Proportionality in Private Law

Edited by
FRANZ BAUER
and BEN KÖHLER

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Preface

The present volume is the result of a conference held at the Max Planck Institute for Comparative and International Private Law in Hamburg in May 2022. The aim of this conference was to explore the concept of proportionality, which has been a focal point of comparative constitutional law, specifically from the perspective of comparative private law. The contributions do not attempt to provide a comprehensive comparative account but instead look at particular manifestations of proportionality in private law as illustrations of a more general idea. They come from early career scholars from various jurisdictions with different perspectives and preconceptions but a shared interest in the comparative foundations of private law. The concept of proportionality serves as a common starting point to examine its function and relevance in different private law settings and across different legal systems and contexts. Taken together, the contributions show both the pervasiveness and multifaceted nature of proportionality reasoning in private law.

We have structured the volume according to three main themes. After two introductory chapters, the first part is dedicated to the constitutional and theoretical foundations of proportionality reasoning, both in Germany and in the US. The contributions in the second part examine the potential of the concept in three specific areas of European private law: contract law, intellectual property law, and private international law. Finally, the third part explores whether and how ideas of proportionality can be used to address problems of procedural law.

As organisers of the conference and editors of this volume, we would like to express our immense gratitude to the contributors for their readiness to engage with the theme of the book, the fruitful and enjoyable discussions at the conference, and their lasting commitment to this project during the publication process. We are also very grateful to Professor Dr. Dr. h.c. mult. Reinhard Zimmermann for his generous support throughout the different stages of this project and his welcome address at the conference. We thank him, Professor Dr. Dr. h.c. Dr. h.c. Holger Fleischer, and Professor Dr. Ralf Michaels for the inclusion in the *Studien zum ausländischen und internationalen Privatrecht*, as well as Mohr Siebeck for the publication of the book. We would also like to say thank you to our colleagues at the Institute who contributed to the realisation of this project: to Anja Hell-Mynarik and the events team for their invaluable support in staging the conference; to Jonas Voigt for writing the conference report; and to Dr. Christian Eckl and Janina Jentz for their

work in the finalisation of the manuscript. Finally, our special thanks go to Michael Friedman for reading and editing all the contributions and for his stylistic advice.

Hamburg, January 2023 *Franz Bauer*
Ben Köhler

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Abbreviations

AC	Law Reports, Appeal Cases
AcP	Archiv für die civilistische Praxis
ADR	Alternative Dispute Resolution
All ER	All England Law Reports
All ER (Comm)	All England Law Reports (Commercial Cases)
ALT	American Legal Thought
Am Soc Soc'y	American Sociological Society
Am J Comp L	American Journal of Comparative Law
Annu Rep ABA	Annual Report of the American Bar Association
AöR	Archiv des öffentlichen Rechts
art/arts	article/articles
BAG	Bundesarbeitsgericht
BAGE	Entscheidungen des Bundesarbeitsgerichts
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BLR	Building Law Reports
Buff L Rev	Buffalo Law Review
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
BYU L Rev	Brigham Young University Law Review
CA	Court of Appeal (England and Wales)
ca	circa
Cal L Rev	California Law Review
CAP	Carolina Academic Press
CC	Constitutional Court (South Africa)
CE	Conseil d'Etat
CFREU	Charter of Fundamental Rights of the European Union
Chi-Kent L Rev	Chicago-Kent Law Review
ch/chs	chapter/s
Ch	High Court, Chancery Division
CJEU	Court of Justice of the European Union
CJLJ	Canadian Journal of Law and Jurisprudence
CJQ	Civil Justice Quarterly
CLJ	Cambridge Law Journal
CML Rev	Common Market Law Review
Co	Company
Colum L Rev	Columbia Law Review
Comm	Commercial Court
Const Comment	Constitutional Commentary
CPR	(English) Civil Procedure Rules

CUP	Cambridge University Press
CYELP	Croatian Yearbook of European Law and Policy
CYELS	Cambridge Yearbook of European Legal Studies
DePaul L Rev	DePaul Law Review
Duke J Comp & Int'l L	Duke Journal of Comparative & International Law
Duke LJ	Duke Law Journal
EBL Rev	European Business Law Review
EC	European Community
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECLI	European Case Law Identifier
ECR	European Court Reports
ed/eds	editor/s
edn	edition
ED Tex	Eastern District of Texas
eg	for example
EHRR	European Human Rights Reports
EIPR	European Intellectual Property Review
EJIL	European Journal of International Law
ER	English Reports
ERPL	European Review of Private Law
Erasmus L Rev	Erasmus Law Review
EU	European Union
EuR	Europarecht (journal)
Eur J Legal Stud	European Journal of Legal Studies
Eur L Rev	European Law Review
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWCA Civ	Court of Appeal of England and Wales (Civil Division)
EWHC	High Court of England and Wales
FCR	Federal Court Reports
Fed Cir	Federal Circuit
Fed Cts L Rev	Federal Courts Law Review
Fla L Rev	Florida Law Review
fn/fns	footnote/s (external to the chapter)
FRCP	Federal Rules of Civil Procedure
FRF	French franc
Ga J Int'l & Comp L	Georgia Journal of International and Comparative law
Geo LJ	Georgetown Law Journal
German LJ	German Law Journal
GPR	Zeitschrift für das Privatrecht der Europäischen Union
Harv Int'l LJ	Harvard International Law Journal

Harv JL & Pub Pol'y	Harvard Journal of Law & Public Policy
Harv L Rev	Harvard Law Review
Hastings Int'l & Comp L Rev	Hastings International & Comparative Law Review
Hastings LJ	Hastings Law Journal
HL	House of Lords
HUP	Harvard University Press
HLS	Harvard Law School
ICJ Rep	Report of the International Court of Justice
ICLQ	International and Comparative Law Quarterly
ie	that is
IIC	International Review of Intellectual Property and Competition Law
IJCA	International Journal for Court Administration
IJPL	International Journal of Procedural Law
Ill L Rev	Illinois Law Review
Int ALR	International Arbitration Law Review
Int'l J Const L	International Journal of Constitutional Law
Iowa L Rev	Iowa Law Review
IP	Intellectual Property
ISP	Internet service provider
J Civ LP	Journal of Civil Litigation and Practice
J Contemp Legal Issues	Journal of Contemporary Legal Issues
J Crim L & Criminology	Journal of Criminal Law and Criminology
J Law Soc	Journal of Law & Society
J Priv Int L	Journal of Private International Law
J Legal Stud	The Journal of Legal Studies
J Soc Wel & Fam L	Journal of Social Welfare & Family Law
Jr	Junior
JURA	Juristische Ausbildung
JuS	Juristische Schulung
JZ	JuristenZeitung
KB	High Court, King's Bench Division Law Reports, King's Bench Division
La L Rev	Louisiana Law Review
Law J Soc & Lab Rel	Law Journal of Social and Labor Relations
LQR	Law Quarterly Review
Marq L Rev	Marquette Law Review
Melb U L Rev	Melbourne University Law Review
McGill LJ	McGill Law Journal
MERCP	ELI/UNIDROIT Model European Rules on Civil Procedure

Mich L Rev	Michigan Law Review
Minn L Rev	Minnesota Law Review
MLR	Modern Law Review
n/nn	footnote/s (internal to the chapter)
NC L Rev	North Carolina Law Review
NILR	Netherlands International Law Review
NJW	Neue Juristische Wochenschrift
no	number
Notre Dame L Rev	Notre Dame Law Review
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NYU	New York University
NYU L Rev	New York University Law Review
NZ L Rev	New Zealand Law Review
Ohio St J Crim L	Ohio State Journal of Criminal Law
OJ	Official Journal (of the European Union)
OJLS	Oxford Journal of Legal Studies
ONSC	Ontario Superior Court of Justice
OUP	Oxford University Press
Or	Oregon Reports
OR	Ontario Reports
Pac LJ	Pacific Law Journal
para/paras	paragraph/paragraphs
PL	Public law (journal)
PSC	President of the Supreme Court of the United Kingdom
PSPP	Public Sector Purchase Programme
pt/pts	part/parts
QB	High Court, Queen's Bench Division Law Reports, Queen's Bench Division
r/rr	rule/rules
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
Riv trim dir proc civ	Rivista trimestrale di diritto e procedura civile
s/ss	section/sections
SA	South African Law Reports
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
S Cal L Rev	Southern California Law Review
SCC	Supreme Court of Canada
SchwarzArbG	Gesetz zur Bekämpfung der Schwarzarbeit und illegalen Beschäftigung
SCR	Canada Supreme Court Reports
SDNY	Southern District of New York
SJD	Doctor of Juridical Science
Sup Ct Rev	The Supreme Court Review

Temp LQ	Temple Law Quarterly
TEU	Treaty on European Union
Tex L Rev	Texas Law Review
TFEU	Treaty on the Functioning of the European Union
tr/trs	translator/s
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
U Chi L Rev	University of Chicago Law Review
U Pa L Rev	University of Pennsylvania Law Review
U St Thomas LJ	University of St. Thomas Law Journal
U Toronto LJ	University of Toronto Law Journal
UCLA L Rev	University of California, Los Angeles (UCLA) Law Review
UK	United Kingdom
UKHL	United Kingdom House of Lords
UKPC	United Kingdom Privy Council
UKSC	United Kingdom Supreme Court
UP	University Press
US	United States of America
USC	United States Code
US Const	United States Constitution
US Const amend	Amendment to the United States Constitution
UW Austl L Rev	University of Western Australia Law Review
vol	volume
Va L Rev Online	Virginia Law Review Online
Wash & Lee L Rev	Washington & Lee Law Review
Wis L Rev	Wisconsin Law Review
WLR	Weekly Law Reports
WTO	World Trade Organisation
Yale LJ	Yale Law Journal
YEL	Yearbook of European Law
YPIL	Yearbook of Private International Law
ZEuP	Zeitschrift für Europäisches Privatrecht
ZEuS	Zeitschrift für Europarechtliche Studien
ZfPW	Zeitschrift für die gesamte Privatrechtswissenschaft
ZZP	Zeitschrift für Zivilprozess

Introduction

Proportionality in Private Law: A Primer

Ben Köhler

I. Introduction

Proportionality is a ubiquitous and yet elusive concept in law. It has long been a topic of legal and philosophical discourse.[1] Accounts of the history of proportionality usually start with Aristotle or Thomas Aquinas.[2] An all-encompassing historical or genealogical account of proportionality in law goes well beyond the scope of this volume. Instead, we will focus on the more recent debates that proportionality has sparked across many jurisdictions and different areas of law. While the notion of proportionality is mostly associated with constitutional rights review, the main focus of this volume is a different one: the contributions will analyse how proportionality is contained in or affects private law settings in different jurisdictions. A study of proportionality in private law cannot, however, ignore the constitutional dimension. Proportionality's role in private law is deeply intertwined with constitutional law: it can influence and, in some cases, even determine private

[1] Franz Wieacker, 'Geschichtliche Wurzeln des Prinzips der verhältnismäßigen Rechtsanwendung' in Marcus Lutter, Walter Stimpel and Herbert Wiedemann (eds), *Festschrift für Robert Fischer* (De Gruyter 1979) 867.

[2] Emily Crawford, 'Proportionality' in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (OUP 2022) paras 3–5; Oliver Remien, 'Principle of Proportionality' in Jürgen Basedow, Klaus Hopt and Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (OUP 2012) 1321; Michael Stürner, *Der Grundsatz der Verhältnismäßigkeit im Schuldvertragsrecht* (Mohr Siebeck 2010) 13–14.

law outcomes, as many of the contributions to the present volume demonstrate.[3] Constitutional law and private law discussions can therefore not be neatly separated. At the same time, proportionality in private law goes beyond 'constitutionally-infused'[4] proportionality.[5]

With such a wide field to cover, this introduction can give only a cursory account of the permutations and migrations of proportionality, before Franz Bauer provides a framework for proportionality in private law more specifically.[6] The contributions in the present volume will thereafter focus on specific instances in which proportionality affects or should affect private law and private law theory. This tour d'horizon will start with the role of proportionality in German law (II.), before it will turn to proportionality as a global principle of law (III.) and the potential role for comparative private law (IV.).

II. Invention or Rediscovery? Proportionality in German Law

A traditional stronghold of the proportionality principle has been German constitutional law and scholarship, most notably in relation to its function as a safeguard against the excessive restriction of fundamental rights.[7] Shortly after the adoption of the German Basic Law, the Federal Constitutional Court introduced, in its famous 'pharmacy judgment',[8] the requirement of proportionality for restrictions of fundamental rights.[9] Assisted by legal scholarship,[10] the

[3] See, for instance, Victor Jouannaud, 'The Various Manifestations of the Constitutional Principle of Proportionality in Private Law', in this volume; Philip M Bender, 'Private Law Adjudication versus Constitutional Adjudication: Proportionality between Coherence and Balancing', in this volume; see also Franz Bauer, 'Proportionality in Private Law: An Analytical Framework', in this volume.

[4] Bauer (n 3).

[5] Stürner (n 2) 2.

[6] Bauer (n 3).

[7] See Oliver Lepsius, 'Die Chancen und Grenzen des Grundsatzes der Verhältnismäßigkeit' in Matthias Jestaedt and Oliver Lepsius (eds), *Verhältnismäßigkeit: Zur Tragfähigkeit eines verfassungsrechtlichen Schlüsselkonzepts* (Mohr Siebeck 2015) 2.

[8] BVerfG 11 June 1958, 1 BvR 596/56, 7 BVerfGE 377 (*Apotheken-Urteil*).

[9] For the early development, see Lepsius (n 7) 5–10; Ralf Poscher, 'Das Grundgesetz als Verfassung des verhältnismäßigen Ausgleichs' in Matthias Herdegen and others (eds), *Handbuch des Verfassungsrechts. Darstellung in transnationaler Perspektive* (CH Beck 2021) 160–167; Alexander Tischbirek, *Die Verhältnismäßigkeitsprüfung* (Mohr Siebeck 2017) 27–38.

[10] Peter Lerche, *Übermass und Verfassungsrecht* (1961); Bernhard Schlink, *Abwägung im Verfassungsstaat* (1976); Lothar Hirschberg, *Der Grundsatz der Verhältnismäßigkeit* (Otto Schwartz 1981); on the role of constitutional law scholarship in the development of the proportionality principle, see Christian Bumke, 'Die Entwicklung der Grundrechts-

Court further developed the proportionality principle as the bedrock of fundamental rights doctrine in its subsequent jurisprudence.[11] While there are still discussions on the implementation of the principle, most notably as it relates to the delineation of competence as between the legislature and the Constitutional Court,[12] the central role of proportionality in the protection of fundamental rights seems universally acknowledged.[13] Proportionality in this context has been labelled 'one of the great legal inventions after the Second World War'.[14] The label 'invention' may, however, be slightly misleading given that proportionality as such could hardly be seen as a totally novel idea. Its roots have been traced back to 19th century administrative law[15] and, perhaps less obviously, to 19th century private law, most notably with respect to emergency rights.[16]

This connection to 19th century private law shows that proportionality is not confined to public law. It also plays a significant yet arguably more complicated role in private law. The principle of proportionality has been a component of private law debates for quite some time.[17] Many private law scholars would surely contend that private law, in essence, consists of balanced rules that embody the principle of proportionality.[18] In other words, traditional private law rules are, or at least should be, proportionate by their nature.[19] This traditional view of private law is now confronted with the different, very specific

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dogmatik in der deutschen Staatsrechtslehre unter dem Grundgesetz' (2019) 144 AöR 1, 52–54.

[11] Johannes Saurer, 'Die Globalisierung des Verhältnismäßigkeitsgrundsatzes' (2012) 51 Der Staat 3.

[12] See, for instance, Matthias Jestaedt, 'Verhältnismäßigkeit als Verhaltensmaß. Gesetzgebung angesichts der Vielfalt der Rationalitäten und des Eigenwerts des politischen Kompromisses' in Lepsius and Jestaedt (n 7) 300–302.

[13] Poscher (n 9) 159.

[14] Lepsius (n 7) 2.

[15] Hirschberg (n 10) 2–7; Lepsius (n 7) 2; Tischbirek (n 9) 8–11.

[16] Tischbirek (n 9) 11–13; on the history of s 228 of the German Civil Code, see Tilman Repgen, in *J. von Staudinger Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (DeGruyter 2019) § 228 para 10.

[17] See, monographically, Marcus Bieder, *Das ungeschriebene Verhältnismäßigkeitsprinzip als Schranke privater Rechtsausübung* (CH Beck 2007); Hans Hanau, *Der Grundsatz der Verhältnismäßigkeit als Schranke privater Gestaltungsmacht* (Mohr Siebeck 2004); Matthias Ruffert, *Vorrang der Verfassung und Eigenständigkeit des Privatrechts: eine verfassungsrechtliche Untersuchung zur Privatrechtswirkung des Grundgesetzes* (Mohr Siebeck 2001) 99–102; Stürner (n 2); see also Dieter Medicus, 'Der Grundsatz der Verhältnismäßigkeit' (1992) 192 AcP 35; for recent contributions, see Peter Derleder, 'Die uneingelöste Grundrechtsbindung des Privatrechts' in Lepsius and Jestaedt (n 7) 234; Lorenz Kähler, 'Raum für Maßlosigkeit: Zu den Grenzen des Verhältnismäßigkeitsgrundsatzes im Privatrecht' in Lepsius and Jestaedt (n 7) 210.

[18] See, with examples, Medicus (n 17) 37; Stürner (n 2) 289–290.

[19] Ruffert (n 17) 100; Stürner (n 2) 3, 289–290.

type of proportionality of constitutional law.[20] Conversely, the constitutional version of proportionality leaves its natural habitat of rights review and needs to be integrated into the broader framework of private law. In the private law realm, proportionality, or even parts of it, may come in different shapes and with ambivalent meanings that need to be disentangled and distinguished.[21]

It is not the purpose of this short introduction to recapitulate the multifaceted discussion on fundamental rights, private law and proportionality. I will therefore limit myself to highlighting some of the most important tensions. One of the crucial differences concerns the different actors in public and private law as addressees of the proportionality review. The solution is relatively simple for legislators: it is clear that they are bound to legislate without disproportionately restricting fundamental rights, also in private law settings.[22] This includes, of course, restrictions placed on fundamental rights protecting foundational values of private law, such as freedom of contract.[23] The situation of courts is a bit more complex. There are some conceptual challenges and disagreements as to the reasons for and the extent of the courts' duty to balance the fundamental rights of different actors in private law settings.[24] In this volume, Philip M. Bender will identify different features and modes of reasoning for constitutional adjudication on the one side and private law adjudication on the other.[25] Irrespective of these conceptual challenges, there is little doubt that courts are often charged with balancing fundamental rights when adjudicating private law disputes.

The real conundrum concerns proportionality requirements for private actors.[26] There is a strand of private law scholarship which maintains that the requirement of proportionality is fundamentally at odds with private autonomy.[27] While proportionality is a structured form of a rationality review,[28] private law, at least as far as private actions are concerned, to a large extent denies this rationality review and defers to the will of the parties: *stat pro*

[20] For more detail, see Bauer (n 3) 23–29.

[21] Bauer (n 3) 23–31.

[22] Medicus (n 17) 46–47; Stürner (n 2) 297–299.

[23] Medicus (n 17) 46; for freedom of contract in EU law, Jan Lüttringhaus, *Vertragsfreiheit und ihre Materialisierung im Europäischen Binnenmarkt* (Mohr Siebeck 2018) 218–221.

[24] For a recapitulation of the debate on 'third party effects', see Ruffert (n 17) 8–28.

[25] Bender (n 3).

[26] Kähler (n 17) 210.

[27] See, eg, Kähler (n 17).

[28] On the relationship between proportionality and other forms of rationality controls, see Alison L Young and Gráinne de Búrca, 'Proportionality' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law* (Hart 2017) 138; for the argument that proportionality is (only) a rationality review, see Niels Petersen, *Verhältnismäßigkeit als Rationalitätskontrolle* (Mohr Siebeck 2015) 269–274; on the justificatory function, see also Bauer (n 3) 19–21.

ratione voluntas.[29] Or, as a German scholar has recently put it: private law offers 'room for excessiveness'.[30] This traditional view of private law with party autonomy reigning supreme is increasingly challenged by more instrumental conceptions of private law.[31] One of the current debates, for instance, focuses on sustainability in private law and shows that interests beyond the bi- or multilateral relationships of private law need to be accounted for.[32] A well-established tool to balance these interests could perhaps be found in proportionality. The role for proportionality in private law thus seems to depend upon the relationship between constitutional and private law as well as on the understanding of the function of private law.[33] This tension is addressed by Victor Jouannaud in this volume.[34]

In addition to the proportionality analysis within private law itself, also civil procedure is confronted with the expectation that proceedings be proportionate in terms of expenditure in relation to both the issues at stake as well as the overall resources of the court system, as Wiebke Voß demonstrates in her contribution to this volume.[35] As she shows, this procedural version of proportionality is markedly different from proportionality within private law. In this regard, the challenge for civil procedure is to balance demands for procedural efficiency with the objective of material justice.

III. The 'Ultimate Rule of Law'? Migrations and Permutations of Proportionality

Proportionality transcends national jurisdictions.[36] It has even been dubbed the 'ultimate rule of law'[37] and identified as a characteristic trait of the globaliza-

[29] Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts, Zweiter Band: Das Rechtsgeschäft* (3rd edn, Springer 1979) 6; on this principle and its relationship with proportionality in private law, see Stürner (n 2) 7–10.

[30] Kähler (n 17): 'Raum für Maßlosigkeit'.

[31] See Alexander Hellgardt, *Regulierung und Privatrecht: Staatliche Verhaltenssteuerung mittels Privatrecht und ihre Bedeutung für Rechtswissenschaft, Gesetzgebung und Rechtsanwendung* (Mohr Siebeck 2016) 64–73.

[32] Alexander Hellgardt and Victor Jouannaud, 'Nachhaltigkeitsziele und Privatrecht' (2022) 222 AcP 163; Jan-Erik Schirmer, 'Nachhaltigkeit in den Privatrechten Europas' [2021] ZEuP 35, 41–43.

[33] Hellgardt (n 31) 301–302.

[34] Jouannaud (n 3).

[35] Wiebke Voß, 'Proportionality in Civil Procedure: A Different Animal?', in this volume.

[36] Duncan Kennedy, 'A Transnational Genealogy of Proportionality in Private Law' in Roger Brownsworth and others (eds), *The Foundations of European Private Law* (Hart 2011) 185; Saurer (n 11) 8–21; see also Matthias Klatt and Moritz Meister, *The Constitu-*

tion of law.[38] And indeed, many jurisdictions have adopted a proportionality analysis for rights review.[39] Sources of inspiration are not only the German Constitutional Court: in common law countries, the Canadian Supreme Court's decision in *Oakes* has been particularly influential.[40] It goes without saying that the specifics of the proportionality analysis vary from one jurisdiction to another. For instance, while the decisions of the German Constitutional Court often centre around appropriateness, the Canadian constitutional jurisprudence seems to focus on necessity.[41] Although it is important to highlight these terminological and doctrinal differences, it is equally noteworthy that they are not necessarily indicative of differences in results or levels of scrutiny.[42]

It goes beyond the scope of this brief introduction to provide details on individual jurisdictions and their implementation of the proportionality principle, but it is worth briefly addressing the European dimension of proportionality, especially in EU law (1.), as well as the (seemingly) precarious status of proportionality in US law (2.).

1. Proportionality in EU Law

Proportionality is also anchored firmly in the law of the European Union.[43] The principle, which is today enshrined in article 5(1)(4) TEU and article 52(1)

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tional Structure of Proportionality (OUP 2012) 1–6; for Asia, see Po Jen Yap (ed), *Proportionality in Asia* (CUP 2020).

[37] David M Beatty, *The Ultimate Rule of Law* (2004).

[38] Kennedy (n 36) 187; see also David S Law, 'Generic Constitutional Law' (2005) 89 Minn L Rev 652; Mark Tushnet, 'Comparative Constitutional Law' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 1214.

[39] Saurer (n 11) 16–21, on South Africa and Israel; Giuseppe Martinico and Marta Simoncini, 'An Italian Perspective on the Principle of Proportionality' in Vogenauer and Weatherill (n 28) 235–240, pointing to terminological uncertainty in the jurisprudence of the Italian Constitutional Court; for an overview, see Poscher (n 9) 158; monographically, Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012) 178–209.

[40] *R v Oakes* [1986] 1 SCR 103; on this decision and its influence, see Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 U Toronto LJ 383; Petersen (n 28) 248.

[41] Grimm (n 40) 393–395; Petersen (n 28) 247–267.

[42] Grimm (n 40) 394–395; Petersen (n 28) 266, for the case of Germany and Canada.

[43] Christian Calliess, in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit der Grundrechtecharta: Kommentar* (6th edn, CH Beck 2022) art 5 para 45; Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer 1996) 134–139; Uwe Kischel, 'Die Kontrolle der Verhältnismäßigkeit durch den Europäischen Gerichtshof' [2000] EuR 380; Verica Trstenjak and Erwin Beysen, 'Das Prinzip der Verhältnismäßigkeit in der Unionsrechtsordnung' [2012] EuR 265.

CFREU,[44] was adopted by the European Court of Justice early on and is used in different contexts ranging from the review of fundamental rights or fundamental freedoms to the delineation of competence in the Union.[45] In the jurisprudence of the ECJ, the structure and the level of scrutiny can differ significantly depending on the context in which the principle is applied.[46]

The German Constitutional jurisprudence seems to have served as a source of inspiration for the development of proportionality in EU law.[47] Despite these roots, the understanding and application of proportionality seems to differ considerably.[48] Particularly, the four canonical steps of the German test cannot always be identified in the ECJ's reasoning.[49] The different handling of the proportionality analysis has recently contributed to a serious jurisdictional conflict between the ECJ and the German Federal Constitutional Court in the saga concerning the European Central Bank's (ECB) public sector purchase programme (PSPP):[50] the Federal Constitutional Court declared the ECJ's determination of the competences of the ECB to be 'arbitrary from an objective perspective'.[51] One of the focal points of the decision was the ECJ's proportionality analysis. The Federal Constitutional Court held that 'the manner in which the [Court of Justice of the EU] applies the principle of proportionality in the case at hand renders it meaningless' for the purposes of establishing the competences of the ECB.[52] In a way, differences in how propor-

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[44] Saurer (n 11) 8–9.

[45] Trstenjak and Beysen (n 43), pointing to these areas as among the most important in which the proportionality principle is applied.

[46] Remien (n 2) 1321.

[47] Saurer (n 11) 8.

[48] Hans D Jarass, *Charta der Grundrechte der Europäischen Union unter Einbeziehung der sonstigen Grundrechtsregelungen des Primärrechts und der EMRK* (4th edn, CH Beck 2021) art 52 para 36.

[49] See on this point, Jürgen Kühling, 'Fundamental Rights' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart 2011) 479, 505; Trstenjak and Beysen (n 43) 269–270, noting that the distinction between suitability, necessity and appropriateness underlies the dominant line of ECJ jurisprudence, although it is not always made explicit; for a detailed analysis, see Christian GH Riedel, *Die Grundrechtsprüfung durch den EuGH: Systematisierung, Analyse und Kontextualisierung der Rechtsprechung nach Inkraftreten der EU-Grundrechtecharta* (Mohr Siebeck 2020) 234–326.

[50] BVerfG, 10 October 2017 – 2 BvR 859/15 and others, 147 BVerfGE 39 (request for preliminary ruling); C-493/17 *Weiss and others* ECLI:EU:C:2018:1000 (decision by the ECJ); BVerfG, 5 May 2020, 2 BvR 859/15 and others, 154 BVerfGE 7 (decision by the Federal Constitutional Court).

[51] BVerfG, 5 May 2020, 2 BvR 859/15 and others, 154 BVerfGE 7, translation available at <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html> accessed 11 November 2022.

[52] BVerfG, 5 May 2020, 2 BvR 859/15 and others, 154 BVerfGE 7 para 127; on the different conceptions of proportionality in the context of art 5(1)(4) TEU, see Matthias

tionality is applied and questions regarding the role it should have in the reasoning of the court have now put the European institutional order to the test.[53]

As one of the most fundamental principles of European law, proportionality has not left private law unaffected, with respect to both the private law systems of the Member States as well as EU private law itself. The private law systems of the Member States cannot unduly restrict fundamental freedoms because such restrictions need to satisfy the proportionality test.[54] Based on the ECJ's case law on the restrictions of fundamental freedoms, Sorina Doroga explores whether the proportionality analysis can be used to rationalise the use of public policy clauses in European private international law.[55] The perhaps most impactful effect of EU law on private law of the Member States can be observed in anti-discrimination law in which private actions are openly subjected to a proportionality analysis.[56] Proportionality can also be found in the private law rules of the EU,[57] for example as a restriction on claims for information or the disclosure of evidence.[58] In this

Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) 21 German LJ 979, 985–990; see also Orlando Scarello, 'Proportionality in the PSPP and Weiss Judgments: Comparing Two Conceptions of the Unity of Public Law' (2021) 13 Eur J Legal Stud 45, 48–52.

[53] The Federal Constitutional Court's decision is very controversial: for a criticism, see Christian Callies, 'Vorrang des Unionsrechts und Kompetenzkontrolle im europäischen Verfassungsgerichtsverbund' [2021] NJW 2845, 2848; Stefanie Egidy, 'Proportionality and procedure of monetary policy-making' (2021) 19 Int'l J Const L 285, 290–292; Franz C Mayer, 'Der Ultra vires-Akt. Zum PSPP-Urteil des BVerfG v. 5.5.2020 – 2 BvR 859/15 u.a.' (2020) 75 JZ 725; Friedemann Kainer, 'Aus der nationalen Brille: Das PSPP-Urteil des BVerfG' [2020] EuZW 533; for a defence of the decision, see Ulrich Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' [2020] NVwZ 817; Frank Schorkopf, 'Wer wandelt die Verfassung? Das PSPP-Urteil des Bundesverfassungsgerichts und die Ultra vires-Kontrolle als Ausdruck europäischer Verfassungskämpfe – zugleich Besprechung von BVerfG, Urteil v. 5.5.2020 – 2 BvR 859/15 u.a.' (2020) 75 JZ 734, 737; for an assessment of the methodology of the ECJ in light of the PSPP judgment, see Sorina Doroga and Alexandra Mercescu, 'A Call to Impossibility: The Methodology of Interpretation at the European Court of Justice and the PSPP Ruling' (2021) 13 Eur J Legal Stud 87; for a discussion of the communicative dimension of the decision, see Philip M Bender, Ambivalenz der Offensichtlichkeit – zugleich Anmerkung zur Entscheidung des BVerfGs vom 5. Mai 2020' [2020] ZEuS 409.

[54] Remien (n 2) 1324.

[55] Sorina Doroga, 'The Use of Public Policy Clauses for the Protection of Human Rights in the EU and the Role of Proportionality', in this volume.

