. v. Natividad, G.R. No. 15574, 40 Phil. 136, 17 September 1919 (Malcolm, J., *ponencia*).

[49] Cf. Paolo S. Tamase, *Guilty by Reasonable Doubt and Counterfactual Innocence: Asymmetric Appeals in Philippine Double Jeopardy Law*, Note, 90 Phil. L.J. 401, 2016.

American jurisprudence often without an independent justification. [50] It liberally cites U.S. case law in Bill of Rights decisions as "a rich source of persuasive jurisprudence", [51] and draws on U.S. statutes and secondary sources such as law review articles and research papers in landmark decisions. And these are crucial citations: nearly all the basic doctrines of Philippine constitutional law are American imports. As we saw, in due process and equal protection cases, the Court applies rational basis, intermediate scrutiny, or strict scrutiny review—all borrowed from U.S. jurisprudence.

Article III—the Bill of Rights—is largely drawn from the U.S. Bill of Rights, 'slightly changed in form, but not in substance', as the *Kepner* Court observed. [52] The United States extended nearly its entire suite of constitutional rights to Christian Filipinos (though not to Muslims and indigenous groups [53]), with three exceptions. It withheld the right to bear arms, the right to trial by jury, and the protection against the involuntary quartering of soldiers in peacetime. It also extended the safeguard against imprisonment for debt, a protection found in every state constitution but not in the U.S. Constitution. [54] All these transplanted freedoms are still guaranteed in the Philippine Bill of Rights.

Article III also inscribes several rights recognized under America's doctrinal, *i.e.*, judicially elaborated, Constitution. It protects the freedom of association and the privacy of communication and correspondence. It incorporates the *Miranda* rights, which requires that suspects under investigation be informed of their rights. It has codified the exclusionary rule, *viz.*, that evidence obtained in violation of certain constitutional rights (*e.g.*, against unreasonable search and seizure, *Miranda* rights) is inadmissible. It protects the freedom of movement, guarantees free access to the courts, and affirms the presumption of innocence in favor of the criminally accused.

Philippine courts construe these rights in line with American case law, which has also not adopted proportionality analysis.

Fealty to American jurisprudence is clearest in constitutional privacy. In Morfe v Mutuc, the Philippine Supreme Court adopted the U.S. approach of inferring the right to privacy, i.e., 'the constitutional right to be let alone', from several zones of privacy protected by the Bill of Rights—including the privacy of communications

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[50] *Ibid.*

[51] Social Justice Society v. Dangerous Drugs Board, G.R. No. 157870, 591 Phil. 393, 409, 3 November 2008.

[52] 195 U.S. 100, 123 (1904), *followed in* Serra v. Mortiga, 204 U.S. 470 (1097).

[53] Rubi v. Provincial Board of Mindoro, G.R. No. 14078, 7 March 1919; Owen Lynch, Colonial Legacies in a Fragile Republic: Philippine Land Law and State Formation—With an Emphasis on the Early U.S. Regime (1898-1913) 339-371 (Quezon City: University of the Philippines College of Law, 2011).

[54] Tang Cong v. Stewart, No. 4073, 14 June 1907, *quoted in* Ganaway v. Quillen, G.R. No. 18619, 42 Phil. 805, 809 n.1, 20 February 1922.

and correspondence. [55] *Twenty years later, it again turned to U.S. case law for guidance in balancing the rights to privacy and free speech, and imported, from a leading U.S. torts treatise, the doctrine that public figures have a narrower right to privacy than ordinary citizens.* [56] *In 1998, Ople v Torres affirmed privacy as a fundamental right that required the government to justify any intrusion as narrowly tailored to achieve a compelling state interest.* [57] *The Court has since continued to fertilize this transplanted doctrine with American case law. In 2014, it adopted the U.S. doctrine that the right to privacy protects both decisional privacy, i.e., the right to independently make certain important decisions, and informational privacy, i.e., the right against unreasonable surveillance and the disclosure of private information.* [58] *In 2021, it added locational or situational privacy, i.e., privacy felt in physical space, identifying it as one of "the three strands of privacy in American Jurisprudence".* [59]

All this has meant that even when Congress sets proportionality as the test, the Supreme Court still applies U.S.-style analysis. In Philippine Stock Exchange v Secretary of Finance, [60] *the Court was asked to decide whether a finance regulation requiring brokers to disclose the personal information of their clients—including taxpayer identification numbers, birthdates, and addresses—was an invalid violation of the DPA. The Court struck down the regulation as violative of the right to privacy, citing Morfe and applying the strict scrutiny test in Ople. It found that the DPA was violated without undertaking a structured proportionality analysis. Instead, it asked only whether the disclosure was 'necessary in order to carry out the functions of public authority' and thus excluded from the DPA's application. Finding that it was not so excluded, the Court stopped, declaring a violation without examining whether the information was properly processed under Section 11 of the DPA.*

The Court's reliance on American tests has wide implications. First, these doctrines are taught nationwide. Philippine legal education is highly doctrinal and relies mostly on Supreme Court cases. Philippine scholars have long bemoaned this 'bar examination-centric' legal education to no avail. [61] *When Supreme Court cases are uncritically taught—as they often are—future generations of legal professionals are likely to replicate their approach.*

Second, the design of the Philippine court system discourages lower courts from breaking with this reliance on American tests. As a mixed jurisdiction, Philippine

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[55] G.R. No. L-20387, 130 Phil. 415, 31 January 1968.

[56] Ayer Productions Pty. Ltd. v. Capulong, G.R. No. 82380, 245 Phil. 1007, 29 April 1988.

[57] G.R. No. 127685, 354 Phil. 948, 970-985, 23 July 1998.

[58] Disini v. Secretary of Justice, G.R. No. 203335, 727 Phil. 28, 132, 18 February 2014.

[59] Cadajas v. People, G.R. No. 247348, 915 Phil. 220, 227, 16 November 2021.

[60] GR No 213860, 5 July 2022.

[61] Evalyn G Urusa, *The Lawyer as Policymaking: A Challenge to Philippine Legal Education*, 63 Phil LJ 186, 186, 1988.

courts are instructed to apply statutes based on an independent construction, with the caveat that the Philippine Supreme Court's interpretations are to be read into the text. As the Court emphasizes, its doctrines 'are as much a part of the law of the land as the letters of the laws themselves'.[62] Unlike in purely common law systems where lower courts can create law and push back against erroneous doctrines of their apex court, Philippine lower courts risk administrative sanctions when they deviate from Supreme Court doctrine. Hence, even when proportionality analysis is statutorily sanctioned, lower courts will be hesitant to apply a new test that is yet to be blessed by the Supreme Court.

5. Proportionality's Renewed Promise

This failure aside, proportionality shows renewed promise in two developments: agency practice that mimics structured proportionality and diversified borrowing from other jurisdictions.

First, while the Supreme Court has not applied structured proportionality, the data privacy regulator has done so in its rulemaking, adjudication, and advisories. The National Privacy Commission (NPC) defines 'proportionality' as 'adequate, relevant, suitable, necessary, and not excessive in relation to a declared and specified purpose. Personal data shall be processed only if the purpose of the processing could not reasonably be fulfilled by other means'. This definition in Section 18(c) of the DPA's Implementing Rules and Regulations, taken with Section 18(b)'s requirement of legitimate purpose, reflects all four stages of structured proportionality, albeit in unstructured form.

The NPC has applied Section 18(b) in ways that telegraph *strictu sensu* proportionality without explicitly mentioning this stage. In *In Re: Pesopop*,[63] the NPC struck down a privacy policy granting a company the 'right to access and use' a user's 'personal contact information, including [Facebook], Instagram, Google+, etc.' as 'excessive in relation to the declared purpose of avoiding fraud and loan collection'. The NPC's adjudication and rulemaking on the DPA has mostly concerned violations by private entities. It can nevertheless influence constitutional analysis by demonstrating the method, usefulness, and transparency benefits of the structured proportionality test to the Supreme Court.

The second development is diversified borrowing. In the last decade, both Congress and the Court have looked beyond the United States in passing new legislation or introducing new frameworks in jurisprudence. Apart from the DPA, another major statute influenced by European law is the Philippine Competition Act, whose Anti-Competitive Agreements provisions were taken from

[62] Evangelista v Sistoza, GR No 143881, 9 Aug 2001.

[63] NPC SS 21-008, 26 Jun 2020.

European competition law.[64] And while the Supreme Court has yet to apply structured proportionality, it has begun to refer more explicitly to the European concept of privacy and mentions the right to be forgotten, although in passing.[65]

It remains to be seen whether these developments are green shoots or the last green grass of proportionality and other non-American frameworks in Philippine law. In the final analysis, the growth of proportionality in the Philippines relies on the Supreme Court committing to its assertion in 2004 that it has 'cut the umbilical cord' of American jurisprudence.[66] The irony is that departure from American principles may mean embracing another foreign influence. Yet transplantation is not necessarily legal colonization when justified by independent analysis and promotes transparency in judicial decision making.

[64] Andre Palacios, *Origins and Outcomes: The Philippine Competition Act of 2015*, 93 Phil LJ 344, 359, 2020.

[65] Cadajas v People, GR No 247348, 16 Nov 2021.

[66] Francisco v House of Representatives, GR No 160261, 10 Nov 2003.

Part II

Europe

The French Style of Proportionality. Between Judicial Prudence and Administrative Rationalization

Michael Koskas [*]

Introduction

The principle of proportionality gradually established itself over the course of the twentieth century as a cornerstone of contemporary public law, operating both as a mode of legal reasoning and as an expression of measured governance. Far from being merely a judicial technique, it embodies a genuine form of regulation aimed at balancing the protection of fundamental rights with the imperatives of public action. From a comparative perspective, this principle stands as a central instrument of constitutional review in Europe. Yet, its application varies according to national traditions and legal cultures, revealing distinct styles of implementation. [1]

Viewed in this broader context, proportionality appears both as a privileged tool for the protection of fundamental rights and as one of the most accomplished examples of the transnational circulation—or legal transplant—of legal categories. [2] Its plasticity makes it a particularly revealing lens through which to observe the convergence of European legal orders, and even what some, following Alec Stone Sweet, describe as global constitutionalism. [3] Others, such as Mattias Kumm, interpret it as an ethic of justification, inviting all forms of authority—

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[1] R. Alexy, *A Theory of Legal Argumentation : The Theory of Rational Discourse as Theory of Legal Justification*. Translated by Ruth Adler and Neil McCormick, 2nd ed., Clarendon Press, Oxford-New York, 2010. A. Marketou, *Local Meanings of Proportionality*, CUP, Cambridge, 2021.

[2] A. Barak, *Proportionality: Constitutional Rights and Their Limitations. Cambridge Studies in Constitutional Law*, Cambridge University Press, Cambridge, 2012. B. Schlink, *Proportionality*, in M. Rosenfeld, A. Sajó (éd.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, OUP, 2012, 7.

[3] A. Stone Sweet, J. Mathew, "Proportionality Balancing and Global Constitutionalism", in *Columbia Journal of Transnational Law*, n° 47:72, 2008, 73-164.

judicial, administrative, or political—to demonstrate the necessity and proportionality of their choices. [4]

Understood in this way, proportionality is not merely a technique of judicial review but a grammar of contemporary public reason: a demand for justification and moderation that seems to embody the ideal of a government ruled by law. [5] Yet, beneath this apparent convergence, the uses of proportionality remain deeply shaped by national traditions. In France, the principle was neither invented nor spontaneously embraced. Its diffusion was slow, its reception cautious, and its present-day application remains highly circumscribed. [6] It is within this gap—between the universalization of the principle and the persistence of legal-cultural resistances—that the French style of proportionality emerges, characterized by a distinctive blend of judicial restraint and a growing concern for administrative rationalization.

Although the principle of proportionality did not originate within French law, the administrative judge gradually developed a practice of in-depth review of administrative measures, particularly when such measures restrict public freedoms. This evolution was a slow one, shaped by a culture of judicial restraint inherited from the French Revolution, itself marked by a strict separation between administrative and judicial functions. It was only in a landmark decision of 1933 that the supreme administrative court, the Conseil d'État, accepted to review the proportionality of police measures. [7] In doing so, it verified that the administrative authority had duly reconciled the exercise of its powers with the freedom of assembly.

Despite significant progress in the judicial review of administrative action, the French administrative judge remains broadly characterized by a posture of restraint. The term proportionality is not systematically employed, or it appears only contingently—sometimes merely as an adjective rather than as a fully articulated principle. Scholarly commentary has long emphasized that not all decisions applying tests of appropriateness, necessity, and proportionality are explicitly framed under the label of "proportionality." Moreover, the proportionality review itself tends to be moderate: judges often accept that the administration retains a margin of discretion, particularly when public interest, public order, or political and technical imperatives require a choice of means—thus limiting the

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[4] M. Kumm, *Democracy is Not Enough: Rights, Proportionality and the Point of Judicial Review (N.Y.U. Pub. L. & Legal Theory, Working Paper No. 118, 2009)*, available at http://www.law.harvard.edu/faculty/faculty-workshops/kumm.paper.i.pdf, 2009.

[5] G. Letsas, *Proportionality*, in R. Bellamy, J. King (ed.), *The Cambridge Handbook of Constitutional Theory*, Cambridge University Press, Cambridge, 2025, 378-396.

[6] C. Roulhac, "La mutation du contrôle des mesures de police administrative. Retour sur l'appropriation du «triple test de proportionnalité» par le juge administrative", in *Revue française de droit administratif*, 2018, p. 343.

[7] Conseil d'Etat, decision, 19 may 1933, *Benjamin* (n° 17413).

intensity of judicial scrutiny. The judge does not intervene to question the opportunity or policy wisdom of an administrative decision, except in exceptional circumstances. Finally, doctrine observes that beyond the sphere of fundamental freedoms, proportionality is far less systematically or explicitly invoked—in areas such as regulatory policy, economic intervention, or public health—revealing that its application depends heavily on the individual judge, the legal context, and the field of law concerned. [8]

For these reasons, proportionality long remained a discreet presence within the French legal landscape. During the first half of the twentieth century, it was neither a recognized principle nor a method familiar to national jurists. It was in fact under the influence of German law that the principle of proportionality gradually gained visibility and legitimacy in France. [9]

Historically, the origins of the principle as we know it today—structured around the three requirements of *suitability*, *necessity*, and *proportionality stricto sensu*—can be traced back to the late nineteenth century in the German Empire. [10] It first emerged in administrative law, particularly in the judicial review of police measures. German courts began to ensure that the means employed by administrative authorities did not exceed what was necessary to achieve the legitimate public objective pursued. This shift effectively displaced the center of gravity of legality review: it was no longer sufficient merely to verify whether an administrative act conformed formally to the law; the judge was now tasked with assessing the proportional relationship between the constraint imposed and the public interest invoked.

This transformation of judicial oversight, which extended the broader movement toward the rationalization of German administrative law, led some commentators to describe it as a paradigmatic change in the understanding of legality itself. Walter Jellinek famously captured this ideal of moderation with his ironic warning against "shooting sparrows with a cannon [11]".

This logic of measured intervention—soon to become a hallmark of the *Rechtsstaat*—quickly endowed the principle of proportionality with binding legal force. In Germany, it came to govern not only administrative adjudication but also the constitutional review of legislation, whereby the Constitutional Court ensured that lawmakers did not impose excessive restrictions on fundamental rights. Its field of application even expanded beyond this dimension: the Federal

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[8] S. Hennette Vauchez, A. Vauchez, *Des juges bien trop sages, Qui protège encore nos libertés?*, Seuil, Paris, 2025.

[9] X. Philippe, *Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative françaises*, Economica, Paris, 1990, 541, 41-42.

[10] E. Forsthoff, *Traité de droit administratif allemand*, translated by M. Fromont, Bruylant, Bruxelles, 1969, 130.

[11] W. Jellineck, *Gesetz. gesetzesanwendung und Zweckmäßigkeit erwägung*, generic editor, Tübingen, 1913.

Constitutional Court invoked proportionality to delineate the separation of powers among state organs and to limit certain prerogatives of the administration.

The postwar constitutionalization of the principle gave it a major normative dimension. The celebrated *Pharmacy* decision (*Apothekenurteil* [12]) of the Federal Constitutional Court in 1958 marked a decisive step in its recognition as a general principle of German constitutional law. It articulated proportionality as "a principle prohibiting any excessive infringement of individual rights or situations, thereby imposing upon the State a duty of moderation [13]". On this basis, the German judge no longer confined himself to an abstract control of conformity; he engaged in a teleological evaluation of state action—one grounded in justification, rationality, and the proportionality of means to ends.

This culture of proportionality, firmly rooted in German legal doctrine and judicial practice, attracted the attention of many European jurists, including French legal scholars. Its reception in France, however, was both slow and selective—as though the very plasticity of the principle clashed with the reflexes of a system still dominated by the primacy of statute and wary of value-balancing reasoning. [14] This initial dissonance helps explain the specificity of the "*French style*" of proportionality: one simultaneously influenced by the German model and adapted to France's national tradition of legality review.

In France, the implementation of the proportionality principle has been most directly tested in the context of two exceptional legal regimes. [15] The first, known as the *state of emergency for security reasons*, was declared on the night of November 13, 2015, following the terrorist attacks in Paris and Saint-Denis (which left 130 dead and several hundred injured). This regime was instituted by decree on November 14th, 2015, under the *Law of April 3, 1955 on the State of Emergency*, and was renewed several times until November 1, 2017. [16] The second was the *state of health emergency*, established by the *Law of March 23, 2020*, in response to the COVID-19 pandemic. [17] Under this regime, the executive branch was granted exceptional regulatory powers, including the authority to restrict individual freedoms (such as confinement, isolation, travel restrictions, and the closure of public venues) under the guise of protecting public health.

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[12] Apothekenurteil, *BverfGE*, 7, 377.

[13] M. Fromont, "République fédérale d'Allemagne: l'État de droit", in *Revue du droit public*, 1984, 1203.

[14] M. Koskas, "Le dynamisme de la proportionnalité : enjeux de la fragmentation tripartite du principe dans le processus juridictionnel", in *La Revue des droits de l'homme*, 15, 2019.

[15] O. Beaud, S. Benzina, C. Guérin-Bargues, *L'état d'urgence sécuritaire et sanitaire. Une étude constitutionnelle, historique et critique*, 3e éd., Dalloz, Paris, 2024.

[16] Décret n° 2015-1475 du 14 novembre 2015 portant application de la loi n° 55-385 du 3 avril 1955.

[17] Décret n° 2020-293 du 23 mars 2020 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire.

Both regimes gave rise to extensive litigation, putting the proportionality principle to the test. The Constitutional Council was called upon to assess the legality and necessity of various emergency measures. In its decisions, the Council conducted a proportionality review, weighing the conditions justifying the declaration of emergency, the seriousness of the threat, the effects of the measures adopted, and the safeguards attached to them. [18]

During the health emergency, both the Conseil d'État (in its urgent applications procedure) and the Constitutional Council examined the legality and proportionality of measures restricting liberty or imposing obligations—such as quarantine or isolation orders, limitations on movement, restrictions on cultural activities, and other measures of social control. The law itself incorporated several safeguards: limitations on the scope of persons affected, restrictions in time and purpose, and the guarantee of procedural rights and access to judicial review. [19] These two exceptional regimes thus provide particularly revealing case studies for observing how proportionality is actually applied in moments of crisis—when public freedoms are directly curtailed or threatened.

Viewed through these extraordinary contexts, the implementation of proportionality in France exposes a deep tension between the requirements of the rule of law and the imperatives of administrative and legislative efficiency. The French style of proportionality seems to oscillate between *judicial restraint*—where courts refrain from questioning the legitimacy of administrative choices except in manifestly disproportionate cases—and *administrative rationalization*—where the executive and legislature themselves anticipate judicial scrutiny by embedding guarantees, limitations, and calibrated procedures into policy design.

This tension becomes particularly acute in times of emergency. Whether in a security or health crisis, the gravity of the threat, the compressed temporality of decision-making, and the pressure to act swiftly weigh heavily on public authorities, often at the expense of individual freedoms. Yet such moments are also those in which courts—both the Conseil d'État and the Constitutional Council—are compelled to impose limits, to demand justification, adaptation, necessity, and proportionality. The French style, therefore, cannot be reduced to a mechanical transplantation of foreign models. It integrates the demand for justification within a distinct legal and institutional framework, sensitive to France's constitutional balances, its *légicentriste* tradition, the centrality of executive power, and established administrative practices. [20]

From this standpoint, the French style of proportionality may be characterized

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[18] For example : Conseil constitutionnel, decision, 11 mai 2020, n° 2020-800 DC, *Loi prorogeant l'état d'urgence sanitaire et complétant ses dispositions*.

[19] R. Maison, O. Mamoudy, *Autour de l'état d'urgence français, Le droit politique d'exception, pratique nationale et sources internationales*, Institut Universitaire Varenne, Paris, 2018.

[20] D. Baranger, *Penser la loi. Essai sur le législateur des temps modernes*, Gallimard, Paris, 2018.

by two principal features. The first is *judicial prudence*: proportionality review remains moderate, often implicit, marked by a wide margin of discretion accorded to the administration and legislature, and by a reluctance to impose overly demanding obligations or to second-guess public policy choices. The second is *administrative rationalization*: public authorities themselves increasingly internalize proportionality, embedding guarantees, limitations, and procedures of justification, transparency, and review to pre-empt judicial control and to structure administrative action within proportionate legal frameworks.

From here, a series of questions emerges: to what extent does this French style truly reconcile the protection of fundamental rights with the necessities of public action? What are its strengths and its limits? And how does it compare with foreign—particularly European and international—models, given that the French approach seems to favor a less radical but more stable equilibrium between legality and efficiency?

To grasp the scope and tensions of the French style of proportionality, the analysis will proceed in three stages. First, it will examine the *scope and intensity* of its application: in which fields is the principle of proportionality most frequently invoked by French judges—administrative, constitutional, or, more marginally, judicial? Second, it will assess the *effects* of proportionality review within the French legal order: does it extend the protection of fundamental rights, or does it instead rationalize their exercise in favor of administrative legitimacy? Finally, it will identify the *limits and distinctive features* of the French style itself—marked by persistent judicial prudence and an ever-deepening process of administrative rationalization.

1. Proportionality by the French Administrative Judge

To understand how the French administrative judge mobilizes the principle of proportionality, one must first place this practice in its historical and institutional context. The origins of the administrative judge can be traced back to the French Revolution (1789), when the revolutionaries sought to prevent ordinary judges from adjudicating disputes involving the administration. [21] This intent was most clearly expressed in Article 13 of the Law of 16-24 August 1790, which provided that: "*Judicial functions are distinct and shall always remain separate from administrative functions. Judges may not, on pain of forfeiture, in any way interfere with the operations of administrative bodies, nor summon administrators before them in respect of their functions*". The same rule was reiterated a few years later in the Decree of 16 Fructidor, Year III (2 September 1795), which prohibited

[21] A. Hachemi, *Le juge administratif et la loi (1789-1889)*, LGDJ, Paris, 2020.

courts from reviewing administrative acts "of any kind whatsoever". [22]

The revolutionaries' aim was not to establish a fully independent administrative judiciary, but rather to weaken the Parlements of the Ancien Régime and secure freedom of action for a radical transformation of the state. In the short term, the solution was pragmatic: disputes involving the administration were to be resolved by the administration itself, and later by a distinct, specialized judge—the Conseil d'État—whose independence gradually consolidated in the nineteenth century.

This deep-seated distrust of the judiciary, perceived as a remnant of the Ancien Régime, profoundly shaped French contentious culture: the administration was to be controlled by itself, not by an external judicial power. [23] Until the early twentieth century, this conception translated into a form of judicial review that was narrow in scope, focusing mainly on the formal legality of administrative acts—competence, procedure, and form—or, at most, on the existence of a "manifest error of assessment" where the administration had discretionary authority. There was not yet any explicit balancing between individual rights and public order, nor any inquiry into the necessity or appropriateness of administrative measures. This procedural formalism stemmed as much from institutional tradition as from a particular conception of the judge's role: the judge was to apply the law, not interpret it through a proportionality-based reasoning that weighed competing interests. As historians of French administrative justice have shown, the Conseil d'État long distrusted axiological balancing tools, preferring instead a logic of formal legality.

A decisive shift began only with the landmark *Benjamin* decision of 1933. In this case, the Conseil d'État held that, while the police authority was required to maintain public order, it must also reconcile the exercise of its powers with the protection of freedom of assembly. [24] Through this formulation, the court implicitly recognized that an administrative measure could be lawful only if it was appropriate, necessary, and proportionate to the objective pursued. The *Benjamin* ruling thus marked the transition from a review of mere legality to a review grounded in proportionality—still intuitive, but indicative of a profound methodological transformation. Gradually, through subsequent jurisprudence concerning police measures, administrative sanctions, and disciplinary powers, the administrative judge systematized the three classic components of proportionality reasoning—suitability, necessity, and proportionality *stricto sensu*—making it a standard tool of review, applied even beyond the field of public freedoms.

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[22] G. Burdeau, *Histoire du droit administratif*, PUF, Paris, 1995.

[23] D. Lochak, "Le Conseil d'État en politique", in *Pouvoirs*, 123, 2007, 19-32.

[24] G. Kalfleche, "Le contrôle de proportionnalité exercé par les juridictions administratives", in *Les petites affiches*, 2009, 46.

Proportionality review in ordinary times

Outside periods of emergency, the French administrative judge applies the proportionality principle in a variety of areas—administrative policing, disciplinary sanctions, freedom of expression, property rights, and others—with a higher, more consistent, and more structured standard than that applied under exceptional regimes. Recent case law reveals both the routine use of the triple test (necessity, suitability, and proportionality *stricto sensu*) and its inherent limitations.

The proportionality principle is now a common tool in Conseil d'État jurisprudence to assess the legality of restrictive measures, even in the absence of a declared state of emergency. A particularly illustrative example concerns administrative sanctions: in an decision of September 2024,[25] the Conseil d'État annulled a disciplinary sanction imposed by the CNESER,[26] holding that the measure was disproportionate to the seriousness of the alleged misconduct. This "full" review encompasses not only factual assessment but also the evaluation of the sanction's severity.

Another notable case is *Domenjoud*,[27] in which the Conseil d'État affirmed that, regarding residence orders, the judge must conduct a full proportionality review, verifying that the measure is suitable, necessary, and proportionate. Similarly, in matters of general administrative policing, the Conseil d'État's official website, in a statement entitled "*The Principle of Proportionality, a Safeguard of Freedoms*", recalls that prohibitions of public meetings or funeral processions are lawful only if the risks to public order are of such gravity that no less restrictive measure could suffice to prevent them.

The administrative judge structures the review around three classic elements: suitability, necessity, and proportionality stricto sensu. Suitability requires that the measure be capable of effectively achieving the objective pursued—for instance, in cases involving bans on demonstrations, the judge examines whether the prohibition genuinely addresses the identified risk. Necessity implies that no less restrictive yet equally effective measure could have been adopted; administrative authorities must often justify why milder alternatives would have been insufficient. Finally, proportionality stricto sensu involves a balancing exercise between the infringement on rights and freedoms and the public interest pursued, ensuring that the cost—in terms of liberty, material burden, or administrative constraint—is not excessive relative to the expected benefit.

An essential procedural tool is the *référé-liberté*,[28] an emergency procedure allowing the judge to order any necessary measure to end a grave and manifestly

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[25] Conseil d'Etat, 27 september 2024, CE, n° 488978.

[26] The CNESER is a consultative council to the French Minister of Higher Education and Research, also functioning as an administrative tribunal for disciplinary appeals in universities.

[27] Conseil d'État, 11 december, 2015, n° 394990.

[28] See Article L.521-2 of the French Code of Administrative Justice.

unlawful infringement of a fundamental freedom. Although summary in nature, this procedure nonetheless requires a proportionality assessment. [29]

Even outside emergency regimes, proportionality review shows several weaknesses. First, the Conseil d'État often refers to measures as "suitable, necessary, and proportionate" without explicitly unpacking each component. This limits the visibility and persuasive force of the reasoning. Second, the court affords wide margins of appreciation to the administration in areas such as public order and security, thereby reducing the effective intensity of review. The notion of "public order disturbance" frequently serves as a justification for upholding restrictive measures. [30]

In disciplinary matters, proportionality review plays a significant role, though decisions favorable to claimants remain rare. Judges consider the seriousness of the misconduct, prior conduct, and contextual factors, yet often uphold sanctions without fully exploring less severe alternatives. For instance, the Conseil d'État annulled a decree dissolving an association, holding that it was neither suitable, necessary, nor proportionate to the objective of protecting public order—demonstrating that even drastic restrictions on association or expression may be struck down under ordinary law. [31]

Ordinary proportionality review is thus not a mere technical exercise: it serves as a safeguard against arbitrariness and ensures that administrative power remains subordinated to the rule of law. Recent jurisprudence also shows qualitative progress: judicial reasoning is increasingly detailed, factual or scientific evidence is more often cited, and explicit comparison among alternative measures is more frequent. These developments attest to the maturation of the French style of proportionality in non-crisis contexts. Yet the practice remains uneven across jurisdictions and policy areas (policing, expression, sanctions, economic freedoms), and continues to depend on the sensitivity of the issues at stake.

Proportionality under the state of emergency

The application of proportionality takes a distinct turn in times of emergency. In theory, the Conseil d'État has consistently affirmed that exceptional regimes are not legal vacuums. Since 2015, it has declared that it would exercise "full and complete review" over emergency measures, based on the triple test of necessity, suitability, and proportionality. In practice, however, the jurisprudence reveals a

[29] See for example the decision Conseil d'État, 20 September 2022, n° 451129: the Conseil d'État recognized the right of everyone to live in a balanced and healthy environment as a fundamental freedom, thus allowing its protection through emergency judicial proceedings.

[30] Jean-Marc Sauvé, Vice-President of the French Conseil d'État, *Le principe de proportionnalité, protecteur des libertés*, speech delivered on 17 March 2017, offering an institutional perspective on proportionality as a safeguard of rights.

[31] Conseil d'État, decision, 11 August 2023, n° 476385.

gap between this doctrinal commitment and its effective implementation. [32] A comprehensive study of more than 700 decisions issued between 2015 and 2017 shows that the triple test is rarely articulated explicitly, giving way instead to a limited review focused on factual plausibility and the credibility of alleged threats. This restraint reflects the traditional self-limitation of the administrative judge toward the executive in times of crisis [33].

As the Conseil d'État's 2021 annual report itself acknowledged, the state of emergency does not "degrade" the law, but it "alters the way in which the balance between public order and individual freedom is struck," with the former "weighing more heavily" in such circumstances. In other words, proportionality does not disappear—it adjusts. Yet this adjustment often results in a rebalancing in which security imperatives prevail over individual rights. Judicial decisions opposing aspects of emergency regimes do exist, but they remain exceptional. [34] The most striking contrast may be found abroad: in March 2021, a Brussels court annulled all COVID-19 measures adopted by the Belgian government by decree, ruling that they lacked sufficient legal basis. This contrast underscores the prudence of the French administrative judge, who, while reaffirming the primacy of legality, adapts review to exceptional circumstances and to the executive's stated objectives.

The so-called "chilling effect," frequently discussed in the literature, aptly captures this dynamic: in exceptional times, the judge self-censors, hesitating to oppose administrative authorities and, at times, assuming the role of an auxiliary to the public power [35]. The nationwide lockdown of spring 2020 offers a telling example: seized in an emergency procedure challenging the leniency of the government's measures, the Conseil d'État instead endorsed their tightening, prescribing even stricter restrictions on liberty in the name of public health protection. This shift—from guardian of freedoms to guarantor of administrative effectiveness—signals a silent mutation in the function of judicial review under the state of emergency.

This does not mean that the protection of rights has vanished entirely. The administrative judge has occasionally struck down manifestly excessive measures, for instance concerning freedom of worship, drone surveillance, or the right of nursing-home residents to move freely. Yet such rulings remain exceptional. Statistical data on the health emergency reveal that out of more than 800 actions brought before administrative courts, fewer than ten resulted in annulment of

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[32] S. Hennette Vauchez, *La démocratie en état d'urgence. Quand l'exception devient permanente*, Seuil, Paris, 2022, 82-91.

[33] *Ibid.*

[34] Conseil d'État, *Les États d'urgence: la démocratie sous contraintes*, La documentation française, Paris, 2010, 131.

[35] F. Aoláin, *The Cloak and Dagger Game of Derogation*, in E. Criddle (ed.), *Human Rights in Emergencies*, Cambridge University Press, Cambridge, 2016, 136.

government measures—highlighting a structural imbalance between the theoretical affirmation of proportionality review and its actual practice.

The experience of individual administrative control and surveillance measures (*MICAS*), which replaced house arrest orders under the 2015-2017 counterterrorism emergency, illustrates this ambivalence. [36] These measures, made permanent by the 2017 SILT Act, should in principle be subject to rigorous proportionality review: the judge must ensure that the person concerned poses a particularly serious threat to public security and that the measure is suitable, necessary, and proportionate. In practice, however, rejection rates remain extremely high—over 90% before administrative tribunals and courts of appeal, and around 65% before the Conseil d'État. Review often remains confined to verifying factual materiality or formal reasoning, without genuine balancing of the rights at stake.

Thus, while the proportionality principle now permeates the entire field of emergency litigation, it remains marked by an inherent tension: a judge who proclaims full competence yet imposes implicit limits upon himself whenever national security is invoked. Behind the apparent rationality of the "triple test" lies the deeper question of the effectiveness of judicial review—and, more broadly, of the capacity of the administrative judge to uphold the rule of law at the very heart of the state of exception. [37]

2. Proportionality by the French Constitutional Judge

Unlike the Bundesverfassungsgericht, conceived from 1949 as a guardian of fundamental rights, the Conseil constitutionnel was initially imagined as a "watchdog of the executive," in Michel Debré's famous words, tasked with containing parliamentary encroachments upon the domain of the government. [38] This original conception—organically and functionally linked to the rationalization of parliamentarism—long shaped its relationship to rights protection and to the use of proportionality.

In the European landscape, the Conseil constitutionnel occupies a singular position among constitutional courts. [39] Whereas many foreign constitutional courts—such as the Italian Corte costituzionale or the Spanish Tribunal Constitucional—were conceived from the outset as supreme guardians of fundamental rights, the French *Conseil* was primarily oriented toward preserving the

[36] S. Hennette-Vauchez, N. Klausser, V. Louis, "De la normalisation de l'état d'urgence à sa routinisation ? Une étude empirique des MICAS", in *La revue des droits de l'homme*, 27, 2025.

[37] J. Chevallier, *L'État de droit*, 7th ed., LGDJ, Paris, 133.

[38] F. Luchaire, *Le Conseil constitutionnel*, Economica, Paris, 1981.

[39] A. Stone Sweet, *The Birth of Judicial politics in France. The Constitutional Council in Comparative Perspective*, Oxford University Press, Oxford, 1992, 18.

institutional balance defined by the Constitution and ensuring respect for the distribution of competences among public authorities. For decades, access to the *Conseil* was limited to a few political authorities, with no direct recourse available to citizens, thereby restricting its ability to embody a fully rights-oriented constitutional justice.

Created by the Constitution of 4 October 1958, the Conseil constitutionnel was therefore not born as a true constitutional court comparable to Karlsruhe. A decisive shift occurred only in the 1970s. The landmark decision *Liberté d'association* introduced the "bloc de constitutionnalité" [40] into constitutional review, recognizing the constitutional value of the 1946 Preamble and, consequently, of the rights and freedoms it proclaims. [41] From that point on, the Conseil became a genuine guardian of rights, paving the way for an increasingly substantive review of legislation.

Nevertheless, proportionality as an explicit method of reasoning emerged only gradually. During the 1980s and 1990s, the Conseil began reasoning in terms of reconciling individual freedoms and public interest objectives, particularly in areas such as public security, health, or economic order. Even when the term "proportionality" was not explicitly used, the reasoning often followed its structure—examining the adequacy, necessity, and non-excessiveness of legislative measures. It was only in the early 2000s that the Conseil's case law explicitly enshrined the principle, particularly in cases concerning infringements of individual liberty or the right to property.