[56] Tischbirek (n 9) 119–127.

[57] See Jürgen Basedow, *EU Private Law: Anatomy of a Growing Legal Order* (Intersentia 2021) 347–351, with many examples; but see also Remien (n 2) 1325, offering examples but observing that a general principle of proportionality in EU private law does not seem to be discernible.

[58] Basedow (n 57) 347–348.

context, Johanna Stark analyses whether, instead of the abuse of rights doctrine, a proportionality test could serve as limit to exercising legal rights in European contract law.[59] The area of European private law where proportionality plays a particularly important role is intellectual property law, as Luc Desaunettes-Barbero discusses in his contribution to this volume.[60]

2. US 'Exceptionalism'?

The success of proportionality has, however, not been as triumphant everywhere.[61] An example of a jurisdiction that has resisted an open adoption of proportionality-based rights review can be found in the United States.[62] The different levels of scrutiny the Supreme Court uses for different constitutional rights do not – at least not explicitly – depend upon a proportionality analysis.[63] In the case of *Heller v District of Columbia* on the right to keep firearms at one's home, Justice Scalia, writing for the majority, expressly rejected a proportionality analysis in the context of the Second Amendment, arguing that he knows 'of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach.'[64] In a very recent decision, the Supreme Court doubled down on *Heller*'s rejection of means-end rationality in the context of the Second Amendment, holding that there is no room for balancing competing interests or even for intermediate scrutiny.[65] This outright rejection of proportionality is controversial.[66] In his dissent in *Heller*, Justice Breyer specifically asks the court to embrace the principle of proportionality.[67] There is also a growing strand of constitutional

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[59] Johanna Stark, 'Rights and their Boundaries in European Contract Law: Abuse, Proportionality, or Both?', in this volume.

[60] Luc Desaunettes-Barbero, 'Proportionality and IP Law: Toward an Age of Balancing?', in this volume.

[61] For a comparative overview, see Saurer (n 11); on the development in England, see Paul Craig, 'Proportionality and Judicial Review: A UK Historical Perspective' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart 2017) 145.

[62] Saurer (n 11) 21.

[63] Jamal Greene, 'Rights as Trumps?' (2018) 132 Harv L Rev 30, 38–52; seminally, Vicki C Jackson, 'Constitutional Law in the Age of Proportionality' (2015) 124 Yale LJ 3094; see also Lorraine E Weinreb, 'The Postwar Paradigm and American Exceptionalism' in Sujit Choudhry (ed), *The Migrations of Constitutional Ideas* (CUP 2006).

[64] *District of Columbia v Heller* 554 US 570, 634–5 (2008).

[65] *New York State Rifle & Pistol Association v Bruen* 597 US __ (2022) (Thomas J) 10: '*Heller* and *McDonald* do not support applying means-end scrutiny in the Second amendment context.'

[66] Jackson (n 63).

[67] *Heller* (n 64) 687–691 (Breyer J, dissenting).

law scholarship that points to proportionality as a more suitable mechanism for approaching and deciding rights review cases.[68]

The rejection of proportionality in rights review does not, however, mean that it has no role to play in US (constitutional) law.[69] The US Supreme Court, for instance, held that under the Eighth Amendment a sentence imposed on a defendant must be proportionate to the crime committed.[70] In the context of violations of a suspects' procedural rights under the Fourth Amendment, the prevalent remedy consists of the exclusion of evidence, but there are calls for more proportionate remedies.[71] Guy Rubinstein explains how the notion of proportionality is used in this discussion and explores whether it can contribute to a better balance between the protection of suspects' procedural rights and effective enforcement of criminal law.[72] Additionally, different elements of the four steps comprising the proportionality test can be found in the different levels of scrutiny set out by the US Supreme Court.[73] It has even been argued that, as a general matter, balancing rights and interests constitutes an integral part of constitutional adjudication in the US.[74] Moving away from constitutional law to private law and private law theory, proportionality and balancing – as Nicolás Parra-Herrera explains in his contribution to this volume[75] – seem to always have been important elements of US legal theory and private law scholarship, uniting personalities as different as Oliver Wendell Holmes Jr and Duncan Kennedy.

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[68] Jamal Greene, *How Rights Went Wrong: Why Our Obsession with Rights is Tearing America Apart* (Houghton Mifflin Harcourt 2021); on this proposal, see Nelson Tebbe and Micah Schwartzman, 'The Politics of Proportionality' (2022) 120 Mich L Rev 1307; for a discussion of the relationship between a potential introduction of proportionality and other features of constitutional rights doctrine, see Kai Möller, 'US Constitutional Law, Proportionality, and the Global Model' in Vicki Jackson and Mark Tushnet (eds), *Proportionality: New Frontier, New Challenges* (CUP 2017); see also Ryan D Doerfler and Samuel Moyn, 'Democratizing the Supreme Court' (2021) 109 Cal L Rev 1703, 1741–1742, in the context of Supreme Court reform.

[69] Jackson (n 63) 3104–3106.

[70] *Graham v Florida* 560 US 48, 59 (2010); Jackson (n 63) 3104, with further references.

[71] Guy Rubinstein, 'The Influence of Proportionality in Private Law on Remedies in American Constitutional Criminal Procedure', in this volume.

[72] Rubinstein (n 71).

[73] On this point, see also *Bruen* (n 65) 21–25 (Breyer J, dissenting); Greene (n 63) 58, likening proportionality to intermediate scrutiny; Richard H Fallon, 'Strict Judicial Scrutiny (2007) 54 UCLA L Rev 1267, 1330 (strict scrutiny); for a general discussion of proportionality and the different levels of review, see E Thomas Sullivan and Richard S Frase, *Proportionality Principles in American Law* (OUP 2009) 53–66.

[74] T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 Yale LJ 943; for a nuanced view, see Moshe Cohen-Eliya and Iddo Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) 8 Int'l J Const L 263.

[75] Nicolás Parra-Herrera, 'Three Approaches to Proportionality in American Legal Thought: A Genealogy', in this volume.

IV. Proportionality and the Role for Comparative Private Law

Proportionality is thus a pervasive concept in constitutional law in many jurisdictions and one of the focal points of comparative constitutional law.[76] As discussed above, it is also an important concept in private law theory and doctrine. Nonetheless, there are relatively few comparative accounts of proportionality in private law.[77] The reasons for this are certainly manifold. One of them may be that the role of proportionality in private law systems seems to be still uncertain and depends on the assumptions about the function of private law. The fluidity of the debate in different jurisdictions complicates comparisons.[78] Another difficulty is perhaps that, at least at first sight, comparisons revolving around proportionality as a principle as well as a technique do not fit squarely with the functional method in comparative law.[79] In a crude description, the functional method is concerned with the outcomes legal systems produce when faced with similar or identical conflicts of interests or regulatory challenges.[80] This is, however, a very reductionist account of 'the functionalist method', which for its part is interested not only in results but in precisely how and why different jurisdictions produce certain results and how competing interests or values shape the solution to legal problems.[81] Proportionality in a broad sense is, of course, but one mechanism to measure the burdens imposed on a party by another party or the State and to relate these burdens to the underlying objectives and reasons. Proportionality and its potential functional equivalents thus serve as a mediating tech-

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[76] Young and de Búrca (n 28) 133, with references to the subsequent chapters on individual jurisdictions.

[77] Stürner (n 2) 64–94, 133–147; 208–227; 266–280; 409–418; for a discussion including private law issues, see Young and de Búrca (n 28) 141–142 as well as subsequent chapters 9–14 in Vogenauer and Weatherill (n 28).

[78] On the inability of functional comparative law to account for ambivalence or tensions within legal systems, see Ralf Michaels, 'The Functional Method of Comparative Law', in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 385.

[79] See on this point, Jacco Bomhoff, 'Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law' (2008) 31 Hastings Int'l & Comp L Rev 555, 564–567.

[80] In this direction, Bomhoff (n 79) 564, citing Günther Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 Harv Int'l LJ 411, 435.

[81] Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung* (3rd edn, Mohr Siebeck 1996) 33; see also Max Rheinstein, *Einführung in die Rechtsvergleichung* (2nd edn, CH Beck 1987) 25–28; for a more nuanced account of different strands and approaches within the functional method, see Michaels (n 78) 348–368; for a discussion of different strands of criticism, Uwe Kischel, *Comparative Law* (Andrew Hammel tr, OUP 2019) 90–101; Sarah Piek, 'Die Kritik an der funktionalen Rechtsvergleichung' [2013] ZEuP 60.

nique to incorporate the parties' interests as well as externalities into private law decision making. The comparative study of proportionality could, in this context, serve as a step allowing a deeper understanding of how private law systems use proportionality to balance the interests of parties and of third parties or society as a whole. Such a comprehensive functionalist comparative inquiry, however, goes well beyond the scope of the present volume. Our goal in this volume is much more modest: we attempt to set out some preliminary steps in order to facilitate a comparative understanding of how proportionality works in private law settings. Accordingly, we focus on different instances and examples of how proportionality affects private law theory and private law solutions in different jurisdictions. We do not aim to identify a hitherto hidden 'super-principle of private law adjudication' or to provide definite answers as to which role proportionality should play in private law. Rather, the contributions will perhaps help to challenge some of the assumptions that underlie private law theory and debates by showing the variety of meanings and functions attached to the notion of proportionality.

Proportionality in Private Law: An Analytical Framework

Franz Bauer

I. Introduction

Duncan Kennedy has described the 'move to proportionality' as representing 'the simultaneous de-rationalisation and politicisation of legal technique'.[1] In his view, bright-line categorisation purports to evade adjudicative subjectivity and limit bare judicial power, while proportionality reasoning embraces the indeterminacy of legal decision-making and underscores the need to choose between competing and irreconcilable values.[2] Others have presented proportionality in a very different light: as the most promising attempt to structure and rationalise complex legal decision making. Proportionality has been hailed 'as the most disciplined sort of standards-based reasoning in rights

[1] Duncan Kennedy, 'A Transnational Genealogy of Proportionality in Private Law' in Roger Brownsword and others (eds), *The Foundations of European Private Law* (Hart 2011) 187.

[2] For a more detailed discussion of Duncan Kennedy's account, see Nicolás Parra-Herrera, 'Three Approaches to Proportionality in American Legal Thought: A Genealogy', in this volume, 110–113. For a different view, see Nicola Lacey, 'The Metaphor of Proportionality' (2016) 43 J Law Soc 27, 38, who conceives of proportionality as 'purporting […] to constrain the exercise of power'. For a general discussion of the antagonism between objectivity and power, see Philip M Bender, 'Ways of Thinking about Objectivity' in Philip M Bender (ed), *The Law between Objectivity and Power* (Nomos & Hart 2022).

adjudication'[3] or as a technique that 'can claim an objectivity and integrity no other model of judicial review can match'.[4] The protagonists in these debates seem to disagree not only regarding their attitude towards ideas like objectivity or rationality but also about what proportionality actually is and how it operates in legal reasoning.

The same observation can be made when we turn to proportionality in private law: some regard proportionality as a conceptual misfit in this context;[5] others consider it a highly consequential principle affecting all private law legislation and adjudication.[6] And while some maintain that proportionality has always been a principle or aspiration of private law,[7] others see it as the ultimate threat to private autonomy[8] and, accordingly, try to limit its reach to extreme cases.[9] Here again, people seem to presuppose quite different conceptual ideas about proportionality.

As can be seen from these observations, proportionality has many faces, and writers do not always sufficiently distinguish between them. This can be an impediment not only to normative debates like the ones just mentioned but also to comparative projects.[10] Hence, it may prove worthwhile to devote one of the introductory contributions of this volume to providing a more structured

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[3] Katharine G Young, 'Proportionality, Reasonableness, and Economic and Social Rights' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality* (CUP 2017) 249.

[4] David M Beatty, *The Ultimate Rule of Law* (OUP 2004) 171.

[5] Stephen Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' in Jackson and Tushnet (n 3) 237–241 and 246.

[6] See eg Claus-Wilhelm Canaris, 'Grundrechtswirkungen und Verhältnismäßigkeitsprinzip in der richterlichen Anwendung und Fortbildung des Privatrechts' [1989] JuS 161, 161–163. See also Beatty (n 4) 165 ('If any judicially created rule of private law […] cannot satisfy the principle of proportionality, there is no logical way it can be saved').

[7] See eg Ulrich Preis, 'Verhältnismäßigkeit und Privatrechtsordnung' in Peter Hanau, Friedrich Heither and Jürgen Kühling (eds), *Richterliches Arbeitsrecht: Festschrift für Thomas Dieterich zum 65. Geburtstag* (CH Beck 1999) 433–434; Michael Stürner, *Der Grundsatz der Verhältnismäßigkeit im Schuldvertragsrecht* (Mohr Siebeck 2010) 289–290 and 442–443.

[8] See eg Lorenz Kähler, 'Raum für Maßlosigkeit: Zu den Grenzen des Verhältnismäßigkeitsgrundsatzes im Privatrecht' in Matthias Jestaedt and Oliver Lepsius (eds), *Verhältnismäßigkeit: Zur Tragfähigkeit eines verfassungsrechtlichen Schlüsselkonzepts* (Mohr Siebeck 2015) 229–233 (arguing that it would be unconstitutional to subject all private action to a general proportionality requirement since it would violate the right to personal freedom). For a related but even broader claim, see Leisner, '"Abwägung überall" – Gefahr für den Rechtsstaat' [1997] NJW 636 (proportionality as a threat to the rule of law). Less pronounced, Dieter Medicus, 'Der Grundsatz der Verhältnismäßigkeit im Privatrecht' (1992) 192 AcP 35, 41 and 61–62.

[9] See eg Medicus (n 8) 69–70; Uwe Diederichsen, 'Das Bundesverfassungsgericht als oberstes Zivilgericht – ein Lehrstück der juristischen Methodenlehre' (1998) 198 AcP 171, 252–260, especially 257.

framework encompassing and analysing these different faces. In doing so, I will proceed in two steps. The first part will deal with proportionality as such and will pick out and discuss three central features. The second part will focus on the more specific roles proportionality can play in a private law context.

II. Three Features of Proportionality

Despite the large agreement on proportionality's dominance in modern legal discourse, there is surprisingly little consensus on what proportionality actually is. Depending on the jurisdiction, the field of law, and the legal context, the terminology varies considerably: On the one hand, proportionality is used in a very broad way and is simply associated with other discretionary standards such as reasonableness or balancing.[11] In constitutional law, on the other hand, proportionality has become 'a term of art',[12] referring to a specific four-prong test for the judicial review of government action.[13] To add to the confusion, this rather narrow understanding has been dubbed 'proportionality in the broad sense', in contrast to the test's final balancing step known as 'proportionality in the narrow or strict sense'.[14] A third very different sense of proportionality concerns cases of so-called quantitative proportionality.[15] Here, the concept

[10] On these challenges, see Ben Köhler, 'Proportionality in Private Law: A Primer', in this volume, 13–14. See also Jacco Bomhoff, 'Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law' (2008) 31 Hastings Int'l & Comp L Rev 555.

[11] See eg Kennedy (n 1) 217–219 (claiming that public law proportionality and private law balancing are essentially the same and referring indiscriminately to 'balancing/proportionality' throughout his article). See also Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 Am J Comp L 463, 468–469 (contrasting categorisation with 'standards such as reasonableness, balancing and proportionality'). Reasonableness and balancing are discussed below, see text to nn 27–39 and to nn 43–54.

[12] Vicki C Jackson, 'Being Proportional about Proportionality' (2004) 21 Const Comment 803.

[13] Some omit the first step and thus identify only three prongs; see eg *R v Oakes* [1986] 1 SCR 103, 139; Vicki C Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 Yale LJ 3094, 3113; Robert Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 Int'l J Const L 572. This is, however, merely a terminological matter that does not entail any substantial difference. For a more detailed discussion of the four-prong test, see text to nn 41–42.

[14] See eg Bernhard Schlink, 'Proportionality in Constitutional Law: Why Everywhere but Here?' (2012) 22 Duke J Comp & Int'l L 291, 294; Kai Möller, 'Proportionality: Challenging the critics' (2012) 10 Int'l J Const L 709, 711. See also Jackson (n 13) 3116 ('proportionality as such'); Nicholas Emiliou, *The Principle of Proportionality in European Law* (Kluwer 1996) 192 ('proportionality stricto sensu').

describes a specific arithmetic operation, for example with respect to the proportionate distribution of gains or losses in a partnership: the larger an individual partner's share, the larger her portion of the profits or losses.[16]

It is not the aim of this introduction to resolve all these ambiguities into one clear-cut definition of proportionality. In fact, this might do more harm than good to the comparative enterprise. Instead, it shall suffice to highlight three typical and important features of proportionality: (1.) its relational structure, (2.) its justificatory function, and (3.) its combination of two modes of reasoning.

1. Proportionality as a Relational Concept

Proportionality is often described as a relational concept.[17] As such, it concerns 'the existence of a broad moral or practical equivalence or comparability between two different phenomena'.[18] Such phenomena can be quite diverse: In criminal law, people may refer to the relation between the severity of a crime and the punishment of the perpetrator as being proportionate or disproportionate.[19] In contract law, the same may be said about the relation between performance and counter-performance.[20] In company law, as already mentioned, proportionality may refer to the merely quantitative relation between a partner's share and her portion of the profits.[21]

However, the by far most significant relation in today's proportionality thinking is that between means and ends. In public law, the infringement of a right must be proportionate to the government objective pursued. In private law, an act of self-defence must be proportionate to the severity of the attack it is meant to fend off. In fact, the relation between means and ends has become so dominant in public law discourse that proportionality is often

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[15] Stürner (n 7) 22–23. See also Richard Metzner, *Das Verbot der Unverhältnismäßigkeit im Privatrecht* (doctoral thesis, Erlangen-Nürnberg 1970) 18–22. For a discussion of the historical origins of this type of proportionality, see Rolf Knütel, 'Verteilungsgerechtigkeit' in Hans Haarmeyer and others (eds), *Verschuldung, Haftung, Vollstreckung, Insolvenz: Festschrift für Gerhard Kreft zum 65. Geburtstag* (ZAP-Verlag 2004).

[16] See eg German Civil Code, ss 734, 735, 739.

[17] Gardbaum (n 5) 227. See also Franz Wieacker, 'Geschichtliche Wurzeln des Prinzips der verhältnismäßigen Rechtsanwendung' in Marcus Lutter, Walter Stimpel and Herbert Wiedemann (eds), *Festschrift für Robert Fischer* (De Gruyter 1979) 871 ('Relationsbegriff').

[18] Lacey (n 2) 30.

[19] Lacey (n 2) 38–41. In fact, this relation is one of the oldest roots of proportionality thinking in law, see Wieacker (n 17) 869–870 and 875–876.

[20] Wieacker (n 17) 871 and 877 (with reference to the historical debate on the just price in contract law). See also the examples in n 68.

[21] See text to nn 15–16.

thought of exclusively in these terms.[22] When focusing on proportionality's role in private law one should ideally be aware of both: while the concept is predominantly conceived of as a means-ends-relation, it can also be extended to other phenomena like the ones just mentioned.[23]

2. Proportionality's Justificatory Function

The second feature of proportionality is its justificatory function.[24] Wherever the relation between two phenomena is said to be proportionate, this usually entails an affirmative judgment: a proportionate punishment is a justified punishment, a proportionate distribution is a justified distribution, a proportionate means is a justified means. In this vein, proportionality reasoning has been associated with a 'culture of justification'.[25]

Proportionality in its predominant means-ends-version serves as a possible justification for the infringements of rights.[26] This can be seen both in typical public and private law scenarios: If the police carry out a search and seizure, thereby interfering with people's property and privacy rights, proportionality can serve as a test of justification. If a private individual kills her neighbour's bull terrier in self-defence, proportionality again provides such a test. In both cases, the test is meant to resolve a tension between individual rights on the one hand and legitimate private or government goals on the other.

Proportionality is of course not the only standard that performs a justificatory function. A common alternative to proportionality is reasonableness, an omnipresent and highly versatile standard, well-known from legal concepts like 'reasonable person'[27], 'reasonable period of time',[28] or 'reasonable com-

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[22] See eg Schlink (n 14) 292 ('Proportionality analysis is about means and ends').

[23] See Gardbaum (n 5) 227 ('Most often this conceptually necessary relationship is that of means to end, so that we talk of a disproportionate means of achieving a goal. But it need not be […]').

[24] See Lacey (n 2) 31 and 38 ('proportionality operates to legitimate […] the exercise of power').

[25] Cohen-Eliya and Porat (n 11). The term 'culture of justification' is taken from Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31, 32–33.

[26] Möller (n 14) 711 ('Proportionality is a test to determine whether an interference with a prima facie right is justified'). Even though the justificatory function with respect to rights infringements takes centre stage, proportionality can also be applied to conflicts of powers, eg between the federal and state level or between the EU and its member states; see Schlink (n 14) 296–297; Kennedy (n 1) 218.

[27] See eg John Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 LQR 563; Arthur Ripstein, 'Reasonable Persons in Private Law' in Giorgio Bongiovanni, Giovanni Sartor and Chiara Valentini (eds), *Reasonableness and Law* (Springer 2009). On the reasonable person's particularly important role with respect to negligence liability, see James Goudkamp and Donal Nolan, *Winfield and Jolowicz on Tort* (20th edn, Sweet & Maxwell 2020) paras 3.013 and 6.001–6.015.

pensation'.[29] Labelling a certain kind of legally relevant conduct as reasonable entails its justification: '[t]he reasonable person […] can also be thought of as the justified person.'[30]

The indeterminacy of this concept makes it a convenient device for situations where lawmakers want to allow for a particularly fact-sensitive and discretionary decision in an individual case.[31] Accordingly, it is uncertain whether, in the hands of a specific decision-maker, reasonableness turns into a more rigorous or more lenient standard.[32] Still, in comparison with proportionality, reasonableness usually tends to be a decidedly less demanding and less structured concept. In the UK, for example, the traditional *Wednesbury* reasonableness test for the judicial review of administrative acts[33] has been contrasted with and eventually superseded by a more rigorous proportionality test.[34] And while the reasonableness standard applicable to the socio-economic rights enshrined in the South African Constitution[35] is understood to be more robust than its *Wednesbury* model,[36] it is still 'arguably less restraining of the adjudicator's own views' than proportionality.[37]

This may help to understand why proportionality can appear as both a door opener for and a constraint on judicial discretion.[38] It may simply depend on the respective baseline: compared with bright-line categorisation, proportion-

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[28] See eg German Civil Code, ss 281(1)(1), 314(3), 637(1), 640, 2307(2).

[29] See eg German Civil Code, ss 253(2), 552(2), 642(1), 906(2)(2).

[30] Gardner (n 27) 565.

[31] Gardner (n 27) 570 ('The issue is passed away from the law to some legal official […] as its authoritative "finder of fact"'). On the intentional choice of open-ended language to invite dynamic interpretation, see Franz Bauer, 'Historical Arguments, Dynamic Interpretation, and Objectivity: Reconciling Three Conflicting Concepts in Legal Reasoning' in Bender (n 2) 138–139.

[32] This high degree of malleability explains why reasonableness review can, in individual cases, produce a higher level of rights protection than the generally more robust proportionality review; see Young (n 3) 268–269 and 271–272.

[33] *Associated Provincial Picture Houses v Wednesbury* [1948] 1 KB 223.

[34] *R (Daly) v Secretary of State for the Home Dept* [2001] 2 AC 532 para 27. See also Alec Stone Sweet and Jud Mathews, 'Proportionality, Judicial Review, and Global Constitutionalism' in Bongiovanni, Sartor and Valentini (n 27) 175–176 and 203–205; Gardbaum (n 5) 225; Young (n 3) 252–253. For a more detailed discussion of both *Wednesbury* reasonableness and proportionality, see Paul Craig, 'Unreasonableness and Proportionality in UK Law' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999) 85.

[35] See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46.

[36] On the relationship between these two types of reasonableness review, see Young (n 3) 251–256.

[37] Young (n 3) 267. In Israeli constitutional law, reasonableness is also considered to be a less demanding alternative to proportionality, see Stone Sweet and Mathews (n 34) 198.

[38] See text to nn 1–4.

ality is vaguer and more open-ended; but compared with other justificatory standards, such as reasonableness, it appears more structured and reliable.[39]

3. Proportionality as a Combination of Two Modes of Reasoning

The third and final feature does not apply to all instances of proportionality but only to its predominant version: means-ends-proportionality.[40] This version is characterised by combining two quite different types of reasoning: means-ends-rationality and balancing. Let us take the well-known four-prong test[41] from constitutional law as the classic example of means-ends-proportionality. The means is the government measure that leads to the infringement of an individual right. For this means to be proportionate and hence justified, four cumulative conditions have to be met: (1) it has to serve a legitimate end, (2) it has to be suitable to attain that end, (3) it has to be necessary to attain that end, and (4) it has to be proportionate in the strict sense. This final criterion requires that the benefit of attaining the end carries more weight than the costs associated with the infringement of the right.[42]

As has often been noted, the mode of reasoning changes between the third and the fourth prong.[43] The first three prongs determine the relevant means and ends and examine if the means are well-chosen on an empirical level: Is it even possible to attain this end by this means? Are there other measures that could attain it? Would they be less costly? All these are, in principle,

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[39] See Stürner (n 7) 449; Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2012) 108 (praising proportionality reasoning for 'avoiding both the Scylla of a minimum core approach and the Charybdis of a mere reasonableness test'). In this sense, proportionality analysis can possibly serve as a less arbitrary alternative to the open-ended interpretation of public policy clauses in private international law; see Sorina Doroga, 'The Use of Public Policy Clauses for the Protection of Human Rights in the EU and the Role of Proportionality', in this volume.

[40] See text to n 22.

[41] See n 13.

[42] The four-prong test is well established in a broad range of jurisdictions. For Germany, see eg BVerfG 16 March 1973, 1 BvR 52/665, 30 BVerfGE 292, 316–317; less explicit in the famous 'Apothekenurteil': BVerfG 11 June 1958, 1 BvR 596/56, 7 BVerfGE, 377, 404–412. For Canada, see eg *Oakes* (n 13) 138–139; Jackson (n 13) 3110–3119. For Israel, see Stone Sweet and Mathews (n 34) 197–199. From a European law perspective, Emiliou (n 14) 191–194.

[43] Zhong Xing Tan, 'The Proportionality Puzzle in Contract Law: A Challenge for Private Law Theory?' (2020) 33 CJLJ 215, 219 ('foundational twin ideas of means-ends rationality and balancing'); Iddo Porat, 'The *Starting at Home* Principle: On Ritual Animal Slaughter, Male Circumcision and Proportionality' (2021) 41 OJLS 30, 57 ('Only this last sub-test is a straightforward balancing test, as the first two are, strictly speaking, means–ends tests'); Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 U Toronto LJ 383, 393–394 ('In the third step, the Court leaves the means-ends analysis of the first two steps behind').

empirical questions.[44] The fourth step, on the other hand, requires the balancing of – possibly incommensurable[45] – rights or interests. This requires a decision as to the relative importance or weight of these rights or interests, which necessarily involves value judgments.[46] Consequently, the contrast between these two modes of reasoning has been described as one between value-neutral and value-oriented thinking,[47] between instrumental rationality and value rationality,[48] or between rule-like and standard-like adjudication.[49]

The respective roles of these two types of reasoning have been assessed rather differently in legal literature. While some see balancing at the very heart of proportionality thinking[50] or hardly even distinguish between the two,[51] others have tried to limit the fourth step to a more specific kind of means-ends-balancing.[52] Still others prefer to abandon the umbrella term of proportionality altogether and treat the two components as strictly separate.[53] And according to yet another view, proportionality is simply one possible way of structuring a balancing exercise.[54]

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[44] Schlink (n 14) 299. See also Lothar Hirschberg, *Der Grundsatz der Verhältnismäßigkeit* (Otto Schwartz 1981) 43–45; Alexy (n 13) 573 ('relative to what is factually possible'). Admittedly, the boundaries get blurry at the necessity stage since an assessment of which measure will be less costly may also require certain value judgments. However, these will not have a significant role to play as long as the (empirical) effects of the two measures are reasonably comparable: it will hardly be contentious that stunning the bull terrier is a less invasive defensive measure than killing it.

[45] See Virgílio Afonso da Silva, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision' (2011) 31 OJLS 273.

[46] See eg Möller (n 14) 715; Schlink (n 14) 299. On balancing as a general technique of legal decision-making, see Thomas Riehm, *Abwägungsentscheidungen in der praktischen Rechtsanwendung* (CH Beck 2006).

[47] Grimm (n 43) 395.

[48] Gardbaum (n 5) 227–228. See also Tan (n 43) 243 ('both a thinner means-ends rationality review and a thicker balancing component').

[49] See Karl Larenz, *Methodenlehre der Rechtswissenschaft* (6th edn, Springer 1991) 480–481 ('Rechtssatzcharakter' versus 'Beurteilungsspielraum'). For a more detailed discussion of this idea, see Philip M Bender, 'Private Law Adjudication versus Constitutional Adjudication', in this volume, 74–82.

[50] See eg Möller (n 14) 711 ('At its core, the proportionality test is about the resolution of a conflict between the right and a competing right or interest, and this conflict is ultimately resolved at the balancing stage'); Cohen-Eliya and Porat (n 11) 464 fn 3 ('Balancing between rights and interests is the core of proportionality analysis').

[51] See eg Kennedy (n 1) 217–219.

[52] See eg Gardbaum (n 5) 226–228.

[53] See eg Hirschberg (n 44) 245–248.

[54] See eg Jorge Silva Sampaio, 'Brute Balancing, Proportionality and Meta-Weighing of Reasons' in Jan-R Sieckmann (ed), *Proportionality, Balancing, and Rights* (Springer 2021) 57 ('This means that there is no conceptual equivalence or flat opposition between balancing and proportionality; the former is an intellectual operation to solve normative conflicts, while the latter is a principle that regulates the exercise of that operation'). See

Despite these differences in emphasis, style, and terminology, there seems to be general acknowledgment that the two types of reasoning require separate analysis and pose different challenges.[55] This insight from constitutional law can and should be transferred to private law contexts where, similarly, both types of reasoning can be found.[56] Moreover, it may help to elucidate the relationship between constitutionally infused proportionality[57] and traditional private law techniques of legal reasoning.[58]

III. Four Roles of Proportionality in Private Law

In the preceding part, we have looked at three typical features that are characteristic of proportionality in both public law and private law settings. The present part turns away from proportionality as a general legal technique and addresses the central theme of this volume: proportionality's specific role in private law. Here again, we find proportionality as a concept of many faces that should be distinguished carefully. Even though distinctions could certainly be drawn along different lines, I propose to focus on two dimensions, one concerning the source of the concept, the other its level of operation.

The distinction concerning the source of the concept is between genuine private law proportionality and constitutionally infused proportionality.[59] As we have already seen,[60] proportionality often serves as a test of justification for the infringement of constitutional or fundamental rights.[61] Inasmuch as

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also Schlink (n 14) 294 ('In jurisprudence as well as in legal literature, we find balancing used both as the last step of proportionality analysis and as the framework for proportionality analysis. This can be confusing. But it only means that, as happens often, one and the same problem can be tackled from different angles').

[55] See Schlink (n 14) 299–301.

[56] See Larenz (n 49) 481 (from a German perspective); Tan (n 43) 220–223 (from a UK perspective).

[57] See text to nn 60–64.

[58] See Bender (n 49).

[59] Luc Desaunettes-Barbero, 'Proportionality and IP Law: Toward an Age of Balancing?', in this volume, 149–156 stresses the differences between these two types of proportionality – which he calls 'constitutional proportionality' and 'US-style balancing' – in the context of IP law. A similar distinction is drawn by Johanna Stark, 'Rights and their Boundaries in European Contract Law: Abuse, Proportionality, or Both?', in this volume, 127 between 'external' and 'internal' proportionality with respect to European contract law.

[60] See text to n 26.

[61] In what follows, I do not distinguish terminologically between constitutional rights, fundamental rights, and human rights. It seems immaterial for present purposes whether a human rights regime is based on a constitution (like the German *Grundgesetz*), an international treaty (like the European Convention on Human Rights), European Union Law (like the European Charter of Fundamental Rights), or simply an Act of Parliament (like the

such rights are considered to have some impact on private relations as well, proportionality analysis is bound to spill over into private law. Hence, this type of constitutionally infused proportionality[62] is a consequence of the much-discussed constitutionalisation of private law.[63] It can be contrasted with genuine private law ideas of proportionality that developed prior to or at least independent of constitutional rights doctrine.[64]

The distinction concerning the level of operation is between proportionality as a component of private law and proportionality as an evaluative standard which private law has to live up to.[65] Proportionality serves as a component of private law if it governs or regulates the relations between private individuals or, in other words, if proportionality is required of private conduct. In contrast, proportionality serves as an evaluative standard if it governs or regulates the law applicable to private relations or, in other words, if proportionality is required of private law.[66] In the first case, proportionality operates within private law and applies directly to private actors; in the second case, it operates one level above.

If these two dimensions are combined, we get four possible roles of proportionality, which can be illustrated by the following table:

Human Rights Act 1998 in the UK). Much of the current debate focuses on the *constitutionalisation* of private law, ie 'the increasing impact of national constitutional rights on national private legal orders'; Hans-W Micklitz, 'Introduction' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (OUP 2014) 1. Thus, I also take this scenario as the standard model and accordingly adopt the same terminology, without intending to exclude other forms of human rights influence.

[62] See Tan (n 43) 243 ('constitutionally inflected'); Medicus (n 8) 36 (induced through constitutional law).

[63] See eg Hans-W Micklitz (n 61) 1–2; Mattias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 German LJ 341; Hugh Collins, 'The constitutionalization of European private law as a path to social justice?' in Hans-W Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011) 133.

[64] See eg Uwe Diederichsen, 'Die Rangverhältnisse zwischen den Grundrechten und dem Privatrecht' in Christian Starck (ed), *Rangordnung der Gesetze* (Vandenhoeck & Ruprecht 1995) 73–76; Stürner (n 7) 289–290; Medicus (n 8) 36.

[65] The distinction here is somewhat related though not entirely identical to the ones made by Stürner (n 7) 442–444 (proportionality as a legal principle versus proportionality as a balancing task) and Young (n 3) 250 ('proportionality as *principle* and proportionality analysis as a structured *doctrine*' (emphasis in the original)).

[66] The same distinction is drawn in a narrower context by Halton Cheadle, 'Third Party Effect in the South African Constitution' in András Sajó and Renáta Uitz (eds), *The Constitution in Private Relations* (eleven 2005) 58–62 and Stephen Gardbaum, 'Where the (State) Action Is' (2006) 4 Int'l J Const L 760, 764–765.

		Level of operation	
		Component of private law	Evaluative standard for private law
Source	Genuine private law proportionality	Proportionality tests (specific or general)	Virtue of law-making
	Constitutionally infused proportionality	Direct horizontal effect	Indirect horizontal effect

1. Proportionality as a Component of Private Law

If we start with proportionality as a component of private law, we can distinguish between genuine private law proportionality tests and constitutional requirements directed at private individuals. In both cases, proportionality is part of the normative framework that private conduct has to live up to in order to be accepted and enforced by the law.

a) Genuine private law proportionality: specific and general proportionality tests

Proportionality requirements in private law can be either specific or general. Specific requirements of proportionality are a common feature in many private law systems – indeed, it has been argued that such requirements are at least one historical source of modern proportionality thinking.[67] For example, a rule of contract law may declare a contract voidable if, *inter alia*, performance and counter-performance are heavily disproportionate.[68] A penalty or liquidated damages clause may be unenforceable if there is 'an extravagant disproportion between the stipulated sum and the highest level of damages that could possibly arise from the breach'.[69] Similarly, an award of punitive damages may be subjected to a proportionality test.[70] A certain type of civil procedure may only be eligible if it is proportionate to the importance of the

[67] Alexander Tischbirek, *Die Verhältnismäßigkeitsprüfung* (Mohr Siebeck 2017) 14–47; Alexander Tischbirek, 'Fächerdichotomie und Verhältnismäßigkeit' (2018) 73 JZ 421, 421–424.

[68] See eg German Civil Code, s 138(2); Swiss Law of Obligations, art 21(1). See also Stürner (n 7) 43–97 (on German, Italian, and English law).

[69] *Cavendish Square Holding BV v Makdessi; ParkingEye Ltd v Beavis* [2016] AC 1172 para 255. See Tan (n 43) 229–232. German law also applies a proportionality test to such cases, see German Civil Code, s 343(1).

[70] As is the case in Canadian law, see *Whiten v Pilot Insurance Company*, 2002 SCC 18 para 74 ('Eighth, the governing rule for quantum is *proportionality.* The overall award […] should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation)' (emphasis in the original)).

issue at stake, for example its financial value or its complexity.[71] Other prominent examples are the availability of specific performance or cost-of-cure damages as compared to mere reduction-in-value damages,[72] the grant of injunctions in intellectual property law,[73] and – as already mentioned – the justification of private self-defence or self-help.[74]

These various situations of explicitly prescribed proportionality tests raise the question whether they share similar structural characteristics or whether they are too context-dependent to have much in common.[75] Related to this idea of a common structure is a larger and more fundamental question: are all of these tests merely instantiations of one general, unwritten principle of proportionality that pervades the whole field of private law? In other words: is all private conduct at least in principle subject to a test of proportionality? German courts, for example, have subjected a broad array of private law rights to such a test: the exercise of a forfeiture clause in an insurance contract,[76] the termination of an employment contract,[77] self-help measures against a trespassing car,[78] or the implementation of labour conflict measures like strikes or lockouts[79] need to be proportionate to be sanctioned by the courts.

It is important to note that this general requirement of proportionality is not based on constitutional law. Instead, the courts have applied genuine private law techniques like reasoning by analogy or they have derived the principle from the general contract law duty to act in good faith.[80] In light of this already available toolset for dealing with proportionality considerations, some academic writers stress the independence of private law and reject the need for any constitutional intermeddling.[81]

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[71] For a detailed discussion, see Wiebke Voß, 'Proportionality in Civil Procedure: A Different Animal?', in this volume, 192–196, with particular reference to rule 1.1 of the English Civil Procedure Rules.

[72] See eg German Civil Code, ss 251(2), 275(2), 439(4), 635(3). The leading case in English law is *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344. See also Tan (n 43) 232–234; Stürner (n 7) 167–235.

[73] See Desaunettes-Barbero (n 59) 144–156.

[74] See eg German Civil Code, ss 227–229, 904.

[75] For a discussion of structural commonalities, see Tan (n 43) 220–223 and Stürner (n 7) 443–444. See also Preis (n 7) 435 and 437–439, who emphasises the high context dependency of proportionality reasoning.

[76] See eg BGH 11 February 1987, IVa ZR 194/85, 100 BGHZ 60, 63–66.

[77] See eg BAG 30 May 1978, 2 AZR 630/76, 30 BAGE 309, 313–314.

[78] See eg BGH 5 June 2009, V ZR 144/08, 181 BGHZ 233 para 16.

[79] See eg BAG 10 June 1980, 1 AZR 822/79, 33 BAGE 140, 174–177.

[80] For a critical evaluation of both approaches, see Kähler (n 8) 213–223 (with further references). For a discussion of the link between proportionality and the principle of good faith in EU law, see Stark (n 59) 134–136.

[81] Stürner (n 7) 289–290; Diederichsen (n 64) 73–76.

b) Constitutionally infused proportionality: direct horizontal effect

This emphasis on traditional private law reasoning is partly a reaction to the so-called constitutionalisation of private law, which some authors have perceived as disruptive and dangerous.[82] Indeed, the type of proportionality that has sparked the most vigorous debate over the last decades is constitutionally infused proportionality. This type offers a different route to arrive at a general proportionality requirement for private conduct: the notion of direct horizontal effect. Constitutional rights like the right to property, the freedom of speech, or the right against discrimination have direct horizontal effect if they apply not only vis-à-vis the state, but also vis-à-vis private actors. In that case, any kind of private conduct that affects these rights – and most private conduct giving rise to legal disputes will – is subject to the usual constraints on such infringements, including the constitutional four-prong test of proportionality.

Where constitutional rights are directly applicable between private actors, constitutionally infused proportionality supplements or supplants traditional private law rules. Hence, it operates on the level of private law: it imports a proportionality component into the law applicable to private disputes and requires private parties to act in a proportionate way.

This idea of subjecting private actors to the constitutional rights of their fellow citizens is highly controversial in many jurisdictions around the world. In the US, for example, the scope of constitutional rights remains limited to 'state action',[83] while the Constitutional Court of South Africa has become increasingly supportive of direct horizontal effect in recent years.[84] In Germany, the idea of *direct* horizontal effect has traditionally been rejected[85] in favour of a notion of *indirect* horizontal effect.[86] However, the German Con-

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[82] For a strong version of this view, see Diederichsen (n 9); Diederichsen (n 64).

[83] For a short overview of both the content and history of this doctrine as well as the wide-spread scholarly criticism, see Louis Michael Seidman, 'State Action and the Constitution's Middle Band' (2018) 117 Mich L Rev 1, 11–20 and Matthias Kumm and Víctor Ferreres Comella, 'What Is So Special about Constitutional Rights in Private Litigation?' in Sajó and Uitz (n 66) 265–272.

[84] See the recent decisions in *Daniels v Scribante* 2017 (4) SA 341 (CC) and *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC). According to the relevant constitutional norm, a 'provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'; Constitution of the Republic of South Africa, 1996, s 8(2). For a critical analysis of the case law, see Meghan Finn, 'Befriending the bogeyman: Direct horizontal application in *AB v Pridwin*' (2020) 137 SALJ 591.

[85] But see the older case law, eg BAG 10 May 1957, 1 AZR 249/56, 4 BAGE 274 (invalidating a termination clause in an employment contract for violating the employee's constitutional rights).

[86] See eg BVerfG 11 April 2018, 1 BvR 3080/09, 148 BVerfGE 267 paras 31–34. See also Andreas Kulick, *Horizontalwirkung im Vergleich* (Mohr Siebeck 2020) 1–2 (with further references). On indirect horizontal effect, see text to nn 89–94.

stitutional Court leans towards a more direct application in 'specific constellations', ie where private parties occupy a state-like position or exercise state-like powers.[87] Moreover, legal scholars have advocated the view that direct horizontal effect is justified at least in cases of a severe power imbalance between private actors.[88]

2. Proportionality as an Evaluative Standard for Private Law

After having discussed proportionality as a component of private law, we will now turn to proportionality as an evaluative standard that private law has to live up to.

a) Constitutionally infused proportionality: indirect horizontal effect

Since such a standard is often set by some higher law, I will start with constitutionally infused proportionality. Constitutional law can mandate that the production, application, and enforcement of private law must comply with the constitutional rights of those affected. This notion is sometimes called the 'indirect horizontal effect' of constitutional rights, even though this terminology is ambiguous and potentially misleading.[89] The effect is indirect insofar as the proportionality requirement is not incorporated into private law, ie it is not directed at private action but only at the specific state action implicit in private law legislation and adjudication.[90]

Indirect horizontal effect can operate in different ways and can have different consequences. On the one hand, it can mean that courts have a duty to develop the law of contract, tort, or property, in a way that takes constitution-

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[87] BVerfG 11 April 2018, 1 BvR 3080/09, 148 BVerfGE 267 paras 39–41, where the court held that the constitutional principle of equality can bind private parties in 'specific constellations', eg a football stadium operator when banning a fan from entering a stadium. Although treated by the court under the label of *indirect* horizontal effect, this is simply a case of *direct* horizontal effect limited to a specific group of private actors, see Stefan Greiner and Ansgar Kalle, 'Gleichbehandlung als Produkt der Freiheits- oder der Gleichheitsrechte? Zur Drittwirkung nach der Stadionverbotsentscheidung' (2022) 77 JZ 542, 549–550 (with further references in fn 97). See also the discussion by Victor Jouannaud, 'The Various Manifestations of the Constitutional Principle of Proportionality in Private Law', in this volume, 59–60.

[88] Franz Gamillscheg, 'Die Grundrechte im Arbeitsrecht' (1964) 164 AcP 386, 407–408 (with regard to labour law); Peter Derleder, 'Die uneingelöste Grundrechtsbindung des Privatrechts' in Jestaedt and Lepsius (n 8) 234. In a similar vein, Lacey (n 2) 37–38. But see for the contrary position, Claus-Wilhelm Canaris, 'Grundrechte und Privatrecht' (1984) 184 AcP 201, 206–207; Medicus (n 8) 61–62.

[89] For a discussion of different models of (indirect) horizontality, see Alison L Young, 'Horizontality and the Human Rights Act 1998' in Katja S Ziegler (ed), *Human Rights and Private Law* (Hart 2007) 39–41; Gardbaum (n 66) 762–767; Kulick (n 86) 20–40.

[90] See text to and the references in n 66.

al rights into account. Here, the traditional toolset of adjudication – interpretation, concretising of open-ended standards, judicial law-making, etc – is used to produce proportionate results in private law disputes.[91] On the other hand, indirect horizontal effect can mean that private law 'is directly and fully subject to constitutional rights and may be challenged in private litigation'.[92] In that case, a private law norm yielding results that disproportionately infringe constitutional rights is unconstitutional and – with due regard to the applicable procedures – must be struck down.[93]

Certainly, less limits on the first type of indirect horizontality imply less need for the second type. If courts can bend the rules of private law to produce proportionate results in each and every case, they do not need to use the sledgehammer of constitutional invalidation. At the same time, unlimited judicial discretion to reshape private law in a constitutionally acceptable way blurs the distinction between indirect and direct horizontality.[94] But even then, indirect horizontal effect remains conceptually different because, at least formally, respect for constitutional rights and the principle of proportionality are required not of the private actors themselves but only of private law and those who make it.[95]

b) Genuine private law proportionality: proportionality as a virtue of law-making

Although constitutional law has become an important standard for the evaluation of private law, there are also evaluative standards in a more traditional sense. When private lawyers discuss what the best answer to a legal question is, this is not necessarily done in terms of constitutional law. Instead, they use

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[91] Depending on the powers available to the courts in that regard, one can distinguish between stronger and weaker versions of this type of indirect horizontal effect, see Young (n 89) 40–41.

[92] Gardbaum (n 66) 766.

[93] Gardbaum (n 66) 766 calls the first type of indirect horizontality 'weak' and the second type 'strong'. I am hesitant to adopt this terminology for two reasons: First, others have used the same terminology to mark the difference between mandatory and non-mandatory development of private law; see Young (n 89) 39. Second, from the point of view of the private actors invoking their constitutional rights, the opposite labelling may seem more intuitive: modifying private law by legal reasoning might be much easier – and hence provide stronger protection of the constitutional right in question – than the potentially cumbersome process of constitutional invalidation.

[94] Young (n 89) 41 ('This version of strong indirect horizontality is, in effect, direct horizontality in all but name'); Mark Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1 Int'l J Const L 79, 84 fn 22 ('It is not clear to me why a theory of state duty is less radical than a theory that individuals are directly bound. I believe […] that the theories are precisely equivalent.'). See also, with regard to German law, Kumm and Ferreres Comella (n 83) 246–256; Kulick (n 86) 390–394.

[95] For another possible difference, see Gardbaum (n 66) 767.

traditional private law criteria like coherence, efficiency, and predictability to evaluate the merits and demerits of particular solutions. Whether these principles are somehow derived from the internal structure of private law, or whether they are simply treated as extra-legal standards, is not overly significant in the present context. Two conceptual points should, however, be emphasised: first, such standards operate one level above the ordinary rules of private law and, second, they are not part of constitutional law or, at least, are not usually conceptualised as such.[96]

Proportionality can also serve as such a genuine private law standard. For example, legislators or judges may choose a vague or flexible wording over a bright-line rule because it allows for a more proportionate response to a legal problem: In tort law, limiting a public authority's liability to cases of gross negligence can be a more proportionate way to reduce its risk of liability than a rule of total immunity.[97] Or, a claim for damages against a police officer may be a more proportionate response to Fourth Amendment violations than the dismissal of criminal charges.[98] In these contexts, proportionality is not understood as a constitutional requirement but rather as an imperative of prudence and expediency or, in other words, a virtue of law-making.

c) Two ways of living up to the standard: incorporation and rulification

Where proportionality operates as an evaluative standard which private law has to live up to, there are two ways for this to be achieved. On the one hand, private law can incorporate a proportionality component as described above.[99] On the other hand, it can try to spell out clear rules and categories that are able to provide proportionate results, a process sometimes termed 'rulification'.[100] For example, it might be a disproportionate infringement of a resi-

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[96] On the (controversial) constitutionalisation of coherence, see Bender (n 49) 70–72.

[97] See Donal Nolan, 'Varying the Standard of Care in Negligence' (2013) 72 CLJ 651, 681 and 684. For a much older evocation of ideas of proportionality with respect to the degree of care required from a bailee, see William Jones, *An Essay on the Law of Bailments* (J Nichols 1781), 5–6.

[98] For a detailed discussion of this issue, see Guy Rubinstein, 'The Influence of Proportionality in Private Law on Remedies in American Constitutional Criminal Procedure', in this volume, 206–212.

[99] See text to nn 67–81.

[100] See Frederick Schauer, 'The Tyranny of Choice and the Rulification of Standards' (2005) 14 J Contemp Legal Issues 803; Michael Coenen, 'Rules against Rulification' (2014) 124 Yale LJ 644, 653–658. However, when referring to 'rulification', I do not intend to adopt the notion of chronology underlying Schauer's and Coenen's account. Many private law rules that could be understood as 'rulified' proportionality did not develop as a direct or conscious response to any proportionality standard. In other words, the 'rulification' I have in mind may well have occurred long before anyone was aware of the standard.

dential tenant's constitutional rights if the law permitted the landlord to terminate the lease at will. Private law could deal with this situation in two ways. It could either incorporate a proportionality test by providing that the termination of a residential lease is valid only if it is proportionate with respect to the tenant's rights and interests, or it could provide a list of rules that determine the situations in which a termination will or will not be justified.[101] Thus, 'proportionality as a principle may not always require case-by-case application of proportionality'.[102]

Rulification has been hailed by private law scholars for avoiding the main disadvantages of proportionality components: indeterminacy, lack of legal certainty, and hence potential curtailment of private autonomy.[103] Particularly in a private law context, it may be desirable to provide a crisp and clear legal framework that delineates the room for private autonomy as exactly and predictably as possible. However, it should be kept in mind that rulification requires a level of uniformity among the relevant fact scenarios that may not always be available. Thus, open-ended proportionality tests may prove useful even in private law contexts, where lawmakers are not able to anticipate all the different situations that are likely to arise.[104]

IV. Conclusion

Proportionality has many faces. This holds true both for law in general and for private law in particular. In this introductory contribution, I have tried to provide an analytical framework in order to differentiate more precisely between proportionality's various features and roles. Whenever we are faced with the concept of proportionality in a private law context, it may be useful to ask: Which relation is exactly at issue? What is the concept meant to justify? Is it an example of means-ends-rationality with its two combined modes of reasoning? Does it operate as an internal component or as an external standard? Is it the constitutionally infused or the genuine private law kind of proportionality?

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[101] German law tends towards the latter approach, see German Civil Code, ss 573–574c. See also Preis (n 7) 454–455.

[102] Vicki C Jackson and Mark Tushnet, 'Introduction' in Jackson and Tushnet (n 3) 9. See also Canaris (n 88) 223; Medicus (n 8) 37; Diederichsen (n 64) 73–74.

[103] See eg Medicus (n 8) 54–62. The lack of legal certainty is stressed by Diederichsen (n 64) 91.

[104] See Schlink (n 14) 293 in the context of self-defence: 'Unable to deal with the abundance of self-defense situations more specifically, [the law] requires proportionate self-defense.' For a similar argument in the context of proportionality in civil procedure, see Voß (n 71) 188.

Drawing these distinctions may help to avoid overly simplistic and sweeping statements about proportionality's either inherently subjective or power-constraining nature. Both statements may be true, depending on the particular type and role of proportionality as well as the respective baseline: as we have seen, proportionality is somewhere in the middle between bright-line rules on the one hand and completely open-ended standards on the other.[105]

Whether proportionality should be understood as a technique of rationalisation or de-rationalisation, as embracing adjudicative choice or constraining judicial discretion, can be resolved only in the context of the specific legal problem at issue.[106] Accordingly, the contributions that follow turn to specific legal problems in various contexts and have a closer look at proportionality's different faces in private law.

[105] See text to n 39.

[106] See also Lacey (n 2) 41 in the context of criminal punishment ('Hence the constraining power of the appeal to proportionality is contingent upon other aspects of the context and system in which it operates').

Part 1

Constitutional and Theoretical Perspectives

The Various Manifestations of the Constitutional Principle of Proportionality in Private Law

Victor Jouannaud[*]

I. Introduction

The criterion of proportionality takes on different manifestations and appears in various legal contexts. As a specific constitutional requirement, however, the proportionality principle is usually perceived as a characteristic of public law, where its traditional function is to assess and limit the exercise of regulatory state power. By contrast, in private law the question arises as to whether a proportionality analysis is constitutionally compelled or at all suitable to evaluate the legitimacy of private acts and contracts. Notably, where private law does embrace the notion of proportionality or provide for a proportionality (or appropriateness) test, it is not always the case that this stems from the implementation of a constitutional requirement.[1] For example, granting the seller a right to reject the form of supplementary performance chosen by the

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buyer to remedy a defect in a case of *disproportionate* expenses[2] is a decision the private law legislature has made free from constitutional constraint. For there is no constitutional obligation to subject this specific weighing of interests between buyer and seller to a proportionality test. In other cases, however, there is broad consensus that a proportionality test is constitutionally required also in private law constellations. For example, a private law provision limiting housing rents in order to achieve the political goal of preventing gentrification[3] (and thereby limiting landlords' right of property) must satisfy the constitutional proportionality test.[4]

This article endeavours to distinguish different structures of the constitutional proportionality test and to examine in which private law constellations they must be observed. To this end, the inquiry adopts an intra-disciplinary view, drawing parallels between the role of proportionality in public and private law.[5] The first part focuses on the distinction between different structures of the constitutional proportionality analysis and their theoretical foundation, especially in respect of fundamental rights.[6] The second part deals more specifically with private law and examines in which constellations the different manifestations of the principle of proportionality apply.

II. Different Structures of the Proportionality Test and their Theoretical Foundations

I will present three approaches to the proportionality test that can be assigned to different constellations in which the constitutional review of state acts is required. In principle, these approaches exist side-by-side, since they target

[1] Dieter Medicus, 'Der Grundsatz der Verhältnismäßigkeit im Privatrecht' (1992) 192 AcP 35, 40; Alexander Tischbirek, *Die Verhältnismäßigkeitsprüfung* (Mohr Siebeck 2016) 2–3.

[2] German Civil Code, s 439(4)(1); see also s 251(2)(1) 'disproportionate expenses', s 275(2)(1) 'grossly disproportionate', s 343(1)(1) 'disproportionately high'.

[3] See German Civil Code, s 556d–556g. The goal of preventing gentrification appears in the legislative materials, see Gesetzesentwurf Mietrechtsnovellierungsgesetzes, BT-Drucksache 18/3121, 11.

[4] For a detailed proportionality analysis of German Civil Code, s 556d(1), see BVerfG 18 July 2019, 1 BvL 1/18, [2019] NJW 3054, paras 59–89 (*Mietpreisbremse*).

[5] For a similar approach, see Tischbirek (n 1) 2.

[6] The observations are based on German constitutional law and are partly transposable to EU law, where the principle of proportionality is explicitly stipulated in art 52(1)(2) EU Charter of Fundamental Rights. For a comparison of proportionality and unreasonableness as standards of judicial review from a UK law perspective, with reference to the *Wednesbury*-test of reasonableness, see Paul Craig, 'Unreasonableness and Proportionality in UK Law' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999) 88–106.

different types of state measures, but they may also overlap or be combined when a measure has multiple purposes. The point here is not so much to critically evaluate these approaches to proportionality, but to explain them and thus provide a basis for putting them into a private law context. First, the classical vertical proportionality test will be addressed (1.). It applies in the bipolar relationship of state–citizen, in which fundamental rights serve as defensive rights. While there is broad agreement on the structure of this test, it is more difficult to determine a consistent approach to proportionality in constellations where the interests of private parties collide and the state assumes either a protective or an arbitral role, which is particularly frequent in private law. In this regard, I will shed light on two approaches that are discussed in academia and applied by the Federal Constitutional Court (*Bundesverfassungsgericht*). One approach ties in with the protective function of fundamental rights and focuses on assessing whether the state sufficiently fulfils its duties of protection towards private parties (2.). The other approach is less concerned with threats to fundamental rights by private parties than with constellations in which the state must mediate between equally legitimate interests of private parties (3.).

1. The Vertical Proportionality Test: Prohibition of Excess Regulation (Übermaßverbot)

Simply put, the constitutional proportionality principle can be understood as a consequence of two core features of liberal societies: the recognition and protection of individual constitutional rights and the appreciation that limitations on these rights are indispensable. Two types of necessary limitations of individual rights can be broadly distinguished:[7] The first are necessary to allow other citizens to exercise their own rights; the second include restrictions that are necessary for society to achieve goals of public interest.[8] In

[7] On the concept and types of limits of constitutional rights Robert Alexy, *A theory of constitutional rights* (Julian Rivers tr, OUP 2004) 178–192. Two basic concepts about the extent of constitutional rights can be distinguished: the *external* theory accepts that rights in legal systems appear mostly or exclusively as (relatively) limited rights; by contrast, in the *internal* theory the idea of a limitation on the extent of rights is replaced by a focus on the initial scope of these rights, which means that questions about the reach of a right are understood as questions not about the degree to which they can be limited but about their initial content. This article uses the *external* theory as a basis, which is generally also adopted by the Federal Constitutional Court; see eg with regard to the freedom of art BVerfG 13 June 2007, 1 BvR 1783/05, 119 BVerfGE 1, 23 (*Esra*); BVerfG 31 May 2016, 1 BvR 1585/13, 142 BVerfGE 74, 104 (*Sampling*).

[8] Similarly Aharon Barak, 'Proportionality and Principled Balancing' (2010) 4 Law & Ethics of Human Rights 1, 3–4. The public interest objectives to be pursued by law are principally determined by the legislature as the most democratically legitimized state organ, see BVerfG 17 July 1961, 1 BvL 44/55, 13 BVerfGE 97, 107.

German constitutional law, the latter type of limitation stands at the origin of the development of the proportionality principle. The starting point is the liberal political principle that any use of regulatory state power interfering with individual rights must not be disproportionate.[9]

a) Origins and constitutional basis

A first implementation and incremental structuring of this concept took place in the Prussian administrative law of the 19th century. On the basis of a provision of the General Prussian Land Law of 1794, which empowered the police to 'take the *necessary* measures for the maintenance of public peace, security and order',[10] the Prussian administrative courts developed a proportionality test setting a limitation on the exercise of police powers.[11] Combined with the requirement of a statutory basis for the exercise of state power (which specifies the public interests that the administration may pursue) the proportionality principle became a core characteristic of the rule of law principle.[12] That historical background still aptly reflects the classical role of the proportionality principle under the German Basic Law of 1949:[13] In a practical sense it is the most important limitation for state restrictions of fundamental rights.[14] An explicit mention of the principle in the German Basic Law was not considered necessary, as it was assumed that it follows from the logic of fundamental rights and the need to justify state interventions in the latter.[15]

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[9] Nicola Lacey, 'The Metaphor of Proportionality' (2016) 43 J Law Soc 27, 34.

[10] Section 10 title 17 pt II (emphasis added); German wording: 'Die nöthigen Anstalten zur Erhaltung der öffentlichen Ruhe, Sicherheit, und Ordnung, und zur Abwendung der dem Publico, oder einzelnen Mitgliedern desselben, bevorstehenden Gefahr zu treffen, ist das Amt der Polizey.'

[11] For more details, see Tischbirek (n 1) 8–10; Thorsten Kingreen and Ralf Poscher, *Polizei- und Ordnungsrecht* (11th edn, CH Beck 2020) sec 1 paras 12–13; M. Cohen-Eliya and I. Porat, 'American balancing and German proportionality: The historical origins' (2010) 8 Int'l J Const L 263, 271–273.

[12] Michael Sachs in Michael Sachs (ed), *Grundgesetz: Kommentar* (9th edn, CH Beck 2021) art 20 para 146; Cohen-Eliya and Porat (n 11) 271–272. The development of the proportionality principle is considered as marking the transition from the absolutistic and police state to the rule of law (*Rechtsstaat*), see Tischbirek (n 1) 10.

[13] The German Basic Law significantly strengthened the protection of fundamental rights in what constituted a clear rejection of the National Socialist dictatorship and the weak protection of fundamental rights under the Weimar Constitution of 1919. This strengthening is based particularly on the direct applicability of fundamental rights provided for in German Basic Law, art 1(3), and on the possibility for individuals to assert their violation in court. On this point, see Matthias Herdegen in Roman Herzog and others (eds), *Grundgesetz: Kommentar* (99th supp, CH Beck 2022) art 1(3) paras 7–9.

[14] Sachs (n 12) art 20 para 146; Ralf Poscher, *Grundrechte als Abwehrrechte: Reflexive Regelung rechtlich geordneter Freiheit* (Mohr Siebeck 2003) 325.