The introduction of the Question Prioritaire de Constitutionnalité (QPC) through the 2008 constitutional reform significantly accelerated this evolution. [42] Faced with a more concrete and rights-centered litigation—enriched by the influence of the ECtHR and the CJEU—the Conseil increasingly adopted a proportionality-based approach. In recent decisions, notably those concerning deprivation of liberty, automatic penalties, or counterterrorism measures, it now explicitly verifies that any restriction on a constitutional right is "appropriate, necessary, and proportionate" to the objective pursued.

Thus, having started from a position of deference grounded in legislative primacy, the Conseil constitutionnel has progressively integrated proportionality as an instrument for rationalizing constitutional review. Yet this integration remains marked by a specifically French restraint: a constant concern to avoid transforming the judge into a political arbiter and to maintain a delicate balance between

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[40] The bloc de constitutionnalité refers to the body of constitutional norms in France that the Constitutional Council uses for judicial review, including the 1958 Constitution, the 1789 Declaration of the Rights of Man and of the Citizen, the 1946 Preamble, and the 2004 Environmental Charter.

[41] Conseil constitutionnel, decision, 16 july 1971, n° 71-44 DC.

[42] The QPC is a procedure allowing any litigant, in the course of judicial proceedings, to challenge the constitutionality of a legislative provision on the ground that it infringes rights and freedoms guaranteed by the bloc de constitutionnalité.

the demand for justification and the respect for legislative sovereignty.

This reserve stems from a deeper feature of French legal culture: the enduring weight of légicentrisme. Inherited from Rousseau's political philosophy and theorized by Carré de Malberg, this tradition elevates the law as the direct expression of the volonté générale, endowed with a quasi-sacred authority. [43] To control the law, therefore, was to risk infringing upon national sovereignty itself. Within such a framework, the constitutional judge could not legitimately substitute its own assessment for that of the legislature in balancing rights and public interests. Proportionality thus appeared as a foreign technique, rooted in a value-based judicial philosophy alien to the French legal imagination.

Proportionality review in normal times

The first appearance of proportionality in the Conseil constitutionnel's jurisprudence dates back to its decision of 3 September 1986 concerning the law on crime and delinquency, [44] where the Court was asked to assess the duration of the mandatory safety period applicable to criminal sentences. The deliberation records illuminate how this emerging principle was understood and constrained. The rapporteur, Léon Jozeau-Marigné, had proposed extending to this area the principle of proportionality between offenses and penalties derived from Article 8 of the 1789 Declaration, elevating it to a general constitutional principle applicable even to the execution of sentences. This suggestion—clearly inspired by the German doctrine of *Verhältnismäßigkeitsprinzip*—was rejected under the decisive influence of Georges Vedel, who argued that "it is not for the Conseil to lecture the legislature," and that absent a "manifest disproportion," no in-depth review was legitimate. [45]

By adopting this approach, the Conseil declined to elevate proportionality to the rank of an autonomous principle, limiting itself to verifying that statutory penalties were not manifestly disproportionate. This choice reflected a form of institutional self-restraint: unlike the German Constitutional Court, the French judge did not present itself as an evaluator of legislative rationality but as the guardian of a minimal threshold of abuse. Hence, proportionality in France initially developed as a negative and limited review, grounded in the idea that, absent a manifest error, the balancing of freedoms and public order imperatives remained the sovereign prerogative of the legislature.

Over subsequent decades, however, the Conseil's reasoning evolved under the combined influence of European jurisprudence (ECtHR, CJEU) and the rise of *a posteriori* review through the QPC. The decision of 2008, *Rétention de sûreté*, [46]

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[43] P. Brunet, "Les idées constitutionnelles de Raymond Carré de Malberg (1861-1935)", in *halshs-00662018*, 2012.

[44] Conseil constitutionnel, 3 septembre 1986, 86-216 DC.

[45] Conseil constitutionnel, deliberation, 3rd september 1986.

[46] Conseil constitutionnel, decision, 21 february 2008, n° 2008-562 DC.

marks a symbolic turning point: for the first time, the *Conseil* explicitly employed the three-tiered proportionality test—adequacy (the link between means and ends), necessity (the absence of less restrictive alternatives), and proportionality *stricto sensu* (the overall balance between the objective pursued and the rights affected). While this decision reflects an intellectual refinement of constitutional review, it does not depart from France's culture of *self-restraint*: the *Conseil* continued to affirm that it "does not possess a general power of appreciation and decision equivalent to that of Parliament." Proportionality review, as exercised since 2008, thus remains circumscribed by the separation of powers—it seeks to prevent legislative arbitrariness without substituting judicial policy judgments for those of the legislature.

Today, the *Conseil constitutionnel* applies proportionality regularly yet discreetly, embedding it within the broader logic of reconciling "constitutional values" rather than treating it as an autonomous standard. Its recent decisions reveal a flexible, implicit practice, where the three sub-tests are often merged into an overall assessment expressed through the recurring formula that a measure must not be "manifestly disproportionate" to the objective pursued. This style of review reflects a will to rationalize constitutional discourse without politicizing it: proportionality here serves less to impose a rigorous justification standard than to ensure a threshold of coherence in legislative decision-making. The *Conseil* thereby seeks to avoid the "dangerous drift" feared in 1986 while meeting contemporary expectations of reasoned judgment and transparency.

Proportionality review under the state of emergency

The remarks made above concerning the administrative judge apply equally to the Conseil constitutionnel, which displays a certain leniency toward measures adopted under emergency regimes. A particularly revealing example is the decision rendered in the early days of the COVID-19 health emergency. The Conseil was seized of an organic law suspending procedural deadlines for the *QPC* mechanism—a procedure allowing any litigant to challenge the constitutionality of a law applicable to their case. Although the Constitution requires a minimum fifteen-day delay between the introduction of an organic bill and its parliamentary deliberation, the Senate adopted the bill barely twenty-four hours after its filing. [47]

Despite this clear procedural violation, the *Conseil* held that there was no breach of the Constitution "given the particular circumstances of the case". [48] This reference to "particular circumstances" enabled it, contrary to the constitutional text, to validate the law's adoption in the name of urgency. The decision,

[47] See Article 46 of the 1958 French Constitution, which provides that no debate may take place in Parliament on an organic bill before the expiration of a fifteen-day period following its introduction.

[48] Conseil constitutionnel, decision, 26 march 2020, n° 2020-799 DC.

followed by public comments from the Conseil's president distinguishing "particular" from "exceptional" circumstances, illustrates the malleability of constitutional reasoning in times of crisis. [49]

A broader review of the fifteen or so decisions rendered under the permanent state of emergency confirms this pattern. Even when declaring certain provisions unconstitutional, the Conseil frequently neutralized the effects of its own censures through deferred implementation clauses, allowing Parliament to preserve the contested provisions temporarily. This was the case, for instance, in its decision of 1 December 2017 concerning identity checks and vehicle searches ordered by prefects: while the *Conseil* found the provisions unconstitutional, it postponed their repeal until 30 June 2018—several months after the state of emergency had already expired. [50] Such choices reveal a persistent tension between legal coherence and institutional prudence: even in declaring unconstitutionality, the *Conseil* sought to preserve the administrative apparatus's full capacity in the event of renewed crisis. [51]

In short, the proportionality review conducted by the French *Conseil constitutionnel*—whether in ordinary or exceptional times—remains guided by a distinctive concern for equilibrium. It seeks neither to emulate the activist rationality review of Karlsruhe nor to abandon the requirement of justification altogether, but rather to reconcile the logic of the *État de droit* with that of administrative and legislative efficiency. [52]

3. Conclusion

The examination of proportionality in French constitutional adjudication highlights a distinct juridical sensibility. Far from a doctrine of judicial empowerment, proportionality functions as a tool of rationalization within an administratively inspired conception of constitutional review. The Constitutional Council

[49] V. Champeil-Desplats, *L'état d'urgence devant le Conseil constitutionnel ou quand l'Etat de droit s'accomode de normes inconstitutionnel*, in Stéphanie Hennette Vauchez (éd.), *Ce qui restera toujours de l'urgence*, Institut Universitaire Varenne, 2018.

[50] Conseil constitutionnel, decision, 1st December 2017, n° 2017-677 QPC.

[51] For another example, see the decision of the 3 September 2016 (n° 2016-567/568 QPC). In this case, the Constitutional Council declared unconstitutional the search and seizure procedures provided for in Article 11 of the Act of 3 April 1955. However, it held that "calling into question criminal proceedings resulting from measures based on provisions declared unconstitutional would infringe the constitutional objective of safeguarding public order and would have manifestly excessive consequences. Accordingly, measures adopted based on those provisions cannot, in the context of subsequent criminal proceedings, be challenged on the ground of such unconstitutionality".

[52] J. Chevallier, *L'État de droit*, LGDJ, Paris.

employs it with restraint, using its structured reasoning to maintain coherence and predictability rather than to maximize rights. This prudence reflects a broader preference for method over value judgment, for justification over intervention. In the French style, proportionality is not primarily a balancing exercise but a means of organizing and legitimizing decision-making through reasoned argument. Ultimately, it reveals a constitutional culture that privileges clarity, hierarchy, and rational discipline over the expansion of judicial discretion.

Proportionality at the Italian Constitutional Court: A Long (And Yet to Be Completed) Journey

Davide Paris [*]

1. An unwritten, yet ubiquitous principle

The principle of proportionality cannot be found in the text of the Italian Constitution. [1] Unlike the Charter of Fundamental Rights of the European Union, which subjects the limitation of rights to compliance with the principle of proportionality (Art. 52), and the European Convention on Human Rights ('ECHR'), which indirectly refers to proportionality in several provisions by requiring that restrictions on certain rights be "necessary in a democratic society" (notably Arts. 8-11), the Italian Constitution contains no comparable general clause governing the limitation of rights. Instead, the scope of each individual right—and the possible limitations thereof—is defined through specific, concrete rules applicable to each right separately. [2] Thus, for example, Article 13 of the Italian Constitution sets forth the conditions under which personal freedom may be restricted, Article 14 those governing limitations on the inviolability of the home, and so forth.

Nevertheless, the balancing of rights has soon emerged as the general framework within which the Italian Constitutional Court ('ItCC', or 'the Court') has adjudicated limitations on rights. [3] A significant judgment from 2013 explicitly acknowledged the importance of such balancing:

> As is the case under other contemporary democratic and pluralist constitutions, the Italian Constitution requires that an ongoing reciprocal balance be struck between fundamental principles and rights, and that none of them may claim

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[1] The only exception is Art. 36: "Workers have the right to a remuneration *proportional* to the quantity and quality of their work and, in any case, sufficient to ensuring them and their families a free and dignified existence" (emphasis added).

[2] On this technique of fundamental rights' protection see A. Barak, *Proportionality. Constitutional Rights and their limitation*, Cambridge University Press, Cambridge, 2012, 141.

[3] See R. Bin, *Diritti e argomenti. Il bilanciamento degli interessi nella giurisprudenza costituzionale*, Giuffrè, Milan, 1992, 4.

> absolute status. […] Precisely because it is dynamic and not set in advance, the point of equilibrium must be assessed—by Parliament when enacting legislation and by the Constitutional Court upon review—according to the criteria of proportionality and reasonableness in such a manner as to ensure that their essential core is not sacrificed. [4]

Interestingly, in this passage the ItCC refers to two distinct principles guiding the balancing of rights: proportionality and reasonableness. As will be explained in greater detail throughout this paper, neither principle has been sharply defined in the ItCC's case law, and the distinction between them remains far from clear. Still, it is fair to say that while for a long time reasonableness (*ragionevolezza*) was the principle most often invoked by the ItCC in rights adjudication, in the past decade proportionality has taken center stage, either alongside reasonableness or even in its place. [5] By way of example, in 2024 the ItCC applied some form of proportionality test across an array of domains, including criminal sanctions, [6] labour law, [7] freedom to conduct a business, [8] taxation, [9] urban planning, [10] prisoners' rights, [11] appointment to public office, [12] public selections, [13] and many others.

2. A long journey toward (structured) proportionality

As former President of the ItCC Marta Cartabia observed in a seminal 2013 paper, proportionality has always been part of the Court's daily business. [14] However, the ItCC never clarified or systematized the proportionality test into a sequence of distinct steps, as other courts have done following the example of the

[4] Judgment No. 85/2013.

[5] See M. Cartabia, *Ragionevolezza e proporzionalità: oltre l'uguaglianza delle leggi*, in L. Cassetti, F. Fabrizzi, A. Morrone, F. Savastano, A. Sterpa (eds), *Studi in onore di Beniamino Caravita*, III, Editoriale Scientifica, Naples, 2389.

[6] See, e.g., Judgments Nos. 86 and 91/2024.

[7] See, e.g. Judgments Nos. 7, 90, and 129/2024.

[8] Judgments Nos. 140 and 144/2024.

[9] Judgment No. 111/2024.

[10] Judgment No. 119/2024.

[11] Judgment No. 10/2024.

[12] Judgment No. 107/2024.

[13] Judgment No. 181/2024.

[14] M. Cartabia, *I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana*, relazione alla Conferenza trilaterale delle Corte costituzionali italiana, portoghese e spagnola, Roma, Palazzo della Consulta 24-26 ottobre 2013, available at www.cortecostituzionale.it, 1.

German Federal Constitutional Tribunal, namely, the pursuit of a legitimate aim, the suitability of the measure, its necessity, and proportionality in the narrower sense. [15] Instead, the Court has applied one, some, or all of these steps depending on the circumstances of the case, without codifying its approach in a rigid or predictable order. [16]

The Court's terminology has also been uncertain. It has traditionally referred to the principle of "reasonableness", both as an expression of the equality principle under Article 3 of the Constitution and as an autonomous principle derived from the same provision. [17] Yet references to "proportionality" were also frequent, without any clear distinction between the two. [18]

Judgment No. 1/2014 marked a turning point toward a clearer definition of proportionality. The decision was itself highly significant, as it declared the electoral law unconstitutional; however, interestingly, the case did not concern the natural field of application of the proportionality principle, namely fundamental rights. In this judgment, the ItCC offered its most precise formulation of the proportionality test:

> The proportionality test used by this Court and by many other European constitutional courts, which is often paired with a reasonableness test and is an essential instrument of the Court of Justice of the European Union within the judicial review of the legality of acts of the Union and of the Member States, requires an assessment as to whether the provision under review, along with the arrangements stipulated for its application, is necessary and capable of achieving legitimately pursued objectives by requiring that the measure chosen out of those most appropriate is the least restrictive of the rights in play and imposes burdens that are not disproportionate having regard to the pursuit of those objectives.

As can be seen, all the elements of the proportionality test are identified by

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[15] Although different formulations of proportionality exist, this four-steps sequence is the generally accepted basic structure of proportionality: see, e.g., T. Steiner, A. Lang and M. Kremnitzer, *Introduction: Analysing Proportionality Comparatively and Empirically*, in M. Kremnitzer, T. Steiner and A. Lang (eds), *Proportionality in Action. Comparative and Empirical Perspectives on the Judicial Practice*, Cambridge University Press, 2020, 2.

[16] M. Cartabia, *I principi di ragionevolezza e proporzionalità*, cit., 6-7. The case-by-case approach of the Court, based on the principle of reasonableness, has been particularly stressed by L. Paladin, *Ragionevolezza (principio di)*, in *Enc. dir.*, *Agg. I*, Giuffrè, Milan, 1997, 911.

[17] For a detail account on the principle of reasonableness, and its diverse applications in the ItCC's less recent case law see, among many, G. Scaccia, *Gli 'strumenti' della ragionevolezza nel giudizio costituzionale*, Giuffrè, Milan, 2000; A. Morrone, *Il custode della ragionevolezza*, Giuffrè, Milan, 2001; Id., *Il bilanciamento nello stato costituzionale. Teoria e prassi delle tecniche di giudizio nei conflitti tra diritti e interessi costituzionali*, Giappichelli, Turin, 2014; L. D'Andrea, *Ragionevolezza e legittimazione del sistema*, Giuffrè, Milan, 2005; F. Modugno, *La ragionevolezza nella giustizia costituzionale*, Editoriale Scientifica, Naples, 2007.

[18] M. Cartabia, *I principi di ragionevolezza e proporzionalità*, cit., 2.

the ItCC (legitimate aim, suitability, necessity, and proportionality in the narrower sense), albeit in a different order than usual.

In subsequent years, the proportionality test has been applied more frequently by the ItCC, both in some important judgments concerning the balancing and limitation of fundamental rights, [19] and in other domains, including the division of legislative powers between the State and the Regions. [20] One area in which proportionality has been consistently invoked, and has proved particularly effective, is the review of criminal (and, more broadly: punitive) sanctions. [21] In a recent case concerning the power of the police to issue a mandatory order to leave a municipality without prior judicial authorization, the ItCC reaffirmed its full endorsement of the principle of proportionality:

> proportionality is a requirement which applies systematically within Italian constitutional law in relation to any act by the authorities that is liable to impinge upon the fundamental rights of the individual […]. This requirement operates both as a prerequisite for the constitutionality of any law that provides for restrictions on the fundamental rights of the individual, as well as a prerequisite for the legitimacy of any administrative or judicial measure that, in giving effect to the law, encroaches upon the rights of a person within the specific individual case.

In the ItCC's view, proportionality applies to "any act by the authorities" affecting fundamental rights and has a twofold application. On the one hand, it serves as the guiding principle for the ItCC's *review* of legislation; on the other, it informs the *application* of legislation by administrative and judicial authorities. The scope of this statement is far-reaching: the ItCC not only embraces proportionality as the central principle of its own constitutional review but also calls upon all other law-applying authorities, administrative and judicial alike, to apply it in their decisions. This is particularly significant in light of the ItCC's limited jurisdiction. Unlike other constitutional courts, the ItCC lacks competence to

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[19] See, e.g., Judgment No. 20/2019, concerning the transparency of fiscal data of all managers working for the public administrations, and their spouses and relatives.

[20] See, for an account, F. Viganò, *La proporzionalità nella giurisprudenza recente della Corte costituzionale: un primo bilancio*, in *Studi in onore di Beniamino Caravita*, cit., 1113 ff.; and F. Falorni, *Verso una compiuta elaborazione del "test di proporzionalità"? La Corte Costituzionale italiana al passo con le altre esperienze di giustizia costituzionale*, in *DPCE online*, 2020/4, 5320 ff.

[21] See F. Viganò, *La proporzionalità della pena. Profili di diritto penale e costituzionale*, Giappichelli, Turin, 2021, 52 ff. The Author is currently a judge of the ItCC and rapporteur in most of the judgments concerning the proportionality of criminal sanctions. Drawing on a distinction widely accepted in English legal scholarship, he emphasizes the peculiar nature of proportionality when applied to the constitutionality of criminal sanctions. While in the context of fundamental rights limitations proportionality is *forward-looking* (requiring an assessment of whether a restriction on a right is justified in pursuit of a legitimate aim), when applied to criminal sanctions it is *backward-looking* (requiring an assessment of whether the response to a past offence is proportionate to the gravity of that offence).

hear individual complaints alleging violations of fundamental rights; it adjudicates the constitutionality of legislation primarily on the basis of referrals from ordinary courts. [22] By requiring other authorities to apply the principle of proportionality, the ItCC thus diffuses this principle throughout the legal order, extending its reach beyond the boundaries of the Court's own jurisdiction.

Finally, it should be noted that proportionality has entered the ItCC's case law not only by deliberate choice but also as a by-product of its jurisprudence on the relationship between domestic constitutional law, EU law, and the ECHR. Since 2007, the ItCC has expressly recognized the ECHR, as interpreted by the Strasbourg Court, as a standard for reviewing domestic legislation. [23] More recently, following an evolution in its jurisprudence, it has accepted EU law too as a yardstick for constitutional review. [24] As a result, an increasing number of cases reach the ItCC through referrals asking it to assess the conformity of Italian legislation with the ECHR or with EU law rather than directly with the Constitution. Consequently, in these cases the ItCC must apply the categories and reasoning developed respectively by the European Court of Human Rights and the Court of Justice of the European Union, a reasoning that often entails the use of a proportionality test.

For instance, in Judgment No. 144/2024, concerning an alleged discrimination against a category of tax advisers, the ItCC was called upon to assess the conformity of the relevant domestic law with Article 56 TFEU and Article 16 of Directive 2006/123/EC. The Court acknowledged that the applicable standard of review derived from the settled case law of the Court of Justice, according to which national measures liable to restrict the freedom to provide services may be justified only if they pursue a legitimate objective in the public interest, are appropriate to attaining that objective, and do not go beyond what is necessary to achieve it. The ItCC therefore conducted its proportionality review following the guidance of the Court of Justice.

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[22] See A. von Bogdandy and D. Paris, *Building Judicial Authority: A Comparison Between the Italian Constitutional Court and the German Federal Constitutional Court*, MPIL Research Paper Series No. 2019-1, 4.

[23] See Judgments No. 348 and 349/2017; for a general account see R. Bifulco, D. Paris, *The Italian Constitutional Court*, in A. von Bogdandy, P.M. Huber and C. Grabenwarter (eds), *The Max Planck Handbooks in European Public Law. Volume 3: Constitutional Adjudication: Institutions*, Oxford University Press, 2020, 494 f.

[24] See Judgment No. 181/2024 and the case notes by G. Fransoni, *Judgment No. 181/2024 of the Italian Constitutional Court: Harmonies and Dissonances in the Constitutional Jurisprudence on Double Preliminarity: Searching for the Right "Tone"*, and S. Filippi, *Judgment No. 181/2024 of the Italian Constitutional Court: The Beginning of a New Trend on Dual Preliminarity Case Law?*, both in *The Italian Review of International and Comparative Law*, 1/2025, 99 and 111 respectively.

3. Current uncertainties in the use of the proportionality

Although the past decade has witnessed a clear shift toward a more frequent and better-defined use of proportionality, the ItCC remains far from achieving a consistent application of this principle, as illustrated by examples from its most recent case law.

First, the use of proportionality as the guiding principle for balancing rights remains unsettled. In several cases, the Court *omits any reference to proportionality* and relies on other frameworks.

In some judgments, instead of proportionality the ItCC *invokes the "older" principle of reasonableness*. Judgment No. 173/2024 is a case in point. The Court was called upon to assess the constitutionality of a measure aimed at preventing domestic and gender-based violence: specifically, a prohibition on approaching the victim within a distance of 500 meters, enforced through electronic monitoring. Among other issues, the referring court questioned the "reasonableness and proportionality" of the measure, noting that in small villages the fixed distance of 500 meters could make it practically impossible for the suspect to carry out ordinary daily activities. The ItCC acknowledged that the measure required balancing the suspect's freedom of movement against the protection of the victim. However, rather than applying a proportionality test, the Court found the measure "not unreasonable", reasoning that the pressing need to protect the victim justified a relatively minor restriction of movement. In substance, the ItCC did perform a proportionality assessment, and notably one of proportionality in the narrower sense; but it did so under the rubric of "reasonableness" and through an unstructured, case-specific approach.

In other cases, the ItCC applies *specific tests developed for particular contexts* and not the general proportionality test. Mandatory vaccination and legislation based on scientific evidence provide prominent examples, as will be discussed in the next section. Another example concerns retrospective legislation. In Judgment No. 70/2024, the ItCC applied a four-pronged test to assess the "reasonableness" of retroactive laws. According to the Court, in balancing the aims and effects of retrospective legislation against its adverse impact on rights previously established by law, the following elements must be considered:

a) the degree of consolidation of the situation affected by the retroactive law;
b) the predictability of the new law, with completely unexpected retroactive changes being harder to justify;
c) the existence of new circumstances justifying the law, within the limits of proportionality; and
d) the context and circumstances of the new law, particularly when intended to redress a prior inequality.

This test, which explicitly includes a proportionality assessment, could easily be subsumed within the general framework of proportionality, since each of these

factors corresponds to the balancing of competing interests. Yet the ItCC treats it not as a specific application of proportionality, but as an autonomous, *ad hoc* test for retroactive legislation.

In yet another line of cases, the ItCC resorts to *alternative general principles that largely correspond to one of the steps of the proportionality test*. For instance, in Judgment No. 143/2025 concerning a regional law of Liguria regulating the conversion of hotels into residential properties, the Court declared the provision unconstitutional for breaching the principle of "minimum means." According to the Court, this newly articulated principle requires authorities "to give preference, among all possible measures, to the one that entails the least sacrifice of the competing interests". At first glance, this principle is indistinguishable from the necessity test, one of the standard components of the proportionality test. Yet in this case the ItCC treated it as an autonomous doctrine.

Another frequently invoked concept is "intrinsic unreasonableness." According to the ItCC's case law, a measure is intrinsically unreasonable, and therefore unconstitutional, when it produces effects inconsistent with the very aim it seeks to achieve. [25] Like the "minimum means" test, this test, which the ItCC generally treats as an independent ground of unconstitutionality, could easily be integrated into the proportionality framework too, specifically under the suitability step: a measure that produces effects contrary to its legitimate purpose is, by definition, unsuitable to achieve that purpose.

Second, even when the ItCC explicitly refers to proportionality, it frequently *conflates it with the neighboring principle of reasonableness*.

In some judgments, the two are used interchangeably. For example, in Judgment No. 107/2024, which concerned restrictions on eligibility for appointment to public office, the Court struck down the contested law for its manifest conflict "with the principles of proportionality and reasonableness", without distinguishing between them. In other cases, the ItCC examines the two principles separately but without clarifying the difference. For instance, in Judgment No. 144/2024, the Court first assessed the reasonableness of the measure, concluding that the objective pursued justified the restrictions introduced. It then examined proportionality, referring to the same arguments used under the reasonableness review to uphold the law's constitutionality. In effect, the same reasoning was used to satisfy both standards, leaving the conceptual boundary between them obscure. In yet other judgments, reasonableness appears to refer to the legitimacy of the aim and the suitability of the measure, while proportionality seems to concern the extent of interference with fundamental rights. [26] In sum, reasonableness and proportionality are combined in a number of different ways, [27] the ItCC's

[25] See, e.g., Judgment No. 197/2023, § 5.5.4.

[26] See, e.g., Judgment No. 140/2024, and Judgment No. 14/2023 examined later, in the next section.

[27] See also Judgment No. 20/2019, where the Court stated that, in balancing competing

terminology remains inconsistent, and the notions of reasonableness and proportionality frequently overlap or coincide. [28]

Third, even the clearest definitions of proportionality in the ItCC's case law leave room for uncertainty about *the intensity of the scrutiny* the Court applies. Consider, in particular, Judgment No. 46/2024, a paradigmatic application of proportionality to criminal sanctions. In this case, the Court declared unconstitutional an increase in the minimum penalty for the crime of misappropriation, from fifteen days to two years of imprisonment. The judgment opened with a general statement:

> Any law that entails restrictions on the fundamental rights of the individual must be rationally justified in relation to one or more legitimate aims pursued by the legislature; and the means chosen by the legislature must not be manifestly disproportionate to those legitimate aims.

This passage treats proportionality as a general requirement for all legislation affecting fundamental rights, anticipating its later recognition as a systemic principle in Judgment No. 203/2025. Yet the phrasing—"must not be manifestly disproportionate"—hints at a deferential standard of review, more lenient than the necessity test that forms part of the classical proportionality framework and that the ItCC has invoked elsewhere. This likely reflects the context: the case concerned criminal sanctions, an area in which the ItCC typically accords the legislature broad discretion. To be clear, the principle of proportionality is, in general, compatible with varying levels of scrutiny and allows for different degrees of judicial deference. [29] However, in its abstract formulation, it does not refer to the "manifestly disproportion" of the means with respect to the aim.

In sum, while the ItCC's case law over the past decade shows a clear trend toward a more frequent reliance on proportionality, its use of the principle still lacks a coherent framework and reveals conceptual ambiguities and overlaps with other principles, particularly reasonableness. The case study examined in the next section exemplifies both the growing significance and the persistent uncertainties surrounding the ItCC's recourse to proportionality.

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rights, "the judgment of reasonableness on legislative choices utilizes the so-called test of proportionality".

[28] For an attempt to clarify the distinction between proportionality and reasonableness see G. Scaccia, *Ragionevolezza e proporzionalità nel diritto costituzionale*, in A. Fachechi (ed.), *Dialoghi su ragionevolezza e proporzionalità*, Edizioni Scientifiche Italiane, Naples, 2019, 177 ff; and M. Massa, *Il giudizio di bilanciamento: una giurisprudenza costituzionale orientata al caso? Notazioni introduttive*, in *Lo Stato*, 18, 2022, 12 ff.

[29] See J. Rivers, "Proportionality and Variable Intensity Review", in *Cambridge Law Journal*, 65, 2006, 177.

4. Proportionality and limitations of rights in the context of the COVID-19 pandemic: a case study

Like other constitutional and supreme courts, the ItCC in recent years has been confronted with several constitutional challenges concerning national measures adopted to combat the COVID-19 pandemic. Judgment No. 14/2023 is among the most significant of these decisions. It addressed the constitutionality of the mandatory vaccination requirement for healthcare workers and the related provision mandating suspension from professional practice in the event of non-compliance, as established by Law Decree No. 44/2021. The proportionality test features prominently in this judgment; yet, in applying it, the ItCC does not display the same degree of methodological clarity found in the case law of other courts.

A comparison with the German Federal Constitutional Court's *Impfnachweis (COVID-19)* judgment [30] is particularly instructive. Although the two countries' vaccination regimes differed—Germany's law imposed vaccination on persons working in certain healthcare institutions (e.g. hospitals, medical and dental practices, retirement and nursing homes), whereas Italy's obligation applied to specified categories of healthcare professionals (e.g. doctors, nurses)—both judgments addressed comparable constitutional questions and both rejected the challenges of unconstitutionality. Indeed, if one compares the "building blocks" of the two judgments, namely their main analytical steps, most are strikingly similar: the protection of the health of others and of the functioning of healthcare facilities as the legitimate objective of the measure; [31] the safety and efficacy of the vaccines according to available scientific evidence; [32] the need to adjust the obligation in light of evolving knowledge about the virus and the vaccines; [33] the specific position of healthcare workers as distinct from the general population; [34] and the inadequacy of alternative measures to contain the spread of infection, like regular diagnostic testing. [35] Yet while the German Court organizes these considerations within the structured framework of the proportionality test—legitimate aim, suitability, necessity, and proportionality in the narrower sense—Judgment No. 14/2023 of the

[30] BVerfG, Order of the First Senate of 27 April 2022 - 1 BvR 2649/21.

[31] See BVerfG, *Impfnachweis (COVID-19)* judgment, § 153 ff. and § 182; Judgment No. 14/2023, § 6, § 12.1, and § 12.2.

[32] See BVerfG, *Impfnachweis (COVID-19)* judgment, § 170 ff. and 222 ff.; Judgment No. 14/2023, § 9 and § 10.

[33] See BVerfG, *Impfnachweis (COVID-19)* judgment, § 127, 132 ff., and 234 ff.; Judgment No. 14/2023, § 8.2.

[34] See BVerfG, *Impfnachweis (COVID-19)* judgment, § 214; Judgment No. 14/2023, § 8.2.

[35] See BVerfG, *Impfnachweis (COVID-19)* judgment, § 192 ff.; Judgment No. 14/2023, § 13.1.

ItCC displays a far less systematic structure. The Court appears to apply, and to some extent conflate, three distinct standards:

a) the specific test developed in its own case law to assess the constitutionality of mandatory vaccinations under Article 32 of the Constitution;
b) the proportionality test; and
c) the test of "scientific reasonableness", which the ItCC applies to legislation involving scientific assessments.

The first part of Judgment No. 14/2023 follows the tripartite test that the ItCC has consistently applied for more than 35 years when assessing the compatibility of compulsory medical treatments, particularly vaccinations, with Article 32 of the Constitution. [36] This test requires:

a) that the treatment "is intended not only to improve or safeguard the health of the person who receives it, but also to preserve the health of others", for it is this additional purpose pertaining to the interest of society at large that justifies the interference with each individual's self-determination;
b) that "the treatment must not adversely affect the health of the person who receives it, except exclusively those consequences that, on account of their ephemeral nature and low level of severity, are a normal feature of any medical treatment, and hence tolerable";
c) that "in the event of any further harm to the health of the person receiving compulsory treatment—including any infectious disease contracted as a result of prophylactic vaccination—provision has been made under all circumstances for 'fair compensation' to the injured party". [37]

Although not expressly derived from Article 32, this test—an original creation of the ItCC—can easily be traced back to the logic of the proportionality test. Condition (a) concerns the legitimate aim of the measure, [38] while conditions (b) and (c) correspond to the proportionality in the narrower sense, ensuring that the burden imposed on the individual is not excessive in light of the collective benefit pursued. Nonetheless, the ItCC has long preferred to apply this specific doctrinal framework rather than the general proportionality test, for historical reasons. The leading case on compulsory vaccination dates to the early 1990s, when the ItCC

[36] See S. Leone, *La salute degli altri. Giustificazione e limite degli obblighi vaccinali*, Giappichelli, Turin, 2024.

[37] Judgments Nos. 307/1990 and 258/1994, quoted in Judgment No. 14/2023, at § 5.

[38] Notice that by using this test, the ItCC accepts only one possible legitimate aim for compulsory vaccinations, i.e. the pursuit of the health of others. This caused some troubles when the Court had to assess the legitimacy of mandatory vaccinations to counter non-infectious diseases, like tetanus vaccine. In this case, vaccination is imposed not to protect the health of others, but in the interest of the minor, who is unable to self-determination: see Order No. 262/2004 and Judgment No. 5/2018. Applying the proportionality test would give the ItCC more room to appreciate the aims of vaccinations, beyond the rigidity of the current test.

had not yet embraced the four-step proportionality analysis. Over time, this specific test became widely accepted by ordinary courts, which still frame constitutional questions to the ItCC using this scheme; this makes it difficult for the Court to abandon it in favor of the more general proportionality framework.

In Judgment No. 14/2023, the referring court invoked such test, arguing that, unlike traditional vaccines, the adverse effects of COVID-19 vaccination could include death, thereby violating condition (b), which permits only tolerable consequences for the vaccinated person. The ItCC, however, readily clarified that the test does not exclude the possibility of severe side effects, including death. Condition (c) explicitly addresses such situations: the "remote risk of adverse events, which may in some cases be serious" does not make mandatory vaccination unconstitutional, "but rather establishes grounds for compensation". [39]

> Having disposed of this first argument, the ItCC turned to examine whether the balance struck by the legislature between public health protection and individual autonomy was "not unreasonable or disproportionate having regard to the goals pursued". [40] However, this reasonableness/proportionality review immediately evolved into an inquiry as to whether "when exercising its legislative discretion, the legislator remained within the bounds of scientific credibility, having regard to the state of the art at the given moment in time, as defined by the competent medical and scientific authorities". [41]
>
> This "scientific reasonableness" test is not new. It was best articulated in Judgment No. 282/2002, which addressed a regional law prohibiting within the Region some controversial psychiatric treatments (electroconvulsive therapy and prefrontal lobotomy), and has since been applied in other sensitive fields such as assisted reproduction. [42] The underlying premise is that, in areas characterized by rapid scientific and technological progress, legislative intervention cannot rest on "pure political discretion but must rather provide for the consideration of approaches based on a review of the state of scientific knowledge and experimental evidence acquired by institutions and bodies—normally national or supranational—charged with obtaining such knowledge and evidence, given the 'essential significance' that 'technical-scientific bodies' take on in this regard […]; alternatively, it should in

[39] See M. Massa, *Dati scientifici e discrezionalità politica nella legislazione sugli obblighi vaccinali*, in *Corti supreme e salute*, 1/2023, stressing the consistency of Judgment No. 14/2023 with the ItCC previous case law on mandatory vaccinations.

[40] Judgment No. 14/2023, § 6.

[41] *Ibid.*, § 8.2.