Its constitutional basis is widely seen in the idea of fundamental rights and in the rule of law principle.[16]

b) Fundamental rights as subjective defensive rights (status negativus)

The vertical proportionality test traditionally applies in the 'state versus citizen' relationship where fundamental rights fulfil their classical *defensive* function.[17] Defensive rights are rights of omission on the part of the addressee.[18] The individual's right of omission correlates with the state's duty not to infringe the right in question.[19] In the relationship of subordination between the state and the citizen,[20] the individual sphere of freedom enjoys a prima facie priority.[21] State interventions in fundamental rights are always subject to a justification requirement that includes the proportionality test. The latter aims to protect fundamental rights and – in a broader sense – all legally protected individual interests from state interference.[22] It should be clarified, however, that despite its function of protecting fundamental rights, the principle of proportionality also relativizes the idea of fundamental rights as ab-

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[15] Josef Isensee in Josef Isensee and Ferdinand Kirchhof (eds), *Handbuch des Staatsrechts*, vol 4 (3rd edn, CF Müller 2006) sec 71 para 63; BVerfG 15 December 1965, 1 BvR 513/65, 19 BVerfGE 342, 348–349.

[16] Bernd Grzeszick in Roman Herzog and others (eds), *Grundgesetz: Kommentar* (99th supp, CH Beck 2022) art 20 part VII para 110; Laura Clérico, *Die Struktur der Verhältnismäßigkeit* (Nomos 2001) 19–20 (with further references).

[17] Fundamental rights are primarily defensive rights of the individual which can be asserted against the state, BVerfG 15 January 1958, 1 BvR 400/51, 7 BVerfGE 198, 204: 'Ohne Zweifel sind die Grundrechte in erster Linie dazu bestimmt, die Freiheitssphäre des einzelnen vor Eingriffen der öffentlichen Gewalt zu sichern; sie sind Abwehrrechte des Bürgers gegen den Staat'; for details on the content of defensive rights, see Alexy (n 7) 122–125.

[18] Alexy (n 7) 122–125, 197.

[19] Alexy (n 7) 134, 136, 197, referring to the theory on logical connections between legal relationships as posited by Wesley N Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16, 28–33.

[20] The criterion of subordination is commonly used to separate public and private law, see Walter Leisner, 'Unterscheidung zwischen privatem und öffentlichem Recht' (2006) 61 JZ 869, 870–875, who concludes that a sharp demarcation of public and private law based on substantive questions is neither possible nor necessary.

[21] Clérico (n 16) 213–214 (on the prima facie priority of fundamental rights with regard to public goods).

[22] Sachs (n 12) art 20 para 146; Grzeszick (n 16) art 20 part VII para 110. This wider understanding, however, makes no major difference in practice, since the protected interests of individuals can usually be traced back to a fundamental right enshrined in the German Basic Law. In particular, the right to develop one's personality (German Basic Law, art 2(1)) is interpreted in a broad sense by the Federal Constitutional Court as encompassing a wide variety of individual activities, see BVerfG 23 May 1980, 2 BvR 854/79, 54 BVerfGE 143, 144; BVerfG 6 June 1989, 1 BvR 921/85, 80 BVerfGE 137, 152.

solutely protected rights since it serves to justify limitations on these rights by the state for legitimate purposes.[23]

From a functional perspective on law,[24] we can observe that the defensive function of fundamental rights is triggered primarily when the state uses law for regulatory purposes, ie as an instrument of behavioural steering designed to implement political goals of common interest.[25] This is because regulatory use of law is characterized by the subordination relationship already mentioned: the state (ie the legislature, the administration or a court) uses law to implement goals of common interest and thereby usually restricts individual freedom, eg by installing sanctions for behaviours that conflict with a policy goal. We can thus note that, in principle, the vertical proportionality test applies when a state actor enacts or applies law with a regulatory intent, regardless of the different subsystems of law (ie public, private and criminal law), as they are variable means used by the legislature in pursuit of its policy goals, which can be used separately or in combination.[26]

c) Structure of the vertical proportionality test

As an assessment tool[27] for regulatory state action, the vertical proportionality test consists of four steps: the interference with the individual sphere must serve a *legitimate end*, it must be capable of achieving the desired end (*suitable*), it must be the least restrictive means of doing so (*necessary*), and it must be justified given the 'cost' posed to the right in question (*proportionate in a*

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[23] Similarly, Cohen-Eliya and Porat (n 11) 284–285.

[24] The concept of functions of law is typically used in the sociology of law, see eg Manfred Rehbinder, *Rechtssoziologie* (8th edn, Beck 2014) 98–112; Karl N Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (1940) 49 Yale LJ 1355. For the purpose of this article, the functional perspective is useful because it helps to adopt an intra-disciplinary approach on the issue of proportionality.

[25] For details of this definition of the regulatory function of law, see Alexander Hellgardt, *Regulierung und Privatrecht* (Mohr Siebeck 2016) 50–55; for a broader definition of regulation, including other regulatory means and non-governmental regulatory actors, see eg Julia Black, 'Constitutionalising Regulatory Governance Systems' [2021] LSE Law, Society and Economy Working Papers, 4: 'Regulation […] is understood here as a series of intentional, sustained and focused attempts to change the behaviour of others in order to pursue a collective purpose, using a range of techniques which often, but not always, include a combination of rules or norms and some means for their implementation and enforcement.'

[26] For example, the European as well as the German legislature uses public, criminal, and private law in parallel to achieve environmental (or sustainability) goals; on this Alexander Hellgardt and Victor Jouannaud, 'Nachhaltigkeitsziele und Privatrecht' (2022) 222 AcP 163, 171–182.

[27] Christoph Engel, 'The Constitutional Court – applying the proportionality principle – as a subsidiary authority for the assessment of political outcomes' 1, 3 <http://papers.ssrn.com/abstract=296367> accessed 10 November 2022.

narrow sense or *adequate*).[28] The non-satisfaction of these cumulatively applying sub-tests leads to the illegality of the state action in question. Then, there is not only an encroachment of a fundamental right but an unconstitutional violation of it.

An important characteristic of this analysis – which distinguishes it from a mere balancing of two equal legal positions (of private parties) – is its specific relational 'end-means' structure, tailored to the bipolar relationship of state versus citizen.[29] The means deployed by the state to pursue a policy goal must be proportionate with regard to the affected individual rights. The test starts by identifying the *legitimate end* the state pursues with its regulatory policy.[30] The following subtests in the proportionality analysis are based on the legitimate end first defined.[31] A distinction can be made between ends that derive directly from the constitution[32] and ends that are not constitutionally predefined but discretionarily determined and concretized by the legislature. This differentiation between 'absolute' and 'relative' public interests[33] is useful for the fourth step of the proportionality test which requires a balancing of the importance of the public interest pursued (and the probability of achieving it) and the degree of the infringement of fundamental rights. Ends deriving directly from the constitution typically have more weight in the proportionality analysis than purposes the legislature discretionarily puts on its political agenda.[34]

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[28] Peter Lerche, *Übermaß und Verfassungsrecht* (2nd edn, Keip 1999) 19–23; Clérico (n 16) 18–19; see also BVerfG 11 June 1958, 1 BvR 596/56, 7 BVerfGE, 377, 407–413 (*Apotheke*).

[29] Lerche (n 28) 22; Gunnar F Schuppert, *Funktionell-rechtliche Grenzen der Verfassungsinterpretation* (Athenäum 1980) 39–40; on the relational structure of the proportionality test, see Poscher (n 14) 326.

[30] For details on the characteristics of the 'legitimate end' as a key element of the proportionality test, see Christoph Engel, 'Das legitime Ziel als Element des Übermaßverbots' in Winfried Brugger, Michael Anderheiden and Stephan Kirste (eds), *Gemeinwohl in Deutschland, Europa und der Welt* (Nomos 2002) 108–163.

[31] Tischbirek (n 1) 2.

[32] Eg the promotion of gender equality or environmental protection (German Basic Law, art 3(2)(2), art 20a).

[33] See BVerfG 17 July 1961, BvL 44/55, 13 BVerfGE 97, 107; Eberhard Grabitz, 'Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts' (1973) 98 AöR 568, 602–603.

[34] The Federal Constitutional Court generally holds that fundamental rights which are drafted in absolute terms (ie not accompanied by an authorization of statutory restrictions) can be limited when the state act aims to promote another constitutional value, see eg BVerfG 11 April 1972, 2 BvR 75/71, 33 BVerfGE 23, 29.

2. The Prohibition of Insufficient Protection (Untermaßverbot) as a Standard for Assessing a State's Duties to Protect Fundamental Rights

Modifications of the vertical proportionality test are suggested when assessing whether the state sufficiently fulfils its duties to protect in a situation of conflict between private parties.

a) Fundamental rights as entitlements (status positivus)

The state' s duties to protect[35] reveal the entitlement function of fundamental rights: citizens have a right requiring the state to actively protect them, especially from violations of third parties.[36] The right to claim protective measures from the state necessarily follows from the state's monopoly on the use of force and the broad abandonment of rights to effective self-help.[37] It has a subjective content,[38] although the Federal Constitutional Court often refers to fundamental rights as *objective norms* when it comes to state's duties of protection.[39] Still, it is important to stress that the duties to protect which derive from fundamental rights are addressed to the state and do not directly grant any claims among private parties.[40] However, since the values associated with fundamental rights must be reflected in the protective provisions set by the legislature (eg tortious damages, claims for removal and injunction) as well as in their interpretation and application by the courts, there is a mediated[41] effect of fundamental rights in the relationship between private parties (*mittelbare Drittwirkung*).[42]

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[35] For details regarding the development and the constitutional foundations of the state's duties to protect, see Josef Isensee in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts*, vol 9 (3rd edn, CF Müller 2011) sec 191, para 11, 146–172; on duties to protect in the context of private law, Claus-Wilhelm Canaris, *Grundrechte und Privatrecht* (de Gruyter 1999) 37–51; in the context of European private law, see eg Case C-131/12 *Google Spain SL, Google Inc v Agencia Española de Protección de Datos [AEPD], Mario Costeja González* [2014] ECLI:EU:C:2014:317, paras 68–74.

[36] BVerfG 25 February 1975, 1 BvF 1/74, 39 BVerfGE 1, 42; Alexy (n 7) 300. The duties to protect also apply in cases of general emergencies such as natural disasters or war, see Poscher (n 14) 382.

[37] Alexy (n 7) 303–304; Christian Calliess, 'Die grundrechtliche Schutzpflicht im mehrpoligen Verfassungsrechtsverhältnis' (2006) 61 JZ 321, 321, 326.

[38] Alexy (n 7) 301–304; BVerfG 24 March 2021, 1 BvR 2656/18, 157 BVerfGE 30 para 145.

[39] Eg BVerfG 25 February 1975, 1 BvF 1/74, 39 BVerfGE 1, 41; BVerfG 8 August 1978, 2 BvL 8/77, 49 BVerfGE 89, 140. The understanding of fundamental rights as objective norms indicates primarily that their values must be taken into account comprehensively, ie in every subsystem of law and by all state organs.

[40] Isensee (n 35) sec 191 para 3; Canaris, *Grundrechte und Privatrecht* (n 35) 38.

[41] The horizontal or third-party effect of fundamental rights in private law is commonly referred to as 'indirect' or 'mediated', since the fundamental rights directly bind only state

b) The prohibition of insufficient protection as the standard of review (Untermaßverbot)

The entitlement dimension of fundamental rights poses difficulties regarding its implementation and justiciability.[43] In contrast to the defensive dimension, which grants rights of omission, it is less determined, since there are various ways in which protection can be provided.[44] The state has a wide scope in choosing means of protection, unless effective protection can be achieved by only one means;[45] how to ensure the adequate level of protection is primarily left to the discretion of the legislature.[46] This wider discretion is one reason to question whether the rather strict vertical proportionality test – tailored to state interventions – is suited to assess the adequacy of protective measures adopted by the state.[47] Also, the legal consequences of the vertical proportionality test, which aim at an omission by the state or a milder intervention, do not quite fit when private parties ask for adequate protection by the state. Moreover, fulfilment of the state's duties to protect in conflicts between private parties raises the problem that protective measures in favour of the 'victim' generally interfere with (defensive) rights of the 'offender'.[48] In such triangular relationships (victim–state–offender),[49] whether a measure is to be classified as protection or intervention depends on one's perspective.[50] Thus, a combination of different

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organs and not private parties, as art 1(3) German Basic Law clarifies: 'The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.' The Federal Constitutional Court also adopts a so-called 'radiation' doctrine, meaning that the objective values incarnated in the fundamental rights radiate into private relationships especially via the civil courts' interpretation of statutes, in particular general clauses, BVerfG, 15 January 1958, 1 BvR 400/51, 7 BVerfGE, 198, 207 (*Lüth*); BVerfG 11 April 2018, 1 BvR 3080/09, 148 BVerfGE 267 paras 30–32.

[42] Claus-Wilhelm Canaris, 'Grundrechtswirkungen und Verhältnismäßigkeitsprinzip' [1989] JuS 161, 163; Canaris, *Grundrechte und Privatrecht* (n 35) 44–45.

[43] On this point, see Alexy (n 7) 308–314.

[44] Alexy (n 7) 308–309.

[45] BVerfG 25 February 1975, 1 BvF 1/74, 39 BVerfGE 1, 46–47.

[46] BVerfG 28 May 1993, 2 BvF 2/90, 88 BVerfGE 203, 261–262; BVerfG 6 May 1997, 1 BvR 409/90, 96 BVerfGE 56, 64; Calliess (n 37) 328.

[47] Canaris, 'Grundrechtswirkungen und Verhältnismäßigkeitsprinzip' (n 42) 163.

[48] BVerfG 28 May 1993, 2 BvF 2/90, 88 BVerfGE 203, 340 (dissenting opinion of judges Mahrenholz and Sommer); see also Canaris, 'Grundrechtswirkungen und Verhältnismäßigkeitsprinzip' (n 42) 163; Rainer Wahl and Johannes Masing, 'Schutz durch Eingriff' (1990) 45 JZ 553, 556–557. The collision puts the state in a dilemma since it must simultaneously respect the protective and defensive function of fundamental rights, Josef Isensee, *Das Grundrecht auf Sicherheit* (de Gruyter 1983) 44; Calliess (n 37) 326.

[49] The terminology is used, for instance, by Matthias Ruffert, *Vorrang der Verfassung und Eigenständigkeit des Privatrechts* (Mohr Siebeck 2001) 202; Calliess (n 37) 326.

[50] Johannes Hager, 'Grundrechte im Privatrecht' (1994) 49 JZ 373, 381.

proportionality standards seems necessary, reflecting both the protective as well as the interfering nature of the state measure in question.

With regard to a private party claiming protective measures by the state (ie claims brought by the 'victim'), Claus-Wilhelm Canaris developed the prohibition on insufficient protection as legal standard (*Untermaßverbot*),[51] which the Federal Constitutional Court applied rarely.[52] The Court specified that the measures (taken by the legislature) must be sufficient to ensure *appropriate* and *effective* protection and be based on a careful analysis of facts and tenable assessments.[53] Canaris suggests that the constitutional 'rank' of the individual position to be protected, the intensity of the threat and the ability to protect one's own interests without state involvement should be considered.[54] He also invokes the concept of a 'core content' of rights as an absolute minimum that the protective measures must not fall below (eg the protection of intimacy as the core of the right of personality).[55] However, the prohibition of insufficient protection as a standard of review remains less structured and less precise than the classical proportionality test. A clear distinction between effective and ineffective means will often not be possible, rather, there will be a choice between means having different degrees of effectiveness.[56] This raises the controversial question of how far (constitutional) courts may interfere with the legislature's right to determine protective measures and thus with its democratic legitimacy.[57] Furthermore, a ranking between the fundamental rights positions involved in a private conflict is – at least on an abstract level – difficult to determine, since the German Basic Law does not provide for a general hierarchy of fundamental rights norms.[58] Rather, a balancing of the colliding interests, taking into account the specific circumstances of the case, is indis-

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[51] Claus-Wilhelm Canaris, 'Grundrechte und Privatrecht' (1984) 184 AcP 201, 228; Canaris, 'Grundrechtswirkungen und Verhältnismäßigkeitsprinzip' (n 42) 163; Canaris, *Grundrechte und Privatrecht* (n 35) 43–47.

[52] Eg BVerfG 28 May 1993, 2 BvF 2/90, 88 BVerfGE 203, 254–255, 257, 262; the Court usually describes its minimum review standard as follows: it will find a violation of duties to protect 'if no precautionary measures whatsoever have been taken, or if the adopted provisions and measures prove to be manifestly unsuitable or completely inadequate for achieving the required protection goal, or if the provisions and measures fall significantly short of the protection goal', BVerfG 24 March 2021, 1 BvR 2656/18, 157 BVerfGE 30 para 152.

[53] BVerfG 28 May 1993, 2 BvF 2/90, 88 BVerfGE 203, 254.

[54] Canaris, 'Grundrechtswirkungen und Verhältnismäßigkeitsprinzip' (n 42) 163.

[55] Canaris, 'Grundrechtswirkungen und Verhältnismäßigkeitsprinzip' (n 42) 163, 171.

[56] Alexy (n 7) 309–310.

[57] On competence problems related to constitutional review of legislative decisions, see eg Schuppert (n 29).

[58] Christian Bumke, *Der Grundrechtsvorbehalt* (Nomos 1998) 165; Ruffert (n 49) 206; Fritz Ossenbühl, 'Versammlungsfreiheit und Spontandemonstration' (1971) 10 Der Staat 53, 77–80.

pensable.[59] In view of these uncertainties, the prohibition of insufficient protection as a standard of review is controversial, and some scholars argue for adherence to the vertical proportionality test only, which would mean to focus on assessing whether the state's protective measures are not excessive with respect to the offender's fundamental rights.[60]

Another concern, which can only shortly be addressed here, is related to the fact that the application of different review standards with regard to protective state measures (prohibition of insufficient protection) and interfering state acts (vertical proportionality test) can lead to an asymmetry between competing positions of fundamental right-holders. For example, if a different review standard applies depending on whether a civil court's judgment is a conviction (active intervention) or a dismissal of a case (omission of protection),[61] the private party claiming a protective measure would systematically have a weaker position than the one arguing against it.[62] Canaris justifies this asymmetry with the liberal idea of a 'primacy of society over the state' (*in dubio pro libertate*): citizens' interactions should in principle be free from state intervention; the latter should remain the exception requiring justification, even if the intervention serves a protective purpose.[63]

3. The Horizontal Proportionality Test: Balancing-Proportionality

The proportionality test, described here as horizontal, also applies in triangular relationships, opposing two fundamental right-holders. However, the fine distinction to constellations discussed above, in which the state's duty to

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[59] Bumke (n 58) 165; Ossenbühl (n 58) 80; accordingly, the review of the state's protection efforts is sometimes referred to as a 'balancing-proportionality' (*Angemessenheits-Verhältnismäßigkeit*) in legal scholarship, see Ernst-Wolfgang Böckenförde, 'Grundrechte als Grundsatznormen' (1990) 29 Der Staat 1, 20; Medicus (n 1) 53; see also Ruffert (n 49) 205–206.

[60] In this direction, Reinhard Singer, 'Grundrechte im Privatrecht: Eingriffsverbote, Schutzgebote und Teilhaberechte' in Gregor Bachmann and others (eds), *Festschrift für Christine Windbichler* (de Gruyter 2020) 147–148; see also Lerche (n 28) 134–135; Bumke (n 58) 78.

[61] For this approach, see Canaris, *Grundrechte und Privatrecht* (n 35) 37–43; critical Fabian Michl, 'Die Bedeutung der Grundrechte im Privatrecht' (2017) 39 JURA 1062, 1066–1067.

[62] Critical Thorsten Kingreen and Ralf Poscher, *Grundrechte: Staatsrecht II* (35th edn, CF Müller 2019) 50–51: 'Derjenige, der sich in Dreieckskonstellationen auf ein Abwehrrecht berufen kann, hat eine stärkere grundrechtliche Position als derjenige, dem lediglich die Schutzpflicht zur Seite steht.'

[63] Canaris, *Grundrechte und Privatrecht* (n 35) 47; similarly, Wahl and Masing (n 48) 559. For criticism regarding this asymmetry, see eg Hager (n 50) 381; Calliess (n 37) 326–327; Singer (n 60) 147–148; Jörg Neuner, 'Pro libertate? Zur Freiheitsbegründung durch Recht und Methodik' [2022] ZfPW 257 generally questions the concept of *in dubio pro libertate* in private law.

protect is triggered, is that the roles of victim and offender are not clearly defined here.[64] The conflicting interests are instead equally legitimate[65] and require a neutral balancing by the state, since there is no prima facia priority that subjects one position to a greater justification constraint than the other.[66] This is typical for contractual disputes, where civil courts are asked to find the balance of interests that comes closest to the parties' intent. Here, the state is confronted with a conflict between private parties whose legitimate interests are backed by fundamental rights which must be balanced according to the principle of practical concordance in such a way that they are as effective as possible for all affected parties.[67]

In such multipolar constellations (citizen–state–citizen), fundamental rights do not apply in terms of their defensive dimension[68] but as entitlements to an objective conflict-resolution by the state, which acts as an arbitrator.[69] The law fulfils the function of balancing private interests, which is traditionally considered as the main task of private law.[70] In contrast to the regulatory function of law, here the main purpose of state action is not the pursuit of an overarching public interest, but to establish an adequate balance between the colliding individual interests. A one-dimensional ends-means relationship, as is characteristic for the vertical proportionality test, is thus not present.[71] The

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[64] See eg BVerfG 9 February 1994, 1 BvR 1687/92, 90 BVerfGE 27, 33–34 (*Parabolantenne*); Andreas Voßkuhle, 'Zur Einwirkung der Verfassung auf das Zivilrecht' in Alexander Bruns and others (eds), *Festschrift für Rolf Stürner*, vol 1 (Mohr Siebeck 2013) 87–88 (regarding the balancing of contractual rights and obligations).

[65] In particular, the acts at issue are not clearly illegal (*rechtswidrig*) under the applicable law, such as, for instance, the violation of a right protected under German Civil Code, s 823(1).

[66] See Clérico (n 16) 214 with fn 813, who rightly points out, however, that there might be a greater burden of persuasion one side.

[67] BVerfG 23 October 2013, 1 BvR 1842/11, 134 BVerfGE 204, 223 para 68.

[68] See BVerfG 23 October 2013, 1 BvR 1842/11, 134 BVerfGE 204 para 68: 'This is not a matter of unilateral interference by the state in one party's exercise of freedom, but rather one of balance intended to reconcile the freedom of one party with the freedom of the other'; a similar differentiation between two-dimensional and multi-dimensional liberty problems is made by Schuppert (n 29) 39–41.

[69] The terminology of 'arbitrator' (*Schiedsrichter*) is used in BVerfG 15 June 1971, 1 BvR 192/70, 31 BVerfGE 194, 210; see also Ruffert (n 49) 132. If the state – namely a civil court – finds a conflict of interests between private parties which results from their deliberate cooperation, it places itself to some extent at the service of them.

[70] For details on this function of law and its distinction from regulation, see Hellgardt (n 25) 59–62.

[71] Lerche (n 28) 152 describes that norms resolving a collision of fundamental rights infringe upon both affected individual spheres, so that the proportionality test must be applied from two sides: 'Die Normen, die diese Konkurrenzverhältnisse auflösen sollen […] sind durch die Grundsätze des Übermaßverbots nicht einseitig gesteuert; sie werden von beiden Eckpunkten her gespannt'; see also Schuppert (n 29) 41; Bumke (n 58) 82 fn 276.

state's arbitrating act must include the positions of two (or more) affected fundamental right-holders and strive for an adequate balance between them.[72] To this end, it seems most appropriate to focus on a pure *balancing-proportionality*.[73] In fundamental rights theory, that approach corresponds closely to Robert Alexys' understanding of rights as principles, ie optimization requirements.[74]

The internal structure of this balancing test can be described only in a rudimentary way here:[75] First, the authority performing the balancing must identify the involved fundamental rights. Second, it must specify their core content,[76] which must not be affected by the outcome of the balancing.[77] Finally, a balance must be found within the framework set out by the identified core areas of the fundamental rights in such way that they are as effective as possible for all affected parties (practical concordance).[78] There is a broad scope of discretion in finding the 'right' balance, but it must not lead to subordinating the interests of one side to the interests of the other in a way that a reasonable balance is no longer given.[79] If the legislature delegates the balancing exercise to courts (or administrative authorities), eg by using general clauses, it is essential for them to transparently present the aspects guiding their decision, as this contributes significantly to a rationalization of the balancing process.[80] The criticism of the doctrine of balancing, which points especially at its lack of rationalism,[81] cannot be further discussed here.[82] It

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[72] BVerfG 23 October 2013, 1 BvR 1842/11, 134 BVerfGE 204 para 69; BVerfG 31 May 2016, 1 BvR 1585/13, 142 BVerfGE 74 para 71.

[73] Similarly, Medicus (n 1) 60; Hellgardt (n 25) 285; this approach appears also in the Federal Constitutional Court's case law on collisions between fundamental rights, see the decisions cited above in nn 64, 68; BVerfG 14 March 2006, 1 BvR 2087/03, 115 BVerfGE 205, 232–236.

[74] Alexy (n 7) 67: 'the principle of proportionality in its narrow sense can be deduced from the character of constitutional rights as principles'.

[75] With further details, Hellgardt (n 25) 284–286.

[76] BVerfG 24 February 1971, 1 BvR 438/68, 30, BVerfGE 227, 241 (on freedom of association); BVerfG 22 November 1994, 1 BvR 351/91, 91 BVerfGE 294, 308 (on property).

[77] See Hellgardt (n 25) 284–285 with further references.

[78] BVerfG 19 October 1993, 1 BvR 567/89, 89 BVerfGE 214, 232; BVerfG 27 January 1998, 1 BvL 15/87, 97 BVerfGE 169, 176; BVerfG 23 October 2013, 1 BvR 1842/11, 134 BVerfGE 204 para 68.

[79] BVerfG 27 January 1998, 1 BvL 15/87, 97 BVerfGE 169, 176–177; BVerfG 23 October 2013, 1 BvR 1842/11, 134 BVerfGE 204 para 70. The Federal Constitutional Court usually limits its review to scrutiny in terms of reasonability or evidence, leaving the legislature or the courts with discretion on how to weigh the involved private interests.

[80] BVerfG 14 March 2006, 1 BvR 2087/03, 1 BvR 2111/03, 115 BVerfGE 205, 236.

[81] Eg BVerfG 24 April 1985, 2 BvF 2/83, 69 BVerfGE 1, 63–64 (dissenting opinion of judges Böckenförde and Mahrenholz).

[82] For a theoretical view on strengths and weaknesses of the doctrine of balancing, see Matthias Jestaedt, 'The Doctrine of Balancing – its Strenghts and Weaknesses' in Matthias

should only be noted that a superior approach to balancing has not yet become apparent and that a structured balancing test can certainly promote rational decision-making.[83]

III. Application in Private Law

In the text that follows, I will look at the above-mentioned structures of the proportionality test from a private law perspective. For this purpose, it is essential to distinguish between law set by the state and the acts of private individuals and entities, especially actions through which private parties create legal consequences by virtue of their free will.[84]

1. Exercise of State Power in Private Law

As in other branches of law, the exercise of state power is (directly) bound by fundamental rights in private law as well (German Basic Law, art 1(3)).[85] Consequently, state actors must justify their conduct under the constitutional proportionality test, and their acts may also be reviewed in this regard by the Federal Constitutional Court. Yet not every exercise of state power by means of private law affects fundamental rights in the same way. As mentioned before, a functional perspective on the state's use of (private) law can help to clarify in which dimension fundamental rights are affected[86] and, accordingly, which version of the proportionality test applies. A rough dividing line can be drawn between the use of private law for regulatory purposes and its conciliatory function in balancing private interests.

a) The state's regulatory use of private law: adequacy of the vertical proportionality test

At first sight, the vertical proportionality test does not seem to suit private law, which is traditionally characterized by relationships between fundamental rights holders and by the absence of unilateral state intervention.[87] However, it has more recently been acknowledged in legal scholarship that private

Klatt (ed), *Institutionalized reason: The jurisprudence of Robert Alexy* (OUP 2012); on balancing with regard to private law constellations, Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft* (3rd edn, Springer 1995) 223–232.

[83] For a structured approach to balancing (ie proportionality in a narrow sense), see eg Alexy (n 7) 50–56; Clérico (n 16) 164–199.

[84] Similarly differentiating, Medicus (n 1) 59–62.

[85] Canaris, 'Grundrechtswirkungen und Verhältnismäßigkeitsprinzip' (n 42) 161; Canaris, *Grundrechte und Privatrecht* (n 35) 16, 24.

[86] See the approach of Hellgardt (n 25) 277–288.

[87] Tischbirek (n 1) 11.

law does not only fulfil a conciliatory and a freedom-enhancing function, but that it is also used by the state as an instrument of behavioural steering designed to implement policy aims of common interest.[88] In that case, means of private law can have similarly intrusive effects on fundamental rights as means of administrative (or even criminal) law.[89] For example, in competition law, sanctions imposed by a state authority (eg injunctions, fines) against undesirable market conduct do not per se imply more intensive interference with fundamental rights than a competitor's claim for injunctive relief and damages.[90] The legislature uses both means, ie public and private enforcement, to prevent anti-competitive behaviour effectively.[91]

When private law primarily fulfils a regulatory function by instrumentalizing individual legal positions to pursue public interests, the constitutional proportionality test applies in its classical vertical structure,[92] for its use in both legislative and judicial private law arenas. It is based on the public interest goal (ie the legitimate end) that the state pursues by means of private law.[93] The regulatory means must be suitable and necessary to achieve this goal and adequate with regard to the infringement of the fundamental rights at stake. Although two private parties are affected in such constellations, the proportionality test has a unilateral ends-means structure: it focuses on the regulatory goal pursued and the interference with fundamental rights and does not need to consider the benefits that accrue to one private party merely

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[88] See Hellgardt (n 25); Jens-Uwe Franck, *Marktordnung durch Haftung* (Mohr Siebeck 2016); Gerhard Wagner, 'Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe?' (2006) 206 AcP 352; on the regulatory function of private law and how it overlaps with public law Eberhad Schmidt-Aßmann, 'Öffentliches Recht und Privatrecht: Ihre Funktionen als wechselseitige Auffangordnungen' in Wolfgang Hoffmann-Riem and Eberhard Schmidt-Aßmann (eds), *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen* (Nomos 1996) 12–23; Christian Kirchner, 'Regulierung durch öffentliches Recht und/oder Privatrecht aus Sicht der ökonomischen Theorie des Rechts' in Wolfgang Hoffmann-Riem and Eberhard Schmidt-Aßmann (eds), *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen* (Nomos 1996) 65–71.

[89] Hellgardt (n 25) 301; see also Voßkuhle (n 64) 82–83.

[90] Franck (n 88) 33–34.

[91] Especially in European law, private enforcement plays an important role in in competition and antitrust violations. With regard to policy goals pursued in EU law, the Member States are frequently free to choose between private and public enforcement as long as the established enforcement mechanisms are effective, deterrent and proportionate, see Case C-882/19 *Sumal SL v Mercedes Benz Trucks España SL* [2021] ECLI:EU:C2021:800, paras 37–38.

[92] For more details, Hellgardt (n 25) 301–313; see also Poscher (n 14) 326–328; Christoph Engel, 'Zivilrecht als Fortsetzung des Wirtschaftsrechts mit anderen Mitteln' (1995) 50 JZ 213, 218.

[93] Hellgardt (n 25) 302.

attendant to the pursuit of the regulatory objective.[94] Two examples may clarify this approach.

(1) Tort law: proportionality of regulatory deterrence through private liability

It is widely acknowledged nowadays that tort law has a regulatory function in addition to its compensatory one.[95] The main focus here is on the preventive effect of private liability: the threat of liability and the establishment of specific duties of care can reduce the occurrence of damages or norm violations by deterring private individuals or firms from engaging in the conduct threatened with sanctions.[96] The preventive effect following from a statutory norm or a standard developed by courts awarding monetary compensation, restricts the freedom of those whom the sanction can potentially affect.[97] Consequently, the preventive measure in the form of private liability must fulfil the vertical constitutional proportionality test, ie not be excessive.[98] The stronger the intended preventive effect, the more exacting the requirement of justification on the part of the state.[99] For instance, fault-based liability (*Verschuldenshaftung*) generally has a lower preventive effect than strict liability (*Gefährdungshaftung*),[100] so that the legislature must make greater efforts to

[94] Hellgardt (n 25) 314–315.

[95] Wagner (n 88) 454–471; Hellgardt (n 25) 159–161; see also Claus-Wilhelm Canaris, 'Verstöße gegen das verfassungsrechtliche Übermaßverbot im Recht der Geschäftsfähigkeit und im Schadensersatzrecht' (1987) 42 JZ 993, 1001 (emphasizing the compensatory function). If the focus is specifically on the proportionality of *compensation*, without referring to a preventive effect, the standard for prohibiting insufficient protection or the horizontal proportionality test is better suited than the vertical test. Thus, it is necessary to identify the purpose of the state measure to be assessed and choose the adequate proportionality test accordingly and/or perform them separately. Compensation and regulatory prevention do not necessarily run parallel, a characterization most accurate precisely when monetary compensation based on concrete damages fails to provide the desired deterrent effect (eg in the case of immaterial damages, scattered damages or lucrative torts). In such cases, the legislature or a court may frame liability in a specific way to promote its intended deterrent effect. Then, the vertical proportionality test applies.

[96] Wagner (n 88) 454; for an economic analysis of tort law, see eg Steven Shavell, *Foundations of Economic Analysis of Law* (HUP 2009) 177–223; Hans-Bernd Schäfer and Claus Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (6th edn, Springer Gabler 2021) 201–267.

[97] BVerfG 13 May 1980, 1 BvR 103/77, 54 BVerfGE 129, 136.

[98] Canaris, 'Verstöße gegen das verfassungsrechtliche Übermaßverbot' (n 95) 995–996.

[99] Similarly, BVerfG 27 November 1990, 1 BvR 402/87, 83 BVerfGE 130, 145–146 (*Mutzenbacher*), regarding the state indexing of a pornographic novel.

[100] Shavell (n 96) 196–198; Schäfer and Ott (n 96) 257–259. This is because strict liability applies regardless of the level of care exercised by private parties. It may have the effect of generally reducing the level of a particular activity, since there is no way to avoid

justify the choice of the latter with regard to the proportionality review.[101] Especially with regard to the *necessity* of the regulatory instrument, it will have to be shown why the policy goal cannot be pursued just as effectively by using fault-based liability as a milder means.[102] Finally, an introduction of punitive damages (based on the US model) would require particularly high justification efforts with regard to the principle of proportionality.[103] Of course, punitive damages may be a useful regulatory tool since they can unfold a strong deterrent effect.[104] However, it is questionable whether they are a *necessary* means, in the sense of being more efficient and less intrusive than means of public or criminal law. In any case, they can only be considered for the pursuit of particularly important public interests, especially the protection of fundamental rights or constitutionally protected public goods.

(2) Contract law: proportionality of regulatory limitations on contractual freedom

Freedom of contract[105] is frequently restricted by the legislature and/or through the application of legal provisions by courts so as to pursue specific policy goals.[106] Both negative and positive freedom of contract can be re-

liability through precautionary measures. Note, however, that a strictly designed fault-based liability rule can have similar effects.

[101] Similarly, Hellgardt (n 25) 306–307. In detail, further differentiation may be necessary to assess how intensely liability rules affect fundamental rights. A strictly applied fault-based liability rule also interferes with freedom rights and may, in some cases, require greater justification efforts than a strict liability rule due to a stigmatizing effect.

[102] For some purposes, a strict liability rule will clearly be more effective, eg where the level of dangerous conduct associated with a certain activity should generally be reduced and/or if an insurance system is to be generally implemented in connection with accidents associated with a specific activity, eg for car accidents (*Straßenverkehrsgesetz*, s 7 in conjunction with *Pflichtversicherungsgesetz*, s 1); see Hellgardt (n 25) 307.

[103] In BGH 4 June 1992, IX ZR 149/91, 118 BGHZ 312, 335, 338–345, the court held that punitive damages violate German *ordre public* and insofar declined to declare a US judgment enforceable. In particular, the court assumed a violation of the principle of proportionality (343–344). The Federal Constitutional Court did not, however, confirm that punitive damages violate compulsory constitutional principles per se, BVerfG 7 December 1994, 1 BvR 1279/94, 91 BVerfGE 335, 344.

[104] On the functions of punitive damages, BVerfG 7 December 1994, 1 BvR 1279/94, 91 BVerfGE 335, 343–344; BGH 4 June 1992, IX ZR 149/91, 118 BGHZ 312, 335, 339.

[105] Freedom of contract is basically protected by art 2(1) German Basic Law as an aspect of private autonomy. However, the concrete activity with which a contract is associated often enjoys special protection on account of a more specific fundamental right, eg under art 12(1) German Basic Law in a professional context or under art 14(1) German Basic Law where property is affected, see BVerfG 23 October 2013, 1 BvR 1842/11, 134 BVerfGE 204 para 67; for further details, see Wolfram Höfling, *Vertragsfreiheit* (Müller 1991) 4–19.

[106] Hellgardt (n 25) 291–293.

stricted for regulatory purposes. For example, the legislature and judiciary use different instruments to inhibit undesirable business. Thus, certain contractual content that the legislature (or a civil court) deems incompatible with the public interest is prohibited, ie sanctioned by voidness[107] (German Civil Code, s 134 in conjunction with a statutory prohibition or s 138(1)); examples here include agreements over undeclared work[108] or contracts on obtaining a public office or academic title in exchange for renumeration.[109] In these examples, the public interest pursued by the legislature and the courts is to effectively combat undeclared work (not only by means of public offenses law[110] but also by private law) or to protect the reputation and meaning of titles and to prevent the impairment of the functioning of public offices.

A complementary deterrent effect can be achieved if courts combine voidness with the exclusion of any further claims based on unjust enrichment once performances have already been exchanged. An example can be found in the case law on credit agreements which provide for an excessive interest rate and therefore are void according to s 138(1) German Civil Code: civil courts adjust the lender's restitution claim on the basis of s 817(2) German Civil Code in such a way that the borrower has to make restitution only for the loan sum but not interest, thereby deterring lenders from offering usurious loans in the future.[111] Here, the proportionality test must consider the end of preventing usurious loans and the sanction in form of obliging the lender to grant an interest-free loan. In another setting, the civil courts rejected the claims of an undeclared worker on the grounds of unjust enrichment by applying s 817(2) German Civil Code and explicitly justified this with the objective of general deterrence.[112] The vertical proportionality test must thus focus on the end of combatting undeclared work and the sanction imposed on the worker, ie not allowing any claims against the client.

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[107] Besides voidness, other regulatory means are of course applied in contract law, eg judicial review of standard business terms (German Civil Code, s 307), judicial contract adaptions on the basis of German Civil Code, ss 242 or 313(1), or disclosure duties in B2C contracts and corresponding rights of consumers to withdraw from contracts if these duties are not complied with (German Civil Code, ss 312–312m).

[108] German Civil Code, s 134 in conjunction with s 1(2) Nr. 2 of the Act on combatting undeclared work (*Schwarzarbeiterbekämpfungsgesetz* – SchwarzArbG); BGH 10 April 2014, VII ZR 241/13, 201 BGHZ 1, 4.

[109] German Civil Code, s 138(1); BGH 5 October 1993, XI ZR 200/92 (KG), [1994] NJW 187, 187–188.

[110] See s 8 SchwarzArbG.

[111] RG 30 June 1939, V 50/38, 161 RGZ (GS) 52, 56–58 (the Reichsgericht explicitly mentioned the 'penal' character of Germane Civil Code, s 817(2)); BGH 15 January 1987, III ZR 217/85, 99 BGHZ 33, 338–339; for more details, see Wagner (n 88) 367–368.

[112] BGH 10 April 2014, VII ZR 241/13, 201 BGHZ 1, 8–9.

Statutory restrictions typically infringe the freedom of contract of both parties,[113] albeit often with varying degrees of intensity. Therefore, it may be necessary to apply multiple proportionality tests that are specific to the concrete restrictions for certain individuals or groups of individuals. Often, the interference with one party's fundamental rights will be more intense because contract law, as a regulatory tool, typically works by strengthening or weakening one party's legal position so as to incentivize it to act in a way that promotes the regulatory goal. For example, an owner's right to raise rents (protected by his right of property) is limited in areas threatened by severe gentrification, this being done to prevent further rental rate increases in the area (German Civil Code, s 556d(1)).[114] Correspondingly, the tenant's rights are strengthened in such a way that she can contest prohibited rent increases and reclaim overpaid amounts.[115] Thus, even though the rent cap restricts the freedom of contract of both the tenant and the owner, the restriction is clearly more severe for the latter, such that the vertical proportionality test demands greater attention here. An example, where the tenant's rights are weakened for regulatory purposes can be found in s 536(1a) German Civil Code, which excludes a tenant's right to reduce rent on account of ongoing construction for a certain period if the owner undertakes the construction for the purpose of improving energy efficiency.[116] Here, the focus is on whether this restriction of tenants' rights is proportionate in light of the goal of transitioning to new models of energy use.

We can summarize by stating that private law regulatory instruments must satisfy the vertical proportionality test, ie they must be *suitable*, *necessary* and *adequate* to achieve the targeted policy goal. The proportionality review should start by identifying the regulatory goal and the fundamental rights affected by the regulatory means. A particular difficulty lies in assessing the *necessity* of regulatory means under contract law, since a clear hierarchy of intensity – as previously observed in tort law – is less apparent here.[117]

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[113] BVerfG 6 June 2018, 1 BvL 7/14, 149 BVerfGE 126, 141–142 (limitation of fixed-term employment relationships not based on objective reasons); BVerfG 18 July 2019, BvL 1/18, [2019] NJW 3054 para 90 (*rental cap*).

[114] For a detailed proportionality review of that provision with regard to the infringement of property rights of the owners, see BVerfG 18 July 2019, 1 BvL 1/18, [2019] NJW 3054 paras 59–90.

[115] German Civil Code, s 556g.

[116] On this Hellgardt (n 25) 82, 287.

[117] At first sight, the voidness sanction seems to be the harshest interference with freedom of contract. However, other regulatory means can be equally intensive, such as judicial modifications of contracts or the review of standard business terms and the resulting application of dispositive rules, as they are less predictable and can result in the parties being bound to an agreement they did not want to enter into initially. Very high pre-contractual duties of disclosure can also put a heavy burden on a business activity. For an

b) The use of private law for protective purposes

As we have seen in the first part, regulatory law can be used to fulfil the state's duty to protect fundamental rights. Here, the state has an obligation to act and, at the same time, must not infringe the 'offender's' rights excessively. An example[118] is the (preventive) protection of the general personality right (*Allgemeines Persönlichkeitsrecht*)[119] promoted by civil courts by awarding monetary compensation on the basis of s 823(1) German Civil Code.[120] In most cases, private statements, press reports or artistic representations which affect the general personality rights of a third party are themselves protected by fundamental rights.[121] We have seen above that a viable way to assess the proportionality of the state's conflict resolution measure is to ask first whether it adheres to the prohibition of insufficient protection (*Untermaßverbot*) with respect to the private party claiming protection (victim); and then to apply the vertical (intervention-based) proportionality test with respect to the other party (offender). To the extent that the measure goes beyond the constitutionally required minimum level of protection, it must satisfy the vertical proportionality test (with regard to the offender's rights): (1) The *legitimate end* is the protection of the general personality right from private encroachments, which is also required under the state's duty to protect. (2) Liability for damages on the basis of s 823(1) German Civil Code is in principle a *suitable means* for preventively protecting the right of personality against private assaults. (3) The specific amount of damages to be awarded to potential victims (or the method of calculation) must be *necessary* to

assessment of the necessity of different regulatory means in contract law, see Hellgardt (n 25) 307–309.

[118] This example lies on the border between the regulatory function of private law and its function of balancing private interests. The state's duty to protect – and thus a need for regulatory private law – is activated especially in cases of public statements of private parties that are highly defamatory and lack any objectively plausible justification (such that the level of a punishable insult is generally reached) or deliberately untrue statements made for purely commercial purposes (eg by mass media). By contrast, if the statement of a private party serves primarily to form a public opinion and contribute to a public discourse, the need for regulatory state protection is reduced. Insofar, the (legitimate) end of the private actor must be considered in the weighing of conflicting private interests. See BVerfG 15 January 1958, 1 BvR 400/51, 7 BVerfGE 198, 211–212, 215 (*Lüth*).

[119] German Basic law, arts 2(1) in conjunction with 1(1).

[120] Eg BGH 15 November 1994, VI ZR 56/94, 128 BGHZ 1, 15–16: 'Außerdem soll der Rechtsbehelf der Prävention dienen. […] Von der Höhe der Entschädigung muss ein echter Hemmungseffekt auch für solche Vermarktung der Persönlichkeit ausgehen.'

[121] They are protected, in particular, by the freedom of expression, the freedom of the press and the freedom of arts (German Basic Law, art 5(1), (3)). A very high amount of damages can also have ruinous effects and thus infringe the freedom of profession, the right to property or even the general personality right of the person who is liable in damages, see Canaris, 'Verstöße gegen das verfassungsrechtliche Übermaßverbot' (n 95) 995–996.

achieve effective deterrence.[122] (4) Finally, it must be *adequate* (or proportionate in a narrow sense), that is, establish the proper balance between the goal of effective prevention benefitting the holders of the general right of personality on the one side and the interests of holders of other fundamental rights (eg the freedom of expression or the press) on the other. To this end, civil courts have developed a threefold way to calculate damages: the figure can be based on the concrete pecuniary loss, a fictitious fee for obtaining exclusivity rights to the published information enjoying exclusivity rights or the profit gained from the publication of the information.[123]

c) Private law's function of balancing interests

In the domain of private interaction, the exercise of fundamental rights is characterized by the cooperation of private parties. Here, the main task of private law is to provide the infrastructure for such cooperation and, in the case of colliding interests, to find an adequate balance. If the purpose of a statute or a civil court decision focuses on striking an adequate balance between the competing interests of private parties – without pursuing a specific policy goal beyond that – it must satisfy the horizontal proportionality test and not the stricter vertical proportionality test.[124] The legislature can to a certain extent outline the balancing of interests on an abstract level, but frequently it leaves the task of a detailed balancing to the civil courts, which can identify and weigh the interests in the concrete case and often have a specific proximity to the subject matter.[125] When civil courts are to balance the interests of private parties in a contract dispute, they must identify and respect the parties' initial intent as to how their mutual interests should be balanced. For instance, if there is dispute about whether a tenancy agreement includes the tenant's right to mount a satellite dish on the façade of the landlord's building, thus opposing the tenants right to information and the landlord's property right,[126] the court must verify if the parties have reached an agreement on this point before carrying out its own balancing of the competing interests.

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[122] The German Federal Court (*Bundesgerichtshof*) has developed a threefold calculation of damages, especially for cases of a commercial abuse of the general personality right (eg by the tabloid press or for advertising purposes); on this point Wagner (n 88) 385–386.

[123] BGH 1 December 1999, I ZR 49/97, [2000] NJW 2195, 2201 (*Marlene Dietrich*).

[124] On the specific requirements, see text to nn 64–83.

[125] On the legitimacy of such delegation BVerfG 23 October 2013, 1 BvR 1842/11, 134 BVerfGE 204 para 115; Larenz and Canaris (n 82) 232 emphasize the necessity of case-by-case balancing. However, there may be good reasons – especially a higher predictability for private parties – for carrying out a detailed weighing of interests at the statutory level.

[126] BVerfG 9 February 1994, 1 BvR 1687/92, 90 BVerfGE 27, 33–34 (*Parabolantenne*).

d) How to deal with measures pursuing multiple purposes

State measures may pursue several purposes at the same time[127] so that there can be areas of overlap between the private law functions identified above. I have mentioned, for example, that tort law can serve both a compensatory as well as a preventive (ie regulatory) function. In such cases, the first step is to identify the different functions of the measure and the proportionality tests that best correspond to them. However, mere side effects that were not intended by the state actor should be screened out.[128] In a second step, these tests should be conducted separately, as they may lead to different results and require different adjustments by the state actor to render the measure proportionate.

2. Legal Consequences Created by Private Parties by Virtue of their Free Will

Finally, I address the question of whether private acts are directly bound by the constitutional proportionality principle, ie if their (contractual or non-contractual) interaction must comply with the vertical proportionality test. This would go hand-in-hand with the idea of having private parties directly bound to fundamental rights and would mean that civil courts are constitutionally required to examine private acts under the proportionality criterion. Private parties could thus demand compliance with the vertical proportionality test from those with whom they interact, especially in contractual relationships. Unlike the situation where state actors (ie the legislature or a civil court) are bound to the principle of proportionality, its direct application to private parties would significantly restrict private autonomy, as they would generally be required to demonstrate the proportionality of their agreements.[129] In what follows, I will argue that the application of the vertical proportionality test to private acts is justified only in exceptional constellations.

a) Principle: no constitutional proportionality requirement for private acts

In contrast to holders of state power, private parties are in principle not subject to any constitutional justification requirement in respect of their actions.[130] In particular, they are not directly bound by fundamental rights, as is

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[127] That problem is mentioned in the context of proportionality by Engel, 'Zivilrecht als Fortsetzung des Wirtschaftsrechts mit anderen Mitteln' (n 92) 218.

[128] The negative or positive side effects of a regulatory measure must be considered especially under the subtests of necessity and adequacy.

[129] On that difference with regard to having private parties directly bound to the constitutional principle of equality (German Basic Law, art 3(1)), see Fabian Michl, 'Situativ staatsgleiche Grundrechtsbindung privater Akteure' (2018) 73 JZ 910, 915.

[130] Bumke (n 58) 79. Of course, private individuals must respect the rules established by the legislature, which are supposed to be aligned with the values of the Constitution.

apparent from art 1(3) German Basic Law. This also applies to contractual relations in which private parties may hold a structural position of power. Insofar as a contract is valid – ie is recognized by the legal system and not sanctioned with voidness (eg German Civil Code, ss 134 and 138) – its consequences do not require any further justification (beyond the contract itself), even if they meaningfully harm the interests of one party.[131] The legal consequences based on the private parties' actions will find their basis and justification in the right to self-determination (ie private autonomy), which finds expression in the conclusion of contracts.[132] Unlike legal consequences imposed (externally) by law, they reflect the will of the parties involved. In contrast to (burdensome) state acts which are subject to the constraint of proportionality and reason, 'individual arbitrariness' is principally permitted – it serves as the source of law for contracts.[133]

It would be erroneous to neglect the liberal basis of contractual obligation and assign to the state every restriction of fundamental rights which private parties voluntarily enter into by contract. Such a so-called 'assignment theory' (*Zurechnungslösung*)[134] would imply the state's responsibility for every private act (contractual or non-contractual) which is not explicitly forbidden – a consequence that is quite far from how individuals conceive of the conclusion of contracts.[135] Also, the mere fact that the judiciary recognizes and enforces agreements of private parties is not a sufficient basis to consider this procedural act as an infringement attributable to the court (also in substantive terms).[136]

b) Exceptions for asymmetrically negotiated contracts?

It would be unduly idealistic to assume that contracts always reflect the combined will of private parties or an optimal balancing of their conflicting interests. Social and economic imbalances can lead to large asymmetries in contractual negotiations, such that the outcome might represent a unilaterally

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[131] Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts: Zweiter Band: Das Rechtsgeschäft* (4th edn, Springer Berlin 1992) 4–5; see also BVerfG 7 February 1990, 1 BvR 26/84, 81 BVerfGE 242, 254.

[132] Flume (n 131) 5; on the protection of private autonomy based on fundamental rights, see n 105.

[133] Hans Christoph Grigoleit, 'Anforderungen des Privatrechts an die Rechtstheorie' in Matthias Jestaedt and Oliver Lepsius (eds), *Rechtswissenschaftstheorie* (Mohr Siebeck 2008) 55: 'individuelle Willkür als Rechtsquelle'; Flume (n 131) 6: 'Selbstherrlichkeit des einzelnen'.

[134] The most prominent advocate of this theory is Jürgen Schwabe, *Die sogenannte Drittwirkung der Grundrechte* (Goldmann 1971) 23–25, 67–71, 149–150.

[135] For criticism, see Alexy (n 7) 304–307; Gerrit Manssen, *Privatrechtsgestaltung durch Hoheitsakt* (Mohr Siebeck 1994) 143.

[136] Medicus (n 1) 49. However, if there is a specific mistake in the enforcement process, it can be regarded as a genuine infringement by the judiciary.

imposed will rather than a compromise of the parties. However, such constellations do not necessarily require applying the vertical proportionality test to private agreements, although a gross disproportionality in the contractual duties can be an indicator for a unilaterally imposed obligation. In considering the validity of a contractual obligation or the need for its adjustment, civil courts rather perform the task of balancing the involved interests in a way that most closely reflects the intent of the parties. In extreme cases of contractual imbalance,[137] when the relative weakness of one party is abusively exploited to impose excessive burdens on it, civil courts will have to declare the contract void according to s 138(1) German Civil Code or adjust it.[138] As the contractual obligation is not based on the free will of the weaker party, the state must refuse its authoritative enforcement, which is also required by the state's duties to protect, specifically with regard to the (negative) private autonomy of the weaker party.[139]

Certainly, one can argue in favour of applying a vertical proportionality test unilaterally in contractual relations as a means of counteracting social imbalance in horizontal relations that are typically characterized by structural imbalances.[140] However, that is primarily a politically motivated decision incumbent upon the legislature, and not one that is necessarily constitutionally required.[141] An example of introducing a proportionality test for reasons of a typical structural imbalance is provided by individual labour law rules governing the extraordinary termination of employment contracts: on the basis of s 626(1) German Civil Code, the Federal Labour Court (*Bundesarbeitsgericht*) subjects the employer's extraordinary termination to a proportionality test in form of the *ultima ratio* principle, ie all possible milder means must be attempted first.[142]

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[137] Note that social imbalance alone does not necessarily mean that the negotiation of contracts is disrupted. In particular, functioning competition between economic actors prevents them from unilaterally imposing their contractual intentions, see Canaris, 'Grundrechte und Privatrecht' (n 51) 206–207.

[138] BVerfG 7 February 1990, 1 BvR 26/84, 81 BVerfGE 242, 254–256 (*Handelsvertreter*); BVerfG 19 October 1993, 1 BvR 567/89, 89 BVerfGE 214, 232 (*Bürgschaftsverträge*).

[139] See Hellgardt (n 25) 69.

[140] On this point Tischbirek (n 1) 142–143.

[141] It should be noted in this context that powers of the legislature are devalued if courts can refer directly to fundamental rights and a proportionality test instead of statutory provisions when reviewing the legitimacy of private parties' actions, see Michl, 'Situativ staatsgleiche Grundrechtsbindung privater Akteure' (n 129) 917–918. That might also significantly promote a 'constitutionalization' of private law. On this more generally Mattias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 German LJ 341, 341; see also Philip M Bender, 'Private Law Adjudication Versus Constitutional Adjudication: Proportionality between Coherence and Balancing', in this volume, 69–72.

c) Exceptions for private parties occupying state-like positions or assuming state functions?

A reason to subject private power directly to a vertical proportionality test can exceptionally arise if private parties hold a position of power similar to that of the state and perform state functions relevant for fundamental rights. More recently, this approach has received renewed attention in light of several decisions of the Federal Constitutional Court that have found it appropriate to bind powerful private parties directly to fundamental rights when certain constellations are present.[143]

In this context, it is important to distinguish between two groups of private parties in state-like positions. If the state formally vests private parties with state authority or if a private company is majority-owned by the public sector, such actors are as a general rule directly bound by fundamental rights.[144] This does not in principle apply to private companies which are neither vested with state authority to fulfil state tasks nor subject to a controlling state influence. However, the Federal Constitutional Court has deviated from this rule in a number of recent decisions involving situations in which private companies had enforced their house rules (*Hausrechte*) against third parties. In the context of a stadium ban imposed by a private soccer club, the Court required that such a 'sanction' be based on factual reasons and that the fan who was to be sanctioned be granted equal treatment (German Basic Law, art 1(3)) and certain procedural rights.[145] A similar decision was issued with respect to the right of a company to prohibit entrance onto its property in the course of a demonstration.[146] The 'specific constellations' targeted by this case law basically have two characteristics: in addition to the private company's particular position of power or monopoly, it is necessary that it deliberately opens its services to the public at large and that access to those services (or the exclusion from them) has a considerable impact on the ability of the concerned persons to participate in social life.[147] The Federal Court of Justice (*Bun-*

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[142] BAG 50 May 1987, 2 AZR 30/76, [1979] NJW, 332; for more details regarding the role of the proportionality principle in individual labour law rules, see Tischbirek (n 1) 80–88.

[143] On this development, Michl, 'Situativ staatsgleiche Grundrechtsbindung privater Akteure' (n 129) 911–916.

[144] BVerfG 22 February 2011, BvR 699/06, 128 BVerfGE 226, 244 (*Fraport*).

[145] BVerfG 11 April 2018, 1 BvR 3080/09, 148 BVerfGE 267 paras 44–48 (*Stadionverbot*).

[146] BVerfG 18 July 2015, 1 BvQ 25/15, [2015] NJW 2485 para 6 (*Bierdosen Flashmob*).

[147] BVerfG 11 April 2018, 1 BvR 3080/09, 148 BVerfGE 267 para 41 (*Stadionverbot*); see also, with a focus on open spaces for communication, BVerfG 22 February 2011, BvR 699/06, 128 BVerfGE 226, 252 (*Fraport*); BVerfG 18 July 2015, 1 BvQ 25/15, [2015] NJW 2485 para 5 (*Bierdosen Flashmob*); such a specific constellation was rejected in the

desgerichtshof) has recently taken a similar approach with regard to a social network platform (Facebook) blocking a user-account and deleting a user-post.[148] The Court held that the platform must rely on factual reasons when blocking an account or deleting a post and that it must grant the user equal treatment and certain procedural rights.[149]

Although I cannot address this development in detail here, it indicates that in such specific constellations private companies must also satisfy the vertical proportionality test, which protects private parties from arbitrary sanctions or exclusions from services.[150] The scope of application remains quite open thus far as the Federal Constitutional Court has not yet more precisely specified which aspects of social life are so important as to justify powerful private service providers being directly bound by fundamental rights.[151] In view of the high potential for restricting private autonomy, however, restraint seems advisable.

IV. Conclusion

The application of the constitutional principle of proportionality in private law cannot be tackled with one comprehensive approach. First of all, a distinction must be made as to whether acts of the state (ie the legislature or a court) or of private individuals are to be assessed. While state actors must justify any conduct affecting fundamental rights under the criterion of proportionality, this is in principle not the case for private parties, who are not directly bound by fundamental rights. It is only in specific constellations – in which private parties assume a state-like position – when it seems the appro-

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case of a private hotel owner that had banned a party official from an extremist right-wing party from the hotel premises, BVerfG 27 August 2019, 1 BvR 879/12, [2019] NJW 3769 paras 8–12. For further details and criticism with regard to vagueness of the criteria used by the Federal Constitutional Court, see Alexander Hellgardt, 'Wer hat Angst vor der unmittelbaren Drittwirkung?' (2018) 73 JZ 901, 908–909; Michl, 'Situativ staatsgleiche Grundrechtsbindung privater Akteure' (n 129) 917–918.

[148] BGH 29 July 2021, III ZR 179/20, [2021] NJW 3179 paras 55–59. In a preliminary ruling, the Federal Constitutional Court had already indicated that the parameters of its stadium ban decision might be applicable to social network providers exercising significant market power, see BVerfG 22 May 2019, 1 BvQ 42/19, [2019] NJW 1935 para 15.

[149] BGH 29 July 2021, III ZR 179/20 [2021] NJW 3179 paras 80–89.

[150] A manner of a fortiori argument can be made in this regard since the application of the principle of equality to private acts is a more severe restriction of private autonomy than the application of the principle of proportionality.

[151] Besides organizers of large sporting or cultural events and social networks, private credit agencies like the German Schufa AG are discussed as (potential) addressees of such a direct effect of fundamental rights; see Simon Jobst, 'Konsequenzen einer unmittelbaren Grundrechtsbindung Privater' [2020] NJW 11, 12–16.

priate response to have them directly bound to fundamental rights and the constitutional proportionality principle.

As regards the proportionality of state acts, it is important to clarify what purpose or function they pursue and accordingly, how they affect the fundamental rights of citizens. I have distinguished three constellations and corresponding structures of the proportionality test: the classical vertical proportionality test (*Übermaßverbot*), the prohibition of insufficient protection (*Untermaßverbot*) and the horizontal proportionality test. A precise delimitation of these constellations may cause difficulties and they may overlap, with the result that several proportionality tests may sometimes be required to assess a state act. It is of primary importance to determine the main purpose or function of the measure in question in order to carry out the appropriate proportionality test. If a measure serves multiple regulatory purposes or functions, it can be necessary to conduct several proportionality assessments separately, as the measure in question must satisfy all of them.

Private Law Adjudication Versus Constitutional Adjudication: Proportionality Between Coherence and Balancing

*Philip M. Bender**

I. Introduction

The topic of this essay is the distinction between ordinary private law adjudication and constitutional adjudication: to what extent can judges correct statutes based solely on their judicial power to apply and develop the law and to what extent is the correction of a statute constitutional adjudication? This

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distinction is of particular importance in the German context since ordinary judges do not have the power to declare a statute unconstitutional. Instead, this is the prerogative of specialized judges who rule on constitutional matters. German constitutional law doctrine refers to this exclusive power to invalidate statutes as the 'monopoly of rejection' (*Verwerfungsmonopol*).