[42] See, in particular, Judgments Nos. 151/2009 and 162/2014. On the "scientific reasonableness" test see S. Penasa, *Il dato scientifico nella giurisprudenza della Corte costituzionale: la ragionevolezza scientifica come sintesi tra dimensione scientifica e dimensione assiologica*, in *Pol. dir.*, 2/2015, 271-324; D. Servetti, *Riserva di scienza e tutela della salute. L'incidenza delle valutazioni tecnico-scientifiche di ambito sanitario sulle attività legislativa e giurisdizionale*, Pacini, Pisa, 2019; G. Ragone, *Eine empirische wende? La Corte costituzionale e le sfide della complessità tecnico-scientifica*, Giuffrè, Milan, 2020, 132 ff.

any case constitute the result of such a review". [43] In Judgment No. 14/2023, this approach led the ItCC to focus primarily on whether sufficient scientific evidence existed to confirm the safety and efficacy of COVID-19 vaccines.

Once again, this "scientific reasonableness" analysis could easily be situated within the structure of the proportionality test: only if vaccination is effective in preventing COVID-19 can it be considered *suitable* to achieve the legitimate aim of protecting health, and only if it is safe can it be considered *proportionate*. In the *Impfnachweis (COVID-19)* judgment, the German Federal Constitutional Court conducted precisely such an assessment, drawing especially on data from the Robert Koch-Institut—the German Federal Government's central institution in the field of biomedicine—to evaluate the efficacy and safety of the vaccine under the suitability and proportionality in the narrower sense prongs of its analysis. [44] By contrast, in Judgment No. 14/2023, the ItCC treated the evaluation of scientific data as part of an autonomous "scientific reasonableness" test, whose relationship to the reasonableness and proportionality tests remains ambiguous. In some passages, the Court states that "appropriate consideration of the scientific data available concerning vaccine efficacy and safety" forms part of the "not unreasonable or disproportionate" assessment; [45] in others, it treats it as a distinct inquiry; [46] elsewhere, it appears to relate it specifically to the suitability of the measure. [47]

Finally, proportionality itself constitutes the third analytical standard underlying Judgment No. 14/2023. As observed earlier, even in this decision the boundary between proportionality and reasonableness remains blurred. Some passages use the two terms interchangeably, [48] while others suggest that "reasonableness" refers to the suitability of the measure to its aim and "proportionality" to its necessity and proportionality in the strict sense. [49] When read through the lens of the

[43] Judgment No. 282/2002, as quoted in Judgment No. 14/2023, § 8.

[44] See BVerfG, *Impfnachweis (COVID-19)* judgment, § 173 ff., and § 222 ff.

[45] Judgment No. 14/2023, § 6.

[46] See § 8.1 (the Court's review concerns "the consistency of the legislation with the scientific data underlying the provision, whilst also verifying that the legislation is not unreasonable or disproportionate") and § 9 ("the review that this Court must perform involves verifying whether—using the medical and scientific data made available by the sectoral authorities—the legislator remained within the bounds of "scientific credibility" and whether it reached a decision that was not unreasonable and that was not inappropriate and disproportionate, having regard to the goal pursued").

[47] See § 11 ("the medical and scientific data that attest the full efficacy of the vaccine and the suitability of mandatory vaccination vis-a-vis the aim of reducing the spread of the virus") and § 13.

[48] See § 6, quoted above, n. 39.

[49] See § 13: "Thus, having verified […] the suitability of mandatory vaccination for healthcare professionals and healthcare sector workers […] and having hence established that this requirement is not unreasonable, it is now necessary to consider whether the proportionality principle has been complied with as regards the aims pursued"; see G. Fontana, *Gli obblighi vaccinali anti SARS-COV-2 secondo la Corte costituzionale, tra dati scientifici, discrezionalità legislativa e "non irragionevolezza"*, in *Giur. cost.*, 1/2023, 445 f.

structured proportionality test, the Court's reasoning appears somewhat inconsistent. For example, it states that "the measure is not disproportionate, first of all because at the relevant time no alternative measures were available that were equally appropriate for the purpose set by the legislator of combatting the pandemic". [50] Here, under the heading of proportionality, the Court is in fact applying the *necessity* test, which is one specific step within the broader proportionality framework, distinct from both the proportionality test as a whole, and from proportionality in the narrower sense.

5. Pros and cons of structured proportionality at the Italian Constitutional Court

As the analysis developed in this contribution has shown, the current use of proportionality by the ItCC is marked by ambivalence. While a clear trend toward the adoption of proportionality can be traced in its case law (at least since Judgment No. 1/2014), proportionality has not yet become a standard, well-defined framework of reasoning in fundamental rights adjudication. Rather, the Court tends to apply different analytical models depending on the circumstances of the case or, put differently, to bend and adapt a general and somewhat blurred principle of reasonableness/proportionality to the needs of the case at hand.

This flexible approach has certain advantages. It allows the Court to produce more concise judgments and to avoid repetition when the same arguments apply to different stages of the proportionality test. It enables the Court to tailor its reasoning to the specific features of each case, focusing on the decisive element that determines whether a law withstands constitutional scrutiny, thereby possibly enhancing the clarity of the decision. It also affords the Court greater discretion in selecting which issues to address and which to leave aside, avoiding rigid precedents that might constrain its future jurisprudence. Yet there are equally compelling arguments in favor of adopting a more coherent and standardized use of proportionality.

The virtues and limitations of proportionality have been extensively examined in global constitutional scholarship. [51] A recent essay by András Jakab succinctly summarizes its main strengths: it "ensures retrospective transparency and comprehensibility in the reasoning"; it "leaves a great deal of freedom for judicial considerations"; it provides an uniform structure that can "be applied to different types of fundamental rights"; it provides a "neutral and technical language" to deal with moral and political conflicts; it enables "permeating the legal system and ultimately society as a whole"; and it fosters a "culture of compromise and justification". [52]

[50] Judgment No. 14/2023, § 13.1.

[51] For some indications see T. Steiner, A. Lang and M. Kremnitzer, *Introduction*, cit., 4 ff.

[52] A. Jakab, *Six Alternatives to the Proportionality Test in Fundamental Rights Adjudication*,

Many of these strengths would benefit Italian constitutional adjudication. Consistent with this view, leading voices in Italian scholarship have advocated a more standardized use of proportionality, emphasizing in particular that a coherent and predictable reasoning framework enhances the authority of the ItCC and helps counter criticisms that the Court oversteps its boundaries and encroaches on the domain of political institutions. [53]

Beyond these general arguments, there is also an institutional factor specific to the ItCC that, though it may seem trivial, reinforces the case for a more structured analytical framework. In comparative perspective, the ItCC's composition is relatively large, comprising fifteen judges. By contrast, many supreme or constitutional courts operate with fewer members: the Supreme Court of the United States, the Supreme Court of Canada, and the French *Conseil constitutionnel* each consist of nine judges (excluding, for France, the possible participation of former Presidents of the Republic). In systems where the bench is larger and comparable to that of the ItCC, the court usually operates in smaller formations. The UK Supreme Court, for instance, has twelve justices but sits in panels of five, seven, or nine; [54] the German Federal Constitutional Court counts sixteen judges but functions in two Senates of eight, sitting *en banc* only in exceptional cases, while the majority of the cases are disposed of by chambers of three judges. [55]

By contrast, the ItCC has no internal divisions into senates or chambers: all decisions are taken *en banc*, regardless of the type of proceedings. The principle of collegiality is thus a defining feature of the Italian Constitutional Court. [56] Under these conditions, a sufficiently structured analytical framework is particularly valuable. The deliberation of fifteen judges is not easily coordinated without a shared outline of legal reasoning. The more clearly defined and standardized framework that proportionality provides could facilitate collective deliberation, ensure that all judges can contribute effectively to the discussion, and ultimately enhance the clarity, coherence, and transparency of the Court's reasoning.

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[53] See M. Cartabia, *Ragionevolezza e proporzionalità*, cit., 2391, and Id., *I principi di ragionevolezza e proporzionalità*, cit., 7-8, with further references to Italian legal scholarship. See also F. Viganò, *La proporzionalità nella giurisprudenza recente della Corte costituzionale*, cit., 1139 f., stressing that proportionality places fundamental rights at the centre of legal reasoning.

[54] See C. Hanretty, *A Court of Specialists*, Oxford University Press, Oxford, 2020, 87 ff.

[55] See A. Farahat, *The German Federal Constitutional Court*, in A. von Bogdandy, P.M. Huber and C. Grabenwarter (eds), *The Max Planck Handbooks in European Public Law. Volume 3*, cit., 307.

[56] See V. Barsotti, P.G. Carozza, M. Cartabia and A. Simoncini, *Italian Constitutional Justice in Global Context*, Oxford University Press, Oxford, 2015, 239 f.

Proportionality in the context of social rights and public emergencies in Germany

Niels Petersen [*]

The proportionality test plays a crucial role in the German legal order. [1] It was originally developed in administrative law as a doctrinal tool to limit the state's police power. [2] After the Second World War, the German Federal Constitutional Court adapted it as an instrument of fundamental rights review, where it continues to play its most significant role. [3] Beyond fundamental rights, the Court also applies a modified form of proportionality when deciding vertical competency conflicts between the federal level and individual states or between states and municipalities. [4]

This article focuses on the application of proportionality in the fundamental rights context. It proceeds in four steps. First, it briefly introduces the use of proportionality in fundamental rights doctrine (1). Second, it examines the Court's

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[1] See F. Meinel, "The Merkel Court: Judicial Populism since the Lisbon Treaty", in *European Constitutional Law Review*, 19, 2023, 111, 117. See also N. Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa*, 2017, 80-182; A. Lang, *Proportionality Analysis by the German Federal Constitutional Court*, in M. Kremnitzer, T. Steiner, A. Lang (eds), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice*, 2020, 22-133 (for a detailed analysis of the proportionality case law of the German Federal Constitutional Court).

[2] See U. Held-Daab, *Das freie Ermessen*, 1996, 189-192.

[3] D. Grimm, "Proportionality in Canadian and German Jurisprudence", in *University of Toronto Law Journal*, 57, 2007, 383, 385; A. Stone Sweet, J. Mathews, "Proportionality Balancing and Global Constitutionalism", in *Columbia Journal of Transnational Law*, 47, 2008, 73, 98-102.

[4] See H.P. Aust, "Grundrechtsdogmatik im Staatsorganisationsrecht", in *Archiv des öffentlichen Rechts*, 141, 2016, 415-448; N. Petersen, K. Chatziathanasiou, "Balancing competences? Proportionality as an Instrument to Regulate the Exercise of Competences after the PSPP Judgment of the Bundesverfassungsgericht", in *European Constitutional Law Review*, 17, 2021, 314, 326-329; B. Stohlmann *et al.*, "Konsolidierung statt Siegeszug: Eine quantitative Untersuchung der Verwendung des Grundsatzes der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts", in *Der Staat*, 63, 2024, 217, 219-220.

practice, identifying the areas in which proportionality is most frequently applied (2). Third, it considers proportionality in relation to social rights. While Germany does not explicitly protect social rights in its constitution, the Federal Constitutional Court has derived a right to subsistence from the social state principle and the guarantee of human dignity. Proportionality, however, has played only a marginal role in this context (3). Finally, it analyzes proportionality in states of emergency. It focuses particularly on the Court's jurisprudence during the COVID-19 pandemic, where the Court applied proportionality more deferentially than under normal circumstances (4).

1. The proportionality test in German fundamental rights doctrine

The proportionality test lies at the core of the justification analysis in fundamental rights review. [5] Most fundamental rights in the German Constitution are not guaranteed in an absolute manner. Instead, they are subject to limitation clauses. Even when no explicit limitation clause exists, restrictions may still be justified if they protect competing constitutional values. [6] In any case, a restriction must be proportionate in order to be constitutional. According to the German framing, the test consists of four steps. [7] First, the Court asks whether the restriction pursues a legitimate aim. [8] Its understanding of legitimate aims is broad: only self-serving aims or those directly contradicting explicit constitutional values are excluded. [9]

Second, the Court examines whether the restriction is suitable to achieve the aim. Here the Court is deferential: it does not require a perfect fit. Instead, it is

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[5] Grimm, *supra* note 3, at 386; M. Hailbronner, S. Martini, *The German Federal Constitutional Court*, in A. Jakab, A. Dyevre, G. Itzcovich (eds), *Comparative Constitutional Reasoning*, 2017, 356, 387. For an empirical analysis of the use of the proportionality test of the German Federal Constitutional Court over time, see Stohlmann *et al.*, *supra* note 4.

[6] BVerfGE 28, 243, at 261.

[7] See Grimm, *supra* note 3, at 387; W. Heun, *The Constitution of Germany: a contextual analysis*, 2011, 196-197; M. Hailbronner, S. Martini, *supra* note 5, at 387.

[8] On the legitimate aim in the proportionality analysis, see C. Engel, *Das legitime Ziel als Element des Übermaßverbots*, in W. Brugger, S. Kirste, M. Anderheiden (eds), *Gemeinwohl in Deutschland, Europa und der Welt*, 2002, 103-172; Lang, *supra* note 1, at 68-77.

[9] See D. Merten, *Verhältnismäßigkeitsgrundsatz*, in D. Merten, H.-J. Papier (eds), *Handbuch der Grundrechte. Band III. Grundrechte in Deutschland: Allgemeine Lehren II*, 2009, ch. 68, para. 54; N. Petersen, *Verhältnismäßigkeit*, in W. Kahl, M. Ludwigs (eds), *Handbuch des Verwaltungsrechts. Band III: Verwaltung und Verfassungsrecht*, 2022, ch. 73, para. 31. See also Grimm, *supra* note 3, 388-389.

sufficient that the measure increases the likelihood of achieving the aim. [10] Third, the Court applies the less-restrictive-means test. A measure fails if there is an equally effective but less rights-restrictive alternative. [11] In its more recent practice, the Court also applies this step deferentially, giving the legislature discretion in assessing the effectiveness of alternative measures. As a result, restrictions rarely fail here. [12]

Finally, balancing is the core of the proportionality test in Germany. [13] The balancing test compares the importance of the aim and the effectiveness of the measure with the importance of the restricted right and the intensity of its infringement. [14] In practice, the Court exercises considerable restraint in striking down laws on balancing grounds. [15] Balancing language is used more frequently when upholding legislation or reviewing decisions of civil or criminal courts. [16]

When legislation is invalidated through balancing, the Court makes much more restrained use of balancing. [17] Most balancing decisions usually fall into one of four categories: (1) financial burden-shifting, where the restriction is upheld but the state must compensate the affected individuals; [18] (2) insufficient fit between measure and purpose, e.g. where the effectiveness of the measure is

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[10] BVerfGE 63, 88, at 115; 67, 157, at 175; 96, 10, at 23; 146, 164, at 202. See also Lang, *supra* note 1, at 78.

[11] BVerfGE 68, 193, at 218-19; 113, 167, at 252; 135, 90, at 118; 148, 40, at 57. See also Hailbronner, Martini, *supra* note 5, at 387.

[12] See N. Petersen, "Balancing and Judicial Self-Empowerment: A case study on the rise of balancing in the jurisprudence of the German Constitutional Court", in *Global Constitutionalism*, 4, 2015, 49, 65; Lang, *supra* note 1, at 89.

[13] See F. Ossenbühl, "Abwägung im Verfassungsrecht", in *Deutsches Verwaltungsblatt*, 110, 1995, 904, 906; J. Isensee, "Bundesverfassungsgericht – quo vadis?", in *Juristenzeitung*, 51, 1996, 1085, 1090; F.J. Lindner, *Theorie der Grundrechtsdogmatik*, 2005, 217; D.P. Kommers, *Germany: Balancing Rights and Duties*, in J. Goldsworthy (ed.), *Interpreting Constitutions*, 2006, 161, 202; Grimm, *supra* note 3, at 393; O. Lepsius, *Die maßstabsetzende Gewalt*, in M. Jestaedt *et al.* (eds.), *Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht*, 2011, 159, 206-207; G. Lübbe-Wolff, "The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court", in *Human Rights Law Journal*, 34, 2014, 12, 15; M. Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism*, 2015, 118. For an empirical analysis, see Petersen, *supra* note 1, at 83-86; Lang, *supra* note 1, at 103-129; K. Lüders, "Balancing as a Means of Judicial Activism? Analysis of the German Federal Constitutional Court's Use of Balancing Language", in *German Law Journal*, 26, 2025, 471-492.

[14] See R. Alexy, "On Balancing and Subsumption: A Structural Comparison", in *Ratio Juris*, 16, 2003, 433, 446.

[15] Petersen, *supra* note 1, at 186-187.

[16] See *id.*, at 92-95. See also Lüders, *supra* note 13, at 489.

[17] Petersen, *supra* note 1, at 165-182.

[18] *Id.*, at 165-68.

doubtful; [19] (3) inconsistency, where the legislative scheme is incoherent; [20] and (4) particular hardship, where a small group is disproportionately burdened so that exceptions are required. [21]

2. Where is proportionality most prevalent?

The proportionality test is applied in almost all cases involving the negative dimension of rights—i.e. rights serving as shields against state interference. By contrast, there are certain situations where proportionality is not explicitly applied. This concerns, for one, the guarantee of human dignity. [22] Because dignity is usually understood as an absolute guarantee that is not open to restrictions, [23] there is no room for proportionality. [24] Furthermore, positive rights, i.e. rights

[19] *Id.*, at 168-71.

[20] *Id.*, at 172-73.

[21] Id., at 173-75.

[22] Art. 1, para. 1 of the German Constitution.

[23] See M. Kloepfer, *Leben und Würde des Menschen*, in P. Badura, H. Dreier (eds.), *Festschrift 50 Jahre Bundesverfassungsgericht. Zweiter Band: Klärung und Fortbildung des Verfassungsrechts*, 2001, 77, 98; E.-W. Böckenförde, "Menschenwürde als normatives Prinzip", in *Juristenzeitung*, 58, 2003, 809, 809-810; R. Poscher, "Die Würde des Menschen ist unantastbar", in *Juristenzeitung*, 59, 2004, 756-762; H.-J. Papier, *Die Würde des Menschen ist unantastbar*, in R. Grote *et al.* (eds), *Die Ordnung der Freiheit. Festschrift für Christian Starck zum siebzigsten Geburtstag*, 2007, 871, 874; B. Kohl, *Menschenwürde: Relativierung oder notwendiger Wandel? – Zur Interpretation in der gegenwärtigen Kommentierung von Art. 1 Abs. 1 GG*, 2007, 126; J. von Bernstorff, "Pflichtenkollision und Menschenwürdegarantie", in *Der Staat*, 47, 2008, 21, 29-33; K.-H. Ladeur, I. Augsberg, *Die Funktion der Menschenwürde im Verfassungsstaat*, 2008, 27-30; W. Höfling, *Unantastbare Grundrechte – ein normlogischer Widerspruch?*, in R. Gröschner, O.W. Lembcke (eds), *Das Dogma der Unantastbarkeit*, 2009, 111, 114; P. Kunig, *Zum Dogma der unantastbaren Menschenwürde*, in R. Gröschner, O.W. Lembcke (eds), *Das Dogma der Unantastbarkeit*, 2009, 121-132; S. Broß, *Die Würde des Menschen bleibt unantastbar*, in C.Y. Robertson-von Trotha (ed.), *60 Jahre Grundgesetz: Interdisziplinäre Perspektiven*, 2009, 41-50. However, there are also a few authors who deny the absolute nature of human dignity and call for a limited use of balancing, see K.-E. Hain, "Konkretisierung der Menschenwürde durch Abwägung?", in *Der Staat*, 45, 2006, 189-214; W. Brugger, "Menschenwürde im anthropologischen Kreuz der Entscheidung", in *Jahrbuch des öffentlichen Rechts der Gegenwart*, 56, 2008, 95, 123; H.-G. Dederer, "Die Garantie der Menschenwürde (Art. 1 Abs. 1 GG)", in *Jahrbuch des öffentlichen Rechts der Gegenwart*, 57, 2009, 89, 112-124; N. Teifke, *Das Prinzip Menschenwürde. Zur Abwägungsfähigkeit des Höchstrangigen*, 2011; C. Goos, *Innere Freiheit. Eine Rekonstruktion des grundgesetzlichen Würdebegriffs*, 2011, 164-166; M. Baldus, "Menschenwürde und Absolutheitsthese – Zwischenbericht zu einer zukunftsweisenden Debatte", in *Archiv des öffentlichen Rechts*, 136, 2011, 529-552.

[24] However, there is a discussion in the literature on whether the Federal Constitutional

that require the state to perform a positive action, are usually also not open to the proportionality test.[25] Instead, the court derives positive standards through deductive norm interpretation.[26]

There are several empirical studies that analyze the prevalence of certain fundamental rights in the Court's jurisprudence.[27] These studies have a slightly different focus. My own study on proportionality analyzed all decisions from 1951-2015 in which the Court invalidated legislation for violating fundamental rights.[28] Luisa Wendel analyzed all successful cases from 1998–2017.[29] While the timeframe of her study is shorter than the one of my own analysis, her scope of analysis was broader—she did not restrict her sample to cases in which legislation was challenged. Finally, Christoph Engel looked at all fundamental rights cases from 1998 until 2019.[30] Therefore, his thematical scope is even broader: Engel analyzed all cases in which constitutional rights were reviewed, regardless of whether they were successful or not.

Despite these differences in the scope of analysis, the results are fairly similar. When it comes to the cases in which the Court declared cases unconstitutional, almost half of the cases are based on the equality and non-discrimination guarantee in Article 3 of the Constitution.[31] Economic freedoms, such as the freedom of profession and the property guarantee, were next most important. They accounted for 20.24% of all cases.[32] Other significant rights or clusters of rights were the right to marriage and family life (5.88%), procedural rights (5.88%), and the right to privacy (4.23%).

Court engages in implicit balancing when reviewing the human dignity guarantee, see N. Petersen, "Auf dem Weg zur zweckrationalen Relativität des Menschenwürdeschutzes, in Kritische Justiz", 37, 2004, 316, 324; M. Borowski, *Abwehrrechte als grundrechtliche Prinzipien*, in J.-R. Sieckmann (ed.), *Die Prinzipientheorie der Grundrechte*, 2007, 81, 102-104; von Bernstorff, *supra* note 23, at 32; Dederer, *supra* note 23, 114-115; Teifke, *supra* note 23, at 131-134; Baldus, *supra* note 23, at 538-539; C. Möllers, *Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts*, in M. Jestaedt *et al.* (eds), *Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht*, 2011, 281, 294.

[25] See S. Gardbaum, *Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?*, in V. Jackson, M. Tushnet (eds), *Proportionality: New Frontiers, New Challenges*, 2017, 221, 230-237.

[26] See Petersen, *supra* note 1, at 189.

[27] See, in particular, *id.*; L. Wendel, "Welche Grundrechte führen zum Erfolg?", in *Juristenzeitung*, 75, 2020, 668-679; C. Engel, "Grundrechtskonjunkturen", in *Juristenzeitung*, 77, 2022, 593-599.

[28] Petersen, *supra* note 1, at 70.

[29] Wendel, *supra* note 27, at 670.

[30] Engel, *supra* note 27, at 594.

[31] See N. Petersen, *Germany*, in Id. (ed.), *Equality's Guardians: How Courts Conceptualize Equal Protection and Non-Discrimination Guarantees*, 2025, 95, 95.

[32] The data stems from the analysis for Petersen, *supra* note 1.

These results change slightly when changing the sample of analyzed cases. Luisa Wendel's study, which included successful challenges to court decisions, found that procedural rights are the most important rights.[33] The difference likely stems from the review of court decisions which are often found to be in violation of procedural rights, while such violations happen less often when it comes to legislation. Furthermore, the equality and non-discrimination guarantee and economic rights also play an important role. Two rights that played a less significant role in the review of legislation are the general freedom of action and the freedom of expression. The latter has a crucial role in reviewing decisions of private law courts, while the former presumably is important for the review of executive action.

Christoph Engel's analysis, which looked at the review of constitutional rights regardless of whether they were successful also comes to similar results.[34] The most important right in Engel's analysis is the general equality guarantee in Article 3 of the Constitution. Furthermore, procedural rights and economic freedoms also play a major role. Furthermore, Engel identifies the general freedom action and the guarantee of human dignity as constitutional guarantees that are mentioned often by the court.

This analysis demonstrates that the importance of individual rights changes slightly, depending on the perspective. However, taken together, these studies show that the guarantee of equality and non-discrimination, the economic guarantees, i.e. the freedom of profession and the property guarantee, and the procedural rights were by far the most crucial rights in the Court's proportionality practice.

3. Proportionality and social rights

Social rights play only a minor role in the German case law. In the German Constitution, there is no explicit guarantee of social rights. The Constitution contains a guarantee of the social state (*Sozialstaatsprinzip*) in Art. 20, para. 3. However, this principle does not itself confer enforceable individual rights that can be invoked before the Federal Constitutional Court because it is not included in the catalog of constitutional provisions on which a constitutional complaint can be based.[35] Nevertheless, the Federal Constitutional Court has derived a right to subsistence from the guarantee of human dignity in Art. 1 of the Constitution in combination with the social state principle in Art. 20, para. 3.[36]

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[33] Wendel, *supra* note 27, at 674.

[34] Engel, *supra* note 27, at 595.

[35] See Art. 94, para. 1, no. 4, lit. a of the German Constitution.

[36] Seminally BVerfGE 125, 175. See also BVerfGE 113, 88, 108-09; 120, 125, at 154-55.

There are, however, only a few cases reviewed under this guarantee. [37] Furthermore, the proportionality test plays a limited role in operationalizing it. [38] The key question is rather whether certain social benefits granted by the state are adequate. In this context, the Court imposes procedural obligations and a consistency requirement on the legislature. [39] The leading case regarding social rights is the *Hartz IV* judgment from February 2010. [40] In this case, the Court examined whether the level of social subsistence benefits for individuals who had no income or insufficient income was adequate.

The Court held that social subsistence benefits had to cover the basic needs of every individual requiring support. [41] It acknowledged that the legislature enjoyed a wide margin of discretion when determining the specific level of subsistence support. [42] However, it imposed two limits on this discretion. [43] On the one hand, the Court reviews whether the level of subsistence benefits is manifestly insufficient in absolute terms. [44] On the other hand, it undertakes a procedural review: it examines whether the legislature has based its determination of the concrete amount of social benefits on a transparent and adequate procedure capable of establishing actual subsistence needs. [45]

It is the second prong of the test that has shown some bite in judicial practice. The Court predominantly relies on procedural arguments and consistency considerations to review legislative determinations. [46] In *Hartz IV*, it acknowledged that the legislature had generally based its determination of an adequate subsistence level on a rational estimate. [47] The legislature had used a statistical model to calculate the necessary monetary amount for a basic basket of goods. [48] However, the Court argued that this rationale had not been consistently implemented. On the one hand, the legislature had made certain deductions from the basic basket of goods without properly justifying them. [49] In particular, these deductions were

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[37] The key cases are BVerfGE 125, 175; 132, 143; 137, 34; 142, 353; 152, 68.

[38] See Lüders, *supra* note 13, at 490-491.

[39] See Petersen, *supra* note 1, at 145-146.

[40] BVerfGE 125, 175.

[41] *Id.*, at 224.

[42] *Id.*, at 224-25.

[43] See *id.*, at 225-26. See also BVerfGE 132, 134, at 165; 137, 34, at 75.

[44] BVerfGE 125, 175, at 225-26.

[45] *Id.*, at 225.

[46] See S. Rose-Ackerman, S. Egidy, J. Fowkes, *Due Process of Lawmaking: The United States, South Africa, Germany, and the European Union*, 2015, 178-182; Petersen, *supra* note 1, at 145-146.

[47] BVerfGE 125, 175, at 234-38.

[48] *Id.*

[49] *Id.*, at 238-44.

based on mere assumptions without empirical support. [50] On the other hand, the Court also found a violation with respect to the benefits level for children. [51] Here, the legislature had made a lump-sum deduction that, according to the Court, was "devoid of any empirical or methodological foundation". [52]

A similar line of reasoning appears in the 2012 judgment on social benefits for asylum seekers. [53] The case concerned the adequacy of benefits granted to asylum seekers. The Court confirmed that asylum seekers were, in principle, entitled to the same subsistence benefits, derived from human dignity and the social state principle, as all other citizens. [54] In the specific case, the actual benefit level violated the constitutional guarantee because it was manifestly insufficient. [55] The Court based its reasoning on consistency considerations. [56] For almost twenty years, the benefit level had not been raised, even though prices had increased by more than 30% during that period. [57] At the same time, the benefits had not been generous when first introduced, as the legislature had intended to restrict them to the bare minimum. [58] For this reason, the Court assumed that the level of benefits for asylum seekers was inadequate after it remained unchanged for almost 20 years despite inflation.

While the Court did not apply the proportionality test in the two judgments just discussed, it employed the test in a more recent judgment from November 2019. [59] This judgment concerned sanctions in social benefits legislation. According to the challenged statute, benefits could be reduced if the recipient rejected reasonable offers of employment. The Court reviewed these sanctions under the proportionality test and partially declared them unconstitutional. [60] It acknowledged that the sanctions pursued a legitimate aim: since social benefits are financed by the community of citizens, individuals may rely on them only if they have no other means of securing their subsistence. [61] It was therefore reasonable to expect them to accept suitable employment before claiming social assistance. [62]

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[50] *Id.*, at 239 ("'ins Blaue hinein' geschätzt").

[51] *Id.*, at 245-250.

[52] *Id.*, at 246.

[53] BVerfGE 132, 134.

[54] *Id.*, at 159.

[55] *Id.*, at 166-70.

[56] *Id.*

[57] *Id.*, at 166.

[58] *Id.*, at 167-68.

[59] BVerfGE 152, 68.

[60] *Id.*, at 117.

[61] *Id.*, at 116.

[62] *Id.*

However, the concrete design of the sanctions regime was disproportionate. [63] The Court criticized, in particular, its lack of flexibility. On the one hand, the administration lacked discretion to avoid imposing sanctions even where it was evident that sanctions would not achieve their intended purpose, for example, when individuals suffered from severe psychological problems. [64] On the other hand, the Court found it disproportionate to impose benefit reductions lasting at least three months, even when the individuals concerned complied with their obligations well before the end of this period. [65]

Alongside these cases, the Court frequently reviews social benefits legislation under the equality guarantee of the German Constitution. [66] However, such cases do not concern social rights in the proper sense. Instead, the issue is whether social benefits legislation treats different social groups fairly. Consequently, there are only a handful of genuine social rights cases, and these generally avoid the proportionality test. Instead of proportionality, the Court employs procedural considerations or consistency arguments. There is one recent exception—the judgment concerning sanctions in social benefits law. [67] Here, the Court assessed whether the sanctions had been applied proportionately. Still, the use of proportionality in the social rights context remains the exception rather than the rule.

4. Proportionality in states of emergency: COVID-19 as a case study

The German Constitution does not contain an explicit derogation clause that allows for the suspension of fundamental rights in a state of emergency, akin to Art. 4 ICCPR or Art. 15 ECHR. [68] However, the existence of an emergency can be taken into account within the framework of the general justification clauses. [69] With the exception of the guarantee of human dignity, no individual right in the German Constitution is guaranteed absolutely. [70] Instead, most rights include

[63] *Id.*, at 126-48.

[64] *Id.*, at 134-35.

[65] *Id.*, at 135-36.

[66] See Petersen, *supra* note 1, at 107-108.

[67] BVerfGE 152, 68.

[68] See A.-B. Kaiser, *Ausnahmeverfassungsrecht*, 2020, 221-245. On the practice of international human rights courts with regards to derogation clauses, see Max Milas, *Die Notstandsspruchpraxis als Menschenrechtssystemschutz: Eine Analyse der Entscheidungen menschenrechtlicher Kontrollinstitutionen* (PhD thesis, University of Münster, 2024).

[69] Kaiser, *supra* note 68, at 227-231.

[70] *Id.*, at 234.

explicit justification clauses that permit restrictions and specify the purposes for which such restrictions are possible. If a right does not include an explicit justification clause, restrictions may nevertheless be imposed if they serve to protect competing constitutional values, such as the protection of public health. [71]

One question that has not been sufficiently explored is whether courts apply a different standard of review in emergency situations than in normal circumstances. [72] A case study that may shed light on this issue is the review of emergency measures enacted by the legislature and the executive in response to the COVID-19 pandemic. [73] Like many other states, Germany imposed a wide range of emergency measures during the pandemic. These ranged from initial lockdowns and quarantine requirements for travelers and close contacts of infected individuals, to the closure of shops, schools, and daycares, as well as nightly curfews and mask mandates. [74] Since the German Constitution does not permit derogations from fundamental rights, these measures had to be assessed under the general justification clauses of the relevant rights.

Many of the measures were challenged in administrative courts, but only a handful reached the Federal Constitutional Court. Three decisions are particularly noteworthy. [75] In November 2021, the Court issued two judgments directly concerning emergency measures—one on the imposition of a curfew and restrictions on social contacts, [76] and the other on school closures. [77] A further decision from April 2022 addressed the requirement of proof of vaccination for certain professions that

[71] BVerfGE 28, 243, at 261.

[72] On this issue, see C. Binder *et al.*, "*Human Rights in Times of Emergency: Assessment of State practice in respect to times of emergency*", in *Oslo Law Review*, 12, 2025, 1, 32-35; S. Kadelbach, *Menschenrechte in Zeiten des Notstands*, in P.B. Donath *et al.* (eds), *Der Schutz des Individuums durch das Recht: Festschrift für Rainer Hofmann zum 70. Geburtstag*, 2023, 255, 265-266 with regards to international human rights law.

[73] On the assessment of whether emergency measures violated fundamental rights during the COVID-19 pandemic, see H.M. Heinig *et al.*, "Why Constitution Matters - Verfassungsrechtswissenschaft in Zeiten der Corona-Krise", in *Juristenzeitung*, 75, 2020, 861-872; C. Gusy, "Grundrechte unter Quarantäne?", in *Recht und Politik*, 56, 2020, 139-141; F. Hase, "Corona-Krise und Verfassungsdiskurs", in *Juristenzeitung*, 75, 2020, 697-756; A.K. Mangold, "Relationale Freiheit: Grundrechte in der Pandemie", in *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer*, 80, 2021, 7-35; S. Rixen, *Einschränkungen von Grundrechten im Namen von Public Health: Grundrechte als Regulative verhältnismäßiger Pandemie-Bewältigung*, in A. Reis, M. Schmidhuber, A. Frewer (eds), *Pandemien und Ethik*, 2021, 79-91; J. Kersten, S. Rixen, *Der Verfassungsstaat in der Corona-Krise*, 3rd edn. 2022, 153-188; K. Günther, U. Volkmann (eds), *Freiheit oder Leben? Das Abwägungsproblem der Zukunft*, 2022; S. Huster, L. Wiese, *Einschränkbarkeit der Grundrechte des Grundgesetzes in Ausnahme- und Krisenzeiten*, in P. Thielbörger, S.R. Lüders (eds), *Die COVID-19-Pandemie als Herausforderung an das Völkerrecht, das Verfassungsrecht und das Verwaltungsrecht*, 2023, 57-79.

[74] For a brief overview, see Kersten, Rixen, *supra* note 73, at 154.

[75] Alongside the three decisions discussed below, see also BVerfGE 160, 79 on the regulation of triage in emergency situations.

[76] BVerfGE 159, 223.