The distinction between constitutional and ordinary adjudication is a general problem. However, this essay will focus on one specific type of ordinary adjudication: private law adjudication. Indeed, in private law adjudication, the enhancement of the law beyond the wording of statutes has a long tradition so that the problem is especially salient here. Other areas of the law, notably criminal law, are much more sceptical as regards judge-made law.[1] In addition, private law scholars often claim a certain autonomy of private law[2] – even though others underline its policy-dependence and continuing constitutionalization.[3] Thinking about constitutional adjudication as opposed to ordinary adjudication – and doing so with a specific focus on private law –

[1] See especially German Basic Law, art 103(2), and German Criminal Code, s 1, on the proscription against applying a statutory provision by analogy at the expense of the accused. On that proscription as a limitation on the enhancement of the law, see Wolfgang Schön, 'Die Analogie im Europäischen (Privat-)Recht' in Marietta Auer and others (eds), *Privatrechtsdogmatik im 21. Jahrhundert: Festschrift für Claus-Wilhelm Canaris zum 80. Geburtstag* (De Gruyter 2017) 148. On the origins of this proscription in criminal law, see Paul Johann Anselm von Feuerbach, *Lehrbuch des gemeinen in Deutschland geltenden Peinlichen Rechts* (Georg Friedrich Heyer 1801) 20 (§ 24, principle I). On the (contested) proscription against the use of analogy when occuring at the expense of a non-state party in other areas of public law, see Guy Beaucamp, 'Zum Analogieverbot im öffentlichen Recht' (2009) 134 AöR 83, 89–105.

[2] See especially the neoformalists and their conception of private law, eg, Ernest J Weinrib, *The Idea of Private Law* (2nd edn, OUP 2012) 5 ('[…] the purpose of private law is to be private law'). See also Ernest J Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 Yale LJ 949; Herbert Wechsler, 'Towards Neutral Principles of Constitutional Law' (1959) 73 Harv L Rev 1. From the German neoformalist discourse, see, eg, Florian Rödl, *Gerechtigkeit unter freien Gleichen: Eine normative Rekonstruktion von Delikt, Eigentum und Vertrag* (Nomos 2015). It has to be mentioned, however, that these neoformalist contributions are in some sense more formalistic than the older formalists like the representatives of classical legal thought in the US, the proponents of what came to be referred to as jurisprudence of notions (*Begriffsjurisprudenz*) in Germany or the *école de l'exégèse* in France. Interestingly, the courts of that time did not declare regulatory interventions into private law invalid based on the latter's apolitical character or considerations of coherence but by direct reference to constitutional values, see, eg, *Lochner v New York*, 198 US 45 (1905); *Ives v South Buffalo Railway Co*, 201 NY 271, 94 NE 431 (1911). For a nuanced view on the jurisprudence of notions, see also Hans-Peter Haferkamp, 'The Science of Private Law and the State in Nineteenth Century Germany' (2008) 56 Am J Comp L 667.

[3] On that debate in detail, see nn 19–21.

might add a new perspective to this well-established discourse. However, the insights presented here might be valid for other areas of law as well.

The core idea of this essay is to distinguish private law and constitutional adjudication through a reconceptualization of the constitutional principle of proportionality:[4] to the extent the lack of proportionality can be reframed as a problem of coherence, ordinary judges should be competent to resolve the issue; to the extent balancing is involved, the problem becomes constitutional in a strict sense.

In what follows, I want to elaborate this approach in six steps. First, I will point out to what extent coherence is linked to the classical activity of judges who rule on private law matters (hereafter: private law judges), whereas invalidating statutes based on balancing can be described as a specific task of judges who rule on constitutional matters (hereafter: constitutional judges) (II.). Then, I will describe some interconnections between private law and constitutional law. I will point out that balancing permeates private law but that the central challenge to an autonomous activity of private law adjudication stems from the constitutionalization of the principle of coherence (III.). In a third step, I will dwell on the German approach of granting the exclusive power to invalidate statutes to specialized constitutional judges and the problems this entails when trying to delineate the power of judges (IV.). In a fourth step, I will suggest excluding invalidations of statutes based on coherence from the scope of exclusive constitutional adjudication (V.). Based on that claim, I will reconceptualize the principle of proportionality by distinguishing its elements linked to coherence from those involving balancing (VI.). Finally, I will make some remarks on the relationship between rights that guarantee some sort of individual freedom (hereafter: freedom rights) and those that guarantee equality (hereafter: equality rights) since both types of rights might potentially trigger the need for a coherence- or balancing-based constitutional review (VII.).

II. Coherence Versus Balancing

In this first part, I want to introduce the concepts of coherence and balancing. I will associate coherence with private law adjudication (1.) and balancing with constitutional adjudication (2.).

[4] In the terminology of Franz Bauer, 'Proportionality in Private Law: An Analytical Framework', in this volume, 28–29, I use the notion of proportionality to refer to a constitutionally infused, evaluative standard, ie to the indirect horizontal effect of fundamental rights.

1. Coherence as the Domain of Private Law Adjudication

Coherence is often presented as the justification for private law judges to develop and enhance the law – in the common law world[5] as well as in civil law countries.[6] In the common law, judges are bound by precedents, but they have the threshold power to decide whether the new case corresponds to the previously announced rationale or whether it should be distinguished on some grounds.[7] In that way, judges develop an overall system characterized by legal certainty and coherence. In civil law countries, judges normally find the binding norms they have to deal with in statutory enactments. However, just like in the common law, they have to decide whether the new case before them falls under the norm contained in the statute. Their power to extend the statutory norm to cases which are not explicitly mentioned in the statute by analogy (*Analogie*) or to exempt cases from the statutory norm which are explicitly mentioned by 'teleological restriction' (*teleologische Reduktion*) is largely uncontested.[8]

I want to illustrate these methodological operations by the way in which German courts deal with German Civil Code (*Bürgerliches Gesetzbuch*), s 181 – an example that will follow us throughout the essay. According to s 181, an agent may not, unless otherwise permitted, enter into a legal transaction in the name of the principal with herself in her own name or as an agent of a third party, unless the legal transaction consists solely in the performance of an obligation. The goal of this default prohibition is to avoid conflicts of interest. However, there are cases where a conflict of interest does not exist from the very outset so that the default prohibition of the statutory provision is over-inclusive. Such is the case when the contract is only beneficial for the principal. Thus, German judges restrict the norm teleologically and do not apply it where no legal position of the principal can be harmed (*teleologische Reduktion*).[9] In contrast, the wording of s 181 does not

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[5] On the common law and its link to coherence, see Sebastian AE Martens, 'Die Werte des Stare Decisis' (2011) 66 JZ 348; John Hasnas, 'Hayek, the Common Law, and Fluid Drive' (2005) 1 NYU JL & Liberty 79, 93–97; Ernst Rabel, 'Private Laws of Western Civilization: Part IV. Civil Law and Common Law' (1950) 10 La L Rev 431, 444; Christopher J Peters, 'Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis' (1996) 105 Yale LJ 2031.

[6] The idea of coherence in private law is closely linked to the idea of law as a system. On that, see Claus-Wilhelm Canaris, *Systemdenken und Systembegriff in der Jurisprudenz entwickelt am Beispiel des deutschen Privatrechts* (2nd edn, Duncker & Humblot 1983).

[7] See, eg, Guido Calabresi, *A Common Law for the Age of Statutes* (HUP 1982) 13.

[8] See Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft* (Springer 1995) 202–216.

[9] BGH 25 April 1985, IX ZR 141/84, 94 BGHZ 232, 235; BGH 27 September 1972, 59 BGHZ 236, 240; Claudia Schubert, in Franz J Säcker and others (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (9th edn, CH Beck 2021) § 181 para 34.

include the cases in which the agent concludes a contract with an agent of her own even though the conflict of interest does exist here. Thus, German judges apply the default prohibition by analogy (*Analogie*).[10]

According to the *cessante ratione* principle, a private law judge might even invalidate a statutory norm altogether if its purpose or *telos* ceased to exist.[11] In providing coherence, judges only seem to discover and unveil the true spirit of the precedent or the statute – or disregard the precedent or statute once its true spirit is no longer alive. They seem to take previous value judgments that have been implicitly or explicitly adopted by the legislature (hereafter: value-enactments) seriously but abstain from decisions of their own on which substantive values should prevail.

2. Balancing as the Domain of Constitutional Adjudication

Contemporary constitutional adjudication largely developed differently. Here, the balancing of competing principles and values plays a key role in restricting or invalidating statutory enactments. One could describe the rise of the welfare-state at the beginning of the 20th century as a key component of this development: Given the omni-presence of state interference, government powers could not be delineated in an all-or-nothing-manner, which in turn triggered the need for a balancing of competing values in each case.[12] The importance of balancing in contemporary constitutional law has not only been shown for the US legal system,[13] but it likewise characterizes the adjudicative activity of the German Federal Constitutional Court (*Bundesverfassungsgericht*).[14] The principle of proportionality requires that a statutory enactment

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[10] OLG Hamm 2 October 1980, 15 W 117/80, [1982] NJW 1105; Schubert (n 9) para 52.

[11] Hans Christoph Grigoleit, 'Dogmatik – Methodik – Teleologik' in Marietta Auer and others (eds), *Privatrechtsdogmatik im 21. Jahrhundert: Festschrift für Claus-Wilhelm Canaris zum 80. Geburtstag* (De Gruyter 2017) 240–241. See also Jörg Neuner, 'Vertrauensschutz durch die Rechtsprechung' in Marietta Auer and others (eds), *Privatrechtsdogmatik im 21. Jahrhundert: Festschrift für Claus-Wilhelm Canaris zum 80. Geburtstag* (De Gruyter 2017) 204–205; Wolfgang Löwer, *Cessante ratione legis cessat ipsa lex: Wandlung einer gemeinrechtlichen Auslegungsregel zum Verfassungsgebot?* (De Gruyter 1989).

[12] Explicitly on the increase of balancing in the New Deal Era, see T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 Yale LJ 943, 948–949, 953. In general on the increase of state interventions, see Grant Gilmore, *The Ages of American Law* (2nd edn, Yale UP 2014) 86 ('orgy of statute making'); Bruce Ackerman, *We The People,* vol 1 (HUP 1991) 105; Calabresi (n 7) 1–7.

[13] Aleinikoff (n 12) 953 (pointing out the increase in the use of balancing in US constitutional law since the New Deal Era). Specifically with regard to the principle of proportionality, see also Vicki C Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 Yale LJ 3094, 3104–3110.

[14] Peter M Huber, 'The Principle of Proportionality' in Werner Schroeder (ed), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of*

limiting individual freedom pursue a legitimate purpose (*legitimes Ziel*), be suitable (*geeignet*) and be necessary (*erforderlich*) to realize this purpose and be proportionate *stricto sensu* (*angemessen*).[15] Especially the last step, calling for an assessment of proportionality in a strict sense, is emblematic of balancing since the judge has to decide here which of the competing values prevails.[16] Even though the conceptualizations of the principle of proportionality *stricto sensu* in the context of fundamental rights differ,[17] the balancing of values seems to be involved in some way. For instance, if one were to ask whether the beforementioned s 181 is constitutional even though a limitation of freedom of contract in its negative or defensive dimension, or constitutional because protective of freedom of contract in its positive dimension, one would engage in balancing and, therefore, in constitutional adjudication.[18]

III. The Constitution and Private Law Intertwined

Based on this idealized distinction between private law and constitutional adjudication, one might say that balancing specific values is a constitutional law issue whereas coherence is not. However, private law, as a part of the overall legal system, is not a world apart. It is steadily influenced by the prevailing constitutional values and principles. In the analysis of this interaction, two strings of influence have to be kept apart: the expansion of balancing to private law (1.) and the constitutionalization of coherence (2.).

Implementation (Hart 2016) 100 ('the principle of proportionality has turned out to be the most important legal tool in this process [of constitutionalization]'), 101–104 (for an overview of the jurisprudence of the Federal Constitutional Court).

[15] See, eg, Huber (n 14) 106, who mentions, in addition, a fifth element: that the measure at stake does not violate the core of the fundamental right in question, referred to as the *Wesensgehaltsgarantie*. However, this guarantee, codified in the Basic Law, art 19(2), can be seen (and is mostly seen) as a constitutional requirement on its own. It is, therefore, not examined in this essay. See also Thorsten Kingreen and Ralf Poscher, *Grundrechte: Staatsrecht II* (35th edn, CF Müller 2019) paras 330–351.

[16] See notably Robert Alexy, 'Proportionality and Rationality' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017) 16.

[17] For two classical conceptualizations, see Robert Alexy, *Theorie der Grundrechte* (Suhrkamp 1986) (conceptualizing fundamental rights as principles aimed at the optimization of their respective postulate); Peter Lerche, *Übermaß und Verfassungsrecht: Zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismäßigkeit und der Erforderlichkeit* (2nd edn, Keip 1999) (seminal conceptualization of the principle of proportionality). For a recent conceptualization, see Mathias Hong, *Abwägungsfeste Rechte: Von Alexys Prinzipien zum Modell der Grundsatznormen* (Mohr Siebeck 2019).

[18] On the negative (defensive) and positive (protective) dimension of freedom, see text to and literature cited in n 78.

1. The Expansion of Balancing to Private Law

One of the important accomplishments of legal realism[19] and its diverse successors[20] is the deconstruction of the myth of an apolitical private law.[21] Norm creation in private law also implies the balancing of values. Since the constitution is the supreme law of the land, this private law balancing must be guided by the constitution – a development that has been labelled the 'constitutionalization' [22] of private law. However, it has always been the case that constitutional norms and values have influenced private law decisions – they have only done so in a different way.[23] Thus, the presumed constitutionalization of private law is more a 'materialization'[24] in the light of changed constitutional values which themselves require balancing.[25]

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[19] Notably, Oliver W Holmes Jr, 'The Path of the Law' (1897) 10 Harv L Rev 457.

[20] One might count as such the whole law-and-economics-movement, see notably Ronald H Coase, 'The Problem of Social Cost' (1960) 3 J Law Econ 1; Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70 Yale LJ 499; Richard A Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer 2014). One can add authors concerned with issues of justice broadly speaking, see, eg, Bertram Lomfeld, 'Der Mythos vom unpolitischen Privatrecht' in Michael Grünberger and Nils Jansen (eds), *Privatrechtstheorie heute: Perspektiven deutscher Privatrechtstheorie* (Mohr Siebeck 2017) 163–166; Lorenz Kähler, 'Pluralismus und Monismus in der normativen Rekonstruktion des Privatrechts: Zu Florian Rödls "Gerechtigkeit unter freien Gleichen"' in Michael Grünberger and Nils Jansen (eds), *Privatrechtstheorie heute: Perspektiven deutscher Privatrechtstheorie* (Mohr Siebeck 2017) 130–131; Jan-Erik Schirmer, 'Das Private ist politisch: Warum das Mietendeckelurteil eine gute Nachricht für ein progessives Privatrecht ist' (15 April 2021) <http://verfassungsblog.de/das-private-ist-politisch/> accessed 8 December 2022. See also the seminal contribution of Jules Coleman and Arthur Ripstein, 'Mischief and Misfortune: Annual McGill Lecture in Jurisprudence and Public Policy' (1995/1996) 41 McGill LJ 91.

[21] On this neoformalist position, see the literature cited in n 2.

[22] On the constitutionalization of private law, see, eg, Mattias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 German LJ 341; Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (OUP 2014). See also Bauer (n 4) 23.

[23] Emblematically, early interferences into a specific liberal conception of private law were struck down not on grounds of the autonomy of private law but on federal constitutional grounds, see *Lochner v New York*, 198 US 45 (1905) (invoking *substantive due process* against worker protection legislation); *Ives v South Buffalo Railway Co*, 201 NY 271, 94 NE 431 (1911), especially 301 (arguing for a constitutional protection of the negligence regime in torts). On that, see also n 2.

[24] On the materialization of private law, see, eg, Marietta Auer, *Materialisierung, Flexibilisierung, Richterfreiheit: Generalklauseln im Spiegel der Antinomien des Privatrechtsdenkens* (Mohr Siebeck 2005) 28–32. See also Claus-Wilhelm Canaris, 'Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner "Materialisierung"' (2000) 200 AcP 273.

[25] See text to nn 12–18.

This materialization changes the substantive way in which private law judges decide cases. However, it is important to see that it does not challenge their commitment to coherence as the characteristic vehicle for correcting statutory enactments. Even if the ideological underpinning is different now, the ordinary business of private law judges is still not to second-guess statutory objectives through a method of balancing values. Put differently: government objectives have changed on the policy-level, not the way in which private law judges deal with them on the adjudicative level.

2. The Constitutionalization of Coherence

What genuinely challenges the autonomy of private law adjudication is the constitutionalization of the principle of coherence, which – as a phenomenon in and of itself – largely escaped the theoretical work on private law. Once we perceive coherence as a constitutional matter, the very essence of private law adjudication becomes constitutional – independent of the substantive values at stake. The constitutionalization of coherence, on which I will focus in what follows, can be observed in the methodological discourse of private law scholarship (a) as well as in the realm of constitutional law (b).

a) Private law scholarship

In the German context, especially Claus-Wilhelm Canaris has examined the constitutional implications in private law.[26] He has emphasized that the methodological devices of the analogy and of the teleological restriction are – in the end – a consequence of the principle of equality, contained in German Basic Law (*Grundgesetz*), art 3.[27] In that sense, to expand or to limit the scope of a statutory rule is an effort towards treating like cases alike and different cases differently. Also other authors have emphasized, from a more general point of view, that methodological issues are constitutional issues.[28] In that way, the classical activity of private law judges was suddenly be-

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[26] Claus-Wilhelm Canaris, 'Grundrechte und Privatrecht' (1984) 184 AcP 201; Claus-Wilhelm Canaris, *Grundrechte und Privatrecht: Eine Zwischenbilanz* (De Gruyter 1999).

[27] Claus-Wilhelm Canaris, *Die Feststellung von Lücken im Gesetz: Eine methodologische Studie über Voraussetzungen und Grenzen der richterlichen Rechtsfortbildung praeter legem* (2nd edn, Duncker & Humblot 1983) 71–88; Claus-Wilhelm Canaris, 'Die verfassungskonforme Auslegung und Rechtsfortbildung im System der juristischen Methodenlehre' in Heinrich Honsell (ed), *Privatrecht und Methode: Festschrift für Ernst A Kramer* (Helbig & Lichtenhahn 2004) 156 (concerning the analogy); Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (2nd edn, Springer 1991) 456. See also Grigoleit (n 11) 241, 257–258; Canaris, *Systemdenken* (n 6) 16–18 (both pointing to the connection between equality and the teleological enhancement of the law or coherence).

[28] See, eg, Bernd Rüthers, 'Methodenfragen als Verfassungsfragen?' (2009) 40 Rechtstheorie 253, 272.

stowed with a constitutional dimension. A similar development has taken place in the US legal system: Guido Calabresi critically noted that judges increasingly tend to decide cases on constitutional grounds that would have previously been decided based on the traditional adjudicative power to enhance the law.[29]

b) Constitutional law scholarship

From a constitutional law perspective, too, coherence emerged as a core principle binding the legislature. First, the principle of proportionality appeared as a part of the scrutiny judges perform on the grounds of equality. Especially when reviewing statutes in the area of tax law on these grounds, constitutional judges require the legislature to develop the area in question in a coherent manner.[30] However, also the limitation of freedom rights was subject to the constitutional requirement of coherence. Indeed, the principle of proportionality as a limit to such interferences was interpreted as requiring coherent legislative enactments.[31] Even though the linking of coherence with the principle of proportionality became largely uncontested, it remains open as to which concrete doctrinal level coherence should be attached: whereas some suggest that an incoherent statute does not serve a legitimate goal,[32] others consider the enactment unsuitable[33], unnecessary[34] or disproportionate *stricto*

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[29] Calabresi, *Common Law* (n 7) 8–15.

[30] With regard to tax law, see BVerfG 10 October 2001, 1 BvL 17/00, 104 BVerfGE 74, 87. See also Paul Kirchhof, in Roman Herzog and others (eds), *Grundgesetz: Kommentar* (96th supp, CH Beck 2021) art 3 I paras 404–410 (describing coherence as the principle of *Folgerichtigkeit*). See generally Ulrike Schuster, *Das Kohärenzprinzip in der Europäischen Union* (Nomos 2017) 88–91. See also Hans D Jarass, 'Die Widerspruchsfreiheit der Rechtsordnung als verfassungsrechtliche Vorgabe' (2001) 126 AöR 588, 595–596.

[31] BVerfG 30 July 2008, 1 BvR 3262/07 et al, 121 BVerfGE 317, 355, 362–363 (*Nichtraucherschutz*); BVerfG 28 March 2006, 1 BvR 1054/01, 115 BVerfGE 276, 312 (*Glücksspielrecht*) (binding the legislature to its own value-statements when balancing competing interests on the level of proportionality *stricto sensu*).

[32] Christoph Degenhart, *Systemgerechtigkeit und Selbstbindung des Gesetzgebers als Verfassungspostulat* (CH Beck 1976) 199–200.

[33] For instance, in the context of the fundamental freedoms under European Union law, the Court of Justice of the European Union tends to examine coherence on the level of suitability within the principle of proportionality, see Case C-46/08 *Carmen Media* [2010] ECR I-8175, ECLI:EU:C:2010:505, para 64; Case C-243/01 *Gambelli* [2003] ECR I-13076, ECLI:EU:C:2003:597, para 67. See generally, Maximilian Philipp, *Systemgerechtigkeit bei den Marktfreiheiten der Europäischen Union: Die gebotene Kohärenz nationaler Gesetzgebung* (Duncker & Humblot 2016) 231–260.

[34] Critically, Schuster (n 30) 103–104; Joachim D Brückner, *Folgerichtige Gesetzgebung im Steuerrecht und Öffentlichen Wirtschaftsrecht: Verfassungsrechtliche Grundlagen der Forderungen nach Folgerichtigkeit in der Rechtsprechung des Bundesverfassungsgerichts* (Nomos 2014) 222–223.

sensu.[35] In any case, coherence became a constitutional issue, from the perspective of equality rights as well as from the perspective of freedom rights.

IV. The Problem of Exclusive Constitutional Adjudication

The constitutionalization of coherence and, along with that, the constitutionalization of core areas of private law adjudication might not seem problematic as long as the private law judge is also a constitutional judge, as is the case in the United States[36] and even in Germany with regard to pre-constitutional private law enactments.[37] However, at least where the invalidation of a statute on constitutional grounds is the exclusive prerogative of specialized judges,[38] as is the case in Germany for statutory provisions enacted after 1949,[39] the constitutionalization of the principle of coherence becomes a problem of delineating the powers between ordinary private law judges and specialized constitutional judges. Indeed, if coherence is a constitutional issue, the methodological operation of teleological restriction becomes a partial invalidation of the statute on constitutional grounds. More precisely, the private law judge is applying the principle of equality because the to-be-corrected statute treats different cases alike. Or she is applying the principle of proportionality in the context of some freedom rights because the statutory enactment no longer serves the purpose which might have justified it. However, if this is the case, what is left of the prerogative of constitutional judges to invalidate statutes on constitutional grounds?

The problem has received some scholarly attention (although no definite resolution) regards the case where ordinary judges enhance the law by *explicit* reference to substantive constitutional enactments – referred to as 'interpretation in conformity with the constitution' (*verfassungskonforme Auslegung*).[40] This special operation of 'saving' the constitutionality of a statute by

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[35] See n 31.

[36] See *Marbury v Madison*, 5 US 137 (1803).

[37] See Jan-Reinhard Sieckmann and Sibylle Kessal-Wulf, in Hermann v Mangoldt and others (eds), *Grundgesetz: Kommentar* (7th edn, CH Beck 2018) art 100 para 25.

[38] Calabresi (n 7) 8–15 points to an additional problem that exists independent of this prerogative: correcting a statute on constitutional grounds limits the power of the legislature to re-correct judicial corrections. This is an argument to limit not only *exclusive* constitutional adjudication (the focus here) but also constitutional adjudication in general (a claim that would be compatible with but not required by the arguments made in this essay).

[39] See German Basic Law, art 100(1).

[40] Even though this methodological operation seems commonly accepted, its limits are contested. Some authors want it to include only interpretation strictly speaking (*Auslegung*), see Andreas Voßkuhle, 'Theorie und Praxis der verfassungskonformen Auslegung von Gesetzen durch Fachgerichte: Kritische Bestandsaufnahme und Versuch einer Neube-

giving it a specific interpretation[41] – which in reality amounts to a partial invalidation of the statute[42] – is largely seen as something fundamentally different from the ordinary enhancement of the law by analogy and teleological restriction.[43] However, once it is granted that coherence is constitutionally mandated as well, cases dealt with under the label of *verfassungskonforme Auslegung* are just a sub-branch of all constitutionally induced corrections of statutory enactments.[44]

In the search for possible solutions to this conundrum *de lege lata*, abandoning the prerogative altogether is certainly not a sound course since it is explicitly mentioned in the German constitution. But assuming that the correction of a statute, be it by analogy or by teleological restriction, can be undertaken only by constitutional judges is not a recommendable path either. Indeed, it would lead to an overload of constitutional adjudication with ordinary doctrinal ques-

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stimmung' (2000) 125 AöR 177, 197–198; Max-Emanuel Geis, 'Die "Eilversammlung" als Bewährungsprobe verfassungskonformer Auslegung: Verfassungsrechtsprechung im Dilemma zwischen Auslegung und Rechtsschöpfung' [1992] NVwZ 1025, 1026–1027; Max-Emanuel Geis, 'Die pragmatische Sanktion der "verfassungskonformen Analogie": Kritische Anmerkung zur neuesten "Lebenslänglich-Entscheidung" des BVerfG' [1992] NJW 2938, 2939; Klaus Stern, 'Verfassungskonforme Gesetzesauslegung' [1958] NJW 1435. Others argue that it also includes the enhancement of the law (*Rechtsfortbildung*), see Canaris, 'Die verfassungskonforme Auslegung und Rechtsfortbildung' (n 27) 151, 155–158; Jörg Neuner, *Die Rechtsfindung contra legem* (CH Beck 1992) 130; Carsten Herresthal, 'Die richtlinienkonforme und die verfassungskonforme Auslegung im Privatrecht' [2014] JuS 289, 297 (especially teleological restrictions, but analogies only exceptionally); Rolf Wank, 'Sachgrundlose Befristung – "Zuvor-Beschäftigung": Besprechung des Urteils BAG v. 6.4.2011 – 7 AZR 716/09, NZA 2011, 905' [2012] RdA 361, 363–364 (going so far as using the notion of *verfassungskonforme Auslegung* as always implying corrections beyond mere interpretation).

[41] On this aspect of 'saving' a statute to the extent possible (*favor legis*), see Voßkuhle (n 40) 183; Herresthal (n 40) 296; Herbert Bethge, in Bruno Schmidt-Bleibtreu, Franz Klein and Herbert Bethge (eds), *Bundesverfassungsgerichtsgesetz: Kommentar* (61st supp, CH Beck 2021), § 31 para 263; Canaris, 'Die verfassungskonforme Auslegung und Rechtsfortbildung' (n 27) 149. See also BVerfG 7 May 1953, 1 BvL 104/52, 2 BVerfGE 266, 282; BVerfG 26 April 1994, 1 BvR 1299/89 et al, 90 BVerfGE 263, 274–275.

[42] See Sudabeh Kamanabrou, 'Anmerkung zu BVerfG, Beschl. v. 6.6.2018 – 1 BvL 7/14, 1 BvR 1375/14' [2018] JZ 886, 888–889; Voßkuhle (n 40) 181–182, 200; Bethge (n 39) paras 258, 261, 273. See also Herresthal (n 40) 297; Canaris, 'Die verfassungskonforme Auslegung und Rechtsfortbildung' (n 27) 157–158 (pointing to the fact that this partial invalidation is no different from a classical teleological restriction).

[43] See Voßkuhle (n 40) 187.

[44] See Canaris, 'Die verfassungskonforme Auslegung und Rechtsfortbildung' (n 27) 156 (describing the issue as an unresolved problem without pursuing it further). See also Bydlinski (n 27) 456.

tions of private law.[45] It would also lead to new problems of delineating powers because the line between interpreting a statute and correcting it is far from being clear-cut.[46] Hence, finding a way of delineating the powers of private law and constitutional adjudication – one which safeguards the traditional powers of private law judges as well as the prerogative of constitutional judges – is crucial. In what follows, I want to present such a way.

V. Excluding Coherence from the Prerogative of Constitutional Adjudication

Safeguarding both the prerogative of constitutional adjudication and the traditional powers of private law judges requires a restriction of the scope of exclusive constitutional adjudication: it should not apply to invalidations of a statute based on its incoherence. Instead, it should be reserved for cases in which the unconstitutionality is a consequence of a judicial balancing of values contrary to the legislature's decision. To detail the contours of this exception as concerns the prerogative of constitutional adjudication, I will first dwell on its purpose (1.). I will then present different types of constitutional norms based on the distinction between rules and standards and show for which of these types of norms the purpose of exclusive constitutional adjudication is adequate (2.).

1. The Purpose of Exclusive Constitutional Adjudication

The purpose of exclusive constitutional adjudication, as generally presented, is twofold:[47] On the one hand, it is about creating a uniform practice of applying constitutional norms and avoiding the fragmentation of federal law. This justification is not, however, very convincing because uniformity will not be endangered as long as the Federal Constitutional Court has the last word on constitutional issues – just like the interpretation of ordinary private law does not endanger its uniform application as long as there is a federal court of last

[45] For these questions, the constitutional court has no special expertise so that a functional argument can be made against its competence to decide these issues, see Voßkuhle (n 40) 194–195.

[46] Therefore, the distinction between interpretation and enhancement of the law is often viewed as problematic, see, eg, Bernd Rüthers, Christian Fischer and Axel Birk, *Rechtstheorie und Juristische Methodenlehre* (11th edn, CH Beck 2020) 451–452 (paras 730c, 730d), 456 (para 737), or even declared impossible, see, eg, Joachim Hruschka, *Das Verstehen von Texten: Zur hermeneutischen Transpositivität des positiven Rechts* (CH Beck 1972) 102. For a (critical) overview, see Thilo Kuntz, 'Die Grenze zwischen Auslegung und Rechtsfortbildung aus sprachphilosophischer Perspektive' (2015) 215 AcP 387, 389–391.

[47] Sieckmann and Kessal-Wulf (n 37) para 2; Voßkuhle (n 40) 184.

resort that corrects inappropriate interpretations. Indeed, in the United States, each judge can scrutinize statutes on constitutional grounds[48] and still, there is no fragmentation of the law because the US Supreme Court guarantees its uniform application. By the same token, it is acceptable that each judge within the European Union can disregard norms contrary to EU law[49] as long as the European Court of Justice provides for the unity of the law.

On the other hand, the prerogative is about respecting the authority of the parliament: not every judge should have the power to correct the normative statements of a legislature with direct democratic legitimation. Only judges of the constitutional court should be able to do so. This point is valid – however, it is valid only with regard to situations in which judges replace the legislative value-judgment, particularly with their own value-judgment concerning what the higher law requires. As long as they take the value-judgment of the legislature seriously and develop it further, the authority of the specialized constitutional judges is not required. Put differently, reaching a different conclusion on competing higher principles triggers the intended role of exclusive constitutional adjudication; deciding based on value-enactments of the legislature does not.

2. Constitutional Norms Between Rules and Standards

Once we accept that coherence is a constitutional principle as well,[50] we are able to distinguish three types of constitutional norms: rule-like value-enactments (a), standard-like value-enactments (b) and standard-like value-enactments that become rule-like after the legislature has spoken (c).

By rules, I mean those norms that resolve a conflict of principles or competing objectives right away by announcing a certain legal command (*ex ante*). In contrast, I understand standards to defer the resolution of this conflict to a later moment (*ex post*).[51]

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[48] See *Marbury v Madison*, 5 US 137 (1803).

[49] See especially Case 106/77 *Simmenthal* [1978] ECR 00629, ECLI:EU:C:1978:49, para 21.

[50] See text to nn 30–35.

[51] On this definition from law and economics literature, see the seminal contribution of Louis Kaplow, 'Rules versus Standards: An Economic Analysis' (1992) 42 Duke LJ 557, 560. See also (before him) Isaac Ehrlich and Richard A Posner, 'An Economic Analysis of Legal Rulemaking' (1974) 3 J Legal Stud 257 (in general); Colin S Diver, 'The Optimal Precision of Administrative Rules' (1983) 93 Yale LJ 65 (specifically in administrative law). See also (after him) from a behavioural perspective, Russell Korobkin, 'Behavioral Analysis and Legal Form: Rules vs. Standards Revisited' (2000) 79 Oregon L Rev 23, 43–44; Kevin M Clermont, 'Rules, Standards, and Such' (2020) 68 Buff L Rev 751 (criticizing the distinction). From a rule of law perspective, see Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 U Chi L Rev 1175; Dale A Nance, 'Rules, Standards, and the Internal Point of View' (2006) 75 Fordham L Rev 1287; Thomas W Merrill, 'The Mead

a) Rule-like value-enactments

First, there are rule-like value-enactments, such as the proscription against discrimination on the basis of race, contained in Basic Law, art 3(3),[52] or the requirement of Germany to be a republic, contained in Basic Law, art 20(1). Rule-like norms are characterized by resolving a conflict of competing principles and policy considerations *ex ante*.[53] Legislative statements contrary to these rule-like constitutional enactments are invalid. We can illustrate how the judicial review of statutes based on rule-like value-enactments works by returning to the previously mentioned s 181. If this provision were to apply only to a certain racial group because that racial group is considered particularly untrustworthy and prone to be affected by conflicts of interest, this legislative policy consideration would not be accepted. In such a case, the legislative goal is not intended to be optimized by courts but to be declared invalid right away by reference to Basic Law, art 3(3). Judges do not strike their own balancing of values here. However, they still invalidate the balancing of values done by the legislature. Given this fact, respect for the democratically elected legislature justifies applying the prerogative of constitutional adjudication when rule-like constitutional value-enactments are applied.

Doctrine: Rules and Standards, Meta-Rules and Meta-Standards' (2000) 54 Admin L Rev 807 (in favour of rules); Jamal Greene, 'The Rule of Law as a Law of Standards' (2011) 99 Geo LJ 1289 (in favour of standards). More from a legal-sociological perspective, see Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harv L Rev 1685, 1776; Auer (n 23) 43; Kathleen M Sullivan, 'The Supreme Court 1991 Term – Foreword: The Justices of Rules and Standards' (1992) 106 Harv L Rev 22, 58; John Hasnas, 'The Myth of the Rule of Law' [1995] Wis L Rev 199, 213.

[52] Of course, also norms that I describe as rule-like are open to *some* balancing. The distinction is a matter of degree. For instance, according to the German Federal Constitutional Court, also differentiation along the lines of Basic Law, art 3(3), can exceptionally be justified. After the original case law turned to presumed 'natural differences' (see, eg, BVerfG 18 December 1953, 1 BvL 106/53, 3 BVerfGE 225, 242; BVerfG 28 January 1992, 1 BvR 1025/82 et al, 85 BVerfGE 191, 207), later case law invoked these natural differences *and* the (exceptional) balancing of colliding constitutional aspects (BVerfG 25 January 1995, 1 BvL 18/93 et al, 92 BVerfGE 91, 109; BVerfG 25 October 2005, 2 BvR 524/01, 114 BVerfGE 357, 364), until this (exceptional) balancing became the dominant means of justification (see, eg, BVerfG 17 February 1999, 1 BvL 26–97, [1999] NVwZ 1999, 756; BVerfG 7 October 2003, 2 BvR 2118/01, [2004] NJW 1095, 1096). This is close to US strict and intermediate scrutiny. Under strict scrutiny, differentiations notably along race lines require a compelling state interest and narrow tailoring to be justified, see *Korematsu v United States*, 323 US 214 (1944*); McLaughlin v Florida*, 379 US 184 (1964). Under intermediate scrutiny, differentiations along gender and extramarital status require an (exceedingly) important governmental objective and a substantial relation between the purpose and the category that serves it, see *Craig v Boren*, 429 US 190 (1976); *US v Virginia*, 518 US 515 (1996).

[53] Kaplow (n 51) 660.

b) Standard-like value-enactments ('balancing')

Second, there are standard-like enactments that delegate to judges the concretization of higher values. Such is the case when the validity of a statute depends on the balancing of conflicting principles and values *ex post*.[54] Apart from a few rule-like fundamental rights enactments – such as the previously mentioned art 3(3) – the whole area of fundamental rights can be conceptualized as standard-like because the constitution itself only announces some general principles, not how these principles should be put into effect in a concrete case.[55] Also the judicial review based on standard-like value-enactments can be illustrated by the already well-known s 181. If this provision prohibited the agent from concluding contracts on behalf of the principal with every person with whom she had interacted previously so as to avoid any biases, the norm would likely be declared unconstitutional because of a disproportionate restriction on the freedom of contract. However, unlike the case of rule-like value-enactments, the specific value-judgment is not contained in the constitution right away. It is the consequence of a judicial balancing between the statute's protective purpose and freedom of contract. Thus, where judges apply standard-like value-enactments, judges do more than merely replace the specific balancing of values that the legislature has settled upon. They do so by striking their own balancing of values *ex post*. Thus, the respect for the democratically elected legislature is even more at stake. Balancing competing values is at the core of the prerogative of exclusive constitutional adjudication.

c) Standard-like value-enactments that become rule-like after the legislature has spoken ('coherence')

Third, there are standard-like enactments that become rule-like after the legislature has made a value-judgment. Such is the case with regard to the principle of coherence. Even though the principle of coherence does not contain any rule-like value-enactments, it largely functions in a rule-like manner from the perspective of judges. Indeed, when applying the principle of coherence, judges accept the values chosen by the legislature. They only disregard means that seem inappropriate to reach the goals that are chosen according to the operative values.[56] Yet again, s 181 might serve as an example: The concrete shape

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[54] Kaplow (n 51) 660.

[55] On that point, see Alexy, *Theorie der Grundrechte* (n 17) 100–104 (proportionality as optimization of principles), 117–125 (some fundamental rights norms as principles). For a recent monographic work, see also Martin Borowski, *Grundrechte als Prinzipien* (3rd edn, Nomos 2018); Hong (n 17).

[56] On the difference between legislative objectives and means, see also Franz Bauer, 'Historical Arguments, Dynamic Interpretation, and Objectivity: Reconciling Three Con-

of s 181 is not constitutionally required. However, once the legislature has declared the protection of the principal as a primary goal, this goal has to be accepted by judges. Thus, including cases constituting a similar threat but not covered by the wording of the statute, and excluding cases in which this threat does not from the very outset exist, are methodological steps mandated in a rule-like way by the principle of coherence. As in the first category of norms, judges do not engage in an evaluation of their own as to how to balance competing principles and policy considerations. But unlike in the first category, they do not question the balance chosen by the legislature. Instead, they put it into effect in the best way possible. Thus, respect for the democratically elected legislature does not require any exclusive constitutional adjudication.

VI. Reconceptualizing the Principle of Proportionality

Based on this nuanced view on the prerogative of constitutional judges, we can now reconceptualize the principle of proportionality. For this purpose, we will re-examine each of the four classical requirements of proportionality: legitimacy of the goal pursued (1.), suitability (2.), necessity (3.) and proportionality *stricto sensu* (4.). Even though proportionality is a principle that serves as a limit on the infringement of not only freedom rights but also equality rights,[57] this part of the essay will focus on its function as regards the former.

1. Legitimacy of the Goal Pursued: Beyond Proportionality (Rule-Values)

Legitimacy of the goal pursued (*legitimes Ziel*) is, at least in the German context, often conceptualized as the first prong of the principle of proportionality.[58] However, at closer examination, it is nothing but a reminder to examine rule-like constitutional value-enactments of the first category. If we did not have this first prong, we would not proceed any differently. Indeed, we would nonetheless have to check the legitimacy – or better: the legality – of the statutory enactment. Thus, within the principle of proportionality, it does nothing other than announce the legislative goal for the further examination of coherence. To illustrate this point, we can again return to s 181. If its scope of application were limited to a certain racial group, there would be no 'legitimate goal'. However, the reason for the lack of a legitimate goal is the con-

flicting Concepts in Legal Reasoning' in Philip M Bender (ed), *The Law between Objectivity and Power* (Nomos & Hart 2022) 130–134.

[57] I will develop this aspect in more detail below, see text to nn 69–88.

[58] See, for instance, the presentation in Huber (n 14) 106; Volker Epping, *Grundrechte* (8th edn, Springer 2019) 25–26 (paras 50–52); Kingreen and Poscher (n 15) para 330 (who also mention the legitimacy of the means as an independent branch of the proportionality test).

sequence of the rule-like enactment contained in Basic Law, art 3(3). Within the principle of proportionality and the specific scrutiny it requires, the 'legitimate goal' prong has no value of its own, because other constitutional provisions like art 3(3) already defined the prohibition in question.

Sometimes, this first prong is used not only as a reference to rule-like value-enactments contained elsewhere in the constitution but as a tool to single out some objectives that do not seem important enough to limit a certain fundamental freedom right.[59] However, in that case, the court actually engages in a kind of hidden balancing that would be better openly addressed as such and reserved to a proportionality *stricto sensu* – the prong specifically designed for balancing competing values.

2. Suitability: Coherence (Comprehensive Over-Inclusiveness)

The second prong of the principle of proportionality, the suitability of the means applied to reach the goal (*Geeignetheit*),[60] is a concretization of coherence: even though the legislature was free in choosing a specific value-enactment, once chosen, judges are bound by that choice in a rule-like manner. But while they are bound to the specific value-enactment or purpose the legislature has chosen, they can still measure the legislative means applied against the backdrop of the legislative purpose. One can call the kind of coherence that suitability aims at a filter for cases of comprehensive over-inclusiveness: if the relationship between the goal pursued and the means applied is inexistent, the norm would be over-inclusive in each and every case it is applied because it is simply unapt to serve the goal. It is also comprehensively under-inclusive because it does not serve the goal of prohibiting non-dangerous acts. However, with regard to the proportionate restriction of freedom rights in their defensive dimension, it is the over-inclusiveness that is of interest.[61] It is precisely that case that is traditionally conceptualized through the methodological principle of *cessante ratione legis cessat ipsa lex*.[62] An-

[59] This is the tendency of the Court of Justice of the European Union: according to its case law, merely economic interests cannot justify a restriction, see, eg, Case C-400/08 *Com v Spain* [2011] ECR I-01915, ECLI:EU:C:2011:172, para 74; Case C-96/08 *CIBA* [2010] ECR I-02911, ECLI:EU:C:2010:185, para 48; Case C-436/00 *X and Y v Riksskatteverket* [2002] ECR I-10829, ECLI:EU:C:2002:704, para 50; Case C-35/98 *Verkooijen* [2000] ECR I-04071, ECLI:EU:C:2000:294, para 48. In the area of strict (and intermediate) scrutiny, the German Constitutional Court and US courts ruling on constitutional matters proceed in a similar way, see n 52. However, they put the entry-hurdle so high that I qualified these norms as rule-like.

[60] On suitability or aptitude, see, eg, Epping (n 58) 26–27 (paras 53–54); Kingreen and Poscher (n 15) para 334; Alexy, 'Proportionality and Rationality' (n 16) 14–15.

[61] We will come back to under-inclusiveness in short when talking about the principle of equality, see text to nn 84–88.

[62] On that principle, see n 11.

other way of thinking about statutes that are unsuitable is to say that they are arbitrary. Indeed, where they do not foster the goal pursued in any possible way, no reason whatsoever can be found why they should be applied – which amounts precisely to the definition of arbitrariness.[63]

We can illustrate this case of comprehensive over- and under-inclusiveness (the *cessante*-principle or arbitrariness) again by reference to s 181. If, due to the moral progress of humanity, all agents ceased to seek their own advantage even in instances of a conflict of interest, s 181 would no longer contribute to the protection of the principals of this better world. It would be over-inclusive because the prohibition would apply to highly altruistic agents that only sought the best for the principal. And it would be under-inclusive because it would not protect against those agents that – even in this better world – tried to harm the principal in other ways (eg by embezzling money). Thus, s 181 would become unsuitable and, therefore, disproportionate.

3. Necessity: Coherence (Partial Over-Inclusiveness)

The third prong of the principle of proportionality is necessity (*Erforderlichkeit*). A statutory enactment is said to be necessary if there is no similarly effective but less intrusive way of reaching the goal.[64] This definition encompasses two types of unnecessary statutes.

First, a statute might choose the least intrusive measure but define its scope of application too broadly. It is applied to more cases than necessary (*test of horizontal necessity*). Understood in that way, one might re-label the necessity-prong a filter for partial over-inclusiveness: even though the norm as such does not need to be abrogated because it serves its purpose in most cases, in some cases it does not. Just like in the case of suitability, the judge accepts the goal pursued and corrects only the means applied. To return to s 181, in the world we live in, agents may succumb to putting their own interests first, which is why s 181 seems necessary to reach the protective goal it serves. However, if no harm whatsoever is conceivable even from the very outset, the restriction should not apply. Since the wording includes these cases as well, s 181 is over-inclusive. The necessity-prong requires it to be teleologically reduced to those cases where the transaction the agent concludes in the name of the principal is not beneficial only for the latter.

Second, according to its general definition, necessity is used to single out statutes having a correct scope of application but unduly severe measures

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[63] On the definition of arbitrariness, see, eg, BVerfG 1 July 1954, 1 BvR 361/52, 4 BVerfGE 1, 7. See also Philip M Bender, 'Ambivalence of Obviousness: Remarks on the Decision of the Federal Constitutional Court of Germany of 5 May 202[0]' (2021) 27 European Public Law 285, 297–298.

[64] On necessity, see, eg, Epping (n 58) 27–28 (paras 55–56); Kingreen and Poscher (n 15) paras 336–339; Alexy, 'Proportionality and Rationality' (n 16) 15–16.

within this scope (*test of vertical necessity*). However, knowing which measures are less severe but as effective normally requires a balancing of values, something which is better reserved to proportionality *stricto sensu*, the fourth prong of the principle of proportionality.[65] In contrast, if one can empirically show that the additional infringement of a fundamental right does not add anything to the goal pursued, we should already question its suitability. Thus, necessity should be applied as meaning horizontal necessity only.

4. Proportionality Stricto Sensu: Balancing (Principle-Values)

The fourth prong of the principle of proportionality is proportionality *stricto sensu* (*Angemessenheit*).[66] It is only here that judges engage in replacing the statutory value-enactment with their own judgment after conducting an independent balancing of the competing constitutional values. They operate within a standard-like constitutional space which entrusts them with the concretization of specific value-judgments *ex post*. Thus, unlike in the case of suitability and necessity, they accept or disregard the goal the statutory provision is supposed to serve. For instance, an invalidation of s 181 on the level of proportionality *stricto sensu* could be a consequence of balancing the protective purpose against the freedom of contract in its defensive dimension.

In conclusion, after dismissing the first prong of the principle of proportionality as a simple reference to other constitutional provisions, we are able to reconceptualize proportionality as a two-prong-test: the first prong is coherence; the second prong is balancing.[67] The first prong is rule-like; the second prong standard-like.[68] The first prong can be performed by ordinary

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[65] Kingreen and Poscher (n 15) para 345 seem to suggest the contrary and favour having as many considerations as possible fall under the prongs of suitability and necessity so as to avoid the 'subjective' balancing of proportionality *stricto sensu*. However, disguising a balancing-operation as suitability or necessity does not make it less subjective. Therefore, all re-evaluations of the legislative goal should be reserved for proportionality *stricto sensu*.

[66] For a classical presentation of proportionality *stricto sensu*, see Epping (n 58) 28–30 (paras 57–61). See also Alexy, 'Proportionality and Rationality' (n 16) 16 (equating proportionality *stricto sensu* with balancing). Critically on proportionality *stricto sensu*, Kingreen and Poscher (n 15) paras 340–345, because of the subjectivity involved in free balancing. However, this subjectivity is compensated by the special legitimacy of a constitutional court. The latter two contributions point out that proportionality *stricto sensu* – due to its subjectivity or the balancing involved – differs fundamentally from the previous steps. Even if this proportionality-balancing differs from some other forms of balancing (see Jackson (n 13) 3099–3100; Stephen Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017) 225), it is still one possible form of normative, principle-based balancing.

[67] On coherence and balancing, see text to nn 5–18. On these two modes of reasoning within the principle of proportionality, see Bauer (n 22) 21–23 with further references.

[68] On rule-like and standard-like norms, see text to nn 50–56.

judges due to their adjudicative power because a review for coherence still respects the statutory value-enactments (*cessante ratione* principle and teleological restriction); the second prong can be performed only by specialized constitutional judges in order to respect the authority of the parliamentary decisionmaker with its direct democratic legitimation.

VII. Freedom Rights and Equality Rights

In the previous section, we were interested in the general structure of the principle of proportionality, and we focused on proportionality as a limit on the infringement of freedom rights. Therefore, we could explain unwritten exceptions to statutes that go too far in their limitation of freedom. In this part, we will complete the picture by taking into account equality rights and the methodological operation associated with them – applying a statute by analogy. For that purpose, I will first show that the judicial oversight of equality can be divided into aspects of coherence and aspects of balancing as well (1.). Then, I will show that even though issues of freedom and equality are always concurrently at stake (2.), teleological restrictions have a closer link to freedom rights and analogies a closer link to equality rights (3.).

1. Equality and Analogy

The need for justification in respect of the principle of equality arises when two situations are treated differently. Just like the case of freedom rights, the principle of proportionality determines the boundaries of the justification assessment.[69]

[69] This is the now well-established case law of the Federal Constitutional Court. Indeed, after applying the principle of proportionality only to the most severe of three categories of inequal treatment according to what came to be known as 'new formula' (*Neue Formel*) (BVerfG 7 October 1980, 1 BvR 240/79, 55 BVerfGE 72, 88), the Court started to apply the principle in a flexible manner, without sticking to the three previously announced categories (BVerfG 26 January 1993, 1 BvL 38, 40, 43/92, 88 BVerfGE 87, 96–97), while at the same time still taking an especially severe approach towards inequal treatment based on personal characteristics (BVerfG 21 June 2011, 1 BvR 2035/07, 129 BVerfGE 49, 68–69). For a presentation of this case law, see, eg, Gabriele Britz, 'Der allgemeine Gleicheitssatz in der Rechtsprechung des BVerfG: Anforderungen an die Rechtfertigung von Ungleichbehandlungen durch Gesetz' [2014] NJW 346. For an overview, see Huber (n 14) 110–111. Against applying the principle of proportionality for equality rights, see Simon Kempny and Martina Lämmle, 'Der "allgemeine Gleichheitssatz" des Art. 3 I GG im juristischen Gutachten: Teil 3: Rechtfertigung, Rechtsfolgen' [2020] JuS 215, 218–219; Michael Sachs and Christian Jasper, 'Der allgemeine Gleichheitssatz: Das Eingriffsmodell zu Art. 3 I GG als Abwehrrecht' [2016] JuS 769, 772–773; Michael Sachs, 'Grundrechte: Mietpreisbremse: Anmerkung zu BVerfG, Beschl. v. 18.7.2019 – 1 BvL 1/18 ua' [2020]

Where there is no link at all between the purpose and the statutory measure, the differential treatment is not *suitable*. It violates the principle of equality just as it violates the freedom rights at stake. It is arbitrary and it should not be applied.[70] However, once we determine that the statute is suitable to achieve the purpose at stake but that it is under-inclusive, the differential treatment between the situations the statute governs and those to which it should apply as well, is not *necessary*.[71] To remedy the lack of congruence between purpose and means (classification), an analogy is required so that the law lives up to the principle of equality.[72] Finally, there might be cases in which the purpose of the statute does not require an extension of the scope of application but where a balancing of values still prohibits the differentiated treatment. In that case, the unequal treatment is not *proportionate stricto sensu*. The latter is the case especially when the differential treatment is close to those characteristics enumerated in Basic Law, art 3(3).[73] Given this outline, judicial scrutiny based on equality can also be divided into issues of coherence (suitability and necessity) and issues of balancing (proportionality *stricto sensu*).[74] Just as freedom rights and the necessity-prong of the principle of proportionality provided the

JuS 89, 92 (the latter two contributions at least beyond the realm of strict scrutiny); Simon Kempny and Philipp Reimer, *Die Gleichheitssätze: Versuch einer übergreifenden dogmatischen Beschreibung ihres Tatbestands und ihrer Rechtsfolgen* (Mohr Siebeck 2012) 140–148; Gabriel D Machado, *Verhältnismäßigkeitsprinzip vs. Willkürverbot: der Streit um den allgemeinen Gleichheitssatz* (Duncker & Humblot 2015) 130–131; Ferdinand Wollenschläger, in v Mangoldt and others (n 37) art 3 I paras 97, 104. Pointing in general to the different structure of equality rights and freedom rights, see Marion Albers, 'Gleichheit und Verhältnismäßigkeit' [2008] JuS 945, 948; Simon Kempny and Martina Lämmle, 'Der "allgemeine Gleichheitssatz" des Art. 3 I GG im juristischen Gutachten: Teil 1: Persönlicher Anwendungsbereich' [2020] JuS 22, 23. The Court of Justice of the European Union applies the principle of proportionality (Case C-101/12 *Schaible*, ECLI:EU:C:2013:661, para 77). The case law of the US Supreme Court also adopts a varying, flexible standard, see, eg, *Cleburne v Cleburne Living Center,* 473 US 432 (1985) (rational basis test 'with bite' in cases of discrimination against mentally disabled people).

[70] Indeed, it is even the principle of equality that is primarily employed to invalidate arbitrary acts, see n 63.

[71] On equality and under-inclusiveness, see Joseph Tussman and Jacobus tenBroek, 'The Equal Protection of the Laws' (1949) 37 Cal L Rev 341, 348–351.

[72] On the principle of equality as the basis for relying on analogy, see n 26. In general on classifications and over- or under-inclusiveness, see Tussmann and tenBroek (n 70) 348–351; Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press 1991) 31–34; Frederick Schauer, 'Rules and the Rule of Law' (1991) 14 Harv JL & Pub Pol'y 645, 685; Ehrlich and Posner (n 51) 268–270.

[73] On the flexible, proportionality-based approach of the German Federal Constitutional Court, see n 69.

[74] On coherence and balancing, see text to nn 6–18.

basis for teleological restrictions, equality rights and the necessity-prong of the principle of proportionality provide the basis for analogies.[75]

2. *The Analytical Interchangeability of Freedom Rights and Equality Rights*

However, this dual justification of the enhancement of the law by private law judges (freedom rights and teleological restriction vs equality rights and analogy) is not self-evident. Both freedom rights and equality rights are in fact largely analytically interchangeable concepts when it comes to scrutinizing government action.

Indeed, the principle of equality not only requires treating like cases alike (first prong), but also treating different cases differently (second prong).[76] Thus, each teleological restriction can also be conceptualized as the solution to an equality problem: the statute treats different cases alike, and the judge exempts those cases that are unlike the others given the specific purpose of the statute. The principle of equality is about avoiding over-inclusiveness as well as under-inclusiveness.[77] For instance, s 181 can be seen as a limitation on the freedom of contract because it creates a default rule which invalidates certain contracts. As such, proportionality requires the norm to be tailored as narrowly as possible to avoid excessive over-inclusiveness. But the very same over-inclusiveness is also a problem that can be conceptualized from an equality-

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[75] On the connection between equality and analogy, see n 27.

[76] On the two prongs of the principle of equality, see, eg, BVerfG 16 March 1955, 2 BvK 1/54, 4 BVerfGE 144, 155; BVerfG 12 May 1992, 1 BvR 1467, 1501/91, 86 BVerfGE 81, 87; BVerfG 15 July 1998, 1 BvR 1554/89, 963, 964/94, 98 BVerfGE 365, 385; BVerfG 7 December 1999, 2 BvR 1533/94, 101 BVerfGE 275, 290; BVerfG 7 February 2012, 1 BvL 14/07, 130 BVerfG 240, 252; Case C-149/10 *Chatzi v Oikonomikon* [2010] ECR I-08489, ECLI:EU:C:2010:534, para 64; Case C-306/93 *SWM Winzersekt GmbH v Land Rheinland-Pfalz* [1994] ECR I-05555, ECLI:EU:C:1994:407, para 30; Case C-217/91 *Spain v Commission* [1993] ECR I-03923, ECLI:EU:C:1993:293, para 37. From antiquity, see Aristotle, *Nicomachean Ethics* (Robert C Barlett and Susan D Collins trs, The University of Chicago Press 2011) 95 (1131a1–9) and 96–99 (1131b25–1132b20) on corrective justice, and 94–95 (1130b30–1131a1) and 95–96 (1131a10–1131b24) on distributive justice. From the German discourse on Basic Law, art 3, see Uwe Kischel, 'Systembindung des Gesetzgebers und Gleichheitssatz' (1999) 124 AöR 174, 180; Alexy, *Theorie der Grundrechte* (n 17) 377–389. From the discourse on personalized law, see Philipp Hacker, 'The Ambivalence of Algorithms: Gauging the Legitimacy of Personalized Law' in Mor Bakhoum and others (eds), *Personal Data in Competition, Consumer Protection and Intellectual Property Law: Towards a Holistic Approach?* (Springer 2018) 98–101; Philipp Hacker, 'Personalizing EU Private Law: From Disclosure to Nudges and Mandates' (2017) 25 ERPL 651, 659–660 (para 13); Andrew Verstein, 'Privatizing Personalized Law' (2019) 86 U Chi L Rev 551, 556–558 (formal equality vs substantive equality); Philip M Bender, 'Limits of Personalization of Default Rules: Towards a Normative Theory' (2020) 16 ERCL 366, 406.

[77] On equality and over-inclusiveness, see Tussman and tenBroek (n 71) 351–352.

angle because over-inclusive norms treat different cases alike, triggering the burden of justification of the second prong of the principle of equality.

Conversely, freedom rights do not require the state to simply abstain from governmental action – this is only their negative or defensive dimension. They also have a positive or protective dimension: freedom rights can require a certain degree of state action.[78] Thus, the analogy can serve as the solution to a freedom-problem where the protective purpose of the statute requires its extended application. From the perspective of freedom rights in their protective dimension, s 181 is required to cover a sufficient amount of cases in order to protect the freedom and wealth of the principal. Thus, under-inclusiveness becomes a (positive or material) freedom-problem. But under-inclusiveness remains an equality-problem, because equality requires treating like cases alike.

This interchangeability of freedom rights and equality rights is also shown by the parallels on the justification level[79] and by the fact that the question of how to decide which group of rights to examine first is subject to debate. Indeed, no logical, pre-given delineation between freedom- and equality-problems seems to exist. The German Federal Constitutional Court follows a centre-of-gravity-approach according to which it examines freedom rights or equality rights, depending on what it perceives to be concerned to a larger degree.[80] This leads to the result that many problems that are conceptualized

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[78] On this protective dimension of fundamental rights, see, eg, BVerfG 28 May 1993, 88 BVerfGE 203, 254; Canaris, *Grundrechte und Privatrecht: Eine Zwischenbilanz* (n 26) 85; Canaris, 'Grundrechte und Privatrecht' (n 26) 228, 245; Epping (n 58) 66–67 (para 127), 74 (para 141). On negative versus positive freedom in general, see Isaiah Berlin, 'Two Concepts of Liberty' (first published 1958) in Henry Hardy (ed), *Liberty: Incorporating Four Essays on Liberty* (OUP 2002) 166, 169–181. In the end, the distinction is a matter of degree, see Gerald C MacCallum Jr, 'Negative and Positive Freedom' (1967) 76 The Philosophical Review 312, 314; Horacio Spector, 'Four Conceptions of Freedom' (2010) 38 Political Theory 780, 793; Charles Taylor, 'What's Wrong with Negative Liberty' in Alan Ryan (ed), *The Idea of Freedom: Essays in Honor of Isaiah Berlin* (OUP 1979) 177. For an overview, see Philip M Bender, *Grenzen der Personalisierung des Rechts* (forthcoming) § 5.

[79] Indeed, the German Federal Constitutional Court uniformly applies the principle of proportionality, see n 66). Some scholarly work also points to at least some similarities of freedom and equality, see Uwe Kischel, in Volker Epping and Christian Hillgruber (eds), *BeckOK: Grundgesetz* (51st edn, CH Beck 2021) art 3 para 4; Wollenschläger (n 69) para 329; Sigrid Boysen, in Jörn-Axel von Kämmerer and Markus Kotzur (eds), *Grundgesetz: Kommentar* (7th edn, CH Beck 2021) art 3 para 203; Britz (n 69) 349–350; Lothar Michael, 'Die drei Argumentationsstrukturen des Grundsatzes der Verhältnismäßigkeit – Zur Dogmatik des Über- und Untermaßverbotes und der Gleichheitssätze' [2001] JuS 148, 153. However, the main current seems to be to oppose this uniform development and to underline the differences in structure, see n 68. This, however, disguises the always necessary balancing of values and revives the highly problematic 'natural' differences of the early case law of the Federal Constitutional Court; on that case law, see n 51.

[80] See, eg, BVerfG 15 June 1983, 1 BvR 1025/79, 64 BVerfGE 229, 238–239; BVerfG 10 July 1984, 1 BvL 44/80, 67 BVerfGE 186, 195.

as equality-problems in one case are conceptualized as freedom-problems in another.[81] The US Supreme Court often seems to examine both groups of rights in parallel.[82] Academic statements on the issue suggest prioritizing freedom rights,[83] which also shows that there is no analytical structure determining priority between the two categories of rights.