[77] BVerfGE 159, 355.

regularly came into contact with vulnerable individuals. [78]

In all of these decisions, the Federal Constitutional Court granted the legislature a wide margin of discretion. [79] The Court emphasized that it is for the legislature to assess the risks that fundamental rights restrictions are intended to address, and that such risk assessments are subject only to limited review. [80] The Court applied the deferential standard of reasonableness review (*Vertretbarkeitskontrolle*). [81] It merely examined whether the legislature had based its risk assessment on a sufficiently reliable factual foundation. [82]

This deferential approach was most evident in the school closure judgment. [83] The challenged legislation required schools to close once infection rates in a particular region exceeded a pre-defined threshold. The Court acknowledged that the consequences of repeated school closures for affected children were severe. [84] Consecutive closures led to a significant loss of learning opportunities, and the lack of social contact risked hampering children's psycho-social development. [85] The Court also recognized doubts about the effectiveness of closures. On the one hand, evidence suggested that children were not the main drivers of infections, being less susceptible to the virus and less likely to transmit it because of a lower viral load. [86] Moreover, some experts argued that school closures were less effective than alternative measures. In particular, regular testing combined with quarantine measures would have been a more effective way of breaking infection chains than complete school closures. [87]

Despite this evidence of serious negative effects and questionable effectiveness, the Court nevertheless upheld the measures. [88] It pointed to the uncertainties in evaluating the effectiveness of school closures and granted the legislature broad discretion in this respect. [89] Furthermore, it held that the legislature was justified in giving greater weight to the protection of public health than to the well-being of children, even though adequate compensation through distance learning could not be guaranteed. [90] This demonstrates that the Federal

[78] BVerfGE 161, 299.

[79] See BVerfGE 159, 223, at 298-99; 159, 355, at 406; 161, 299, at 360.

[80] BVerfGE 159, 223, at 298; 159, 355, at 406-07; 161, 299, at 360.

[81] BVerfGE 159, 223, at 298-99; 159, 355, at 407; 161, 299, at 368.

[82] BVerfGE 159, 223, at 198; 161, 299, at 360-61.

[83] BVerfGE 159, 355.

[84] *Id.*, at 413-21.

[85] *Id.*, at 418.

[86] *Id.*, at 407.

[87] *Id.*, at 410-11.

[88] *Id.*, at 421-40.

[89] *Id.*, at 407-11.

[90] *Id.*, at 421-40.

Constitutional Court applied a highly deferential standard of review in the face of the significant health emergency caused by COVID-19. Arguably, the Court would have applied a less deferential standard outside of such an emergency.

This also shows that the proportionality test is not necessarily a stringent instrument that invariably intrudes upon the legislative sphere, as critics sometimes claim. [91] Rather, proportionality can be applied with varying levels of deference. [92] In particular, when assessing specific risks, the Court often affords the legislature a broad margin of discretion. The COVID-19 jurisprudence illustrates that the Court adopted a very deferential approach. This was arguably too deferential regarding the protection of children in the context of school closures. [93] Children are a vulnerable group with little political influence, which would have justified more robust judicial intervention. [94] Yet, given the politically contentious nature of the anti-COVID measures and the significant threat to public health posed by the pandemic, it is understandable that the Court preferred to leave the matter to the political process.

5. Conclusion

The proportionality test is an important doctrinal instrument in German fundamental rights jurisprudence. In many cases, it serves as the central focus of analysis. However, it is not ubiquitous. We have seen that proportionality plays only a marginal role in the context of social rights. Instead, the Court largely relies on procedural arguments and consistency considerations. While proportionality featured in the ruling on sanctions in social benefits law, its application was the exception rather than the rule. Finally, we have seen that the Federal Constitutional Court applies proportionality in a highly flexible manner. It is not necessarily a non-deferential instrument that always subjects legislative action to strict scrutiny. As demonstrated by the Court's COVID-19 case law, it adopted a highly deferential approach when dealing with significant public emergencies.

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[91] See also C. Henckels, "Proportionality and the Separation of Powers in Constitutional Review: Examining the Role of Judicial Deference", in *Federal Law Review*, 45, 2017, 181-197; A. Stone, "Proportionality and Its Alternatives", in *Federal Law Review*, 48, 2020, 123-153; A. Carter, "Moving Beyond the Common Law Objection to Structured Proportionality", in *Federal Law Review*, 49, 2021, 73-95.

[92] For the Federal Constitutional Court, this was established in BVerfGE 50, 290, at 332-33.

[93] Cf. Kaiser, *supra* note 68, at 234-238 (arguing that proportionality has structural deficiencies when it comes to reviewing emergency measures).

[94] See N. Petersen, "Equality, Climate Change, and Future Generations", in *European Journal of International Law*, 36, 2025, forthcoming.

Proportionality jurisprudence in Austria

Otto Pfersmann *

"Proportionality" has pervaded rights jurisprudence and case-law like probably no other concept in constitutional adjudication. It has admitted and developed a set of tests, according to which *proportionality* ought to be applied in concrete cases. However, its precise meaning and working remains still perfectly enigmatic. The Austrian experience may illustrate this claim. While "proportionality" seems to be first excluded from constitutional adjudication, it becomes progressively a standard even where it appears truly difficult to find any legal basis for its application.

Starting with its conceptual definition and theoretical background, comparative constitutional history shows why proportionality was absent both from formal constitutional law and from early case-law of constitutional jurisdictions I). It will then be analysed how proportionality progressively reformatted adjudication and scholarship II), concluding with remarks on the problem of the link between proportionality and rationality III).

1. Theoretical background: The fundamental problem with fundamental rights: undetermined quantitative relations in legal concretisation

a) Legal proportionality defined

In *legal* parlance, proportionality refers to a relation of degree with respect to

* EHESS, Lier-FYT, Paris.

References to decisions by the Austrian Constitutional Court are provided under the format of the official collection edited by the Court: number/year.

References to Austrian legal sources are provided according to the official format of the relevant official gazette: RGBl Reichsgesetzblatt number/year for documents issued under Monarchy, StGBl Staatsgesetzblatt (period between the Ende of the Monarchy and the entry in force of the Federal Constitution 1918-1020 and between the Liberation from Nazi occupation and the re-entry in force of the Federal Constitution 1945) number/year BGBl Bundesgesetzblatt number/year for texts issued under de Federal Constitution of Austria. These documents are now accessible under website of the Federal Chancery https://www.ris.bka.gv.at/.

one certain normative requirement, generally structured in such a way that the obligation (or prohibition or authorisation) to perform actions A1, A2,…An is *quantitatively* conditioned by other factual or normative elements E1, E2,…En. The quantitative measure is *proportional* if the amount of conditioning elements is *equivalent* to the amount of normative consequences. This is often the case in contract law, where relations are determined and expressed in terms of a strict conditional: "If a loan at 3% of n is established, the borrower pays the amount of 3% of n per year". In public law, electoral procedures provide for strict proportions: e.g. half of voices plus one, in some cases "absolute majority" or even "qualified majority" and a decision is adopted; the number of seats obtained by one electoral party is calculated in terms of a certain number of votes.

Sometimes and even most often however, equivalence is *undetermined*. As the relation is not fixed in advance through a general normative provision, the determination is operated in a second or third step by an organ thereto entitled and ordained. The meaning of general provisions requiring a proportional equivalence is thus technically elliptic, as the determination is left to the organ setting the terms of the consequence. Criminal law is a classic example: if a certain deed is committed, its author will be punished with prison from m to n years according to the degree of guilt implicated. The sanction has to fit the gravity of the act as well as possibly other parameters left open in a general provision: the cooperation of the perpetrator in the following inquiry, his or her action in order to restore the victim in his or her rights or previous situation.

Proportionality has thus to be distinguished, either *determined* or *undetermined*, and if so, whether *substantially* or *organically*—or both—*undetermined*.

Substantially undetermined legal proportionality is a normative structure where the consequences of a set of conditions C1, C2…Cn apply according to undetermined parameters P1,P2,…Pn. It is organically undetermined if substantial indeterminacy is left to be decided by one or more not explicitly identified organs.

More generally, it is useful to distinguish *undetermined* against *determined concretisation*: i.e. whether a provision is conceived of as having to be applied through organic concretisation or not, independently of the question of the determination of the organ concretely in charge of an effective application. The idea, that legal standards, or some of them are by their very nature substantially undetermined and nonetheless to be ultimately organically determined in a just and satisfying manner has had an important success in legal theory and strong impact on rights adjudication. Ronald Dworkin famously elaborated his conception of rights as being principles and trumps that existed in law, independently of being explicitly stated as positive norms and that weighing, conciliation, ponderation and balancing is the proper duty of adjudication, linking thus indeterminacy or even absence of any positive support to organic determinacy and right answers. [1] Robert Alexy

[1] R. Dworkin, *Taking Rights Seriously*, Duckworth, London, 1977, and many other writings

followed and further elaborated this theory with respect to rights adjudication in German constitutional law. [2] "Unjust" norms could under certain conditions be considered deprived of validity, whereas in other cases an optimisation ought to be arrived at, even in the absence of positive normative support. [3] Proportionality as an inherent structure of legal orders comprehending rights became an important object of debate and constitutional scholarship. Against these tendencies s, only explicit indeterminacy in positive legal provisions will be considered and discussed in what follow.

b) The evolution of proportionality techniques

Significantly, substantial proportionality emerges in founding texts of English revolutionary movements. The Bill of Rights (i.e. the Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown) of 1689 provides "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". Where exactly the border between a moderate and *excessive* bail is to be set is not stated and does not seem to be essential—nor who will decide on the issue. It is not even clear whether any organ should be in charge of concretising such provision.

One century later, such concerns appear in constitutional law or rather in what the French Constituent Assembly considered to be the most fundamental requirements of a just society and the principles of criminal law are explicitly stated in terms of—substantially undetermined—proportionality in the Declaration of Rights from 1789: "The Law must prescribe only the punishments that are strictly and evidently necessary; and no one may be punished except by virtue of a Law drawn up and promulgated before the offense is committed, and legally applied". The elliptic structure concerns both the legislator and the sentencing judge. [4] This is an exigency concerning primary legislation as well as sentencing in accordance with all relevant legal rules, but of course it does not tell us what exactly is "strictly and evidently necessary". The sentencing judge is thus obliged to seek for this undetermined relation without having any other more precise indication as to

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of the same author, e.g. *Freedom's Law: The Moral Reading of the American Constitution*, Harvard, Harvard University Press, 1996.

[2] R. Alexy, *Theorie der Grundrechte*, Suhrkamp, Frankfurt am Main, 1986; engl. *A Theory of Constitutional Rights*, Oxford University Press, Oxford, 2009.

[3] R. Alexy, *Begriff und Geltung des Rechts*, Karl Alber, Baden-Baden, 1992; engl. *The Argument from Injustice: A Reply to Legal Positivism*, Oxford University Press, Oxford, 2002.

[4] Original text: „Art. 8.- La loi ne doit établir que des peines *strictement et évidemment nécessaires*, et nul ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit, et légalement appliquée.

Art. 9. – Tout homme étant présumé innocent jusqu'à ce qu'il ait été déclaré coupable, s'il est jugé *indispensable de l'arrêter, toute rigueur qui ne serait pas nécessaire* pour s'assurer de sa personne doit être sévèrement réprimée par la loi." (underscoring OP).

what result he or she should lastly arrive at in concerto. However, the statement does not even establish a relatively precise organic link, the whole provision remains organically abstract. We don't know what the legislator ought exactly to establish in order to fit the requirement of the Declaration. In fact, the status of the French Declaration is itself legally undetermined and will acquire constitutional value and judicial applicability only much later and as the result of a highly complex and unforeseen evolution. As long as the Declaration is considered to be a philosophical document of political commitment without any precise legal value, the question of the determination of the undetermined exigencies remains equally abstract and outside legal procedures and debates. This situation changes suddenly when the Constitutional Council established by the Constitution of 1958 decides in 1971 to take the Declaration as a reference for the control of conformity of acts of Parliament. [5]

It seems that normative provisions without clear applicability constitute an invitation to use undetermined proportionality: the requirement is strongly formulated, whereas the precise qualification of the means and technique of concretisation are lacking or enigmatic.

This often appears to be the situation with rights provisions, at least before constitutional review. Whenever a proportion is called for, it is undetermined while the appeal of the text resides exactly in the fact that both the legislator and the concretising judge is apparently bound not to go beyond a certain limit, whereas neither this limit is fixed as such, nor is the procedure explained.

There may also be organic determinacy with delegation with or without proportionality: one certain requirement triggers certain consequences, to be performed by the legislator. This leads to other perplexities.

c) Rights under statutory reservations

With the French Declaration a new problem appears, as most rights provisions are afforded under a *statutory reserve*: how and to what—undetermined - extent a right may be exercised has to be organised by legislation. As article 4 expressly states: "Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than

[5] Decision no. 71-44 DC of 16 July 1971, accessible under https://www.conseil-constitutionnel.fr/en/decision/1971/7144DC.htm. The references to applicable norms reads "Having regard to the Constitution and its preamble". The Preamble of the Constitution of 1958 states in the version then in force: "The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946". During the drafting of the Constitution, it was consensual that the Preamble would not be a norm of reference for constitutional review, but have simple legislative value, see for instance Jean-Sébastien Boda, "Retour sur l'élaboration du Préambule de la Constitution de 1958", in *Revue française de droit constitutionnel*, 2016/2 n° 106, pp. 283-308.

those that ensure to the other members of society the enjoyment of these same rights. These bounds *may be determined only by Law*". The reserve is directed against the executive: only the elected Parliament is entitled to set the limits of liberty and this is considered to be a guaranty against arbitrariness of the royal authority and the administration it handles. But this guaranty is a double-edged sword as it means, that the legislator *is* the real master of the liberties and that he may restrict as best it pleases him. Statutory reservations have become the model for framing rights until the competences of the parliamentary legislator were themselves called into question. The concrete organization of liberties is largely entrusted to legislation in Belgium in 1831, Italy both under the Statute of 1848 and under the Republican Constitution of 1947, in Germany under the Weimar Constitution or even under the Basic Law of 1948, to name just but a few examples.

The first Austrian catalogue of rights effectively considered binding and in large parts still in force today is enacted in 1867 [6] and several of its provisions are placed under a statutory reserve. Until the end of the Monarchy, an Imperial Court was entitled to *declare* whether an administrative authority had violated a right granted in the constitutional act, but could not quash it, let alone annul acts of Parliament. The meaning of a legislative reserve in terms of limiting a right granted by a constitutional act could thus not possibly be discussed.

d) Rights plus constitutional review

A fundamental change came with the constitutional act following the beginning of the Republic, [7] then with the republican *Federal-Constitutional Law* of 1920 [8] which provided for the possibility, afforded to the concerned person, of

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[6] Original version: Staatsgrundgesetz vom 21. December 1867, über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder Fundamental Law of the State from 21st December 1867 concerning the general rights of the citizens for the realms and countries represented in the Imperial Diet, RGBl. 142/1867, integrated in the republican Constitution through Art. 149 paragraph 1 B-VG. the presently valaid version is accessible under https://www.ris.bka.gv.at/geltendefassung.wxe?abfrage=bundesnormen&gesetzesnummer=10000006. Previous catalogues were included in constitutional documents elaborated during the 1848 revolution and some rights provisions were enacted in the course of constitutional reforms before the drafting of the "December Constitution" of 1867, shaping the compromise with Hungary and organising institutional life in Austria until the end of the monarchy.

[7] The Imperial Court was renamed "Constitutional Court" with the Law of 25th January 1919 on the establishment of a „German-Austrian Constitutional Court" über die Errichtung des deutschösterreichischen Verfassungsgerichtshofs, StGBl 1919/48; ist competences were extended with the Law 3rd April 1919, StGBI 1919/212.

[8] The Austrian Constitution is divided in several sets of provisions, the most important being the „Federal- Constitutional Law" from October 1st 1920 Gesetz, womit die Republik Österreich als Bundesstaat eingerichtet wird. StGBl 450/1920, BGBl 1/1920. Several times modified and set again in force after WW2 and the liberation from Nazi occupation with

challenging an administrative act violating a right referred to in the Act of 1867 or any other "constitutionally secured right" before the former Imperial, since April 1919 renamed *Constitutional* Court, itself now entitled not only to annul the administrative act—or unconstitutional coercive action—but also to challenge itself the statute on which the act was based, if it comes to doubting that the statutory provision be in conformity with constitutional requirements. This means that the concerned citizen has the legal ability to directly access the Constitutional Court in its quality as *special administrative court*, but the Court may *itself* in a further step become a complainant introducing a request which the selfsame Court will have to decide, either quashing the statutory provision or stating its conformity.

The possibility of accessing the Constitutional Court will later be enlarged in successive steps, but the first essential stage in terms of rights case-law opens precisely with this very specific setting.

With these three elements: rights provisions at a constitutional level, a special court entitled to annul primary legislation and organs entitled to request this court to decide on rights issues either as special administrative (deciding on the constitutionality of administrative acts) or as constitutional court proper (deciding on constitutionality of primary legislation), this jurisdiction faces a problem not previously identified as such: are rights provisions actually protecting *rights* against primary legislation infringing constitutional guarantees? It is important to note that for lack of political agreement between the parties, no new rights catalogue was adopted in the constituent assembly who decided to include the Act of 1867 into the new Constitution: a list of rights dating back 50 years ago are linked with an innovative and sophisticated procedure of judicial review of legislation.

Hans Kelsen who had an important part in the drafting of the Constitution as adviser of State Chancellor Karl Renner was also the first to write a monograph on the new document. [9] In order to explain the result of the developments leading from the revolution of 1848 to the Republic of 1920, he adopted a mainly historical perspective, presenting thus also the Act of 1867 on the rights of citizens, included in the new charter. There he has to address the question of the level of effectively granted protection. Concerning art. 13 of the Constitutional Act of 1867, framing the freedom of opinion, he writes: "(…) as limitations of free speech is made possible through ordinary legislation, the constitutional guarantee is practically abolished in the very same sentence in which it is pronounced, which leads—also taking the general principle of legality stated in art. 18 of the

StGBl. Nr. 4/1945 and modified again several times since, the presently valid version can be accessed under: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000138.

[9] H. Kelsen, *Österreichisches Staatsrecht. Ein Grundriß entwicklungsgeschichtlich dargestellt*, J.C.B. Mohr (Paul Siebeck), Tübingen, 1923.

Constitution into account—to the conclusion that the normative statement of such liberty rights is superfluous". [10]

This radical analysis of the statutory reserve may not have been unanimously shared by scholarship and case-law, but was embedded in a highly restrictive conception of rights precisely and paradoxically at a time where constitutional review with respect to constitutionally protected rights was first established. From a strictly legal point of view and under a political context in which judicial control of legislation was far from being commonly accepted, the conception of constitutional law as "strictly formal" was not only perfectly plausible, but reflected precisely the state of the law.

The Constitutional Court largely followed this restrictive conception of rights under the statutory reservation argument, as long as "constitutionally protected rights" were not framed without such limitations, at least during the First Republic (1920-1934). [11]

2. Limits to limitations

Both caselaw and scholarship changed slowly, but significantly changed after WW2 and the reinstatement of the Federal Constitution in 1945, despite the fact that the leading members of the re-established Court still considered themselves bound to a strictly formal conception of concretizing constitutional norms.

These developments are due to the combined effect of doctrinal imports, constitutional revisions and supranational integration, leading progressively to an opposite understanding of legislative interventions in the domain protected by constitutional rights provisions as testable under varieties of proportionality which it would be difficult to find in the original Federal Constitution.

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[10] H. Kelsen, *op. cit.*, 59. This and similar statements have given the impression that Kelsen dismissed fundamental rights generally, which in my view is a mistake. Kelsen simply makes apparent that the wordings of rights catalogues drafted long before constitutional adjudication and without determining a method of effective protection of rights leads to poor results. As a constitutional judge, bound to a duty of confidentiality, his position was rather favourable to complaints as results from the opened archives, cf. in detail: R. Walter, *Hans Kelsen als Verfassungsrichter* (Schriftenreihe des Hans Kelsen Instituts 27), Vienna, Manz, 2005.

[11] See for instance VfSlg 259/1924 where restrictions on personal liberty are considered to have been limited in a constitutionally authorised way. In detail, there are nonetheless interesting evolutions highlighted for instance by Kurt Heller, *Der Verfassungsgerichtshof. Die Entwicklung der Verfassungsgerichtsbarkeit in Österreich von den Anfängen bis zur Gegenwart*. Verlag Österreich, Vienna 2010, 234, with reference to VfSIg 216/1923, in which the Court called for a specific justification, when legislative provisions institute a differential treatment.

a) The essential substance

A first significant change can be seen in 1949, [12] where the Court requires that expropriations, while in the competence of the legislator, can be imposed only "if in public interest". This exigency will become the first test of constitutionality under the what will later be termed "principle of proportionality".

Doctrinal imports were mainly triggered by ideas developed in the wake of the Germanys postwar Constitution and the following case-law. Confronted with the problem of changing the previous approach in which legislation is considered in and off itself the guarantor of liberties, the German constitutional debate was looking for boundaries of parliamentary sovereignty compatible with the restauration of representative democracy. In order to limit limitations on rights provisions by statute, the Basic Law introduced the principle of the "essential content" of a right, prohibiting limitations that would go beyond this limit. [13] This is again an undetermined concept, leaving it to the German Federal Constitutional Court to draw the boundaries between essential and non-essential elements of a fundamental liberty. This idea seems to have inspired the Austrian Constitutional Court in an important decision concerning the nationalization-law of the main industrial undertakings. [14] The law was enacted in order to prevent Soviet occupation authorities to seize these assets as former "German property". Years later, the government of Lower Austria filed a complaint to the Constitutional Court in order to annul the statute enacted in 1946 as infringing the constitutional guarantee of property. The Court denied the claim with the argument that property was constitutionally granted only under statutory reserve, where the said nationalization was precisely operated through a statute. The interesting part of the decision consists nonetheless in the consideration that "In this respect, it must be pointed out that a nationalization of all enterprises with large capital requirements and the entire industry was therefore prohibited to the legislator, as the constitutionally guaranteed right of the citizen to freedom of occupation (Art. 6 of the Fundamental Law on the Rights of the Citizens 1867) would then have been practically

[12] VfSlg 1809/1949.

[13] Basic Law, "Article 19 (1) Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears. (2) In no case may the essence of a basic right be affected".

Cf. P. Häberle, *Die Wesensgehaltgarantie des Art. 19 Abs. 2 Grundgesetz: zugleich ein Beitrag zum institutionellen Verständnis der Grundrechte und zur Lehre vom Gesetzvorbehalt*, Karlsruhe, Müller, 1962; C, Drews, *Die Wesensgehaltsgarantie des Art. 19 II GG*, Nomos, Baden-Baden, 2005.

[14] Federal statue from 26 July1946 concerning the nationalisation of undertakings ("Verstaatlichungsgesetz"), original version: BGBl. Nr. 168/1946. Concerning the historical context, see W. Weber, S. Koren, *Die Verstaatlichung in Österreich*, Duncker & Humblot, Berlin, 1964; L. Bleckmann, *Verstaatlichung und Entschädigung in Österreich*, Verlag, Österreich, 2021.

eliminated in this ambit. The legislature was necessarily obliged to define the limits of the nationalization action." Legal scholarship has interpreted this view as an implicit reference to the principle of the "essential content" not stated as such in any constitutional provision then in force in Austria. The destiny of the essential content jurisprudence is itself highly interesting and problematic as it prohibits that a statute restricts a right below an inferior limit, whereas proportionality as a jurisprudential principle requires that a right ought to maximally protected.

While still maintaining a relatively restrictive case-law concerning rights, the Austrian Court progressively developed a more far reaching conception, starting with the *principle of equality*. According to the Court, this general exigency prohibiting certain differentiations, was thought to require that statutory norms be "objectively justified" ("sachlich") where "objectively justified" remains obviously entirely undetermined, but allows the Court to delve into a more advanced and substantial critical appreciation of constitutionality. Another domain in which one could have observe a more offensive conception of constitutionally protected rights was "access to the legal judge".

The classical view was, for instance, succinctly summarized by the Court in a decision from 1983: "The Court has repeatedly stated that the essential content of the fundamental right has not to be touched upon and that the right has not to be infringed upon in its essence, nor is the legislator allowed to overstep the boundaries of the matter on which to rule (…) Such an excessive rulemaking can however not be seen in the present provision". [15]

If thus certain decisions seem to have been inspired by theories of essential content or were advancing towards a more substantial conception of limits to limitations of rights, it must be noted that no constitutional provision could be understood as giving any hint in this direction. In order to modify the then generally dominant conception, one needed either other and different constitutional norms or a reception of other external approaches.

b) Conventionalisation of rights adjudication

The main external trigger integrated into the Austrian legal system came with the adoption of the European Convention of Human Rights, first as a statute in 1958, then as part of federal constitutional law in 1964. [16] This changed not only the catalogue of rights, but also the whole conception of the statutory reservation, adding specific and substantial requirements for legislative limitations of liberties.

Moreover, the integration of the Convention into the Federal Constitution

[15] VfSlg 9750/1983.

[16] The Convention for the Protection of Human rights and Fundamental Freedoms was first integrated together with the First Additional Protocol into Austrian law by ratification in 1958 (BGBl 210/1958), then retroactively elevated to formal constitutional law with the Constitutional Law BVG BGBl. Nr. 59/1964.

implicated the possibility of a twofold review: the same cases could be examined both by the Constitutional Court and in a second stage by the European Court of Human Rights, constraining the Austrian court to—slowly—adapt itself to standards and techniques of the ECHR. The Convention conceives rights differently from the older Austrian fundamental law from 1867 as it substantially specifies the justifications for possible limitations as "limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others". [17] The wording is interesting as it states the principle of statutory reservation under the condition of necessity in a "democratic society", where the concept of democratic society can be understood minimally as requiring the participation of citizens in regular elections or maximally as the exigency of highly extended rights and limited competences of the elected legislator. The case-law of the European Court of Human Rights accepts on the whole a rather large "margin of appreciation", whereas the impact on national legal orders may have been stronger, especially in the Austrian case.

Despite the internal constitutional rank of the Convention, the Court did not modify its case-law in a first period. The strongest opposition emerged, however, less on the problem of rights limitations as on the conception of "civil rights" as drafted in Art. 6 of the Convention. Whereas the Austrian courts retained that review of administrative decisions by either the Constitutional or the Administrative Court was perfectly in line with conventional exigencies, the European Court of Human Rights asked for full review on facts and law by "tribunals". The Austrian courts considered this as an attempt to modify the whole institutional architecture of the legal system. The severe stance taken on the question of "civil rights" even led to one of the sharpest statements of resistance against adjudicational developments by the EHRC. [18] The case-law of the European Court of Human Rights constrained Austria to fundamentally revise its system of administrative justice. Whereas its original conception was conceived as an internal control of administrative action with an Administrative Court ultimately reviewing the legality of the

[17] ECHR, art. 9, par. 2. „Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others". Similar clauses are included in articles 8, 10, 11.

[18] VfSlg 11500/1987: "The Constitutional Court would not omit to point out that if the Austrian legal order were in and off itself violating the Convention, this could, in the present state of considerations, only be the result of an open modification of the law by the organs of the Convention which would trigger the question – not be answered in the present context – as to whether the transmission of a competence of legal modification on a constitutional level to an international organ would not have to be considered as the elimination of the constitutional legislator and therefore would have required as a total change of the Federal Constitution in the meaning of its Art. 44 (3) a prior referendum by the whole federal citizenry".

decision of the administrative authority,[19] the case-law of the ECHR, then the Charter of Fundamental Rights of the EU (art. 47) required that administrative decisions should be entirely reviewable in fact and law by judicial organs. After long debates and developments, the Constitution was revised in order to introduce administrative tribunals (instead of internal administrative stages of appeal or so called independent administrative authorities with judicial elements) and the possibility to introduce a complaint either to the Constitutional Court or the Administrative Court or both depending on whether a constitutionally granted right or a statutory right were infringed by the ruling of the administrative tribunal.[20]

On the political level, a reform committee was instituted in order to draft a new catalogue of fundamental rights.[21] After years of parliamentary work, only one constitutional law concerning personal freedom was adopted in 1988.[22] Its wording clearly integrates proportionality requirements as a general principle, before delving into details.[23] This shows the change in rights conception at the level of constitutional reform, but also its limits. What fundamentally modified the approach to fundamental rights was case law and scholarship.

c) Scholarly controversies

Two conception were openly conflicting: on one side, the formal view according to which constitutional review and thus rights adjudication had strictly to follow the provisions of formal constitutional law and to clearly outline applicative arguments.[24] On the other side, a "substantialist" wing positioned itself openly advocating a "material" theory of rights and the systematic performance of a proportionality test. This line was vigorously argued by different authors, opposing the strictly normativist conception. In his monograph on the essential substance argument and the principle of proportionality,[25] Manfred Stelzer came first to

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[19] G. della Cannanea, O. Pfersmann, A. Zumbini (eds.), *The Austrian Codification of Administrative Procedure*, Oxford University Press, 2023.

[20] BGBl. I Nr. 51/2012 "Verwaltungsgerichtsbarkeits-Novelle".

[21] See G. Holzinger, *Grundrechtsreform in Österreich*, in R. Machacek, W. Pahr, G. Stadler, (eds.), *Grund- und Menschenrechte in Österreich*. Vol I: *Grundlagen, Entwicklungen und internationale Verbindungen*, Kehl am Rhein-Straßburg-Arlington, N.P. Engel Verlag, 1991, 459-498.

[22] Bundesverfassungsgesetz vom 29. November 1988 über den Schutz der persönlichen Freiheit, BGBl. Nr. 684/1988, modified BGBl. I Nr. 2/2008.

[23] Art. 1, (3), "The deprivation of personal liberty may only be imposed by statutory provision if it is necessary for the purpose of the measure; personal liberty may only be deprived if and to the extent that this is not disproportionate with respect to the purpose of the measure".

[24] R. Walter, Contribution in *Grundrechtsverständnis und Normenkontrolle: Eine Vergleichung der Rechtslage in Österreich und in Deutschland* Kolloquium zum 70. Geburtstag von Hans Spanner (Forschungen aus Staat und Recht, Band 49) Vienna, New York, 1979, 1sq.

[25] M. Stelzer, *Das Wesensgehaltsargument und der Grundsatz der Verhältnismäßigkeit*, Springer, Vienna, 1991.

the conclusion that no such thing as an essential nature of fundamental rights could be found in formal constitutional law. He then went on claiming that for this very reason, rights jurisprudence ought to follow an "argumentative" path, in the wake of the theories of Stephen Toulmin. [26] Decisions should be justified rather than simply deduced from explicit provisions. Taking this view, he tries to show that the Court had already left his previous conception and required in many decisions that rights restrictions ought to be grounded in public interest. Against relying on deduction, case-law should offer value-laden arguments. Other authors like the later president of the Court, Karl Korinek (member from 1978 to 2008, president 2003-2008), advocated a more moderate, but no less anti-formalist view of case law in which rights would have been given more weight. [27] This is also the line of argumentation followed by Kurt Heller, constitutional judge from 1979 to 2009, in his historical overview of the Court's evolution. [28]

d) The "proportionalist" turn

Perhaps the most important changes occurred first in the field of the freedom of exercising a gainful activity. Commercial opening hours were traditionally very restrictively and rigidly ordered with evening closing times at 6 pm and 1 pm on Saturdays until Monday mornings. In several decisions, the Constitutional Court considered the statute to be excessive and grounded its reasoning on proportionality: the legislator certainly had the competence to regulate opening hours and the aims pursued with their regulation was surely in the public interest, the means were also adequate in order to fulfill the objective and yet the rule appeared to be too restrictive. [29]

In these cases, the Court elaborated a standard formula since then canonical in terms of proportionality reasoning: "According to its established case-law with respect to the liberty to exercise a gainful activity protected by the Constitution, legislative rules limiting this liberty on the ground of statutory reservation within this constitutional provision, are authorized only if required by public interest, appropriate to accomplish the purported scope, adequate and objectively justified".

The reasoning of the Court appears interesting in its details. Exceptions to the strict rules concerning the closing of shops in early evenings and on Saturdays

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[26] Following mainly *The Uses of Argument*, Cambridge Univ. Press, Cambridge, 1958.

[27] See for instance K. Korinek, *Grundrechte und Verfassungsgerichtsbarkeit* (= *Forschungen aus Staat und Recht*, vol. 134). Springer, Vienna New York, 2000.

[28] K. Heller, *Der Verfassungsgerichtshof. Die Entwicklung der Verfassungsgerichtsbarkeit in Österreich von den Anfängen bis zur Gegenwart*. Verlag Österreich, Vienna, 2010, especially 435 sq. Interestingly, Heller draws on Gadamer's hermeneutics (*Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik*. Mohr Siebeck, Tübingen 1960) in order to justify that the Court had to "rationalise" its approach through material value-laden argumentation.

[29] See especially the reasoning in case VfSlg 11.749/1988, later in VfGH 14.03.2018, G 227/2017.

could be authorized if the Governor of a *Land* considered that it would be necessary for tourists in certain particularly relevant locations. In a series of decisions, the Court was confronted with two connected problems: how can such an important delegation of power be reconciled with the principle of legality and with the principle of equality? On the other hand, is such a limitation of the right to exercise a lawful lucrative activity still proportional with respect to the competences of the legislator? In its first decisions, the Court considered that it was the power of the Governor, acting legally as an administrative organ, to impose the closing of shops on one certain half-day by simple regulation was deemed excessive, as it deprives the shopkeepers of any autonomous choice *in view of the needs of the general consumer*. [30] This combination of considerations is restated in several cases finally ending the closing rule on Saturday afternoons, although the legislator tried to adapt the closing rules to the first decisions of the Court while maintaining the general approach, only slightly liberalizing the options open to the shopkeepers. The Court admitted a direct petition and came to the conclusion that even the new law *infringed gravely* upon the freedom of exercising a commercial activity without truly helping customers. [31]

Similar lines of understanding rights rapidly developed in the different fields of rights case-law. This evolution enlarged the power of the court who set up a variable conception of balancing, sometimes vigorously criticized in scholarship, [32] which finally accepted the proportionality turn and engaged mainly in attempts to systematize and classify cases and opinions.

The procedural rules entrust the Government with the defense of the legislative provision against the complainant. [33] On several occasions, at least in the view of the Court, the Federal Government had difficulties or failed to prove that a contested provision was appropriate to promote the purported objective. Two cases became famous for the method of scrutiny applied by the Court in the procedure. This was the case concerning scrap steering: [34] the link between the law

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[30] VfSlg. 11558/1987.

[31] VfGH G 30/90, G 29/90, G 28/90, 09.10.1990. Cf also O. Pfersmann, *Autriche 1990*, in *Annuaire International de Justice Constitutionnelle 1990*, Paris, 1992, 461-486 for details see also C. Grabenwarter, „Ladenschluß verfassungswidrig", in *Recht der Wirtschaft*, 264-268.

[32] W. Barfuss, *Neue Entwicklungen in der Rechtssprechung des Verfassungsgerichtshofes*, in *Östereichische Juristenzeitung*, 44 (1989), 673 sq.; M. Holoubek, *Die Interpretation der Grundrechte in der jüngeren*, Judikatur des Verfassungsgerichtshofs, in R. Machacek, W. Pahr, G. Stadler (eds) „70 Jahre Republik. Grund- und Menschenrechte", in *Österreich. Grundlagen, Entwicklungen und internationale Verbindungen*, Kehl am Rhein, Strasbourg, Arlington, 1991, 43-82.

[33] Art. 63, par. 1 and 2 of the Law concerning the Constitutional Court (Verfassungsgerichtshofgesetz 1953—VfGG, original version, several times revised BGBl. Nr. 85/1953). This is understandable in the French classical setting of a priori review, where it is indeed the Government who exercises its initiative. In the Austrian case however, the Government in charge may be pertaining to a quite different political obedience than the one who introduced the bill in the first place.

[34] Decision VfSlg 10.179/1984.

and the supply of iron for the industry could not be satisfactorily demonstrated. It was the case concerning taxi concessions, [35] the legislative exigency of a "needs test", i.e. that an objective economic demand had to be established and the scope to restrict the number of taxis for the sake of the environment.

The interesting point is that it all happened without explicit empowerment or precise guidelines and that the whole conceptual vocabulary is mainly borrowed—with varieties—from German case-law, itself lacking precise foundations in the Basic Law.

And whereas the traditional conception required either the absence of legislative reservations or its substantial precision in order to exactly set the boundaries for constitutional review, the new approach considers that proportionality is intrinsic to rights provisions and that differences are to be set with respect to the intensity of review.

In view of these developments, one can sum up the main point as the integration and extension of proportionality jurisprudence in constitutional adjudication since the beginnings of 90ties to nearly all constitutionally protected rights, independently of its explicit formulation—as in the constitutional law concerning personal freedom—in some older varieties as in the provisions of the ECHR or of the CHR as far as the Court is bound to apply them. It is of course perfectly impossible to analyze them in detail in the present paper. One can mention that proportionality plays a more or less important role in the application of different rights provisions. [36]

A highly differentiated scrutiny is for instance required in matters of respect for private and family life according to art. 8 of the Convention when it comes to measures of ending the sojourn, with lots of criteria to be considered. [37]

3. Is proportionality-adjudication rational?

The review by the Constitutional Court is—recently - termed *broad scrutiny* and examines the constitutionality of legislative provisions, while the review by

[35] Decision VfSlg 10.932/1986. Similar case with even stronger scrutiny and proportionality requirements: VfSlg 11.483/1987: The Federal Government was unable to demonstrate that the challenged provisions were appropriate to promote railway services and traffic security. Interesting the argumentative link between appropriateness and absence of proportionality in strong sense: "The exam of objective needs is on the whole unsuitable, but in any event a disproportionate means to achieve the purported scope".

[36] To see how „proportionality" works in detail in recent rights adjudication see the presentation of the relevant case-low in the literature, e.g. H. Mayer, G. Kucsko-Stadlmayer, K. Stöger, *Grundriss des österreichischen Bundesverfassungsrechts*, Manz, Vienna, 2015, 11th edition; T. Öhlinger, Ha. Eberhard, *Verfassungsrecht*, Facultas Wien 2019 (12th edition); *Die Grundrechte Grund- und Menschenrechte in Österreich*, Wien New York, Springer, 2020.

[37] See for instance VfSlg 19.220.

the Administrative Court is labelled *strict scrutiny* as all aspects of conformity with legislative norms are analyzed. The terminology resembles standards of review in other legal orders, but concepts are rather different. In the United States strict scrutiny concerns constitutional conformity whereas intermediate scrutiny or rational basis review applies to legislative rules. [38] In France, the standards of review are directly linked to the intensity with which proportionality is required. [39]

These classifications are merely scholarly attempts to a structured understanding of the judicial techniques of application of proportionality. But as there is no such thing as a constitutionally or statutory differentiation, it remains a subject of debate as to whether the Court actually distinguishes different classes of cases. The most interesting and hitherto complete attempt to synthesize the general approach of the Court proposes a three-layered sorting. [40] The general testing works usually in four now well-known steps: a) a legislative limitation of a fundamental right requires a justification, which firstly has to pursue a legitimate objective; b) next one explores whether the limitation furthers the aim; c) thirdly, it is examined whether the means are necessity or whether there are less intrusive means achieving the same result; d) finally, in the fourth and apparently last stage, one has to balance means and ends as to whether the limitation is worth the price. According to Dopplinger and Mörth, the arguments of the Court should be distributed in three categories: a) a review of excess as the least strict scrutiny; b) an intermediate review in which the relation between means and ends is at stake and where the interests of limiting a right have to outweigh those of its holders; c) in strict scrutiny, only the least intrusive means is acceptable. This general scheme undergoes further differentiation: the tests vary for each fundamental right and will be particularly severe where the foundational elements of democracy are at stake. [41]

Interesting and comprehensive as this very dense analysis appears, it seems nonetheless to bear the following weaknesses. If the authors are right, the Court applies different standards to different cases without a method that would strictly mirror constitutional requirements. And indeed, it cannot precisely apply constitutional standards as such standards are not specified in the Constitution. If it could however be demonstrated that the Court had developed for himself a method he strictly applies along clearly defined lines of argumentation, one could at least say that the case-law follows a consistent approach which enhances legal certainty and legitimate

[38] Cf for instance R.H. Fallon Jr., "Strict Judicial Scrutiny", in *UCLA Law Review*, 1267-1337.

[39] Cf. for instance, V. Goesel-Le Bihan, "Le contrôle de proportionnalité exercé par le Conseil constitutionnel", in *Cahier du Conseil constitutionnel* n° 22 (Dossier: Le réalisme en droit constitutionnel) - juin 2007; accessible under https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/le-controle-de-proportionnalite-exerce-par-le-conseil-constitutionnel. For a general overview in different legal orders: Table Ronde on Proportionality in *Annuaire international de justice constitutionnelle*, XXV-2009.

[40] L. Dopplinger, P. Mörth, „Variationen der Verhältnismäßigkeit", in *Juristische Blätter*, 2023, 341-348, 422-435.

[41] *Ibid.*, 433.

expectations among citizens and those looking for justice. But it appears rather that the Courts jurisprudence follows something fairly different like rules of thumb and that in any event it would be difficult to exactly classify different strengths of review according to different precise parameters. All one can induce from a comprehensive overview of the case-law is the fact, that the Court asks sometimes for more compelling justifications for rights limitations and sometimes for less rigorous ones. And one may conclude that the Court has taken a generally skeptical position in matters of rights limitations, even though they are still framed with the same reservations as before, at least since the adoption of the ECHR and the Charter which largely follows this example. One may then raise a more general objection.

Several authors state that proportionality as understood and practiced by the Court has brought rationality to rights jurisprudence. [42]

This is questionable. First, rationality is not an intrinsic property of legal orders or particular norms. Whether or not they may be qualified as "rational" is an open question, where the criteria of rationality have to be explicitly and where, in any event, they reflect the subjective approach of the person engaging in such a discussion. Second, in order to be rational, a jurisprudential conception has at least to follow a clearly established and argumentatively justified methodology. This is certainly not the case and it cannot be the case. One can admit that the problem of rights limitation is nowadays generally approached under a more or less developed test, following legitimate scope, appropriateness and necessity of the limiting norms, consideration of less intrusive means and weighing of advantages and disadvantages of the whole structure, and one may admit that such considerations offer a relatively more justified insight into the competences of the legislator to limit rights—where such competences are indeed limited under such conditions. This is the case with most rights granted by ECHR and the CFR, not with those provided for in the Fundamental State Low of 1867. Even so, these conditions remain nonetheless undetermined within a certain framework and leave thus their concretization to legislative choices. The limits of such choices are certainly to be rigorously examined and such an exam has obviously to be methodologically rational. This has not to be confounded with substantial rationality and rationality of values as if they intrinsic to rights provisions.

[42] Manfred Stelzer insists upon the rationality of value-laden considerations, *op. cit.*, 239; Kurt Heller, seeks to justify the development of constitutional adjudication under „proportionality" arguments in a short summery : „To argue substantially does not mean to judge politically, but rationally", *op. cit.*, 430; according to Theo Öhlinger, Harald Eberhard, op. cit., the application of the proportionality-test makes the elaboration of a decision "rationally understandable", *op. cit.*, 315.

Oscillations of proportionality and thirst for objectivity in spanish constitutional law

Pablo Riquelme Vázquez [*]

1. Introduction

Unlike the Charter of Fundamental Rights of the European Union, Title I ('On Fundamental Rights and Duties') of the Spanish Constitution [1] (SC) does not explicitly refer to proportionality. [2] This absence has not deterred the Spanish Constitutional Court (CC or 'the Court') [3] from frequently invoking this idea in its decisions. Since the CC commenced operations in 1981, the term 'proportionality' has been incorporated within the legal justifications of 1,571 decisions (1,288 judgments, 282 orders and 1 declaration). [4]

Obviously, the mere use of the word does not make it possible to state that proportionality has been decisive in adjudicating a case, nor does it demonstrate that the CC has made consequent use of a specific version of that principle. [5] For

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[1] Spanish Official Gazette (BOE) n. 311, 29 December 1978.

[2] Despite the absence of textual embodiment in this title, the spirit of proportionality is reflected in the prohibition on the limitation of ideological and religious freedom beyond 'what is necessary for the maintenance of public order protected by law' (Article 16(1) SC) or the requirement that pre-trial detention lasts for the 'time strictly necessary for the conduct of enquiries to establish the facts' (Article 17(2) SC).

[3] For further information on this institution see M. Ahumada Ruiz, *The Spanish Constitutional Court*, in A. Jakab, A. Dyevre & G. Itzcovich (ed.), *Comparative Constitutional Reasoning,* Cambridge University Press, Cambridge, 604-640.

[4] A search for the more precise expression 'principle of proportionality' in the CC's case law database returns 452 results citing this expression in legal grounds. Of these, 364 are judgments, 87 are orders, and one is a declaration.

[5] A. Marketou, *Local Meanings of Proportionality*, Cambridge University Press, Cambridge, 2021.

this reason, this chapter does not provide a quantitative analysis of the utilisation of proportionality within the Spanish constitutional jurisdiction; it rather presents a descriptive analysis of such matter. In accordance with the objectives of this volume, I identify the areas of the CC's jurisprudence in which the principle of proportionality is most applied. I also examine whether the Court has utilised the principle of proportionality to either extend or restrict social rights, and I analyse the implications of the use of the principle of proportionality within the Spanish legal system. Finally, I ascertain whether the answers to the foregoing questions changed in the aftermath of the recent states of emergency.

To facilitate understanding of this work, the Court's 44-year activity has been organised into five periods.[6] Jurisprudence is a dynamic, and there may be disagreement about the periodization or the completion of my choice. However, a part of the study draws on previous research[7] and for the rest there is a core of rulings about which Spanish experts would hopefully agree that they belong to the proportionality canon cases. The initial period, which has been designated as 'Informal Proportionality', starts for obvious reasons in 1981 and concludes in 1994. The second stage, entitled 'Formalized proportionality', commenced in 1995 with the introduction of the so-called 'German proportionality test', as it is known in Spain, and finishes in 1999. The third stage, 'Fluctuating proportionality', lasts from 2000 to 2013. The stage entitled 'Contested Proportionality' begins in 2013 and concludes with the declaration of a state of alarm in response to the pandemic crisis engendered by the COVID-19, in 2020. The final phase, entitled 'Proportionality during Emergencies and Beyond, initiated in 2021 and, in light of the most recent rulings of the Court, remains open to further consideration.

2. Informal Proportionality

The CC has referred to 'proportionality' from its earliest decisions.[8] Since 1981, the field in which this notion has been most present is that of fundamental

[6] Therefore, the analysis covers the period from 1981 up to 2024, both inclusive.

[7] See, in particular, J. Barnes, *Jurisprudencia constitucional sobre el principio de proporcionalidad en el ámbito de los derechos y libertades. Introducción, selección y análisis crítico*, in *Cuadernos de Derecho Público*, 5, 1998, 333-370; Id., "El principio de proporcionalidad. Estudio preliminar", in *Cuadernos de Derecho Público*, 5, 1998, 15-49; C. Bernal Pulido, *El principio de proporcionalidad y los derechos fundamentales. El principio de proporcionalidad como criterio para determinar el contenido de los derechos fundamentales vinculante para el legislador*, 2ª ed., CEPC, Madrid, 2007; M. González Beilfuss, *El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional español*, 3rd ed., Aranzadi, Cizur Menor, 2015.

[8] In its Judgement (JCC) 22/1981, the CC referred to a 'reasonable relationship of proportionality between the means employed and the aim pursued'. In its Judgement 30/1981, for its

rights,[9] due in part to the influence of the European Court of Human Rights (ECtHR) case law *via* Article 10(2) SC.[10] In this field, proportionality was employed by the CC between 1981 and 1994 to underpin decisions that declared both the unconstitutionality[11] and the constitutionality[12] of legislation. Furthermore, it was used in direct individual complaints ('*recursos de amparo*') proceedings to motivate judgments that upheld[13] or dismissed[14] cases. A distinctive feature of the country is the presence of proportionality in the realm of social rights,[15] which is certainly an outcome of the comprehensive nature of Chapter 2 ('Rights and Liberties') of Title I of the SC.

The early application of proportionality was not accompanied by a clear and uniform conception of this principle, but rather by an understanding that González Beilfuss has described as 'informal and intuitive'.[16] The analysis of the case law clearly reveals that, on quite a few occasions, the CC did not clearly differentiate proportionality from other legal principles such as 'reasonableness'[17] or from other criteria such as that of the "essence" (Article 53(1) SC) of a right.[18] Nevertheless, this has not hindered the Court from delineating various elements

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part, the Court stated that 'the principle of proportionality [..] between the public interest pursued and the means used for that purpose' must always be observed.

[9] Of course, this does not imply that the concept 'proportionality' has not appeared, albeit sporadically, in other domains from very early on. For some examples of the implementation of this principle in controversies concerning the territorial organisation of Spain see JCC 37/1981, 88/1986, 64/1990 or 66/1991.

[10] M. González Beilfuss, *El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional español*, 2ª ed., Aranzadi, Cizur Menor, 2015, 20 ff.

[11] See JSCC 22/1981, 3/1983, 20/1985, 199/1987, 141/1988, 132/1989, 113/1989, and 158/1993.

[12] See JSCC 75/1983, 6/1984, 178/1985, 160/1987, 161/1987, 196/1987, 19/1988, 178/1989, 76/1990, 6/1991, 36/1991, 150/1991, 24/1993, 142/1993, 214/1994, and 215/1994.

[13] See JSCC 26/1981, 108/1984, 36/1986, 37/1989, 139/1989, 85/1992, 57/1994, and 50/1995.

[14] See JSCC 62/1982, 13/1985, 65/1986, 165/1987, 120/1990, 172/1990, 143/1994.

[15] With regard to the principle of equality (Article 14 SC) in connection with the right to work (Article 35 SC) see JSCC 22/1981. On the right to create and join trade unions (Article 28(1) SC) see JSCC 20/1985. The right to work (Article 35) reappeared in JSCC 178/1989. Finally, regarding the right to strike (Article 28(2) SC) see JSCC 26/1981.

[16] M. González Beilfuss, *El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional español*, 2ª ed., Aranzadi, Cizur Menor, 2015, 23.

[17] JSCC 22/1981, 34/1981, 75/1983. On this principle see Á. Carrasco Perera, *El 'juicio de razonabilidad' en la justicia constitucional*, in *Revista Española de Derecho Constitucional*, 11, 1984, 39-106; I. Perelló Domenech, "Notas sobre el concepto de razonabilidad y su uso en la jurisprudencia constitucional", in *Jueces para la Democracia*, 46, 2003, 75-81; and M. Ahumada Ruiz, *The Spanish Constitutional Court*, in A. Jakab, A. Dyevre & G. Itzcovich (ed.), *Comparative Constitutional Reasoning*, Cambridge University Press, Cambridge, 635.

[18] JCC 11/1981, 161/1987.

of proportionality, albeit in a piecemeal or fragmentary manner.

Following the verification of the constitutional relevance of measures under review, several judgments in the early 1990s proceeded to assess their 'suitability' in achieving the intended purpose. [19] The second component of proportionality, 'necessity', was also portrayed from the outset. In particular, the CC required that measures under review should serve a constitutionally relevant purpose, and that the contested measures under scrutiny were 'necessary in a democratic society' in order to achieve that purpose. [20] This requirement gradually extended to cases beyond the criminal sphere, [21] the one in which it first appeared. Finally, proportionality *sensu stricto* also manifested itself in the jurisprudence of the CC, albeit without attaining the degree of autonomy and precision of the former requirements. Thus, the Court vaguely referred to the balance that should exist between the measure under scrutiny and its intended purpose when it (i.e. the Court) opposed to the 'excessive and unnecessary' sacrifice of a fundamental right. [22] In a similar manner, the CC has demanded that respect be given to the 'proportionality between the sacrifice of the right and the situation of the person on whom it is imposed, [23] to the 'due proportion between the measure subject to control, its result and the end pursued', [24] to 'the proportion that must exist between the seriousness of the interference with a fundamental right and its purpose' [25] or, in the criminal field, to 'the proportion between the seriousness of the offence and the penalty'. [26] On other occasions, the Court called for a 'reasonable balance' between the fundamental right and its limitation, [27] for the 'weighing' [28] of conflicting constitutional goods or to the 'proportionality of sentences'. [29] The Court reiterated that proportionality *sensu stricto* must always be determined 'in the light of the circumstances of each case'. [30]

Consistent with the informal and intuitive use of proportionality during this early period, the intensity of CC's scrutiny was not high. [31] This assessment is

[19] See, among others, JCC 178/1989, conclusion of law or '*fundamento jurídico*' (FJ) 5; 120/1990; FJ 7 ff.; 66/1991, FJ 4; and 142/1993; FJ 10.

[20] JCC 62/1982, FJ 5.

[21] See JCC 13/1985, FJ 2; 141/1988, FFJJ 7 ff.; 132/1989, FJ 8, among others.

[22] JCC 66/1985, FJ 1; 178/1985, FJ 3; 19/1988, FJ 8; 113/1989, FJ 3.

[23] JCC 26/1981, FJ 15; 37/1989, FJ 7; 120/1990, FJ 8; 57/1994, FJ 6.

[24] JCC 76/1990, FJ 9; 214/1994, FJ 8; 215/1994, FJ 4.

[25] JCC 7/1994, FJ 3.

[26] JCC 36/1991, FJ 7.

[27] JCC 178/1985, FJ 3.

[28] JCC 199/1987, FJ 8-12; 85/1992; FJ 4 ff.

[29] JCC 65/1986, FJ 2; 160/1987, FJ 6.

[30] JSCC 341/1993, FJ 5; 50/1995, FJ 5.

[31] M. González Beilfuss, *El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional español*, 2ª ed., Aranzadi, Cizur Menor, 2015, 36.

confirmed by the self-perception of the Court, which from the outset was aware of the functional problems that the review of the constitutionality of judicial decisions can pose:

> *The Chamber acknowledges the complexity of applying a general legal principle to specific cases, particularly when it comes to the interpretation of indeterminate concepts. The Constitutional Court is committed to respect the margin of appreciation of ordinary judges and courts, who are also responsible for safeguarding fundamental rights and public liberties. This approach prevents the Constitutional Court from replacing the ordinary jurisdiction. We understand that the effective functioning of a democratic society depends on each institution fulfilling its designated role. This leads us to conclude that the Constitutional Court should limit its scrutiny to determining whether the principle of proportionality has been infringed, considering the fundamental right and the legal right that limits its exercise. The measures adopted must be proportionate to the defence of the right that gave rise to the restriction. // The Court must confine itself to addressing the issue raised from a constitutional perspective.* [32]

The same can be said about the relationship between the CC and the legislator. The former has shown particular caution in the criminal field by repeatedly stating that the proportionality of penalties is an aspect that falls squarely within the criminal policy of the legislator, which can only result in unconstitutionality 'when there is a disproportionality of such a magnitude as to violate the principle of the rule of law, the value of justice and the dignity of the human person'. [33] The CC thus rejected generic allegations of parties in relation to the supposed violation of proportionality by the ordinary legislator, as well as the possibility of making technical or opportunity judgements on the legislative measures under review. [34] Consequently, it only upheld decisions when it found that they 'obviously or manifestly' infringed the principle of proportionality. [35] Proportionality had nevertheless a notable impact on the creation of law by the CC by favouring the approval of interpretative rulings [36] and the development of sub-constitutional norms.

3. Formalized proportionality

It is important to reiterate that between 1981 and 1994 'suitability', 'necessity' and "proportionality *sensu stricto*' were not used in succession, but rather in an

[32] JCC 62/1982, FJ 5.

[33] JCC 65/1986, FJ 2; 160/1987, FJ 6.

[34] JCC 75/1983, FJ 7; 142/1993, FJ 9.

[35] See, among others, JCC 178/1985, FJ 3; 199/1987, FJ 12; and 141/1988, FFJJ 7 ff.

[36] See JCC 178/1985, 199/1987, 113/1989 or 158/1993, among others.

isolated and intuitive manner. However, this tendency underwent a shift after JCC 66/1995. Since then, the most significant aspect of the Court's jurisprudence in this field has been the implementation of the so-called 'German proportionality test'. This involves the distinction and successive analysis of suitability, necessity, and proportionality *sensu stricto*. In addition to these three canons, several CC's judgements from this period also alluded to the notion of 'logical *prius*' [37] of proportionality. This term refers to the purpose of the measure under review. After JCC 66/1995, a case concerning the right of assembly (Article 22(1) SC), a number of other constitutional judgments have explicitly referred to the four requirements (without explicitly recognising their German inspiration). [38] This has contributed to the doctrinal boom experienced by this principle in Spain towards the end of the century. A form of argumentation based on jurisprudence was imported, as well as a particular doctrinal version of proportionality; however, no theoretical consequences were drawn from it by the CC. [39] During this period, the four-step proportionality test was employed to a lesser extent in the field of social rights. [40]

JCC 55/1996 represents the second significant milestone in the formalisation of this principle. In this ruling, which addressed the alleged violation of the right to personal liberty (Article 17 SC), the constitutional basis of the principle of proportionality was identified and extensive clarifications were made about the functional limits of proportionality, above all when it is used to control the criminal legislator. In this area, the Court had been particularly cautious not to encroach on the leeway of the legislator, [41] but the formalisation of proportionality paved the way to sound institutional reflections about the relationship between courts and the legislature, and ultimately about the function of constitutional courts in a democracy. The formalisation reached its zenith [42] with JCC 136/1999. This judgement is iconic, not only due to the significant political and media attention

[37] JCC 55/1996, FJ 7; 161/1997, FJ 10; 49/1999, FJ 8.

[38] Despite the fact that the German conception of proportionality had already been examined in Spanish scientific literature. See J. Barnes, "Introducción al principio de proporcionalidad en el derecho comunitario y comparado", in *Revista de Administración Pública*, 135, 1994, 499 ff.

[39] The CC has not explicitly aligned with Alexy's approach of invoking Ronald Dworkin's conceptualization of the distinction between rights and principles. It does not contend that fundamental rights are predominantly principles, nor does it modify Dworkin's theoretical distinction by proposing that principles are optimization requirements. For further information on this see C. Bernal Pulido, *El principio de proporcionalidad y los derechos fundamentales. El principio de proporcionalidad como criterio para determinar el contenido de los derechos fundamentales vinculante para el legislador*, 3rd ed., CEPC, Madrid, 2007, 81-89.

[40] On the right to create and join trade unions and to strike (Article 28 SC), for example, see JCC 37/1998.

[41] See *supra*, p. 4 ff.

[42] See also JCC 207/1996, 161/1997, 37/1998, 49/1999, and 69/1999.

it attracted, [43] but also because it was the first judgement to both openly apply the German proportionality test and conclude that the criminal legislator had violated the principle of proportionality *sensu stricto*. [44]

In addition to suitability, necessity, and proportionality *sensu stricto*, several judgments of this period also referred to 'the logical *prius*' [45] of proportionality, i.e. the purpose of the measure under review. The practice of identifying and assessing beforehand the specific purpose of the contested measure made it possible to order the proportionality test and to highlight that proportionality is not predicated on an object considered in isolation, but on a means-end relationship. The relational nature of proportionality constitutes a defining element of that principle which, as will be explained, has an impact on its various elements. According to the Court, all measures pursuing 'constitutionally proscribed goods' and, in the criminal field, all criminal offense definitions that pursue 'socially irrelevant ends' must be rejected from the outset. [46]

During this second period, suitability has been repeatedly defined as the 'adequacy of the measure under scrutiny to achieve the intended purpose'. [47] In this regard, it should be noted that the constitutional jurisprudence of the mid-1990s established that the suitability canon does not require that the measure subject to control must be the optimal instrument for achieving the intended purpose; rather, the suitability requirement is met as long as the measure contributes to bringing the consequence of the pursued purpose closer, without it being necessary for it to do so in the most efficient or effective way. [48]

Necessity has been defined by the CC as the 'absence of more moderate (or less burdensome) alternatives for achieving, with equal effectiveness, the aim pursued'. [49] This requirement has often been at the center of the proportionality test. The most remarkable aspect in relation to this requirement is undoubtedly the Court's insistence on the limits of its control, especially when it is controlling the democratic legislator. In JCC 55/1996, for example, the Court stated that this test

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[43] For further information pertaining to this case see J. M. Bilbao Ubillos, "La excarcelación tenía un precio: el Tribunal Constitucional enmienda la plana del Legislador (comentario de la STC 136/1999) en el caso de la Mesa Nacional de HB)", in *Revista Española de Derecho Constitucional,* 58, 2000, 277-342.

[44] This judgement was not the first to consider proportionality to have been violated; see *supra* note 11. However, JCC 136/1999 was the first to consider the principle of proportionality to have been violated in the criminal sphere, an area in which all the Court's rulings until then had been dismissive.

[45] JCC 55/1996, FJ 7; 61/1997, 17, h); 49/1999, FJ 8.

[46] JCC 55/1996, FJ 7; 161/1997, FJ 10; 136/1999, FJ 23.

[47] JCC 66/1995, FJ 5.

[48] M. González Beilfuss, *El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional español*, 2ª ed., Aranzadi, Cizur Menor, 2015, 50.

[49] JCC 66/1995, FJ 5.

must be applied with a different intensity when it is employed in relation to the legislator than to the bodies responsible for implementing norms. [50] Such a different intensity is understandable, since the concrete circumstances of the factual situation facilitate the analysis of alternative measures that may be less burdensome to achieve the intended purpose. Conversely, the institutional position of the legislator and the principle of democracy recommend a less intense control of necessity, insofar as the choice of one measure instead of another alternative is often easily within the legislator's freedom of configuration. This is of particular importance in the criminal field, where necessity is only violated, so the Court, when there is a 'manifestly useless waste of coercion' [51] or where the alternative measures invoked are 'manifestly of a lesser coercive intensity for citizens and of a manifestly similar functionality to the one criticised as disproportionate'. [52]

Finally, the Court has required that the measures under scrutiny be 'proportionate or balanced in that more benefits or advantages derive for the general interest than harm to other conflicting goods and values'. [53] As this definition suggests, proportionality *sensu stricto* is the canon that has given rise to the most questions from an interpretative perspective. This is because the formalisation of the test into four parts was not accompanied by an unambiguous formulation of the final step. In addition, the Court has also vaguely referred to it as, for example, the 'balancing of the aim pursued (…), the means of punishment (…) and the right affected' [54] or, in the criminal field, to the 'comparison between the seriousness of the offence and the severity of the penalty', [55] between 'the iniquity of the criminalised conduct and the amount of the penalty' [56] or 'between the seriousness of the crime to be prevented - and, in general, the beneficial effects generated by the rule from the perspective of constitutional values - and the seriousness of the penalty to be imposed—as well as, in general, the negative effects generated by the rule from the perspective of constitutional values'. [57] Although all these definitions embrace the idea of balancing and weighing, proportionality *sensu stricto* did not deviate significantly from the general idea of proportionality. Accordingly, the Court has exercised great caution when applying this final canon, almost always doing so with a series of functional considerations in mind. These led the CC to exercise a more or less intense control depending on whether it was reviewing legal norms or implementation acts of such norms. As a consequence

[50] JCC 55/1996, FJ 6.

[51] JCC 55/1996, FJ 8.

[52] JCC 161/1997, FJ 12; 136/1999, FJ 23.

[53] JCC 66/1995, FJ 5.

[54] JCC 69/1999, FJ 4.

[55] JCC 55/1996, FJ 9.

[56] JCC 161/1997, FJ 12.

[57] JCC 136/1999, FJ 29.

of these functional concerns, only one of the judgments in which the so-called German test of proportionality was applied to control the legislator was upheld: in JCC 136/1999, the criminalisation of collaboration with an armed gang under Article 174 bis (a) of the 1973 Spanish Penal Code was deemed to be disproportionate *sensu stricto*. [58]

4. Fluctuating proportionality

The CC's judgements between 2000 and 2013 did not introduce noteworthy changes to the formalised doctrine of proportionality. Its constitutional basis, its scope of application and its normative meaning remain unaltered, showing no significant changes from a substantive perspective. [59] Notwithstanding, the Court interestingly discussed the question of who bears the burden of proof and justification in proportionality cases on the occasion of a regional legislative expropriation. In the CC' view:

> (…) *the properties expropriated may not be the only ones that could eventually allow for the extension of the aforementioned headquarters. This is supported by an examination of the plot plan of the area where the regional parliamentary house is located. Moreover, the Canary Islands legislator itself acknowledges the existence of other properties that are also suitable, insofar as Article 2 of the Act empowers the Administration to expropriate them. In in consideration of such reality and the fact that the Act under review expropriates certain patrimonial rights, it is essential to determine its necessity. However, this particular justification is neither provided by the Act itself nor can it be established by this Court through a judgment on the factual reality whose appropriate venue would be the ordinary jurisdiction*. [60]

Authors such as González Beilfuss, have criticise the 'progressive relaxation' in the use of the four-step test during this period. [61] Its most relevant decision was arguably JCC 60/2010, where the Court reviewed the *ex lege* imposition of

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[58] On the contrary, there were more judgments in which an administrative action was considered disproportionate. See, for example, JCC 207/1996, 37/1998 or 202/1999.

[59] The principle of proportionality was used again to underpin decisions that declared the constitutionality of legislation (JCC 112/2006, 60/2010), as well as in direct individual complaints ('*recursos de amparo*') proceedings to motivate judgments that upheld (43/2000, 98/2000, 193/2000, 285/2000, 14/2003, 90/2006, 163/2006, 206/2007) or dismissed cases (JCC 186/2000, 103/2001, 70/2002, 11/2006, 173/2011, 115/2013, 199/2013). Proportionality also favoured interpretative rulings such as JCC 17/2013.

[60] JCC 48/2005, FJ 8. See similarly JSCC 45/2018 (*infra*).

[61] M. González Beilfuss, *El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional español*, 2ª ed., Aranzadi, Cizur Menor, 2015, 62.

restraining orders on individuals who have perpetrated crimes within the family unit. It is noteworthy that the CC second-guessed the motives of the legislature, thereby showing the significance of the logical *prius* of proportionality. In order to justify the intense control it exercised, the Court determined that 'the more intense the restriction of constitutional principles and, in particular, of the rights and freedoms recognised in the constitutional text, the more demanding are the substantive assumptions of the constitutionality of the contested measure'. [62] No doubt because it was controlling the criminal legislator, the Court exceptionally made rigorous use of the German proportionality test and its various requirements.

The 'lax' jurisprudence of this period suggests that the Court might have not fully replaced its original, 'local' [63] understanding of proportionality with the one imported from Germany. The CC certainly imported the latter in the mid-1990s to refine its doctrine and adjudicated specific controversial cases, but it did not completely detach itself from the disorganised, 'intuitive' core. [64] The fluctuations in the application of the proportionality test cannot obscure that the Court insists on having adopted the principle of proportionality as a fundamental rights doctrine and that this adoption has not increased the overall intensity of the control the Court exercises. However, the seemingly overwhelming success of proportionality [65] has perhaps led in Spain to some misunderstanding among scholars

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[62] JCC 60/2010, FJ 7.

[63] A. Marketou, *Local Meanings of Proportionality*, Cambridge University Press, Cambridge, 2021.

[64] This scepticism had been fuelled by contributions such as those of I. de Otto, *La regulación del ejercicio de los derechos y libertades. La garantía de su contenido esencial en el art. 53.1 de la Constitución*, in L. Martín-Retortillo Baquer & I. de Otto, *Derechos fundamentales y Constitución*, Civitas, Madrid, 1988, pp. 93-193; A.-L. Martínez-Pujalte, *La garantía del contenido esencial de los derechos fundamentales*, CEC, Madrid, 1997; J. Jiménez Campo, *Derechos fundamentales: concepto y garantías*, Trotta, Madrid, 1999.

[65] M. Medina Guerrero, "El principio de proporcionalidad y el legislador de los derechos fundamentales", in *Cuadernos de Derecho Público*, 5, 1998, 119-142; J. M. Rodríguez de Santiago, *La ponderación de bienes e intereses en el derecho administrativo*, Marcial Pons, Madrid, 2000; C. Bernal Pulido, "Estructura y límites de la ponderación", in *Doxa*, 26, 2003, pp. 225-238; J. C. Gavara de Cara, "El principio de proporcionalidad como elemento de control de la constitucionalidad de las restricciones de los derechos fundamentales", in *Revista Aranzadi del Tribunal Constitucional*, 16, 2003, 1-30; J. Brage Camazano, *Los límites a los derechos fundamentales*, Dykinson, Madrid, 2004; C. Bernal Pulido, "Tribunal Constitucional, legislador y principio de proporcionalidad. Una respuesta a Gloria Lopera", in *Revista Española de Derecho Constitucional*, 74, 2005, 417-443; M. J. Cabezudo Bajo, "La restricción de los derechos fundamentales", in *Revista de Derecho Político*, 62, 2005, 187-227; C. Bernal Pulido, "La racionalidad de la ponderación", in *Revista Española de Derecho Constitucional*, 77, 2006, 51-75; Id., *El principio de proporcionalidad y los derechos fundamentales. El principio de proporcionalidad como criterio para determinar el contenido de los derechos fundamentales vinculante para el legislador*, 3rd ed., CEPC, Madrid, 2007; Id., *Estudio introductorio*, in R. Alexy, *Teoría*

who, unlike Robert Alexy and other proponents of this doctrine, do not reason on the background offered by the tripartite scheme used in Germany to verify whether the legislator has respected fundamental rights. [66] In my opinion, many of the above-mentioned contributions on proportionality do not draw sufficient attention to this scheme, [67] which is common in the German *Grundrechtsdogmatik* and provides consistency to both (i) the opening delimitation of the scope of the fundamental right provision and, where appropriate, (ii) the allocation of weights at the weighing stage. [68]

5. Contested Proportionality

The misunderstanding pointed out in the previous paragraph may have paved the way for a situation which has not yet been clearly conceptualized by Spanish scholars: since 2013, the disorganized and 'lax' use of the principle of proportionality has been accompanied by a growing institutional condemnation of it. [69] Such

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de los derechos fundamentales, 2nd ed., CEPC, Madrid, 2007, XXV-LXV; L. Arroyo Jiménez, "Ponderación, proporcionalidad y Derecho administrativo", in *InDret. Revista para el análisis del Derecho*, 2, 2009, 1-32; X. Arzoz Santisteban, *La concretización y actualización de los derechos fundamentales*, CEPC, Madrid, 2014.

[66] This is the well-known '*Struktur der Grundrechtsprüfung*' (literally, 'structure of fundamental rights-based control), which successively analyses the '*Schutzbereich*' ('scope of protection') of the right or freedom, the '*Eingriff*' ('intervention') in it and the '*verfassungsrechtliche Rechtfertigung*' ('*constitutional justification*') of the second. See, among others, B. Pieroth *et al.*, *Grundrechte. Staatsrecht II*, 31st ed., C.F. Müller, Heidelberg, 2015, 368; H. Dreier, *Vorbemerkungen vor Artikel 1 GG*, in H. Dreier (ed.), *Grundgesetz-Kommentar*, 3rd ed., Beck, München, 2013, 42-153; or, more recently, G. Britz, „Die Verhältnismäßigkeitsprüfung", in *Juristische Schulung (JuS)*, 10, 2024, 905-914.

[67] See *supra*, n. 65. For an exception see de M. Medina Guerrero, *La vinculación negativa del legislador a los derechos fundamentales*, McGraw-Hill, Madrid, 1996; J. Alguacil González-Aurioles, "Objeto y contenido de los derechos fundamentales: presupuestos e implicaciones de una nueva diferenciación dogmática", in *Teoría y Realidad Constitucional*, 18, 2006, 305-319.

[68] See V. Ferreres Comella, *Beyond the principle of proportionality*, in G. Jacobsohn & M. Schor (eds), *Comparative Constitutional Theory*, Edward Elgar Publishing, Cheltenham/Northampton, 2018, 229-247; or P. Riquelme Vázquez, *El contenido esencial de los derechos y libertades: una reinterpretación doctrinal*, Aranzadi, Cizur Menor, 2022, 235-347.

[69] Indeed, various members of the CC had already distanced themselves from proportionality prior to 2014. See, for example, the dissenting opinions of judge Alvaro Rodríguez Bereijo to JCC 85/1992 (who dissented from the application of proportionality to judge the criminal legal qualification of the facts and, consequently, the application of the corresponding penalty as it has been carried out by the ordinary courts), of judges Luis López Guerra, Carlos de la Vega Benayas and Julio Diego González Campos to JCC 158/1993 (who considered that it

criticism became apparent in the dissenting opinions to a significant number of judgments issued by the CC: [70] while some constitutional judges have occasionally expressed concerns about the pertinence of and/or the lack of precision in a Court's proportionality analysis, [71] on other occasions it was simply the circumvention of the four-step structure of that principle what motivated their critique. [72] In my opinion, such dissents show an underlying concern regarding the 'practical flexibility' of the principle of proportionality and its tendence to produce *ad hoc* decisions. Its dependency on the circumstances of the case makes it difficult to establish clear constitutional standards and this seems to be a problem

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was not appropriate in the case to make a finding 'of proportionality, unless it is clear that the pensions granted far exceed the minimum requirements and therefore do not merit legal protection'), of judge Manuel Jiménez de Parga y Cabrera to JCC 55/1996 (for whom the matter should have been solved by making a judgement on reasonableness; the criteria of proportionality 'will then have to be applied, on the basis of a verdict in favour of the reasonableness of the criminal sanction, in order to judge the type and amount of the penalties'), of Pedro Cruz Villalón to 49/1999 (who expressed some reservations regarding the centrality that the principle of proportionality was assuming in the CC's conception of fundamental rights, since it did not seem to him that it is essential to start from it in order to give effect to constitutional requirements), and of both Rafael de Mendizábal Allende (who rejected the principle of proportionality, which does not appear by name in the Constitution, as technique to declare a criminal precept unconstitutional because 'is not convincing and lacks judicial precision. The principle of proportionality cannot be invoked before this Court, in an autonomous and isolated manner, to analyse in the abstract whether an action of a public authority is disproportionate or not. The alleged disproportionality must affect fundamental rights and, possibly, other constitutional precepts') and Vicente Conde Martín de Hijas to JCC 136/1999 (who believe that, by entering into a judgement on the proportionality of the penalties, the Court was invading a field that corresponds to the sovereignty of the legislator, departing for the first time from an attitude of caution, which we had been proclaiming on the matter up to this point).

[70] The principle of proportionality was applied again in cases concerning the territorial organisation of Spain (as JCC 79/2017, and 8/2019), although it mainly remained a fundamental rights technique. In this field, proportionality was employed to underpin decisions that declared both the unconstitutionality (JCC 151/2014, 38/2016, 111/2017, 91/2019) and the constitutionality of legislation (JCC 119/2014, 156/2014, 8/2015, 110/2015, 89/2017, and 64/2019), as well as in direct individual complaints ('*recursos de amparo*') proceedings to motivate judgments that upheld (JCC 199/2014) and dismissed cases (JCC 13/2014, 14/2013, 15/2014, 16/2014, 23/2014, 43/2014, 39/2016, 155/2019, 3/2020, 22/2020, 91/2021, 99/2021, 106/2021, 121/2021, and 136/2021, as well as OCC 20/2015, 187/2016, 4/2019). Proportionality had again a notable impact on the creation of law by the CC by favouring interpretative rulings in JCC 140/2016, 86/2017, 97/2018, and 172/2020.

[71] See JCC 199/2013, 13/2014, 119/2014, 151/2014, 8/2015, 39/2016, 99/2019, 91/2021, 106/2021, 121/2021, and 133/2021. For an early critique of JCC 119/2014 see P. Requejo Rodríguez, "El papel de la crisis económica en la argumentación del Tribunal Constitucional. Comentario a la STC 119/2014", in *Teoría y Realidad Constitucional*, 36, 2015, 417-437; and M. González Beilfuss, *El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional español*, 2ª ed., Aranzadi, Cizur Menor, 2015, 91.

[72] See JCC 65/2015, 177/2015, 112/2016, 155/2019, 3/2020, and 172/2020.

from the point of view of the Spanish civil law legal culture and tradition, 'which favors the objective approach (attentive to the *ratio legis* more than to the *legislatoris voluntas*) and establishes a preference for the textualist or literal interpretation'. [73] The shift towards purposive arguments over time, at the expense of textualist arguments, may finally increase the perceived discretion of the Court. The lack of trust in the technique on the part of those responsible for adjudicating cases could be explained as a natural reaction to that circumstance, especially within contexts of increasing political polarization. It is my view that, for these reasons, resistance to proportionality cannot be attributed in Spain to a flawed doctrine. [74] Rather, it is the result of specific 'demands of responsiveness' [75] on the part of the Spanish legal system and constitutional culture that are not always met by proportionality.

During this period, the Court addressed social rights restrictions too, [76] even though a regression test has not been developed in Spain. However, this absence is not the most salient aspect of the CC's jurisprudence during this period; more remarkable, in my view, are the consequences of the aforementioned flexibility for the right to private property (Article 33(1) SC) and the freedom of enterprise (Article 38(1) SC). The Court has replaced its well-established proportionality analysis of restrictions on these rights with the more lenient ECtHR fair balance doctrine. [77] As the latter allows for more intense restrictions on both rights, such replacement has been depicted as a 'silent revolution' [78] in the field.

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[73] M. Ahumada Ruiz, *The Spanish Constitutional Court*, in A. Jakab, A. Dyevre & G. Itzcovich (ed.), *Comparative Constitutional Reasoning,* Cambridge University Press, Cambridge, 608).

[74] Despite the resistance, a segment of the doctrine has persisted in its endeavour to refine the assessment of proportionality. See, among others, J.A. Portocarrero Quispe, *La ponderación y la autoridad en el derecho. El rol de los principios formales en la interpretación constitucional*, Marcial Pons, Madrid, 2016.

[75] As Perju put it, 'an important aspect of proportionality's appeal is enabling judges to mitigate the blunt effect of a binary (valid/invalid) decision of constitutional validity on the right-claimant's own interpretative processes, and thus enhancing the responsiveness of courts, at least vis-`a-vis the parties. But the demands of responsiveness vary across legal systems and constitutional cultures. It is perfectly possible that proportionality would encounter in its global migration a host legal system, such as, I argue, American constitutional law, whose doctrinal and jurisprudential makeup imposes new adaptability challenges that could not be met through the exercise of judicial creativity within proportionality's existing structure' (v. Perju, *Proportionality and Stare Decisis: Proposal for a New Structure*, in V.C, Jackson and M. Tushnet, *Proportionality. New Frontiers, New Challenges*, Cambridge University Press, Cambridge, 2017, 202 f.

[76] JSCC 119/2014 and 8/2015, as well as OCC 40/2020.

[77] JCC 16/2018, 32/2018, 112/2021. On the freedom of enterprise see JCC 35/2016, 112/2021.

[78] J.M. Rodríguez de Santiago and L. Arroyo Jiménez, *A Silent Revolution: Property and Free Enterprise Before the Spanish Constitutional Court*, in C. Izquierdo Sans, C. Martínez

The consequences of the lack of trust in the proportionality test became finally evident in the CC's jurisprudence during the pandemic era. The initial ruling of this period was OCC 40/2020, which prohibited a demonstration on 1 May 2020, thereby restricting the right to demonstrate (Article 21(1) SC). After the imposition of a general lockdown on the Spanish population, the members of a union requested for authorisation to demonstrate 'in private vehicles, without leaving the vehicles at any time, with individual occupation of every vehicle and wearing anti-contagion devices such as masks or gloves'. The CC dismissed the appeal on the basis of a 'liminal judgment on the proportionality of the measures', which did not amount to more than a superficial proportionality analysis of the prohibition.

6. Proportionality during Emergencies and Beyond

OCC 40/2020 attracted much less attention than JCC 148/2021, the first ruling out of four issued by the Court concerning the constitutionality of measures adopted to fight the pandemic of COVID-19 [79] and the most significant decision of this last period. Those who contested RD 463/2020 and brought the case before the CC considered the norm to have suspended a number or fundamental rights. [80] Therefore, the primary question for the Court was to ascertain whether rights had been suspended, as disposed by Article 55(1) SC.

Two opposing definitional strategies were possible and the Court opted for the most intricate one: to develop a substantial concept of 'suspension'. By doing so, the Court inevitably put the principle of proportionality off. In JCC 148/2021, the distinction between general restrictions on fundamental rights and their suspension based on the intensity of the interference with them, i.e. on the relevance of their restriction. In accordance with this 'unfocused' [81] criterion, extremely

Capdevila and M. Nogueira Guastavino, *Fundamental rights challenges: horizontal effectiveness, rule of law and margin of national appreciation*, Springer, 2021, 289-298.

[79] Concerning *Real Decreto 463/2020, de 14 de marzo, por el que se declara el estado de alarma para la gestión de la situación de crisis sanitaria ocasionada por el COVID-19* (RD 463/2020) see specifically JCC 148/2021 and 168/2021. On posterior *Real Decreto 926/2020, de 25 de octubre, por el que se declara el estado de alarma para contener la propagación de infecciones causadas por el SARS-CoV-2* see JCC 183/2021. Finally, JCC 70/2022 reviewed in particular *Ley 3/2020, de 18 de septiembre, de medidas procesales y organizativas para hacer frente al Covid-19 en el ámbito de la administración de justicia*.

[80] Specifically, the rights to demonstrate (Article 21 SC), to political participation (Article 23 SC), to education (Article 27(1) SC) and to choose a profession or trade (Article 35(1) SC), as well as the freedoms of worship (Article 16(1) SC), of movement (Article 19 (SC)) and of enterprise (Article 38 SC).

[81] De la Quadra-Salceda has convincingly explained that '[…] such a conception is based on a clearly unfocused assumption. What the constitutional provision of the state of alarm

intense interferences with fundamental rights could only be adopted after the declaration of a state of emergency (Article 116(3) SC) or a state of siege (Article 116(4) SC). The Court's conclusion that the lockdown established by Article 7 RD 463/2020 violated the fundamental right to freedom of movement (Article 19 SC) was based on this criterion. It is interesting to note that the restriction of other rights imposed by RD 463/2020 was deemed to be proportional (following a lax proportionality analysis). [82]

This criterion was heavily criticised for several reasons: firstly, it required determining *in abstracto* (or intuitively) whether an intervention in the scope of a fundamental right is, by the intensity of the sacrifice it imposes, a mere restriction or a real suspension; [83] and, secondly, due to the 'lack of real usefulness of a difference based on the intensity of the interference itself'. [84] In recent years, the doctrine established in JCC 148/2021 has consequently evolved. Practice shows, so the new doctrine, that safeguarding public health may demand and justify intense restrictions on fundamental rights; therefore, it is reasonable to conclude that such restrictions are to be permitted as long as the guarantees provided for in Article 53(1) SC and the four-step principle of proportionality are respected.

The new doctrine was developed in the context of restrictions on rights during health crisis. It applies to both fundamental rights that can be suspended in accordance with Article 55(1) SC, such as the right of assembly (Article 21 SC), and others not mentioned in Article 55(1) SC, such as the right to personal integrity (Article 15 SC).

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actually adds is not a greater material restrictive capacity, but a greater formal restrictive capacity from two perspectives: 1. a restriction of fundamental rights can be carried out under the state of alarm which, due to the urgency of the situation, has not been foreseen by those who ordinarily have the capacity to restrict fundamental rights: the representatives of the citizens by means of a parliamentary norm. […] 2. a restriction of fundamental rights can be carried out under the state of alarm which, due to the urgency of the situation, must be carried out by the national government and not by the primary competent body, the autonomous regional government' (T. de la Quadra-Salcedo Janini, "El control de la constitucionalidad del estado de alarma. ¿Una oportunidad para desarrollar una correcta teoría general de los derechos fundamentales?", in *Revista de Derecho Público: Teoría y Método*, 10, 2024, 271-322, 289).

[82] The CC found that the rights to demonstrate (Article 21 SC), to political participation (Article 23 SC), to education (Article 27(1) SC) and to choose a profession or trade (Article 35(1) SC), as well as the freedoms of worship (Article 16, paragraph 1) and of enterprise (Article 38) had not been suspended nor restricted in a disproportionate manner.

[83] See, for instance, the five dissenting opinions to JCC 148/2021. See also G. Doménech Pascual, "Dogmatismo contra pragmatismo. Dos maneras de ver las restricciones de derechos fundamentales impuestas con ocasión de la COVID-19", in *InDret*, 4, 2021, 379 ss.; P. Riquelme Vázquez, *El contenido esencial de los derechos y libertades: una reinterpretación doctrinal*, Aranzadi, Cizur Menor, 2022, 400 ff.; A. López Basaguren, "El Tribunal Constitucional frente a la emergencia pandémica (SSTC 148/2021, 168/2021 y 183/2021)", in *Revista Española de Derecho Constitucional*, 125, 2022, 237-282.

[84] JCC 136/2024, FJ 4, B).

In relation to the right of assembly, the Court ruled that the preventive reasons of public health based on Article 43 SC (as reducing the risk of contagion in a context of serious uncertainty about the spread of a transmissible disease) could justify particularly severe restrictions on that right (such as the prohibition of demonstrations), provided that the governmental authority's decision complies with the requirements of suitability, necessity and proportionality *sensu stricto*. [85] Regarding the right to personal integrity, on the other hand, the CC made clear that the administration of a vaccine 'clearly affects the powers of self-determination guaranteed by the right to personal integrity of Article 15 SC'. However, it also underlined 'multiple public interests related to vaccination', as 'its effectiveness as a preventive tool in a epidemic context (Article 43 SC), 'since an effective policy of collective immunisation can lead, and has historically done so, to the eradication of infectious-contagious diseases through so-called «herd immunity»'. [86] As a result, the CC concluded that the 'non-consensual administration of a vaccine is subject to (…) the existence of a precise legal authorisation, with due normative quality in the definition of the event and its consequences, and respect for the principle of proportionality'. [87]

7. Conclusion

The jurisprudence of the Spanish Constitutional Court demonstrates that the implementation of proportionality in Spain has been characterised by its own idiosyncrasies. The canon is a pervasive one in the reasoning behind the Court's decisions, only there has been a tendency to oscillate between an intuitive version of the principle and an accurate application of it. Excluding contingencies, such as the involvement in a case of certain rapporteur judges (*magistrados ponentes*) or specific judicial assistants (*letrados*), these oscillations have been explained by suggesting that the Spanish doctrinal and jurisprudential corpus imposes challenges in terms of objectivity that are not fully addressed by the proportionality principle's four-step structure. The ultimate consequences of this have been a constrained performance of the principle of proportionality during the pandemic of COVID-19. The most recent judgements of the Constitutional Court appear to have overcome this limitation, albeit only in part and only in certain areas.

[85] JCC 61/2023, FJ 3. See also JCC 84/2023, FJ 3; 88/2023, FJ 4, and 164/2023, FJ 2.

[86] Article 43 SC requires public authorities to 'protect public health through preventive measure'', which makes it 'constitutionally legitimate to develop public policies to promote vaccination' (JCC 38/2023, FJ 4 f.).

[87] JCC 38/2023, FJ 5. See also JCC 74/2023, FJ único; 148/2023, FJ 4; 163/2023, FJ único; 4/2024, FJ 2, and 71/2024, FJ único.

Part III

North America

The *Oakes* test in a unique context. Rights limitations in Canada in times of emergency

Federico Falorni [*]

1. The *Oakes* test: introductory remarks

In 1986, in the leading case *R. v. Oakes* [1] the Supreme Court of Canada, with the crucial contribution of Chief Justice Dickson, established a precise legal framework to ascertain whether a restriction on a fundamental right or freedom is reasonable and demonstrably justified in a free and democratic society; and, as such, whether it can be justified under Section 1 of the Canadian Charter of Rights and Freedoms. [2] In addition to the pre-condition of the «prescribed by law» requirement, as outlined in *Oakes* the Section 1 analysis is four-fold. [3] First, the objective of the measure must be important enough to warrant overriding a Charter right (pressing and substantial objective). [4] Second, there must be a rational connection between the limit on the Charter right and the legislative objective (rational connection). Third, the limit should impair the Charter right as

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[1] *R. v. Oakes*, 1 S.C.R. 103 (1986).

[2] Section 1 of the Charter do not treat rights guarantees as absolute entitlements: in addition to recognizing fundamental rights, this section contains a general limitation clause, which permits restrictions on these rights only under certain strict conditions. See J.L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review*, McGill-Queen's University Press, Montreal, 1996, at 4-5 and 52; L.E. Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada's Constitution", in *The Canadian Bar Review*, 80, 2001, 699-748, at 722.

[3] *R. v. Oakes*, *supra* note 1, at 138-139.

[4] The opinion of the Court further clarifies the characteristics that the legislative purpose must have: «The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important» (*R. v. Oakes*, *supra* note 1, at 138).

little as possible (minimal impairment). Fourth, there should be an overall balance or proportionality between the benefits of the limit and its deleterious effects (proportionality in the strict sense).

The four-stage test, enunciated in *Oakes*, is part of the contemporary constitutional mainstream and represents the Canadian version of the proportionality standard. [5] Since its invocation in 1986, [6] the test has played a key role for the justification of limits on Charter rights. Over time, it has become «the universal touchstone» [7] of judicial analysis under Section 1 taking on the character of «holy writ», [8] testifying to its growing importance both nationally and, increasingly, at the supranational level. Indeed, the *Oakes* framework has served as a model for constitutional adjudication around the world. [9]

As the original wording suggests, the *Oakes* decision set out a particularly demanding standard of justification whereby encroachments on Charter rights would be justified only if «exceptional criteria» [10] were met. Thus, the Supreme Court appears to have accepted the approach suggested by the text of Section 1: that rights are of presumptive importance and that justified restrictions constitute exceptions, requiring a special defense. [11] To this end and following the words

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[5] For further bibliographical references and for a more detailed analysis of the Supreme Court's case law on the application of the *Oakes* test, in Italian scholarship, F. Falorni, *Bilanciare i diritti. Esperienze di* common law *a confronto*, Giappichelli, Turin, 2025, ch. III-IV. Academic writings and case law cited below are only a selective sample.

[6] Even if the Chief Justice Dickson drew inspiration from the proportionality test adopted by the German Federal Constitutional Court since 1950, he simply enunciated the *Oakes* framework without making any reference to the foreign constitutional material. In this respect, S. Gardbaum, *The New Commonwealth Model of Constitutionalism. Theory and Practice*, Cambridge University Press, Cambridge, 2013, at 115 («the *Oakes* test itself was largely borrowed from the German court by Chief Justice Brian Dickson, without attribution»); I. Ponomarenko, "The Unbearable Lightness of Balancing: Towards a Theoretical Framework for the Doctrinal Complexity in Proportionality Analysis in Constitutional Adjudication", in *UBC Law Review*, 49, 2016, 1103-1164, at 1106.

[7] P.J. Monahan, *Constitutional Law*, 3rd ed., Irwin Law, Toronto, 2002, at 417.

The Oakes test has also been described as «five of the most important pages ever written in Canadian constitutional law» (R.J. Sharpe, K. Roach, *Brian Dickson. A Judge's Journey*, University of Toronto Press, Toronto, 2004, at 334).

[8] P.W. Hogg, "Section 1 Revisited", in *National Journal of Constitutional Law*, 1992, 1-24, at 3.

[9] R. Hirschl, *Going Global? Canada as Importer and Exporter of Constitutional Thought*, in R. Albert, D.R. Cameron (eds), *Canada in the World. Comparative Perspectives on the Canadian Constitution*, Cambridge University Press, Cambridge, 2018, 305-323, at 305-308; S. Weinrib, "The Emergence of the Third Step of the Oakes Test in Alberta v. Hutterian Brethren of Wilson Colony", in *University of Toronto Faculty of Law Review*, 68, 2010, 77-97, at 80.

[10] *R. v. Oakes*, *supra* note 1, at 105.

[11] P.A. Chapman, "The Politics of Judging: Section 1 of the Charter of Rights and Freedoms", in *Osgoode Hall Law Journal*, 24(4), 1986, 867-896, at 883 and 885; C.M. Panaccio,

«demonstrably justified» in Section 1, the burden of demonstrating that the limits are reasonable lies with the party (generally, the government) seeking to restrict a fundamental right. To satisfy this burden of proof, evidence must be «cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit». [12] The *Oakes* decision thus made empirical evidence central to every step of the proportionality test. [13] As Justice McLachlin (as she then was) later explained in *RJR-MacDonald Inc. v. Canada (A.G.)*, [14] the original version of the *Oakes* test established a process of «reasoned demonstration» [15] and Section 1 analysis is «by its very nature a fact-specific inquiry». [16]

However, subsequent application has substantially diluted the stringency of the *Oakes* test in several ways. [17]

First, the Court has been relatively deferential to the legislative judgement regarding the importance of the objective. Indeed, despite its phrasing, the first stage of the *Oakes* framework has played a limited role, with the government failing this condition only on a small number of occasions. [18]

Second, the rational connection component has been interpreted flexibly, moving from the assumption that it may be particularly difficult to provide evidence of a rational relationship between the infringement of a Charter right and the legislative objective, at least in particularly complex areas of legislation. Again in *RJR-MacDonald Inc. v. Canada (A.G.)*, Justice McLachlin affirmed that, satisfying this second step, requires only alleging «a causal connection between the

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"In Defence of Two-Step Balancing and Proportionality in Rights Adjudication", in *Canadian Journal of Law and Jurisprudence*, 1, 2011, 109-128, at 126.

[12] *R. v. Oakes*, *supra* note 1, at 138.

[13] S. Choudhry, "So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter's Section 1", in *Supreme Court Law Review*, 34, 2006, 501-535, at 522.

[14] *RJR-MacDonald Inc. v. Canada*, 3 S.C.R. 199 (1995)

[15] *Ibid.*, at para 129.

[16] *Ibid.*, at para 133.

[17] W. Black, "The Search for Reasonable Limits: Is Oakes Retired?", in *Constitutional Forum*, 2, 1991, 78-85, at 78; A. Lokan, "The Rise and Fall of Doctrine under Section 1 of the Charter", in *Ottawa Law Review*, 24(1), 1992, 163-192, at 180; T. Macklem, J. Terry, "Making the Justification Fit the Breach", in *The Supreme Court Law Review*, 11, 2000, 575-640, at 579 and 598; R. Moon, "Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights", in *Osgoode Hall Law Journal*, 40 (3/4), 2002, 337-367, at 339; B. Billingsley, "Oakes at 100: A Snapshot of the Supreme Court's Application of the Oakes Test in Social Policy v. Criminal Policy Cases", in *The Supreme Court Law Review*, 35, 2006, 347-411, at 354; C.D. Bredt, H.K. Pessione, "The Death of Oakes: Time for a Rights-Specific Approach?", in *Supreme Court Law Review*, 63, 2013, 485-500, at 488-489.

[18] R.J. Sharpe, K. Roach, *The Charter of Rights and Freedoms*, 7th ed., Irwin Law, Toronto, 2021, at 75-78; L.E. Trakman, W. Cole-Hamilton, S. Gatien, "R. v. Oakes 1986 – 1998: Back to the Drawing Board", in *Osgoode Hall Law Journal*, 36, 1998, 83-149, at 95.

infringement and the benefit sought on the basis of reason or logic». [19] Therefore, the need for accurate evidence has generally all but given way to the use of reason or logic, to which over time, has been added the use of «common sense» [20] and of a «reasoned apprehension» [21] that the restriction on a Charter right will promote the legislative objective. [22] In this way, the Court—with an approach that has gradually involved subsequent phases of the test—has relaxed the empirical attitude, weakened the evidentiary requirement, and shifted towards a more deferential posture. Therefore, except for a few decisions, the Court has seemed to apply a standard of «minimal rationality»: [23] the second stage has resulted in a frequently «not onerous» [24] review, and it has been satisfied in the vast majority of decisions.

Third, immediately afterwards its enunciation, the Court has reformulated the minimal impairment component of the *Oakes* test in *R. v. Edwards Books and Art Ltd.*, [25] adopting a more relaxed approach. In *Edwards*, the Court observed that a mechanical application of the third stage would be excessively rigid and burdensome for the government; rather, the question to be resolved at this step was only «whether there is some reasonable alternative scheme which would allow the province to achieve its objective with fewer detrimental effects» [26] on the rights involved. Under this new formulation, the condition of the third stage is satisfied when the legislative solution is reasonable relative to equally reasonable alternatives, not to all conceivable options. [27] By relying on the principle of reasonableness, the Court has softened the minimal impairment requirement (hence the name, «reasonable impairment or range of reasonable alternatives») [28] and recognized a margin of appreciation for legislators in determining the appropriate solution for advancing the public interest. However, this more deferential attitude

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[19] *RJR-MacDonald Inc. v. Canada*, *supra* note 14, at para 153.

[20] *Lavoie v. Canada*, 1 S.C.R. 769 (2002), at para 60.

[21] *R. v. Butler*, 1 S.C.R. 452 (1992), at para 504.

[22] M.A. Johnston, "Section 1 and the Oakes Test. A Critical Analysis", in *National Journal of Constitutional Law*, 26, 2010, 85-110, at 102; D. Schneiderman, *Common sense and the Charter*, in J. Eliot Magnet, B. Adell, *The Canadian Charter of Rights and Freedoms After Twenty-Five Years*, LexisNexis Canada, Ontario, 2009, 3-18, at 5-7 and 18.

[23] R. Elliot, "Developments in Constitutional Law: The 1989-90 Term", in *The Supreme Court Law Review*, 2, 1991, 83-173, at 142.

[24] *R. v. Ndhlovu*, 3 S.C.R. 52 (2022), at para 121. See also *Little Sisters Book and Art Emporium v. Canada*, 2 S.C.R. 1120 (2000), at para 228.

[25] *R. v. Edwards Books and Art Ltd.*, 2 S.C.R. 713 (1986).

[26] *Ibid.*, at 772-773.

[27] P.W. Hogg, *Section 1 Revisited*, in *National Journal of Constitutional Law*, *supra* note 8, at 21; D. Gibson, "The Deferential Trojan Horse: A Decade of Charter Decisions", in *The Canadian Bar Review*, 72(4), 1993, 417-455, at 441.

[28] E.P. Mendes, "Section 1 of the Charter after 30 Years: The Soul or the Dagger at its Heart?", in *Supreme Court Law Review*, 61, 2013, 293-336, at 319.

has not prevented the third stage of the test from progressively becoming pivotal in the Section 1 analysis. The minimal impairment component—described as the «heart and soul» [29] of the justificatory framework—has represented «the main battleground» [30] of Section 1 adjudication. In the vast majority of cases, where the proportionality test has not been satisfied, these cases have failed this component because legislation restricted fundamental rights more than was reasonably necessary. [31] This is a peculiarity of the Canadian experience compared to the practices of other courts that certainly influenced Chief Justice Dickson's choice to introduce the proportionality framework. The comparison with the German Federal Constitutional Court is particularly instructive. In Germany, at least since the late 1970s, most laws found to be unconstitutional did not pass the final step of the proportionality standard; whereas, in Canada, the last component of the Oakes test has played a largely vestigial role within Section 1 decision-making. [32]

This final feature relates to the fourth point. The Supreme Court has historically paid limited attention to the last branch of the Oakes test in its reasoning. Even though the proportionality in the strict sense stage involves a markedly different analysis from the earlier branches—necessitating, as outlined in *Dagenais v. Canadian Broadcasting Corp.*, [33] a balancing act between the beneficial effects of the legislation and its harmful effects –, for a long time it has only played a residual role. In fact, the Court has seldom struck down a law at this final stage once persuaded that the legislation has satisfied all other criteria. It was only recently, in *Alberta v. Hutterian Brethren of Wilson Colony* [34] with Chief Justice McLachlin's decisive input and in some subsequent decisions, [35] that the Court appeared to adopt a new stance towards the proportionality in the strict sense component by revitalising this step and acknowledging its independent and significant role within the *Oakes* framework. [36]

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[29] P.W. Hogg, W.K. Wright, *Constitutional Law of Canada*, 5th ed. Supplemented, Thomson Reuters, Toronto, 2024, Volume II, at 38.42.

[30] M. Rothstein, "Section 1: Justifying Breaches of Charter Rights and Freedoms", in *Manitoba Law Journal*, 27(2), 1999, 171-183, at 173.

[31] L. Hardcastle, *Proportionality Analysis by the Canadian Supreme Court*, in M. Kremnitzer, T. Steiner, A. Lang (eds), *Proportionality in Action. Comparative and Empirical Perspectives on the Judicial Practice*, Cambridge University Press, Cambridge, 2020, 134-192, at 156.

[32] D. Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence", in *University of Toronto Law Journal*, 57, 2007, 383-397, at 389 and 393.

[33] *Dagenais v. Canadian Broadcasting Corp.*, 3 S.C.R. 835 (1994), at 889.

[34] *Alberta v. Hutterian Brethren of Wilson Colony*, 2 S.C.R. 567 (2009), at paras 72-78.

[35] *R. v. K.R.J.*, 1 S.C.R. 906 (2016), at paras 77-79; *R. v. Brown*, 1 S.C.R. 374 (2022), at paras 143-145.

[36] B.L. Berger, "Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of Alberta v. Hutterian Brethren of Wilson Colony", in *Supreme Court Law Review*,

In light of the above considerations, it is quite clear that the Supreme Court has recently softened the rigorous application of the *Oakes* test by adopting a more flexible interpretation of its stages. This trend indicates a shift in the Court's attitude, which is now characterized by greater deference to policymakers. However—at least until the onset of the recent health emergency –, if «caution, restraint, and a very attenuated standard of review are widely acknowledged to be the leitmotif of Canadian constitutional law», [37] there has never been an abdication of judicial function. Instead, adjudication under Section 1 can be likened to a tiger, whose teeth, as Professor Kent Roach observes, are «much less sharp than they used to be». [38] It is also important to note that the level of deference displayed by the Supreme Court has varied depending on the specific context of each case. [39] From this perspective—which is regarded as the «dominant narrative» [40] about *Oakes*' legacy according to Professor Sujit Choudhry—the application of the proportionality framework has varied in stringency depending on the unique circumstances of each situation. The outcome is a highly context driven inquiry—or a contextual approach [41] –, meaning that the analysis is influenced by the particular circumstances relevant to each case and that those circumstances help determine the level of judicial restraint.

Following these general remarks, the remainder of the paper focuses on the application of the *Oakes* test throughout the health crisis. This analysis is by no means exhaustive: it is based on a selective sample of decisions issued by provincial courts during the pandemic concerning restrictions on religious freedom, mobility rights, and the right to peaceful assembly, all aimed at containing the spread of the virus. The work is divided into three other sections. Part II provides an overview of the proportionality test in the context of the pandemic emergency. Part III examines how the precautionary principle has been integrated into the

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51, 2010, 25-46; M. Moore, "R. v. K.R.J.: Shifting the Balance of the Oakes Test from Minimal Impairment to Proportionality of Effects", in *Supreme Court Law Review*, 82, 2018, 143-177.

[37] D.M. Beatty, "The Canadian Charter of Rights: Lessons and Laments", in *Modern Law Review*, 60(4), 1997, 481-498, at 494.

[38] K. Roach, *The Supreme Court on Trial. Judicial Activism or Democratic Dialogue*, Irwin Law, Toronto, 2016, at 195.

[39] B.M. McLachlin, *The Charter 25 Years Later: The Good, the Bad, and the Challenges*, in *Osgoode Hall Journal*, 45(2), 2007, 365-377, at 369; E.P. Mendes, *The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1*, in G.A. Beaudoin, E. Mendes (eds), *Canadian Charter of Rights and Freedoms*, 4th ed., LexisNexis Canada, Markham (Ontario), 2005, 165-214, at 177; E.P. Mendes, K. Karmali, "Are There Hierarchies of Rights and Vulnerabilities Emerging Due to Deference, Context and Burden of Proof Standards?", in *National Journal of Constitutional Law*, 15(1), 2003, 107-123, at 110.

[40] S. Choudhry, *So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter's Section 1*, *supra* note 13, at 503.

[41] See, for example, *Thomson Newspapers Co. v. Canada*, 1 S.C.R. 877 (1998), at para 87.

proportionality framework to justify a more cautious approach. Part IV draws some brief conclusions.

2. Proportionality analysis during the health emergency

Canadian provinces and territories implemented a wide variety of public health measures to address the health crisis and to prevent the spread of COVID-19. These measures variously infringed on fundamental rights and freedoms and, notably—to name some of those subject to more stringent limitations—, on religious freedom, mobility rights and freedom of peaceful assembly. Claimants across Canada have challenged the constitutionality of emergency statutes, orders and regulations under Section 1 of the Canadian Charter of Rights and Freedoms. [42]

Once Provincial courts have found there to be a violation of a Charter right, their analysis then has proceeded to follow the general approach to Section 1 to determine whether the encroachment upon the right can be justified. [43] With the exception of some cases where the *Doré* standard has been applied, [44] judges have made extensive use of the four-part structure of proportionality as set out in *Oakes* in reviewing legislative and governmental measures. Under exceptional circumstances, the *Oakes* framework has been applied in a very permissive manner. In the vast majority of cases, the proportionality test has been satisfied, and provincial courts have assessed public health measures that violated Charter rights as reasonable limitations in a free and democratic society and justified under Section 1 of the Charter.

First, restrictions were aimed at containing the spread of the virus, protecting Canadians from illness and death, and mitigating threats to the integrity of the healthcare system. In the context of the pandemic, courts stated with «no doubt» [45] that such restrictions relate to pressing and substantial objectives.

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[42] For further information, A.W. MacKay, "The Rule of Law in Pandemic Times", in *National Journal of Constitutional Law*, 43(1), 2022, 35-93.

[43] J.M. Keyes, "Judicial Review of COVID-19 Legislation – How Have the Courts Performed?", in *CanLIIDocs*, 4339 (2022), 1-38, at 24.

[44] In principle, the *Dorè* framework—firstly adopted in *Doré v. Barreau du Québec*, 1 S.C.R. 395 (2012), at paras 3, 7, 39, 54, 56, 57—applies to «Discretionary administrative decisions that engage the Charter» [*Law Society of British Columbia v. Trinity Western University*, 2 S.C.R. 293 (2018), at para 57] and is quite similar to the third and fourth components of the *Oakes* test [*Loyola High School v. Quebec (Attorney General)*, 1 S.C.R. 613 (2015), at para 40].

In the pandemic case law, the *Doré* framework has been used, for example, in *Beaudoin v. British Columbia*, 2021 BCSC 512, at paras 212-248; and in *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427, at paras 257-284.

[45] *Taylor v. Newfoundland and Labrador*, 2020 NLSC 125, at para 437.

At the second stage of the test, courts confirmed that the «burden on government is not particularly demanding» [46] and that it is sufficient to establish that it is reasonable to suppose that the restriction will further the aim. In general, they have no difficulty in finding a rational connection between the infringement and the public purpose. For example, in *Gateway Bible Baptist Church et al. v. Manitoba et al.*,[47] concerning a restriction on private in-home and outdoor public religious gatherings, the Court of Queen's Bench of Manitoba easily concluded that, «based on logic, reason and a common sensical understanding of the evidence» [48], limiting person-to-person contact logically reduces the risk of transmission.

Even the most stringent part of the *Oakes* test—minimally impairment—has been satisfied in the majority of decisions. At this stage of analysis, the question was whether public health measures fall within a range of reasonable alternatives. Accordingly, courts were required to investigate if there were reasonably feasible and less impairing alternatives to achieve the measures' objective «in a real and substantial manner». [49] Generally, on the one hand, courts concluded that less restrictive alternatives were not equally effective at preventing the spread of the virus. On the other hand, they considered limitations of rights reasonably tailored to the objective. In this regard, courts have particularly emphasized the argument that restrictions on Charter rights were carefully tailored to allow exceptions for less risky activities. [50] In *Taylor v. Newfoundland and Labrador*, [51] a case about an interprovincial travel ban, Justice Burrage for the Supreme Court of Newfoundland and Labrador clearly observed that «the travel restriction did not impose a blanket ban on all travel, but admitted of exceptions». [52] He then went through all the cases where travel was still allowed, before concluding that the measure limited mobility rights as little as is reasonably possible. [53] Only in the presence of an absolute ban has the third component of the *Oakes* test shown its "teeth". In the recent judgement, *Hillier v. Ontario*, [54] the Court of Appeal for Ontario struck

[46] *Ontario v. Trinity Bible Chapel et al.*, 2022 ONSC 1344, at para 136.

[47] *Gateway Bible Baptist Church et al. v. Manitoba et al.*, 2021 MBQB 219.

[48] *Ibid.*, at para 297.

[49] This wording has been introduced within the minimal impairment component in *Alberta v. Hutterian Brethren of Wilson Colony*, *supra* note 34, at para 55, and subsequently reiterated, for example, in *Carter v. Canada (Attorney General)*, 1 S.C.R. 331 (2015), at para 102; in *R. v. K.R.J.*, *supra* note 35, at para 70; in *R. v. Safarzadeh-Markhali*, 1 S.C.R. 180 (2016), at para 63.

[50] On this issue, with regard to the justifiability of public health measures restricting religious gatherings, see M. Boutilier, "Limiting Freedom of Religion in a Pandemic: The Constitutionality of Restrictions on Religious Gatherings in a Response to COVID-19", in *Alberta Law Review*, 59(4), 2022, 949-1000, at 971-977.

[51] *Taylor v. Newfoundland and Labrador*, *supra* note 45.

[52] *Ibid.*, at para 483.

[53] *Ibid.*, at paras 484-486.

[54] *Hillier v. Ontario*, 2025 ONCA 259.

down provincial regulations imposing absolute limits on gatherings on the basis that they unjustifiably limited the right to peaceful assembly under Section 2c of the Charter. Writing for the Court, Justice Lauwers noted that the public health measures did not provide exceptions for less dangerous activities, like outdoor political protests, establishing an absolute prohibition on peaceful assembly. Therefore, he was persuaded that, even in times of emergency, a «total ban on the exercise of a fundamental freedom» [55] could not meet the third branch of the proportionality standard.

When it comes to the last step—and even if courts have placed less emphasis in their reasoning on the proportionality in the strict sense component compared to the third stage—, courts have been willing to accept that there was the required proportionality between the beneficial and deleterious effects. Judges have acknowledged that public health measures have had a significant impact on Charter rights. However, the potential benefits to the public gained through these policies outweighed the harms to Charter rights. Ultimately, courts concluded that, on balance, individual rights had to give way to the common good and to the measures' contribution to containing the spread of the pandemic. [56]

Considering the *Oakes* test as a whole, the clear impression is that provincial courts have shown significant deference to political judgement and to public health authorities in adjudicating challenges to various aspects of governments' responses to the pandemic. With few exceptions, judges have adopted a highly cautious attitude towards the other branches of government and medical experts and have afforded these actors a margin of discretion in crafting proper solutions to tackle the health crisis. Although deference may arise in any of the four steps of the *Oakes* test, case law reveals that it has taken center stage within the minimal impairment component and that the degree of deference owed by courts has been expressly and mainly addressed at this stage. [57]

The pandemic case law also provides at least two traditional main justifications for caution on the part of the judiciary.

The primary reason for deferring relates to the unique context of the COVID-19 pandemic. As mentioned previously, the context influences the level of judicial restraint when evaluating government decisions. [58] In this regard, judges have

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[55] *Ibid.*, at para 56.

[56] *Taylor v. Newfoundland and Labrador*, *supra* note 45, at paras 488-492; *Gateway Bible Baptist Church et al. v. Manitoba et al.*, 2023 MBCA 56, at paras 118-128.

[57] *Ontario v. Trinity Bible Chapel et al.*, *supra* note 46, at para 138 («Deference is particularly animated» at the third stage of Section 1 analysis).

On this issue, see also M. Rothstein, *Section 1: Justifying Breaches of Charter Rights and Freedoms*, *supra* note 30, at 178.

[58] *Ontario v. Trinity Bible Chapel*, 2023 ONCA 134, at para 102 (where the Court of Appeal for Ontario stated that deference «takes its meaning from the context of the challenged law or state action»).

consistently pointed out that the situation at the time the contested measures were adopted was unusually complex. [59] Decision-makers were required to respond to an unprecedented public health crisis caused by a novel and deadly disease. On one side, they needed to act urgently across a wide range of public health concerns. On the other side, they had to make decisions amidst scientific uncertainty and limited knowledge about the virus's spread and impact. [60] In this exceptional context, which warranted greater deference than usual and has been described as «a textbook recipe for deferential review», [61] courts have adopted a very permissive standard in assessing the justification for restrictions on Charter rights.

The second argument courts have invoked to justify judicial restraint concerns the limits of judges' institutional expertise. [62] Throughout the case law, courts have pointed out that the pandemic has required highly specialized medical and scientific competence. [63] At the same time, however, judges have expressly recognized that they lack the capacity and the experience to second-guess the decisions of public health officials on such technical matters and that medical experts and governments are «better positioned» [64] to take decisions on how to address the pandemic. [65] In other words, the factual underpinnings for managing a health

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[59] *Gateway Bible Baptist Church et al. v. Manitoba et al.*, *supra* note 47, at para 281.

[60] Empirical uncertainty and complexity have been two traditional arguments invoked to warrant deference to the legislature: R.J. Sharpe, K. Roach, *The Charter of Rights and Freedoms*, *supra* note 18, at 87-88; J.L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review*, *supra* note 2, at 64; R.E. Charney, S.Z. Green, "Prophets of Doom, Seers of Fortune: 20 Years of Expert Evidence under the Oakes Test", in *The Supreme Court Law Review*, 34, 2006, 479-499, at 494.

[61] *Ontario v. Trinity Bible Chapel et al.*, *supra* note 46, at para 128.

[62] The judiciary's institutional expertise has traditionally been invoked as a factor for deferring to legislative choices for those types of decisions that the legislature is «best placed to make» [*M. v. H.*, 2 S.C.R. 3 (1999), at para 78].

In this regard, R.E. Charney, S.Z. Green, *Prophets of Doom, Seers of Fortune: 20 Years of Expert Evidence under the Oakes Test*, *supra* note 60, at 481 and 483-493; T. Macklem, J. Terry, "Making the Justification Fit the Breach", in *The Supreme Court Law Review*, 11, 2000, 575-640, at 590, 593 and 604; G. Davidov, "The Paradox of Judicial Deference", in *National Journal of Constitutional Law*, 12(1), 2000, 133-164, at 140; A. Kavanagh, *Deference of Defiance? The Limits of the Judicial Role in Constitutional Adjudication*, in G. Huscroft (eds), *Expounding the Constitution: Essay in Constitutional Theory*, Cambridge University Press, Cambridge, 2008, 184-215, at 194-200.

See also: *Mckinney v. University of Guelph*, 3 S.C.R. 229 (1990), at 305; *Stoffman v. Vancouver General Hospital*, 3 S.C.R. 483 (1990), at 527; *Newfoundland (Treasury Board) v. N.A.P.E.*, 3 S.C.R. 381 (2004), at para 83.

[63] *Beaudoin v. British Columbia*, *supra* nota 44, at para 244; *Beaudoin v. British Columbia (Attorney General)*, *supra* note 44, at paras 149-151.

[64] *Gateway Bible Baptist Church et al. v. Manitoba et al.*, *supra* note 47, at para 299; *Gateway Bible Baptist Church et al. v. Manitoba et al.*, *supra* note 56, at para 85.

[65] In *Taylor v. Newfoundland and Labrador*, *supra* note 45, Justice Burrage clearly affirmed

crisis were essentially scientific and involved medical issues that fell outside the institutional expertise of the judiciary. This is particularly relevant in the face of conflicting or inconclusive scientific evidence as was the case during the pandemic. In this regard, judges articulated a limited view of their role. By referring to the precedent *Lapointe v. Hôpital Le Gardeur*[66]—where the Supreme Court endorsed the principle that the «courts do not have jurisdiction to settle scientific disputes or to choose among divergent opinions of physicians on certain subjects»[67]—provincial courts emphasized that they did not possess the ability to decide which expert was correct. For example, in *Ontario v. Trinity Bible Chapel et al.*, Justice Pomerance observed that «I am neither equipped nor inclined to resolve scientific debated and controversy surrounding Covid-19».[68] Rather, the courts' issue was only to assess whether, on the evidence presented, there was a reasonable basis to adopt the measures under review.

The exceptional context and courts' institutional expertise represent two rationales invoked by judges to grant a wide degree of deference to elected officials and medical experts. However, these arguments are not new in the case law regarding the application of the *Oakes* test. Rather, the development lies in invoking the precautionary principle within the proportionality framework.

3. Proportionality and the precautionary principle

The precautionary principle assumes that decision-makers are allowed to infringe on fundamental rights in order to proactively prevent serious harm, even when there is epistemic uncertainty about the harm's severity, the likelihood it will materialize and the efficacy of the measures adopted to mitigate the disease. Traditionally invoked in environmental law and in connection with climate change, the principle has become extremely relevant during the health emergency when governments worldwide have adopted public health measures to contain the spread of the virus and its threats to public health.[69]

During the health crisis, the principle has been invoked by provincial courts in their Section 1 analysis to justify a margin of appreciation for decision-makers. In this regard, in *Grandel v. Saskatchewan*,[70] the Saskatchewan Court of King's

that «courts do not have the specialized expertise to second guess the decisions of public health officials» (at para 458).

[66] *Lapointe v. Hôpital Le Gardeur*, 1 S.C.R. 351 (1992).

[67] *Ibid.*, at 363.

[68] *Ontario v. Trinity Bible Chapel et al.*, *supra* note 46, at para 6.

[69] K. Webber, "The precautionary principle and judicial decision making in the COVID-19 pandemic", in *Australian Journal Of Administrative Law*, 29(1), 2022, 43-59, at 44.

[70] *Grandel v. Saskatchewan*, 2022 SKKB 209.

Bench found this principle was «essential» [71] in the Section 1 context when reviewing the government's response to COVID-19 where «some cause and effect relationships are not fully established scientifically». [72] In the face of empirical uncertainty and indeterminate scientific evidence, and acknowledging the compelling need to prevent dangers to the population's health and life, judges have resorted to the precautionary principle to justify a more permissive review of governmental measures introduced to address the pandemic. [73] In *Ontario v. Trinity Bible Chapel et al.*, [74] the Ontario Superior Court of Justice firstly noted that «lack of full scientific certainty is not a reason to postpone harm reduction strategies»; [75] then, it expressly admitted that «[T]o wait for certainty is to wait too long». [76] Hence, the existing epistemic uncertainty has been interpreted in the wording of the precautionary principle in favor of political and expert decision-makers.

Specifically, even if the precautionary principle has largely informed the whole application of the *Oakes* test during the health emergency, in a significant number of decisions courts have expressly invoked this principle at the minimal impairment stage. For example, in *Taylor v. Newfoundland and Labrador*, [77] the Supreme Court of Newfoundland and Labrador addressed this issue before examining the potential less restrictive alternatives to the travel restriction evoked by the applicants, such as self-isolation or testing all incoming travellers. At this point of the third stage analysis, Justice Burrage explicitly invoked the precautionary principle to guarantee a higher degree of deference to public officials. After having recalled the peculiar pandemic context, he observed that «[I]n such a circumstance, the public health response is to err on the side of caution until further confirmatory evidence becomes available; the precautionary principle». [78] Subsequently, the Court readily accepted the experts' testimony and the evidence presented in favor of the provincial government to conclude that the alternatives proposed were not an effective substitute for the interprovincial travel ban.

A similar approach has been adopted in *Ontario v. Trinity Bible Chapel et al.*, [79]

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[71] *Ibid.*, at para 84.

[72] *Ibid.*

[73] On this issue, in general terms, P. Berger, "Proportionality, Evidence and the COVID-19-Jurisprudence in Germany", in *European Journal for Security Research*, 7, 2022, 211-236, at 220, where the author observes that «[T]he mode of political precautionary action is reflected in each case in the judicial proportionality test in specific semantic forms like epistemic uncertainty, of preventing a threat to the life and health of the population, and of the discretion granted to politics».

[74] *Ontario v. Trinity Bible Chapel et al.*, *supra* note 46.

[75] *Ibid.*, at para 145.

[76] *Ibid.*

[77] *Taylor v. Newfoundland and Labrador*, *supra* note 45.

[78] *Ibid.*, at para 467.

[79] *Ontario v. Trinity Bible Chapel et al.*, *supra* note 46.

concerning limits imposed on religious gatherings. Within the analysis on the third branch of the *Oakes* test, the Ontario Superior Court of Justice, after having acknowledged that scientific evidence on the pandemic issues was not definitive, stated that, in the peculiar circumstances of the health crisis, the provincial government was not required to justify its choices on a standard of scientific certainty. The opinion continues as follows: «[I]t is here that the precautionary principle is engaged». [80] By resorting to this principle, the Court was convinced that the evidence presented—even if it was inconclusive—represented a sound enough medical basis to introduce restrictions on religious gatherings and that the public health measures satisfied the third step of the *Oakes* framework.

These cases demonstrate that the precautionary principle has been integrated into the proportionality test. [81] Moreover, it is no surprise that this principle has been invoked primarily within the minimal impairment stage. On the one hand, given that this stage has traditionally been the most stringent part of the *Oakes* test, the need to mitigate its rigor has been particularly felt by courts under exceptional circumstances. On the other hand, and consequently, as well as deference has been mainly raised within the analysis of the third step, even the invocation of the precautionary principle has essentially affected this branch of the Section 1 analysis. In the end, this principle provides another rationale, in addition to traditional arguments, to justify a wide margin of appreciation for governments and health officials engaged in the challenging task of managing the pandemic.

4. Conclusion

The Canadian history reveals a strong tradition of judicial restraint even when applying the multi-pronged formula established in *Oakes*. [82] As noted, immediately after its introduction, the Supreme Court moved away from its strict formulation and adopted a more permissive standard of review: therefore, caution has traditionally guided the court's use of proportionality.

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[80] *Ibid.*, at para 145. The Court, then, added that «Ontario was not required to wait for scientific unanimity on the properties of the pandemic before taking steps to prevent illness and death» (*ibid.*).

[81] For a critical analysis about how the precautionary principle has been incorporated within the proportionality test by Canadian provincial courts, M. Friedman, A. Sangiuliano, "Proportionality and precaution", in *Global Constitutionalism*, 2025, 1-22, at 11-13. In essence, the authors maintain that «the role of the precautionary principle within *Oakes* has not been clarified, nor has the precise amount of deference courts must show when the state asserts it» (at 11).

[82] B.M. McLachlin, "The Charter: A New Role for the Judiciary", in *Alberta Law Review*, 29(3), 1991, 540-559, at 555.

The pandemic case law has done nothing but further reinforce this trend.

In assessing the justifiability of restrictions on Charter rights under Section 1 of the Charter, provincial courts have on several occasions expressed their view that judges must not abdicate their responsibility as guardians of the Constitution even during a severe health crisis. [83] In this regard, judges have explicitly noted that the emergency situation did not call for «a blind or absolute deference», but rather for a «thoughtful deference that recognizes the complexity of the problem presented to public officials, and the challenges associated with crafting a solution». [84]

However, the pandemic case law shows a very high level of deference to elected officials and medical experts. In most cases, challenges to public health measures that restrict Charter rights have been dismissed, and therefore, these measures have been regarded as reasonable limits in a free and democratic society under Section 1. Overall, in constitutional adjudication, the public interest of saving lives, protecting the health of Canadians, and easing the pressure on the healthcare system has carried more weight than individual rights.

Essentially, caution arises both from the complexity and the uncertainty characterizing the emergency and from recognizing that judges lack the specialized expertise to fully assess how the pandemic should have been managed. In addition to these rationales, courts have invoked the precautionary principle, embedding it within the proportionality framework, to further justify their markedly deferential attitude.

In the context of a deadly pandemic, judicial humility is required or, at the very least, wise. Certainly, it is preferable to judicial overreaction, with courts routinely second-guessing the decisions of public health officials, without the necessary expertise. In this vein, the *Oakes*-proportionality test has been applied loosely to avoid frustrating the choices made by other decision-makers and to uphold Canada's longstanding tradition of judicial restraint.

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[83] *Taylor v. Newfoundland and Labrador*, *supra* note 45, at 460.

[84] *Ontario v. Trinity Bible Chapel et al.*, *supra* note 46, at para 6; *Beaudoin v. British Columbia (Attorney General)*, *supra* note 44, at para 151.

Fundamental Rights between the English common law and the principle of Proportionality in the Age of Emergency: the Case of the United States and Japan

Emma A. Imparato [*]

1. Introductory Remarks: The Evolution of Fundamental Rights Protection

Fundamental rights have traditionally been understood as mechanisms for protecting the individual against the State. Originally conceived as "limits" on the omnipotence of State power—particularly executive authority—these rights entail a negative obligation, requiring public authorities to refrain from interfering with individual freedoms. The legislature's role is generally confined, under the principle of legal reservation, to delineating the regulatory framework and any permissible restrictions. This approach, often described as the State's "negative competence," is emblematic of the liberal State based on the rule-of-law. In contrast, later developments—particularly the emergence of the welfare State after the Second World War and the expansion of constitutional adjudication—gave rise to social rights, which impose positive obligations. The effective protection of these rights necessitates an "active competence" of the State, involving proactive intervention to ensure their realization.

At the same time, during this historical period, negative freedoms—as originally conceived—were progressively reinforced. In some instances, these rights benefit from "enhanced" protection through constitutional provisions that limit legislative discretion, [1] even where the legislature is empowered to regulate the exercise of such freedoms. [2] In these cases, legislative discretion is constrained by

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[1] In these terms, see: M. Sachs, *Einführung, Vorbemerkung zu Abschnitt I, Kommentierung der Art. 19*, in M. Sachs (ed.), *Grundgesetz. Kommentar*, 3, München, 2003, 20.

[2] See on this point: E.A. Imparato, *La certezza del diritto dogmatica e attuazione nei sistemi costituzionali liberali*, ES, Napoli, 2025, 210.

the requirement to preserve the essential content of fundamental rights (see, for example, Article 19(2) of the German Basic Law).[3] From this perspective, the protection of fundamental rights, already subject to legal reservation, acquires a "stable" character with respect to their essential core. While negative freedoms have thus undergone different historical phases,[4] accompanied by varying regimes of implementation that are in favour of them, in more recent times they have nonetheless faced increasingly significant restrictions.

For some time, a transformation has been underway regarding the scope of legislative—and, subsequently, judicial—action in relation to the oldest category of negative fundamental rights. This shift is so profound that it calls into question not only the traditional model of rights protection but also the very conception and definition of these rights. In contemporary State practice, particularly concerning negative constitutional freedoms, one observes a complete transformation of State competence, which shifts from a merely negative to a positive form—"even to the point of becoming a task, that is, a duty to intervene".[5] In certain cases, such intervention appears virtually unlimited, especially when the right to security and prevention is invoked, and particularly during states of emergency. Under such circumstances, the State often acts "in advance," through anticipatory risk legislation, responding to potential threats, such as the purported social dangerousness of an individual, even in the absence of concrete evidence. For example, in post-September 11, 2001, anticipatory measures were adopted in the context of the so-called war on terror, although threats were not certain. Another example is the case of measures taken to prevent the risk of SARS-CoV-2 infection during the recent public health emergency beginning in 2019. This approach ultimately undermines "legal certainty"[6] while progressively eroding the domain of individual freedom.

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[3] For discussion on this, see, L. Schneider, *Der Schutz des Wesensgehalts von Grundrechten nach Art. 19 Abs. 2 GG*, Duncker und Humblot, Berlino 1983, 184. Reference is made to a 'protective barrier' for fundamental rights by: H. Sodan, *Art. 19 Grundrechtseinschränkung; Grundrechtsträger; Rechtsschutz*, in A. Haratsch, W. G. Leisner, R.P. Schenke, S. Schmahl, H. Sodan (eds), *Grundgesetz. Beck'scher Kompakt-Kommentar*, Verlag, München, 2009, 196.

[4] On this point, see specifically: O. Pfersmann, E. Imparato, *L'emergenza nello stato di diritto democratico. Una prima tassonomia della distribuzione delle competenze secondo il modo di produzione*, in *Federalismi.it*, 15, 2023, 178.

[5] E. Denninger, *Diritti dell'uomo e legge fondamentale*, in C. Amirante (ed.), Giappichelli, Turin, 1998, 90.

[6] *Ibid*. The author refers, in particular, to a case brought before the Federal Constitutional Court on 16 October 1977, in which the Court was called upon to determine whether the federal government was constitutionally obliged to accede to the demands of certain terrorists in order to save the life of a hostage whom they had threatened to execute. Confronted with the appeal brought by the hostage's son, invoking the rights to life and to equality, and notwithstanding the fact that in a previous, analogous case the government had complied with terrorist demands, the Court dismissed the appeal. It held that every government must assume

This recent legislative trend marks a fundamental transformation: a shift from the traditional institutional strategy of non-intervention to a new logic of state activism, often without clear limits, which tends to redraw the boundary between individual autonomy and the domain of public authority in favour of the latter. From this perspective, the potential for significant harm to fundamental rights becomes evident as they are increasingly subjected to stringent restrictions: as in the case of the Covid-19 emergency, where fundamental rights approached the point of effective negation, even while remaining formally enshrined in constitutional texts.

1.1. The Judicial Approach and the "Gradation" of Fundamental Rights Protection

In the face of legislative interventions that formally purport to regulate fundamental rights, but in substance it can deprive them of meaningful content, judicial power tends to adopt a dual posture. Rather than to secure their fullest possible exercise through a clearer delineation of the limits already traced by constitutional principles, which the legislature itself, as a subordinate source of law, is bound to respect. While in the majority of cases that courts ultimately acquiesce in such legislative "abuses," in other, less frequent instances observed in recent years they instead seek to perform a mediating function. In this latter scenario, the objective is to recalibrate the boundary between authority and liberty in favour of the latter, primarily through recourse to general clauses such as the principle of proportionality, which has been interpreted by some scholars as imposing upon the State an "obligation of moderation". [7]

Through this approach, a form of "gradation" in the protection of fundamental rights is introduced, albeit without displacing the structural predominance of public intervention. An illustrative example of this dynamic—also reflecting the "protective-preventive" logic pursued in the name of public security, which in practice operates as a counter-limit to fundamental rights—is provided by a 2001 judgment of the European Court of Human Rights. Relying, inter alia, on the principle of proportionality as applied within the framework of the "margin of appreciation" [8] afforded to the Member States, the Court held that the right to

responsibility for the choices it makes and that the determination of the measures deemed necessary to address such situations cannot be derived solely from the Constitution, "for otherwise the State's reaction would from the outset become calculable by the terrorists. This would render it impossible for the State to provide effective protection to its citizens".

[7] M. Fromont, "République fédérale d'Allemagne: l'Etat de droit", in *Revue droit publ.*, 1984, 1213.

[8] That is, "While difficult to define, the margin of appreciation refers to the latitude allowed to the member states in their observance of the Convention", as first stated by T.A.

political association may yield to considerations of national security. [9]

In any event, two main premises underpin the case law—particularly constitutional jurisprudence—concerning the admissible strength of limitations on fundamental rights and freedoms. The first is the understanding that constitutional provisions on fundamental rights constitute so-called "open" norms, namely norms that are inherently indeterminate and therefore susceptible to multiple interpretations. The second premise relates to the non-absolute nature of fundamental rights, which may be limited by other values of equal constitutional rank, insofar as rights themselves are ultimately conceived as principles-values. [10] Since constitutional provisions concerning rights contain no internal gradation and normative texts provide no form of prior "quantification," the determination of the threshold separating an unlawful violation from a legally acceptable limitation is ultimately delegated to judicial bodies. Judges are thus empowered, through the application of the proportionality test, to engage in a process of quantification that effectively leads them to appropriate a function of a distinctly legislative character.

The principle of proportionality, which presupposes a conflict between norms of equal rank, requires the judge to adhere to a specific "analytical structure" [11] in order to resolve tensions between fundamental rights and collective interests. [12]

O'Donnell, "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights", in *Human Rights Quarterly*, 4/1982, 474, 475.

[9] ECHR, *Refah Partisi (The Welfare Party) and Others v. Turkey*, February 13, 2003. By this ruling, the Court ultimately dismissed the applications lodged by the political party Refah (Welfare) and by several of its members against the Republic of Turkey which had ordered the party's dissolution. The Court found that the circumstances of the case did not disclose any violation of Articles 9, 10, 11, 14, 17, and 18 of the European Convention on Human Rights, nor of Articles 1 and 3 of Protocol No. 1. In particular, the Court relied on Article 11(2) of the Convention, holding that the restrictions imposed by the Turkish authorities on the exercise of the Convention rights constituted "measures necessary in a democratic society for national security, public safety, the defence of order and the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". Therefore, the Turkish authorities were "responding to a pressing social need and as a measure which was proportionate to the legitimate aims served". On this point, see: T. Murat, *The European Convention on Human Rights: restricting rights in a democratic society with special reference to Turkish political party cases*, University of Leicester, UK, 2006.

[10] It is indeed argued that "regardless of their positive legal value, fundamental rights proclaim a certain system of culture and values, which must give meaning to the life of the State established by this Constitution." On this regard, see: R. Smend, *Verfassung und Verfassungsrecht*, Duncker & Humblot, München und Leipzig, 1928, part. 164, as referred to by E. Forsthoff, *Stato di diritto in trasformazione*, Giuffré, Milan, 1973, 202.

[11] M. Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice", in *Int'l J. Const. L.*, 2/2004, 574, 579.

[12] More recently, see: Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, 2, Intersentia, Oxford, 2002, particularly, at 14 where it is said that "the Strasbourg organs have consistently held that the principle

First elaborated in a systematic manner by the German Federal Constitutional Court as a means of protecting fundamental rights, the theory of the "three stages" [13] of proportionality has since been widely adopted across Europe. In fact, the deterring restrictive legislative interventions, given that the substantive content of a fundamental right may itself impose significant constraints on legislative discretion [14]. According to this framework, a limitation is constitutionally permissible only if it satisfies three cumulative conditions: [15] (a) it pursues a legitimate aim; (b) it employs means that are suitable and entail only a "minimal" degree of interference with the right concerned; and (c) it is ultimately justified by a balancing assessment which weighs, on the one hand, the disadvantage resulting from the interference with the right and, on the other hand, the utility of the objective pursued by the legislative (or administrative) measure under review.

In light of these preliminary considerations, this study aims to examine the emergence of the principle of proportionality as expressly or implicitly articulated by the supreme courts in Japan and the United States. The analysis will demonstrate how, in these legal systems—unlike in European experiences, and particularly the German one—the principle does not rest upon an explicit and generalized constitutional doctrine. Rather, it initially appears in an implicit form, frequently traced back to the notion of "reasonableness," and remains confined to specific doctrinal domains. In these contexts, proportionality never crystallizes into the rigid, European-style test characteristic of German constitutional law, but instead manifests itself as an inherently "flexible" standard of judicial review.

2. The Emergence of the Principle in English Common Law

Some scholars argue that the principle of proportionality does not originate in German law and, more broadly, in the civil law tradition. Instead, they maintain that its roots can be found in the common law, and in particular in English law,

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of proportionality is inherent in evaluating the right of an individual person and the general public interests of society".

[13] In particular, see: F. Hufen, „Berufsfreiheit – Erinnerung an ein Grundrecht", in *Neue juristische Wochenschrift*, 47, 1994. *Contra*, v. J. Lücke*, Die Berufsfreiheit*, Müller, Heidelberg, 1994.

[14] BVerfGE 7, 377, Urteil vom 11. Juni 1958 - 1 BvR 596/56, Apotheken-Urteil, where it is expressly stated that "it is not the legislature that freely determines the content of a fundamental right; rather, the content of the fundamental right itself may impose substantive limits on legislative discretion".

[15] With regard to the question of whether these conditions should be regarded as distinct evaluative elements, reference may be made to: A. Stone Sweet, J. Mathews, "Proportionality balancing and global constitutionalism", in *Columbia Journal of Transnational Law*, 47, 2008, 74.

where it is expressed in the form of a criterion of reasonableness. [16] Through this criterion, the English judge appears to reach results similar to those achieved by German jurists through the principle of proportionality. [17]

In English common law, however, unlike in civil law systems, the criterion of reasonableness did not initially play a significant role in relation to fundamental rights. Rather, it was mainly applied to private law rights, [18] seeking to balance means and ends, and operated within rational basis judicial review in matters of equal protection and substantive protection of individual autonomy. [19] Some authors therefore distinguish between common law countries, where Wednesbury unreasonableness constituted the criterion for judicial intervention, particularly in secondary review, and civil law countries, where proportionality served as the criterion for judicial intervention in primary review. [20]

With regard to the origins of the principle of reasonableness in English common law, reference is often made to a judicial decision delivered more than one hundred years ago in the United Kingdom in the field of contract law. [21] That decision concerned, in particular, the recognition of damages for breach of contract. In this case, as in others relating to private law, the purpose of reasonableness was to ensure fairness. Where the specific circumstances that led to the consequences of non-performance were not foreseeable and did not fall within the "usual course of things" [22] consequential losses had to be "reasonably" limited.

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[16] See on this point: E.T. Sullivan, R.S. Frase, *Proportionality principles in American law: controlling excessive government*, Oxford, 2009, 37.

[17] See: N. Emiliou, "The Principle of Proportionality in European Law: A Comparative Study", in *Kluwer Law Int'l*, 1996, 129.

[18] About the history but also about the importance of comparison, see C.J. Hamson, *The English trial and comparative law*, London, 1952, in particular 7 where it is stated that "It is a good deal easier to have a dispassionate and clear view of our own system of law, of its advantages as much as of its disadvantages, if we begin to see it in the contrasts which it presents to another system".

[19] Regarding the connection between justice and equality, see G. Vlastos, *Justice and equality*, in R.B. Brandt, *Social Justice*, 1962, 31. Also, see D. Muller, *Social Justice*, Oxford, 1979, 20, where it said that "the just state of affairs is that in which each individual has exactly those benefits and burdens which are due to him by virtue of his personal characteristics and circumstances".

[20] G.S. Selma, "Comparative Jurisprudence: Unraveling the Doctrine of Proportionality in the USA, UK, and India", in *International Journal of Law Management & Humanities*, vol. 7, no. 3, 2024, 1175.

[21] See Courts of Exchequer, *Hadley v. Baxendale*, 23 February 1854, EWHC Exch J70 (1854) 9, available at https://www.bailii.org/. On this point, see M.A. Eisenberg, "The Principle of Hadley v. Baxendale", in *California Law Review*, 1992, 563.

[22] Courts of Exchequer, *Hadley*, cit., at 354. On this aspect of the judgment, see the commentary by M. Harris, "Fairness and Remoteness of Damage in Contract Law: A Lexical Ordering Approach", in *Journal of Contract Law*, vol. 3, 28 December 2010.

Individuals should be held liable only for losses that arise as the "probable result" [23] of a breach of contract. In other words, damages must be proportionate to the effects, or more precisely to the "probable effects of a breach of contract". [24] As stated in the judgment, such loss would neither have flowed naturally from the breach in the great majority of cases under ordinary circumstances, nor were the special circumstances that might have made it a reasonable and natural consequence of the breach communicated to or known by the defendants. [25]

The notion of reasonable damages reappeared in a later judgment concerning a contractual relationship between tenant and landlord, [26] as well as in many other cases that expressly referred to the original 1854 decision. In these cases, the criterion of reasonableness was used to quantify damages, particularly where it was necessary to assess whether the defendant's conduct "was reasonable and was the natural result of his default". [27] Moreover, reasonableness is also invoked in the case of a state of emergency by the courts. According to the judges, the phrase "reasonable cause" in the regulations [28] indicated that the actions of the Secretary of State were meant to be evaluated by an objective standard. As a result, it would be within the court's purview to determine the reasonableness of those actions.

Over time, this approach was subsequently extended to the field of administrative law.

2.1. The British administrative context and the courts

In the administrative context as well, illogicality itself constitutes the defining feature.

An administrative authority, although acting within the limits of the discretionary powers granted by legislation, may adopt a decision that is repugnant to

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[23] Courts of Exchequer, *Hadley*, cit.

[24] House of Lords, *The Monarch Steamship Co., Ltd. v. Karlshamns Oljefabriken (A/B)* (1949) A.C. 196 (9 december 1949).

[25] Courts of Exchequer, *Hadley*, cit., at 354.

[26] House of Lords, *Livingstone v. The Rawyards Coal Company* (1880), UKHL 387 (13 February 1880), at "Where any injury is to be compensated by damages, insettling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation".

[27] Specifically, House of Lords, *Bank of Portugal v. Waterlow* (1932) AC 452 (28 April 1932), and, subsequently, House of Lords, *The Monarch Steamship Co. Ltd v. Karlshamns Oljefabriken*, cited above.

[28] Emergency Powers (Defence) Act, 1939. See in this regard, P. Jackson, P. Leopold, *Constitutional and administrative law*, London, 2001, 405.

all reason. [29] While courts may interfere with an act of executive authority only if it is shown that the authority has acted unlawfully, discretion must be exercised not only in accordance with principles expressly laid down by statute but also with implicit principles such as the absence of unreasonableness. From an early stage, it was argued that a court could intervene on grounds of unreasonableness if an administrative act was shown to be "manifestly unjust, capricious, inequitable, or partial in its operation", [30] or if it appeared to be "so absurd that no sensible person could ever dream that it lay within the powers of the authority". [31] It was specifically claimed that is unreasonable an act if, for instance, the appellants "were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as couldn't no justication in the minds of reasonable men". [32]

It was thus affirmed that an administrative decision may be challenged on the ground that it is vitiated by self-misdirection, by taking into account irrelevant factors or failing to consider relevant ones, or because it is so manifestly unreasonable that no reasonable authority entrusted with the relevant power could reasonably have made such a decision". [33] At the same time, it was acknowledged that this approach entails the risk of a "surrogate political process", [34] capable of undermining the foundations of legislative supremacy and political responsibility". [35]

3. The Principle of Proportionality in American Case Law

In general, in light of the framework outlined above, it can be reaffirmed that, in the case of reasonableness, unlike proportionality, the assessment does not focus on the relationship between means and ends. Rather, it concerns the evaluation of "factors", understood, in the administrative context, as "a general description of the things that must not be done". [36] Then, in the private sphere, it reveals

[29] G.L. Peiris, "Wednesbury Unreasonableness: The Expanding Canvas", in *The Cambridge Law Journal*, Vol. 46, No. 1, 1987, 55.

[30] High Court, *Kruse v Johnson*, 1898, 2 QB 91.

[31] Court of appeal, *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, 1948, 1 KB, 223.

[32] High Court, *Kruse v Johnson*, cit.

[33] House of Lords, *Chief Constable of North Wales v. Evans* (1982) UKHL 10.

[34] As noted by R. Stewart, "Reformation of Administrative Law", in *Harvard Law Review*, 88, 1975, 1669.

[35] G.L. Peiris, *op. cit.*, 53.

[36] Court of appeal, *Associated Provincial Picture Houses Ltd*, cit.

itself as elements relevant to the award of damages, that is, as circumstances that may allow or preclude the fulfilment of an obligation. [37]

With specific regard to contractual obligations, several common law decisions, particularly in the United States and delivered shortly after the seminal English judgment of 1854, clarified certain aspects of this approach. [38] Where the circumstances are "special", damages for breach of contract may be awarded only if those circumstances were known to both parties. American courts, expressly stating that their rule "may be varied according to the principles established in *Hadley v. Baxendale*", [39] affirmed that the injured party "is not always entitled to recover the full amount of the damage actually sustained". It is therefore necessary to ascertain whether the "special circumstances" could reasonably be considered as either arising, according to the usual course of things, from the breach of the contract itself, or as having been within the contemplation of both parties. [40]

Over time, the flexibility shown by judges in applying the foreseeability requirement, [41] together with the desire to give more determinate content to limitations on the remedy of damages, led to a significant transformation. The standard of foreseeability, primarily governed by reasonableness, began to be influenced by the "factor of disproportion between the damage claim asserted and the value received by the breaching party in exchange for its promise". [42] As a result, judge-made doctrines developed in United States common law were gradually shaped by the principle of *stare decisis*, according to which "a court may limit damages for foreseeable loss by excluding recovery for lost profits, by allowing recovery only for reliance losses, or otherwise, if it concludes that justice so requires in order to avoid disproportionate compensation". [43] Exceptional circumstances may thus justify a limitation of damages, particularly where there is a clear "disparity between the contract price and the damages" [44] claimed. In short, damages may be limited in cases of "extreme disproportion between the loss and the price

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[37] E.T. Sullivan, R.S. Frase, *Proportionality principles in American law*, cit., 37.

[38] In general, about choice of law questions and judicial jurisdiction, see R.A. Leflar, L.L. McDougal III, R.L. Felix, *American conflicts law*, 1986.

[39] U.S. Supreme Court, *Western Union Tel. Co. v. Hall*, 124 U.S. 444 (1888) (January 30, 1888), in Supreme.justia.com.

[40] U.S. Supreme Court, *Primrose v. Western Union Tel. Co.*, 154 U.S. 1 (1894) (May 26, 1894).

[41] See, D.B. Dobbs, *Handbook on the law of remedies; damages-equity-restitution*, 1973, 803.

[42] W. Burnett Harvey, "Discretionary Justice Under the Restatement (Second) of Contracts", in *Cornell L. Rev.*, 1982, 677. Available at: http://scholarship.law.cornell.edu/clr/vol67/iss4/3.

[43] Restatement (Second) of Contracts § 351(3) (1979), as cited by Supreme Court of New Jersey, *Perini Corp. v. Greate Bay Hotel & Casino*, 129 N.J. 479 (1992) (6 August 1992).

[44] U.S. District Court for the Southern District of New York, *Intern. Ore & Fertilizer v. Sgs control services*, August 23, 1990.

charged by the party whose liability for that loss is in question". [45]

However, the first area in which a principle of proportionality was clearly recognized was criminal law. [46] Through the notion of extreme disproportion, or "severe lack of proportionality", [47] as also affirmed by the Supreme Court, courts came to hold that punitive damages awards cannot be "grossly out of proportion to the severity of the offense". [48] In the first Supreme Court decision to articulate the proportionality doctrine, *Weems v. United States* (1910), proportionality was regarded as a precept of justice according to which punishment for crime "should be graduated and proportioned to the offense". [49] From this perspective, where the penalty prescribed is so severe and oppressive as to be "wholly disproportioned to the offense, and obviously unreasonable", [50] a punitive damages award may violate the implicit notion of fairness embodied in the Due Process Clause.

This reasoning led to the explicit formulation of a proportionality test articulated in three steps.

It was stated that a court's proportionality analysis under the Eighth Amendment should be guided by three objective criteria: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other offenders in the same jurisdiction; and (iii) the sentences imposed for the same crime in other jurisdictions". [51]

Nevertheless, it was only in the 1996 case of *BMW v. Gore* that the Supreme Court invalidated a punitive damages award as excessive under the Due Process Clause of the Fourteenth Amendment. [52] In that case, the relationship between punitive damages and compensatory damages was examined in order to determine whether the punishment bore any reasonable relationship to the offense or was instead wildly disproportionate. The analysis thus focused on whether the punishment imposed was reasonably related to the wrongdoing and if it rationally served the interests of punishment and deterrence.

From a historical perspective, while punitive damages were frequently used well into the nineteenth century to compensate for intangible injuries—compensation that was not otherwise available under the narrow conception of

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[45] Restatement (Second) of Contracts § 351 cmt. f (1981).

[46] See, M. Raymond, "No Fellow in American Legislation: Weems v. United States and the Doctrine of Proportionality", in *Colum. L. Rev.*, 84, 1984, 266.

[47] U.S. Supreme Court, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

[48] U.S. Supreme Court, *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

[49] U.S. Supreme Court, *Weems v. United States*, 217 U.S. 349 (1910). About this case see, M. Raymond, *No Fellow in American Legislation*, cit.

[50] U.S. Supreme Court, *St. Louis, I.M. & Sou. Ry. Co. v. Williams*, 251 U.S. 63 (1919).

[51] U.S. Supreme Court, *Solem v. Helm*, 463 U.S. 277, 303 & n. 32 (1983).

[52] See, E.T. Sullivan, R.S. Frase, *Proportionality principles in American law*, cit., 68.

compensatory damages prevailing at the time [53]—a gradual shift later occurred. [54] Courts progressively moved away from viewing punitive damages as compensation for non-compensable harms and toward a more purely punitive conception. [55] Punitive damages thus lost their compensatory character, typical of early common law and early American law, and assumed a predominantly "retributive" function, [56] aimed at serving society's interest in punishment and deterrence.

Despite this significant development, including in the criminal law sphere, proportionality review in American jurisprudence remains exceptional and residual, without a systematic generalization. As the United States Supreme Court itself has stated, proportionality is applied "only in extraordinary cases, *Weems* being one example". [57] Moreover, it has been consistently affirmed that "the Eighth Amendment does not require strict proportionality between crime and sentence," but instead "forbids only extreme sentences that are 'grossly disproportionate' to the crime". [58]

3.1. Judicial Review of Government Acts in the United States

In American common law, however, the proportionality standard never developed into a specific assessment of less restrictive means or a cost-benefit balancing, particularly in the context of judicial review of government acts. In this area of judicial control, cases originating in the United Kingdom and based on the so-called "*Wednesbury reasonableness*" standard [59] significantly influenced the American courts' approach to proportionality. [60] The criterion governing applications for judicial review of administrative acts thus operates not as a true proportionality test, but rather as a general and abstract assessment, articulated either through a more relaxed "rational basis" standard or through "strict scrutiny". Indeed, the United States Supreme Court has developed a two-tier, or "dual-speed", [61] system

[53] U.S. Supreme Court, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

[54] Note, "Exemplary Damages in the Law of Torts", in *Harvard Law Review*, Vol. 70, No. 3, (1957), 520.

[55] See: T.B. Colby, "Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs", in *Minn. L. Rev.*, 2003, 619.

[56] T.B. Colby, cit., 618.

[57] See, U.S. Supreme Court, *Solem v. Helm*, cit.

[58] U.S. Supreme Court, *Ewing v. California*, 538 U.S. 11 (2003).

[59] UK Court of appeal, *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* (1948) 1 K.B. 223.

[60] A. Stone Sweet, J. Mathews, "Proportionality Balancing and Global Constitutionalism", in *47 Colum. J. Transnat'l L.*, 2008, 147.

[61] F. Falorni, *Bilanciare i diritti. Esperienze di common law a confronto*, Giappichelli, Turin, 186.

of judicial review of rights, in part because of its deep ambivalence toward balancing. [62]

The "*Wednesbury reasonableness*" standard, as established and developed by British courts, allows a decision of a public authority to be set aside if it is shown to be unreasonable, "in the sense that the court considers it to be a decision that no reasonable body could have come to". [63] This approach finds its counterpart in the United States in the "rational basis" inquiry. [64] Under this test, the Court has often identified rational bases—a "mere rationality test" [65]—to uphold state regulation. In many instances, this attitude reflects "a healthy revulsion from the Court's earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls". [66] Rational basis scrutiny is thus described as "the most relaxed and tolerant form of judicial scrutiny". As a result, it is a highly deferential form of review, under which American judges largely refrain from actively protecting rights. [67]

By contrast, *strict scrutiny* and its "narrow tailoring" requirement provide a stronger level of rights protection. Even in this context, however, courts are not required to weigh the sacrifice imposed on a right against the public benefit pursued. Rather, they are asked only to assess the adequacy of the relationship between the means adopted and the ends pursued. [68]

Narrow tailoring may be defined as a test aimed at verifying whether the state has achieved its compelling objectives in a legitimate manner, with a minimal risk of improper practices. [69] A statute is constitutional only if it pursues a compelling governmental interest and is narrowly tailored to further that interest. [70] For example, in the case concerning the exclusion of women from the Virginia Military Institute (VMI), the Supreme Court did not engage in a balancing of the concrete harm suffered by women against the asserted benefits of the policy. Instead, it asked only whether the state had provided an "exceedingly persuasive justification" for the gender classification. The statute failed not because the burden imposed was considered excessive, but because the state did not satisfy the justificatory standard required under intermediate scrutiny. This form of scrutiny has

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[62] See about: A. Stone Sweet, J. Mathews, cit., 164.

[63] UK Court of appeal, *Associated Provincial Picture Houses Ltd.*, cit.

[64] A. Stone Sweet, J. Mathews, cit., 78.

[65] U.S. Supreme court, *Dandridge v. Williams*, 397 U.S. 471 (1970).

[66] U.S. Supreme court, *Dandridge*, cit.

[67] A. Stone Sweet, J. Mathews, *Proportionality Balancing and Global Constitutionalism*, Oxford, 2019.

[68] O. Fiss, "The Law of Narrow Tailoring", in *U. Pa. J. Const. L.*, 2021, 879.

[69] D. Crump, "The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court's Approval in Gratz and Grutter of Race-Based Decision-Making by Individualized Discretion", in *Fla. L. Rev.*, 2004, 486.

[70] U.S. Supreme Court, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

never required a least-restrictive-means analysis, but only a "substantial relation between the classification and the state interests that it serves". [71]

The purpose of the narrow tailoring requirement is to ensure that "the means chosen fit the compelling goal so closely that there is little or no possibility that the legislative decision or classification was motivated by illegitimate considerations, such as (racial) prejudice". [72] Requiring a state, under strict scrutiny, to demonstrate a compelling interest, and to show that it has adopted the least restrictive means of achieving that interest, is therefore considered "the most demanding test known to constitutional law". [73] Even under this more rigorous form of review, however, the Supreme Court does not carry out any balancing or direct comparison between the severity of the sacrifice imposed by the means adopted and the benefit obtained. The analysis remains confined to assessing the suitability of the means in relation to the declared objective. [74]

While one of the strengths of the American approach lies in the flexibility it affords judges in protecting different constitutional rights and interests, this "two-tier system" [75] does not resolve the issue of balancing in the administration of justice, as addressed by the principle of proportionality. [76] By the end of the 1990s, almost all effective systems of constitutional justice worldwide had adopted core elements of proportionality analysis, whereas the United States remained a partial exception. [77] The United States Supreme Court has shown itself to be "resistant" [78] to the use of foreign constitutional law as an interpretative aid. As a result, the United States appears as an "outlier", [79] having developed its own "home-grown" [80] versions of proportionality analysis rather than adopting a fully articulated proportionality framework.

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[71] U.S. Supreme Court, *United States v. Virginia*, 518 U.S. 515 (1996). See, about, V. C. Jackson, "Constitutional Law in an Age of Proportionality", in *The Yale Law Journal*, 2015, 3127.

[72] Grutter v. Bollinger, 539 U.S. 306 (2003). See, about, D. Crump, cit.

[73] U.S. Supreme Court, *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[74] U.S. Supreme Court, *Shaw v. Hunt*, 517 U.S. 899 (1996): "[T]he means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose".

[75] K.M. Sullivan, "Post-Liberal Judging: The Roles of Categorization and Balancing", in *U. Col. L. Rev.*, 1992, 296.

[76] S.J. Mathews, A.S. Sweet, "All Things in Proportion? American Rights Review and the Problem of Balancing", in *Emory L. J.*, 60, 2010, 875.

[77] A. Stone Sweet, J. Mathwes, cit., 74.

[78] V.C. Jackson, "Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality, Rights and Federalism"", in *U. Pa. J. Const. L.*, 1, 2014, 589.

[79] J. Mathews, A.S. Sweet, *All Things in Proportion*, cit., 874.

[80] J. Mathews, A.S. Sweet, *All Things in Proportion*, cit., 875.

4. The U.S. Model and the Japanese case law

Japan, like the U.S., does not formally adopt the proportionality test as developed in Germany and subsequently in Europe, as understood consisting of three stages: 1. adequacy of the legislative measure in light of legislative purposes; 2. necessity of this particular measure; and finally; 3. the proportionality *stricto sensu*, i.e. assessment and balancing between the limitation of rights and the legislative reasons. In Japan, however, morethan in the U.S., proportionality has developed as a "substantive" criterion of balancing between rights and public interests. This operates as a general, widely diffused and cross-cutting standard for reviewing legislative and administrative discretion. In the U.S., by contrast, as noted, the judge does not assess, from a quantitative perspective, the sacrifice of the right in relation to the public interest. Instead, the judiciary merely verifies whether the legislature has met a predetermined justificatory threshold (namely, rational basis, intermediate, or strict scrutiny), and applies such tests only exceptionally and within specific domains.

It is nevertheless possible to detect a certain influence of American evaluative criteria in the methods employed by Japanese judges, in particular in the adoption of a test comparable to the American rational basis review. Particularly, according to some scholars, the "least restrictive alternative", derived from U.S. constitutional law doctrine, requiring the government use the least intrusive means possible when infringing upon fundamental right, has shaped Japanese judicial review. [81] In this way, courts can choose a reasonable, with less difficulty in applying the law, rather than face a constitutional question directly. [82] In any event, this type of Japanese constitutional methodology, based on the American approach, has moved judicial review closer to balancing tests that ask whether a state action is necessary, similarly to proportionality analysis. Accordingly, even though a "formal proportionality" test is often lacking, Japanese courts have tended to apply a substantively reasonableness review, similar to the American reasonableness standard, as a more "elastic" criterion, particularly when assessing economic freedoms.

Consequently, although proportionality analysis has yet to become entrenched in Japanese administrative law, [83] recent developments in the review of discretionary actions indicate that different modes of judicial review may vary, with various degrees of intensity, from lenient through intermediate to strict scrutiny. [84]

[81] N. Ukai, *The Significance of the reception of American Constitutional institutions and ideas in Japan*, in L.W. Beer (eds), *Constitutionalism in Asia: Asian views of the American influence*, California, 1988, 124.

[82] *Ibid.*

[83] C.-Y. Huang, D.S. Law, "Proportionality Review of Administrative Action in Japan, Korea, Taiwan, and China", in *Legal Studies Research Papers series*, 2014, 5.

[84] N. Kawagishi, *Deference to the Administration in Judicial Review in Japan*, in G. Zhu

According to Japanese administrative law scholars, there are at least four ways in which an administration can abuse or exceed its discretion. These include actions that are not only based on incorrect information or improper motives, but also violate the principles of equality or proportionality. [85]

A partly different discourse concerns the Supreme Court, which has been described as a court having almost no idea that "government action should be bound strictly by the Constitution". [86] Indeed, while district courts have demonstrated a less deferential and more engaged role in constitutional adjudication, with a more active and more strictly [87] applied use of the proportionality test, the Supreme Court of Japan has displayed a different attitude: it has shown a certain degree of judicial "disengagement from constitutional interpretation and enforcement". [88] It "has never resorted to strict judicial scrutiny and has been reluctant to develop standards from which heightened judicial scrutiny might be derived". [89] Moreover, a significant difference with respect to the U.S. Supreme Court lies in the standing requirements imposed by both courts. These requisites are more stringent before the Japanese Supreme Court, requiring the demonstration of the infringement of a right or of an individual legal interest [90] (under Article 9 of the Administrative Case Litigation Act [91]). In this manner, evidentiary difficulties discourage the resort to private damages actions in Japan. On the other hand, this is not the only factor discouraging such actions, but also the lack of discretionary power in the awarding of damages by Japanese courts. They do not enjoy the broad equitable powers of common law courts to fashion remedies. [92] Therefore,

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(eds), *Deference to the Administration in Judicial Review. Ius Comparatum - Global Studies in Comparative Law*, vol 39. Springer, 2019, 295.

[85] C.-Y. Huang, D.S. Law, *Proportionality*, cit., 5.

[86] N. Urabe, "Rule of Law and Due Process: A Comparative View of the United States and Japan", in *Law and Contemporary Problems*, 1990, 70.

[87] See about, E. Bertolini, G. Romeo, "The Japanese Supreme Court as a Litmus Test for Generic Constitutionalism?", in *Global Journal of Comparative Law*, 2020, 47.

[88] D.S. Law, "The Myth of the Imposed Constitution", in *Social and Political Foundations of Constitutions*, Cambridge University Press, Cambridge, 239-268, 2013, 247.

[89] H. Tomatsu, "Equal Protection of the Law", in *Law and Contemporary Problems*, 1990, 124, regarding, in particular, the equal protection principle.

[90] E. Bertolini, G. Romeo, cit., 28.

[91] Law no. 139 of 1962, *Administrative Case Litigation Law*, art. 9:"An action for the revocation of an original administrative disposition and an action for the revocation of an administrative determination (hereinafter referred to as "revocation litigation") may be filed only by a person having legal interest for seeking the revocation of the said disposition or decision (including persons having legal interest to be recovered by revocation of disposition or administrative decision even after the effect non longer exists due to the expiration of the period or any other reasons)". Administrative Case Litigation Law, EHS law, 1962, available at https://www.refworld.org/.

[92] See on this point: J. Owen Haley, *Authority Without Power: Law and the Japanese Paradox*, Oxford University Press, 1991, 118.

given the Supreme Court's rather passive stance over more than seventy years of its history, constitutional law scholars, seeking to reinforce judicial review in Japan, have proposed "American-styled tiered" standards of review. [93] However, the Supreme Court has appeared reluctant to adopt this view.

Proportionality, especially before the Supreme Court, thus appears frequently to be absorbed, in the Japanese context as well, into a test of reasonableness or absence of abuse of discretion, [94]: where only minimal restrictions of the fundamental right are deemed reasonable and constitutional. Moreover, the intensity of such review depends on the nature and content of the right under scrutiny. In this context strict proportionality scrutiny is applied in order to protect constitutional rights such as freedom of expression or freedom of conscience, [95] and less rigorous scrutiny in other cases, such as those concerning economic rights. [96]

This is exemplified by one of the earliest cases concerning the compatibility with constitutionally protected economic rights, in particular under Article 22, of restrictions on freedom of enterprise. This is usually cited as marking the beginning of Supreme Court reasoning that implicitly recalls the principle of proportionality.

Although not directly invoking U.S. case law, in a case the Supreme Court of Japan examines in a case whether a measure that substantially restricts a freedom presents "conspicuous imbalances between ends and means", [97] on the basis of reasonableness. Whereas earlier Japanese case law referred only to manifest unreasonableness, this case represents one of the first Supreme Court decisions to apply a proportionality-type analysis. It is examines the necessity and reasonable relationship between legislative means and purposes, requiring that the means be adequate to the aim, namely the public interest, and that, ultimately, the sacrifice imposed on the right not be disproportionate. It is explicitly stated that the relationship between the legislative establishment of conditions and their objectives "as well as their necessity and reasonableness" as means to accomplish such objectives must be verified, in order to determine "whether or not the judgment of the legislative branch has exceeded the bounds of reasonable discretion". [98] In this manner, the Japanese judge does not in fact engage in a truly "quantitative" balancing between benefits and sacrifices. Rather it limits the inquiry to the

[93] S. Matsui, *Judicial Review of Restrictions on Constitutional Rights in Japan Highly Ad Hoc, Contextualized, and Deferential*, in P.J. Yap (ed.), *Proportionality in Asia*, Cambridge, 2020, 166.

[94] C.-Y. Huang, D.S. Law, *Proportionality*, cit., 5.

[95] C.-Y. Huang, D.S. Law, cit., 9.

[96] In this regard, for a detailed analysis of the various decisions, depending on the historical period and rights, E. Bertolini, G. Romeo, *The Japanese Supreme Court*, cit., 31.

[97] *Sumiyoshi Case*, Saikō Saibansho, 30 April 1975, 29 Saikō Saibansho Minji, Hanreishū (Minshū) 4, 572 (Grand Bench).

[98] *Ibid.*

verification of a minimum justificatory threshold. It resembles the American rational relationship test rather than the stringent German-style proportionality principle. [99]

In the field of fundamental rights, however, this reasoning proved, during the same period between the 1970s and 1980s, to be significantly more stringent, sometimes adopting "ad hoc interest balancing as a standard of review" [100]. This appears in a 1974 decision regarding whether the total ban on political activities by public officials could be justified. In that decision, although not expressly invoking the proportionality test, yet undoubtedly considered as such in the literature, the Supreme Court explicitly analysed various elements: the validity of the government's purpose, the suitability and necessity of the means adopted by the government, and the "relationship between that purpose and prohibited political acts, and balance between benefits from the prohibition of political acts and benefits lost by the prohibition". [101] According to the Court, a law that delegates to another authority the power to determine specific measures for the purpose of achieving a given objective should delegate the establishment of provisions. They are particular about "measures that are reasonably found to be necessary and reasonable for the purpose of achieving the aforementioned purpose, even if it does not clearly specify that effect". [102] In this manner, the specific legislative measures adopted were held to conform to the Constitution and to be valid insofar as they can be "reasonably determined to be necessary or appropriate for purposes" that are constitutionally legitimate. However, in this case, the Court, overturning the decisions of the lower courts and their application of the doctrine of "strict scrutiny", which required the State to demonstrate that it had adopted the least restrictive alternative, held that a complete and uniform ban on political activities was constitutional. [103]

In more recent years this type of approach appears to have become less rigorous even with regard to fundamental rights. Preeminent in the reasoning of the Supreme Court is the identification of purposes, one of the elements of proportionality that often exhausts the entire proportionality review.

According to a 2006 Supreme Court decision, judges should regard an administrative decision as an exercise of the discretionary power granted to the administrative authority. They should find illegality only where the decision can be regarded as going beyond the "bounds of discretionary power or constituting an

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[99] See, H. Itoh, L. Ward Beer (eds), *The Constitutional Case Law of Japan: 1970 through 1990*, Washington, 1996, 188.

[100] S. Matsui, cit., 163.

[101] *Japan v. Osawa*, Saikō Saibansho, 6 November 1974, 28 Saikō Saibansho Keiji, Hanreishū (Keishū) 9, 393 (Grand Bench).

[102] *Ibid.*

[103] See, L. Repeta, "Reserved Seats on Japan's Supreme Court", in *Wash. U. L. Rev.*, 2011, 1740. Available at: https://openscholarship.wustl.edu/law_lawreview/vol88/iss6/14.

abuse of such power": that occurs when the administration has ignored relevant factors or considered irrelevant ones, or when its evaluation of the facts is "obviously unreasonable", such that the decision appears "significantly inappropriate in terms of generally accepted social ideas". [104]

In a 2011 case, concerning freedom of thought and conscience as guaranteed by Article 19 of the Constitution, without any assessment of the adequacy of the means in relation to the aim, the Court insisted on this point: if the restriction on the right is "necessary and reasonable", any indirect constraint enforced by way of that restriction "would be permissible as well". Only in the dissenting opinion was it emphasized that the examination should address whether the "purpose is the truly imperative interest", whether the means constitute the "minimum required restriction", and whether the "relationship between the two is indispensable". [105]

Nevertheless, in more recent cases concerning freedom of expression under Article 21 of the Constitution, while the necessity to restrict freedom of expression to a "reasonable, necessary, and indispensable extent" [106] is affirmed, the reasonableness of restrictions on freedom of expression is expressly based on an assessment of three elements: the "degree of necessity" of the restriction in relation to the purpose pursued, the content and nature of the freedom restricted, and the form and degree of the specific restriction imposed on that freedom.

5. Emergencies before Supreme Courts: Silence, Deference, and Corrective Activism

Constitutional review of measures adopted by the executive appears, even in states of emergency, are not to be grounded in an express principle of proportionality, whether in the United States or in Japan. Rather, in the United States system, Supreme Court review in such contexts tends to be structured around institutional deference and selective scrutiny: the intensity here varies not only according to the right affected, as previously noted, but also—specifically in emergency contexts—according to the stage reached by the emergency itself.

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[104] *City Planning and High-Speed Railroad Case*, Saikō Saibansho, 2 November 2006, Case No. 2004(Gyo-Hi)114. C. Yi Huang, D.S. Law, "Proportionality Review of Administrative Action in Japan, Korea, Taiwan, and China", in *St. Louis Legal Studies Research Paper* no. 14-08-07, 2014, 6. Available at SSRN: https://ssrn.com/abstract=2496220.

[105] *Official orders issued by the principals of public high schools*, Saikō Saibansho, 6 June 2011, 65 Saikō Saibansho Minji Hanreishū (Minshū) 4 (1st Petty Bench).

[106] *Osaka City Ordinance*, Saikō Saibansho, 15 february 2022, 54 Saikō Saibansho Keiji, Hanreishū (Keishū) 76, 2 (Petty Bench).

As the emergency unfolds, as occurred for instance during the COVID-19 pandemic, the U.S. Supreme Court appears to assume a more active role in second-guessing government orders that imposed various limitations. [107]

In the Japanese system, by contrast, intervention by the Supreme Court proves to be decidedly more limited. Case law does not develop through "strong" rulings of the Court, but rather through diffuse and low-intensity review, carried out mainly by ordinary judges and grounded in the standard of reasonableness.

Although neither constitutional framework provides for a general state of emergency conferring exceptional powers on the executive, nor for a suspension clause of rights—ordinary legislation being instead the source of authority for the declaration of a national emergency (general legislation in the United States and specific legislation in Japan)—the stance adopted by the two Courts diverges markedly. In contrast to the deference and, at times, corrective activism of the U.S. Supreme Court, as exemplified by the *Roman Catholic Diocese* case discussed below, the Japanese Supreme Court has never constructed a constitutional doctrine of emergency. Through judicial self-restraint, it has instead fostered a culture of consensus, characteristic of the Confucian tradition. Presenting itself as a guardian of "stability" rather than of conflict, the Japanese Supreme Court has, through silence, sought to preclude any constitutionalization of the legal category of emergency, thereby preserving the ordinary parameter of reasonableness.

The U.S. Supreme Court, as noted, has displayed a less consistent approach. It has delivered a range of decisions concerning states of emergency which, in earlier periods, reveal a posture of strong subordination to political power. This ultimately treated the emergency as a factor that substantially suspends judicial review, without any assessment of the necessity of the measures. Recent jurisprudence, however, points to a more assertive stance.

In this light, the 1943 [108] case may be read as one in which the President adopted restrictions consisting of a curfew order as an emergency war measure involving no question of martial law. This was based upon the recognition of fact and circumstances which indicate that a group of one national extraction may menace the public safety more than others. In upholding the constitutionality of the curfew imposed on citizens of Japanese origin, the Supreme Court expressly maintained that its inquiry does not go beyond the inquiry on one condition: whether the challenged orders and statute afforded "a reasonable basis for the action" taken in imposing the curfew. No assessment of the legislative purpose (national security) was undertaken, nor any balancing between the rights

[107] See about, A.L. Tyler, "Judicial Review in Times of Emergency: From the Founding Through the Covid-19 Pandemic", in *Virginia Law Review*, 109, 2023, 525.

[108] U.S. Supreme Court, *Hirabayashi v. United States*, 320 U.S. 81, 21 june 1943.

sacrificed and the measures adopted, which were regarded merely as "necessary and appropriate to provide for the common defense". In this way, although it was asserted that the "broad guaranties of the Bill of Rights" and other provisions of the Constitution protecting essential liberties are not "suspended by the mere existence of a state of war" [109] or state of emergency, the practical effect was to legitimate such a suspension.

A different approach was followed more recently, in a per curiam order concerning measures adopted during the latest public health emergency, imposing stringent limits on attendance at religious services in areas designated as high risk for transmission of COVID-19. [110]

In this case, known as *Roman Catholic Diocese*, while refraining from applying a formally structured proportionality test, the Court held that the State has not shown that public health would be imperilled if less restrictive measures were imposed. Although the members of the Court "are not public health experts", even in the event of a pandemic it cannot be denied that the "Constitution cannot be put away and forgotten". [111] The restrictions, by effectively barring many from attending religious services, "strike at the very heart of the guarantee of religious freedom enshrined in the First Amendment". By implicitly exercising substantive review of the relationship between means and ends in emergency measures, the Court thus maintained that, even in emergency situations, the State must be able to demonstrate a certain adequacy and non-excessiveness of the means employed in relation to the legislative aim pursued.

This perspective reveals how the standard elaborated in earlier case law(dating back to the early twentieth century in relation to another case concerning a compulsory vaccination law for smallpox, upon which judges displayed strong reliance in emergency contexts, including in the first months of litigation dealing with issues arising from COVID-19 [112]) has been rearticulated in a far more stringent form. The minimal review based on the absence of "arbitrary and oppressive" measures, coupled with strong deference to the legislature in emergency contexts, had previously led the Court to an assertion: if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has "no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights" secured by the fundamental law, it is the duty of the courts to so "adjudge, and thereby give effect to the Constitution". [113]

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[109] *Id.*

[110] U.S. Supreme Court, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S., 25 november 2020.

[111] *Id.*

[112] E. Chemerinsky, M. Goodwin, "Civil Liberties in a Pandemic: The Lessons of History", in *Cornell L. Rev.*, 106, 2021, 815, 833.

[113] U.S. Supreme Court, *Jacobson v. Massachusetts*, 197 U.S. 11, 20 february 1905.

This approach, "strikingly" deferential to the discretion of the legislature, [114] established long before the development of strict scrutiny, [115] was also adopted, as anticipated, during the initial phase of the COVID-19 pandemic, though it was later deemed "inapplicable" [116] in subsequent cases. Referring expressly to *Jacobson v. Massachusetts* (1905), the Supreme Court affirmed that the safety and health are entrusted to the politically accountable officials of the States to "guard and protect". [117] Without any balancing of rights, and within a framework limited to reasonableness review, it was argued that in cases characterized by scientific uncertainty, such as the pandemic, the lifting of restrictions on particular social activities is a matter subject to "reasonable disagreement".

The Court thus declined to intervene on the grounds that the assessment is a matter for the legislature and should not be "subject to second-guessing by an unelected federal judiciary". By assuming a weaker judicial role and affording less robust constitutional protections, [118] the Court concluded that judicial review cannot substitute political judgment, lacking the "background, competence, and expertise to assess public health and is not accountable to the people".

A similarly cautious approach appears, albeit from a different perspective, to characterize Japanese judges.

In the Japanese system, while the Supreme Court has, as noted, refrained from issuing emergency-related rulings, the few cases addressed by lower courts nonetheless reveal a certain degree of judicial deference. Judges do not apply any principle of proportionality or a rational basis test, but confine themselves to assessing the non-arbitrariness and necessity of the measures.

During the pandemic emergency, one of the rare cases in which a court was called upon to assess the legality of restrictions imposed by administrative authorities concerned, for instance, the reduction of opening hours for certain restaurants, as decided by the Tokyo District Court. In examining the constitutional challenge to the law introducing restrictive measures, the Tokyo courtcut short any balancing analysis. This was despite the applicant's express request that the issue be assessed in light of the "purpose of the legislation, its necessity and its proportionality", as well as in view of the "nature and content of the freedom of enterprise subject to restrictions" and the "degree of restriction". After an extensive examination of the factual and legal context, as well as of the various regulatory measures adopted over time by the Government, including the declaration of the state of emergency in

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[114] J. Hill, "The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines", in *Tex. L. Rev.*, 86, 2007, 277, 296.

[115] E. Chemerinsky, M. Goodwin, *Civil Liberties in a Pandemic*, cit., 834.

[116] W.K. Mariner, "Shifting Standards of Judicial Review During the Coronavirus Pandemic in the United States", in *German Law Journal*, 22, 2021, 1039, 1046.

[117] U.S. Supreme Court, *South Bay United Pentecostal Church v. Newsom*, No. 19A1044, 29 may 2020.

[118] A.L. Tyler, *Judicial Review in Times of Emergency*, cit., 555.

January 2021, the Tokyo judge merely stated that the "special measures cannot be considered unreasonable means in light of the objectives of the law". [119]

6. Conclusions

Unlike the Japanese Supreme Court, which is marked by significant silence on emergency matters, the U.S. system displays jurisprudential phases oscillating between deference and activism. [120] The latter reveals a dynamic model of judicial control of emergencies, varying not only over time—depending on the right affected and the coherence of the measure—but also in relation to the stage of the emergency itself. In the absence of a constitutionalized emergency regime and of clear constitutional limits, judges may adopt, even within the same emergency situation, seemingly "inconsistent" [121] positions. In this perspective, while proportionality in the United States never crystallizes into a formal and technical test, finding this expression instead in reasonableness review of varying intensity, depending on the rights involved and the historical context, in emergency situations this principle turns out to be more problematic: not only fails to find application but also produces further consequences. At times, the U.S. Supreme Court retreats from effective review, limiting itself to articulating a minimal standard of reasonableness, thereby revealing a certain reluctance to subject the choices of political authorities to constitutional scrutiny. Indeed, this Supreme Court has generally allowed political bodies a wide discretion in managing national emergencies, giving a broad meaning to the concept of emergency, redefinable as the "new normal over time". [122] In contrast to the U.S. model, Japanese judges do not appear, in any respect, to assume the role of constitutional arbiters of emergency.

This difference is also because emergency situations in Japan prove legally "weak"—. That was the case with the pandemic emergency, characterized by a soft lockdown [123] and by measures that were at times "non-coercive", typical of administrative guidance, essential component of the Japanese administrative

[119] Tokyo District Court, May 16, 2022, Case No. 2021(Wa)7039, available at the court of Japan website, https://www.courts.go.jp/ app/hanrei_jp/detail4?id=91291. For the analysis of this case, see K. Obayashi, "Countermeasures for Infectious Diseases and Judicial Review: Focusing on Global-Dining case", in *Journal of Law, Politics and Sociology*, 95, 2022, 1-37.

[120] See about, G. Abiri, S. Guidi, "The Pandemic Constitution", in *Columbia Journal of Transnational Law*, 2021, 89.

[121] G. Abiri, S. Guidi, *The Pandemic Constitution*, cit., 71.

[122] S. Levinson, "Constitutional Norms in a State of Permanent Emergency", in *Ga. L. Rev.*, 40, 2006, 699, 739.

[123] See about, E. Bertolini, *Il "soft lockdown" giapponese: un approccio "etico" all'emergenza sanitaria?*, in *Dpce*, 2020, 2095.

style [124]. Faced with this situation, judges, including the Supreme Court, not only refrain from constructing a constitutional jurisprudence of emergency and from identifying the limits of a state of exception, but also exercise a high degree of self-restraint in the area of judicial review. [125]

In this perspective, proportionality is absorbed into reasonableness review aimed at excluding arbitrary or unreasonable measures, without any reference to fundamental rights. Judicial control thus remains anchored, in Japan, to administrative legality, amid a broad expansion of administrative power [126]. That leaves emergency confined to an ordinary factual dimension rather than elevating it to the constitutional level, which, as noted, offers no legal basis for such an institution. [127]

All of this occurs to the detriment of fundamental rights.

Even when not formally and directly limited by coercive legal measures, such rights in Japan are substantively compressed through administrative requests and socially coercive instruments [128] , which escape judicial review and constitutional balancing, and, ultimately, any effective application of the principle of proportionality.

[124] In these terms, see: N. Kadomatsu, "Legal countermeasures against COVID-19 in Japan: effectiveness and limits of non-coercive measures", in *China-EU Law J.*, 2022, 21.

[125] D.S. Law, "Why Has Judicial Review Failed in Japan?", in *Washington University Law Review*, 2011, 1447.

[126] See on this point: Y. Tsuji, "Japanese Government Actions against COVID-19 under the Directives of Constitutional and Administrative Law", in *Cardozo International & Comparative Law Review*, 4, 2021, 14.

[127] S. Matsui, *The Constitution of Japan. A Contextual Analysis*, Oxford and Portland, 2011, 98.

[128] See about, A. Haradal, T. Tamaki, "Families in Japan during the COVID-19 pandemic: from the perspectives of law and society", in *International Journal of Law, Policy and The Family*, 2025, 39.

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