3. The Normative Link Between Freedom Rights and Teleological Restrictions and Equality Rights and Analogies

Even though freedom rights and equality rights are analytically interchangeable, there is a normative inclination of freedom rights to deal with problems of over-inclusiveness and of equality rights to deal with problems of under-inclusiveness. Indeed, freedom rights and equality rights are shaped by the concrete constitutional order they are part of. In the United States and Germany, this constitutional order is liberal in a specific sense.[84] The prototypical figure in this order is the enlightened citizen who needs little protection and is equal before the law.[85] The burden of justification increases the more the legislature tries to deviate from this constitutional order. Therefore, freedom rights trigger a higher burden of justification once they are activated in their defensive or negative dimension,[86] and equality rights trigger a higher burden

[81] To illustrate this interchangeability in the German context, the decisions of the Federal Constitutional Court on transgender rights are instructive: whereas BVerfG 26 January 1993, 1 BvL 38/92 et al, 88 BVerfGE 87 struck down a statutory provision prohibiting transgender persons under the age of 25 from changing their name on equality grounds (comparing transgender persons younger and older than 25), BVerfG 27 May 2008, 1 BvL 10/05, 121 BVerfGE 175 and BVerfG 11 January 2011, 1 BvR 3295/07, 128 BVerfGE 109 relied on freedom grounds in striking down statutory provisions burdening certain transgender persons (married ones in the first case and those that have not yet undergone surgery in the second).

[82] See notably *Obergefell v Hodges*, 576 US 644, 672–676 (2015), in which the interchangeability of freedom and equality rights is elaborated on in detail.

[83] Kirchhof (n 30) paras 183–189 (priority of freedom rights). See also Kischel (n 79) paras 4–5; Britz (n 69) 350; Michael (n 79) 153 (at least a practical priority of freedom rights).

[84] See Dieter Grimm, *Verfassung und Privatrecht im 19. Jahrhundert: Die Formationsphase* (Mohr Siebeck 2017) 50–55.

[85] On the figure of the enlightened citizen, see Matthias Leistner, 'Das Prinzip der Selbstverantwortung: Verhaltensökonomische Grundlagen' in Karl Riesenhuber (ed), *Das Prinzip der Selbstverantwortung: Grundlagen und Bedeutung im heutigen Privatrecht* (Mohr Siebeck 2011); Matthias Rüping, *Der mündige Bürger: Leitbild der Privatrechtsordnung?* (Duncker & Humblot 2017).

[86] On this prevailing view, see Canaris, *Grundrechte und Privatrecht: Eine Zwischenbilanz* (n 26) 85; Canaris, 'Grundrechte und Privatrecht' (n 26) 228, 245; Epping (n 58) 66–67 (para 127), 75 (para 141). One can also interpret BVerfG 28 May 1993, 2 BvF 2/90 and others, 88 BVerfGE 203, 254, in the same manner. This way of speaking only makes sense

of justification in respect of the first prong of the principle of equality, ie treating like cases alike.[87]

Given this preponderance of the negative dimension of freedom rights and the first prong of the principle of equality, one can say that problems of over-inclusiveness are (not logically but based on our normative order) primarily problems of freedom. Indeed, with regard to an over-inclusive statute, freedom rights (activated in their negative dimension) require more for justification than equality rights (activated in their second prong only). Thus, problems of unsuitability are also largely problems of freedom rights: arbitrary measures should be avoided, not extended.[88] In contrast, problems of under-inclusiveness are primarily problems of equality because, here, the first prong of the principle of equality requires more for justification than the protective dimension of freedom rights.

In conclusion, teleological restrictions are to be conceptualized based on freedom rights, and analogies should be understood as being based on equality rights. In both cases, the infringement on the respective rights by the to-be-corrected statute would not have due regard for the principle of proportionality. If at all suitable, an over-inclusive statute is not necessary as regards the infringement of a freedom right and an under-inclusive statute is not necessary as regards the infringement of an equality right.

VIII. Conclusion

In what follows, I want to summarize the main findings of this inquiry:

§ 1 Enhancing the law by analogies and teleological restrictions based on considerations of coherence can be seen as a classical activity of private law adjudication. In contrast, invalidating laws based on a balancing of values is constitutional adjudication.

§ 2 This dichotomy is not clear-cut. First, private law judges also balance values when they take decisions. This activity, however, is not a major challenge to the distinction between ordinary and constitutional adjudicative functions. Indeed, private law judges do not invalidate statutes on the grounds of a different assessment of values even though they might balance values

based on certain previous value-enactments, see Bender (n 78). On the *status negativus* of fundamental rights (as a concretization of this specific liberal order), see Georg Jellinek, *System der subjektiven öffentlichen Rechte* (Jens Kersten ed, 2nd edn, Mohr Siebeck 2011) 89–108. On the value-dependence of private law, see also Coleman and Ripstein (n 20) 93.

[87] On this understanding of the principle of equality, see Alexy, *Theorie der Grundrechte* (n 17) 371–373. See also Sachs and Jasper (n 69) 775 (going even one step further and arguing that only the first prong is protected by the principle of equality).

[88] On the suitability-prong of the principle of proportionality, see text to nn 60–63. On the principle of equality as a tool to identify arbitrary measures, see n 63.

within the scope of legislation. Second, – and this is the central point – private law judges actually apply a constitutional principle when they enhance the law based on coherence. Given the constitutionalization of coherence, the classical task of private law judges is also constitutional adjudication.

§ 3 This omnipresence of constitutional issues is problematic when we take into account that the German constitution contains a prerogative of exclusive constitutional adjudication in favour of the Federal Constitutional Court: only the Federal Constitutional Court is allowed to invalidate statutes on constitutional grounds. If this prerogative was to be applied in a strict way, the Federal Constitutional Court would have to decide over each analogy and teleological restriction because these methodological figures are tantamount to the application of the constitutional principle of coherence.

§ 4 To avoid this consequence, the scope of application of the prerogative of exclusive constitutional adjudication needs to be limited according to its purpose, which is normally presented as twofold: the prerogative is supposed to guarantee the uniform application of the constitution and respect for the democratically elected legislature. However, the first purpose cannot justify exclusive constitutional adjudication: uniformity is guaranteed as long as the final decision is taken by a supreme federal court. The second purpose is valid – but not with regard to issues of coherence. To understand this, we need to distinguish three types of constitutional norms: (i) rule-like value-enactments do not grant discretion to judges, but they allow for invalidations of statutes and, therefore, have implications as to respecting democratically elected lawmakers; (ii) standard-like value-enactments, such as balancing, allow for an invalidation of statutes and, in addition, grant discretion to judges, with the consequence that respect for the democratically elected legislature is even more at stake; (iii) standard-like value-enactments that become rule-like after the legislature has spoken, which basically refers to the principle of coherence, do not invalidate legislative value-statements and do not grant judges any discretion. Rather, coherence is about fully implementing the legislative objectives. Here, respect for the democratically elected legislature is not at stake and, thus, the prerogative should not be applied.

§ 5 On this basis, the four prongs of the principle of proportionality can be reconceptualized in a two-prong configuration. Whereas its first prong, the need for a legitimate goal (*legitimes Ziel*) has no value on its own but is a simple reference to substantive rule-like enactments of the constitution, the second and third prong, ie suitability (*Geeignetheit*) and necessity (*Notwendigkeit*), can be reconceptualized as a review of coherence. The fourth prong, proportionality *stricto sensu* (*Angemessenheit*), requires balancing. Thus, proportionality means coherence and balancing. Only the balancing-prong requires the prerogative of exclusive constitutional adjudication.

§ 6 Proportionality is not a free-floating principle but is instead applied in asking whether infringements of freedom rights or equality rights are justi-

fied. In the context of freedom rights, the suitability-prong eliminates cases of comprehensive over-inclusiveness. The necessity-prong identifies cases of partial over-inclusiveness and is, therefore, linked to the methodological operation of teleological restriction. In contrast, unequal treatments are problems of under-inclusiveness. Analogy is the remedy for unnecessary under-inclusiveness. Of course, one could try to see problems of under-inclusiveness also as positive freedom-problems (freedom rights activated in their protective dimension) and problems of over-inclusiveness also as problems related to the second prong of the principle of equality (equality as requiring that different things be treated differently). But based on the liberal order that the US constitution and the German Basic Law embrace, freedom rights in their negative dimension and the first prong of the principle of equality (equality as requiring that like cases be treated alike) are normatively stronger. Therefore, the primary normative justification for teleological restrictions are freedom rights, and the primary normative justification for analogies are equality rights. In both cases, the principle of proportionality is activated in terms of its necessity-prong, meaning that the inquiry becomes one guided by the principle of coherence.

Three Approaches to Proportionality in American Legal Thought: A Genealogy

Nicolás Parra-Herrera

> Contradiction all the way down is the route to a responsible, moral formulation of social justice.
> Joseph Singer, *Legal Realism Now*

I. Introduction

Although legal proportionality as a decision-making tool is used around the globe, the popular belief is that it has not filtered into the US.[1] Despite the

[1] There are, to be sure, important differences between proportionality and balancing. Vicki Jackson, for instance, argues that proportionality, understood as a doctrine, differs from the balancing test aimed primarily at achieving a net social good; proportionality, by contrast, is a structured and sequenced decision-making process that puts the burden of justification on the government and that considers both infringements of rights and the government's purposes. Vicki C Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 Yale LJ 3094. Others have argued that the difference lies in their sources. Proportionality grew from German administrative law, whereas balancing arose in American private law. Therefore, proportionality protects individual rights; balancing checks the unhindered freedom derived from an expansive reading of the Fourteenth Amendment of the US Constitution (freedom of contract). Moshe Cohen-Eliya and Iddo Porat, 'American balancing and German proportionality: The historical origins' (2010) 8 Int'l J Const L 263, 266. For a clear distinction between proportionality and balancing with respect to IP law Luc Desaunettes-Barbero, 'Proportionality and IP Law: Toward an Age of Balancing?', in this

limited appearance of proportionality in US legal practice, both at a public and a private law level, proportionality has been relevant in US legal theory, which can be read as reflecting three approaches to proportionality that I label the 'agonistic', 'teleological', and 'distributional-existential' models. I will trace these models in American Legal Thought ('ALT'), showing that proportionality, although associated with a rationalised decision-making method in cases of conflicts or gaps in the law, also unveils the experience of being aware of the responsibility of choosing under conditions of *opacity* and *fogginess* to *distribute* benefits and burdens in the socio-political world and embracing the unforeseen results.

The words *opacity* and *fogginess* refer to two traits of human action. Decisions occur in contexts where our ability to deal with conflicting interests is limited either because we do not know how to best reconcile them (*opacity*) or because we do not know, once we balance them, what consequences will follow and how these values and interests will be operationalised in the world (*fogginess*). *Opacity* is captured in the awareness that *we simply do not know enough now*. *Fogginess,* by contrast, crystallises our limited foresight once a legal decision is made. *We do not quite know what the consequences will be of what we are doing now.*

In this paper, I will trace some writings of Oliver Wendell Holmes Jr, Roscoe Pound, Lon Fuller, the Legal Process School, and Duncan Kennedy contributing to the articulation of proportionality as a decision-making tool. I argue that these contributions illustrate three strands with internal variations. The first, championed by Holmes, is the *agonistic approach* – from the Greek word *ἀγών,* to combat – which understands balancing as a reaction to logical deduction and as a method embedded in a view of reality where interests battle and no superior interest is available to reconcile them. This approach is rooted in a Darwinian view of reality and a sceptical morality rejecting objective compromise. The second is the *teleological approach* that sees balancing as a context-bound tool for harmonising different interests (Pound), legal functions (Fuller), and institutions (Hart and Sacks) to either preserve social order, satisfy social needs, secure a free-choice economy or safeguard faith in law's rationality. Lastly, a *distributional-existential approach,* articulated by Duncan Kennedy, uncovers two dimensions hidden in previous approaches. Instead of preserving rationality in the decision-making process, proportionality can reveal the inescapable responsibility of choosing in a world of struggle where every decision distributes benefits and burdens among social groups. And instead of continuing the rationalisation of the law, proportionality could reveal the experience of *opacity* and *fogginess* in decision-making,

volume, 137–138. Since I am interested in the philosophical and phenomenological underpinnings of the proportional/balancing mindset, I will use these terms interchangeably.

thus leading to an existential reckoning: sometimes we must make decisions without knowing fully and nevertheless take responsibility for their effects.

In the first part, I will explain briefly what I understand by 'genealogy' and how it might be used to uncover some trajectories of proportionality in ALT. Then, I will sketch the contributions of Holmes's agonistic approach as well as Pound's, Fuller's, and the Legal Process School's teleological approaches. Lastly, I will discuss Kennedy's approach as the distributional-existential model of proportionality. I will conclude by showing that proportionality is not a univocal concept. Proportionality oscillates in between two extremes: (a) under a teleological framework of rationalising decision-making to either preserve social order, secure free-choice markets, or maximise human interests under an institutional framework; or (b) under an agonistic and distributional-existential approach that reveals the complexity of deciding who gets what.

II. Why a Genealogy?

Genealogy is not an unequivocal term. For some scholars, genealogy is not about a search for origins but a point where 'we get when we want to reconstruct a concept or institutions as far as we can' to illuminate the concept/practice from a different angle.[2] Friedrich Nietzsche, for instance, conceived genealogy as a critical historical tool to trace and spot when something became the opposite of what it was understood to be.[3] For Michel Foucault it is a way of doing history by describing practices that developed contingently into what exists today, not as a product, but as an effect of multiple accidents, surprises, turns, and historical events determining what counts as true or false in a given discourse.[4] Genealogy involves paying attention not to origins but to points of contingent departures. These points of departure sometimes constitute practices or concepts that still produce effects on how we understand society and distribute power and resources among its members. Sometimes genealogy unveils that what appears in a certain way was its opposite. Lastly, genealogy dwells in the contingency and accidental nature of historical shifts.

In this paper, instead of analysing landmark judicial decisions on proportionality, I explore unconventional places: the legal theories of legal elites who, in their own ways, have been a gravitational force of ALT, who share an affiliation with Harvard Law School ('HLS'), and who in distinct ways are a good sample of legal schools of thought highly influential in the unfolding of American legal discourse (eg proto-legal-realism, sociological jurisprudence,

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[2] Duncan Kennedy, *Sexy Dressing Etc.* (HUP 1993) 191.

[3] Friedrich Nietzsche, *On the Genealogy of Morals* (Marion Farber tr, OUP 1996).

[4] Michel Foucault, 'Nietzsche, Genealogy, History' (Donald F Bouchard and Sherry Simon tr) in Paul Rabinow (ed), *The Foucault Reader* (Pantheon Books 1984) 76–100.

legal process school, natural law, and critical legal studies).[5] My genealogical reading attempts to unveil what remains covered under a seemingly unified concept: the non-monolithic nature of proportionality and its irrational element at the core of a highly technical and rational method. In other words, proportionality is not one fixed thing, it is a dynamic mechanism. It swings from a rationalising tool substituting the vacuum left by logical deduction to a symptomatic experience disclosing the responsibility to decide in the face of distributive consequences. Ultimately, genealogy is a tool for doubting what we know; a genealogical approach to proportionality is a path to doubt what we think we knew well about it.

III. Three Models of Proportionality

1. Provisional Definition

Proportionality is as old as practical reasoning. Aristotle stated that 'the just is the proportional, the unjust is what violates the proportion.'[6] The very image of Lady Justice, depicted with a sword, a blindfold, and a scale, conveys how balancing is embedded in legal symbolism. From its inception, the notion of justice has gravitated around the notion of proportionality. However, the meaning of proportionality is fuzzy.[7] In criminal law, proportionality is associated with identifying the appropriate point between the seriousness of a

[5] I am not the first to use a genealogical approach to proportionality. Duncan Kennedy was the first to do it: Duncan Kennedy, 'A Transnational Genealogy of Proportionality in Private Law' in Roger Brownsword and others (eds), *The Foundations of European Private Law* (Hart 2011) and Duncan Kennedy, 'Proportionality and "Deference" in Contemporary Constitutional Thought' in Tamara Perišin and Siniša Rodin (eds), *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (Hart 2018). I largely agree with Kennedy's historical reading, and I will add that placing Kennedy in the genealogical narrative will show us that he, too, is presenting an alternative view *of* proportionality. Curtis Nyquist traveled this path, distinguishing teleological balancing and conflicting considerations balancing and arguing that the former strives for an external value or principle, whereas the latter is embedded in moral relativism. I draw from this distinction but emphasise the existential and distributional dimensions largely absent in his analysis. Curtis Nyquist, 'Re-Reading Legal Realism and Tracing a Genealogy of Balancing' (2017) 65 Buff L Rev 771. Lastly, Pieter-Augustijn Van Malleghem's dissertation at Harvard Law School under the supervision of Duncan Kennedy unearthed the German and French influence on American balancing. Pieter-Augustijn Van Malleghem, 'Balancing in Transnational Critical Legal Thought' (SJD thesis, Harvard Law School 2019).

[6] Aristotle, 'Nicomachean Ethics' in Jonathan Barnes (ed), *The Complete Works of Aristotle*, vol 2 (Princeton UP 1995) 1786.

[7] On different meanings of proportionality, see Franz Bauer, 'Proportionality in Private Law: An Analytical Framework', in this volume.

crime and the severity of its punishment. In constitutional law, it is associated with the question whether the infringement of a right, interest, or value is proportional to the goal pursued. A plausible definition of the principle of proportionality in a broad sense is provided by Bernhard Schlink:

> 'If you pursue an end, you must use a means that is helpful, necessary, and appropriate. A means that doesn't help to reach the end isn't a real means – to use it would be out of proportion. It is also out of proportion to use a means that does more than necessary, for example a means which is more harmful or more expensive than necessary. It is equally out of proportion to use a means that is inappropriate because, even though it is necessary, by using it you do more harm than the end is worth or you spend more than you gain.'[8]

Proportionality is both a principle and a decision-making tool. The principle is well stated by Schlink, except that he distinguishes balancing and proportionality, which are interchangeable in ALT.[9] For the decision-making tool, I follow the definition provided by Kennedy. Balancing, he argues, is a tool when a conflict or gap appears in legal materials, and the decision-maker perceives the selection of a norm not in the form of a logical conclusion from the legal materials, but rather as an inference traceable to them. Balancing encompasses substantive elements (ie interests and rights) and procedural considerations (ie administrability, deference, institutional competence). Proportionality as a decision-making tool provides the idea of structure and rationality, occluding that legal decision-making sometimes entails tragic choices[10] and trade-offs, heightening the awareness of the responsibility of choosing.[11] Therefore, proportionality appears as something unified, but a closer look shows its plurality. It resembles the Earth's lithosphere with multiple tectonic plates.

2. Holmes's Agonistic Approach

Before the turn of the 20th century, Oliver Wendell Holmes Jr, who would later become a US Supreme Court Justice, changed the climate of ALT by debunking the artificial divide between life and the law, a battle which Rudolph von Jhering had also fought on the other side of the Atlantic with his

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[8] Bernhard Schlink, 'Proportionality in Constitutional Law: Why Everywhere But Here?' (2012) 22 Duke J Comp & Int'l L 292.

[9] Nyquist uses balancing and when citing a reference using proportionality, he brackets the term as 'balancing'. Kennedy uses 'balancing/proportionality' to stress their commutability. Nyquist (n 5) 775 and Kennedy, 'Transnational Genealogy' (n 5) 189.

[10] By tragedy here I evoke Martha Nussbaum's work on decision making (see n 89) and the idea that to uphold a fundamental value or comply with a legal norm or legal duty one necessarily (this modality is key) must sacrifice other values, or violate a legal norm or legal duty.

[11] Except for the last point, I borrow these characteristics from Kennedy, 'Transnational Genealogy' (n 5) 190.

1884 parody *Im juristischen Begriffshimmel* (translated into English in 1951). In this text, Jhering chronicles his dream odyssey through the heaven of legal concepts and legal logic where the threat of expulsion follows everyone who dares to call a problem practical.[12] In the same vein, Holmes wrote '[t]he life of the law has not been logic, it has been experience.'[13] 'This is the text to be unfolded', wrote Justice Benjamin Cardozo, '[a]ll that is to come will be development and commentary.'[14] The goal for the legal philosopher was to find legal problems with significance for life and to reconnect the law with experience. But how can the law maintain its capacity to predict and orient behaviour while reconnecting with the messiness of human experience?

In his seminal paper, *Privilege, Malice, and Intent* (1894), Holmes hinted how law might reconnect with experience. The law aims to balance battling interests, and judges will need to make policy choices. Under tort law, actors are liable for actions that under common experience can be foreseen to cause damage *unless a privilege exists*. How far a privilege should be allowed, Holmes argued, is ultimately a matter of policy, and judges need to address questions of policy based on the particularities of each case. But in those days judges did not like to debate over questions of policy. They were comfortable in their logical deductions of rules and standards. Why? Because 'the moment you leave the path of merely logical deduction', Holmes argued, 'you lose the illusion of certainty which makes legal reasoning seem like mathematics […]. Views of policy are taught by experience of the interests of life. Those interests are fields of battle.'[15]

Holmes later came back to the topic of certainty in a speech reflecting on his two decades of work as a judge. 'It has seemed to me that certainty is an illusion', said Holmes, 'that we have few scientific data on which to affirm that one rule rather than another has the sanction of the universe, that we rarely could be sure that one tends more distinctly than its opposite to the survival and welfare of the society where it is practiced, and the wisest are but blind guides.'[16] The departure from certainty and the view that life as law is a struggle for survival called for other methods, such as balancing, to preserve the predictability of the law in the messiness of experience. Balancing was needed when judges realised that sometimes they were deciding on policy grounds and that their decision-making process was not different from the legislator's.

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[12] Rudolf von Jhering, 'In the Heaven for Legal Concepts: A Fantasy' (1985) 58 Temp LQ 799.

[13] Oliver Wendell Holmes Jr, *The Common Law* (Little, Brown and Co 1923) 1.

[14] Benjamin N Cardozo, 'Mr. Justice Holmes' (1931) 44 Harv L Rev 682, 683.

[15] Oliver Wendell Holmes Jr, 'Privilege Malice, and Intent' (1894) 8 Harv L Rev 7.

[16] Oliver Wendell Holmes Jr, 'Twenty Years in Retrospect' in Richard Posner (ed), *The Essential Holmes* (The University of Chicago Press 1992) 151.

Holmes drew from the example of a boycott. He suggested that a boycott done by one person is privileged, but one done in combination is not. This is a question of degree: when do many persons become too many? By making this decision, the courts act like a legislature. He wanted judges to pay

> 'attention to the very serious legislative considerations which have to be weighed. The danger is that such considerations should have their weight in an inarticulate form as unconscious prejudice or half conscious inclination. To measure them justly needs not only the highest powers of a judge and a training which the practice of the law does not insure, but also a freedom from prepossessions which is very hard to attain. It seems […] desirable that the work should be done with express recognition of its nature.'[17]

It is important to note that balancing occurred within a view of reality, an ontology, of conflict. Holmes adopted an agonistic ontology, which embraced the idea of life as a free struggle for survival, an idea derived from his conversations with William James, Chauncey Wright, and other members of the Metaphysical Club in Cambridge infatuated with Charles Darwin's findings.[18] If conflict is the substratum of biological life, the law needs to be shaped accordingly to this worldview, not by imposing a geometrical order on reality, but rather by weighing *all* the interests at play. How should interests be balanced? 'The advantages to the community, on the one side and the other', argued Holmes, 'are the only matters really entitled to be weighed.'[19] The interest chosen will likely be one that maximised the benefits. But he did not provide much clue on how to know which choices advanced such benefits. For Holmes, we decide under conditions of opacity. Decision-makers are blind guides. They know that social welfare is the reason for struggle but do not know what that means in specific cases. 'There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules', dissented Holmes in *Olmstead v US* (1928), '[t]herefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose.'[20]

Holmes was part of the Justices who decided the paradigmatic US Supreme Court case, *Lochner v New York,* which struck down the limit of working hours for bakers on the basis that workers and employers were free to contract. The principle of freedom of contract, the justices thought, emanated from the Fourteenth Amendment due process clause and, thereby, restricting the ample margin of freedom of choice. Holmes dissented, and he did it fiercely. 'This case is decided' dissented Holmes, 'upon an economic theory which a large part of the country does not entertain.'[21] Still, Holmes erased

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[17] Holmes (n 15) 9.

[18] Louis Menand, *The Metaphysical Club* (Farrar, Straus, and Giroux 2001) 198–199.

[19] Holmes (n 15) 9.

[20] *Olmstead v US* 277 US 438, 470 (1928).

[21] *Lochner v New York* 198 US 45, 75 (1905).

with one hand what he wrote with the other. He saw that the judicial decision reflected an economic theory but then backed off when it came to extending this insight – that legal decisions reflect economic values and order – to what some Justices were reading in the Constitution: 'a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.'[22] The point, however, is that Holmes's agonism gave rise to a larger attack on freedom of contract and the seed of Progressive Legal Thought.[23] *Lochner* marked the progressive attack on freedom of contract and on a legal consciousness supporting a laissez-faire economy, a principle of allocation based on 'free-choice' exchanges, and a minimalist view of the state. It was this context that bridged Holmes's agonistic model and Pound's teleological model. The court was blinded to reality, to industrial conditions and immersed, according to Pound following Holmes, in a fallacy that any 'legislation that disturbs [the] equality [between employee and employer] is an arbitrary interference with the liberty of contract'.[24]

3. The Teleological Model

a) Roscoe Pound

The teleological model was influenced by the work of Rudolph von Jhering, who attacked conceptual jurisprudence and, specifically, the belief in 'correct' decisions. Jhering was influenced by the English utilitarian, Jeremy Bentham, who coined the principle of utility as the standard to judge every human action or law considering the pleasure, good, or happiness it produces for the individual.[25] In the late 18th century, Bentham and Jhering inaugurated a paradigm shift called 'legal functionalism', which means that law is a tool

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[22] *Lochner* (n 21) 75.

[23] For a detailed account of Lochner's impact, see Morton Horwitz, *The Transformation of American Law: 1870–1960: The Crisis of Legal Orthodoxy* (HUP 1992) 33–63 ('The decision of the U.S. Supreme Court in *Lochner v. New York* (1905) brought Progressive Legal Thought into being').

[24] Roscoe Pound, 'Liberty of Contract' (1909) 18 Yale LJ 454.

[25] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (first published 1789, Clarendon Press 1907). Jhering cites Bentham in the second volume of *Der Zweck im Recht* (The Struggle for Law); for a full commentary on Jhering's adoption see Joseph H Drake, 'Editorial Preface to this Volume' in Rudolf von Jhering, *Law as a Means to an End* (I Husik tr, Boston Book Company 1913) xvii ('[Jhering] credits Bentham […] with a very important contribution to ethical theory. "Those concepts which appear but dimly in Leibnitz ('omne honestum publice utile, omne turpe publice damnosum'), which Kant, too, had before him in his 'supremely good' ('Weltbesten'), Bentham first recognized with perfect clearness, and, under the very appropriate name of Utilitarianism developed into an independent ethical system." But it is evident that Ihering uses Bentham's fundamental concept merely as a starting point for his own philosophy').

to some end. In 1913, when Jhering's book *Law as a Means to an End* was published in the United States,[26] his ideas were well received mainly because jurists like Roscoe Pound (1870–1964), a former HLS Dean, had prepared the soil for its reception with his idea that the law is a social engineering tool to satisfy human interests.[27]

Jhering developed two ideas that resonated with Pound. First, the fact that every norm is the effect of a provisional compromise of conflicting interests, revealing the legal process as a back and forth between conflict and compromise.[28] Legislators and judges were ultimately engaging in a similar thought process. Second, the decision-maker should choose the alternative that satisfies society's interests. Social interests demand sacrifices from private owners. This can be seen in the idea of expropriation and easements. But Jhering left, as Kennedy argues, one question unaddressed (as did Holmes): what if social interests clash?[29] This question was taken up by Pound, who saw the usefulness of Jhering's ideas, particularly adopting 'interest' as the analytical unit of the law and social purpose as its *telos*. The law stems from conflict and struggle, but it had a *telos*, a purpose to strive for.

Roscoe Pound described the 20th century as one where a new mindset emerged, where jurists

> 'began to think in terms of human wants or desires rather than human wills. […] They began to weigh or balance and reconcile claims or wants or desires, as formerly they had balanced or reconciled wills. They began to think of the end of law not as maximum self-assertion, but as a maximum satisfaction of wants.'[30]

This new mindset prompted changes. For instance, psychology was commandeered by economic wants, societies were gradually differentiated in industrial organisations creating new economic classes and the law was decentred from norms to consequences.[31] Like Holmes and Jhering, Pound endorsed the instrumental, pragmatic, and antiformalist view in legal decision-making. In 1922, Pound wrote a piece celebrating Holmes's contribution to ALT, describing how Holmes made the legal profession conscious of 'the problem of harmonizing and compromising conflicting or overlapping interests'.[32] Still,

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[26] Rudolf von Jhering, *Law as a Means to an End* (I Husik tr, Boston Book Company 1913).

[27] Roscoe Pound, 'The Need of a Sociological Jurisprudence' (1907) 30 Annu Rep ABA 911, 920–921 ('Law is a means, not an end. […] [sociologists] are defining justice as the satisfaction of everyone's wants so far as they are not outweighed by others' wants.').

[28] Rudolph von Jhering, *The Struggle for Law* (John J Lalor tr, Callaghan and Co 1879) 54 ('a legal right […] is nothing but an interest protected by the law').

[29] Kennedy, 'Transnational Genealogy' (n 5) 194.

[30] Roscoe Pound, *An Introduction to the Philosophy of Law* (Yale UP 1922) 89.

[31] Pound (n 30) 90.

[32] Roscoe Pound, 'Judge Holmes's Contributions to the Science of Law' (1921) 34 Harv L Rev 450.

Pound was not an obedient Holmesian disciple. He accepted Jhering's invitation to join the ranks of the jurisprudence of results school, which was concerned with how a decision operates in practice and was rooted in a teleological view. After all, Jhering believed there is a purpose to the law, while Holmes's scepticism made it difficult to maintain this. Unsurprisingly, Holmes's favourite sceptical maxim was 'to have doubted one's own first principles is the mark of a civilized man'.[33] Stephen Budiansky, Holmes's recent biographer, argued that '[h]is philosophical skepticism was the force behind every one of his most important and enduring contributions, as scholar and judge, to the law'.[34]

In 1908, Pound wrote *Mechanical Jurisprudence,* where he agreed with Holmes's criticism of Classical Legal Thought, particularly his objection against searching for certainty in the internal coherence of the legal system. But, unlike Holmes, he recast the law to achieve more predictability and certainty, transforming it as a means to achieve (yes, predictable) social ends. 'We do not base institutions upon deduction from assumed principles of human nature', writes Pound, channelling Holmes, 'we require them to exhibit practical utility, and we rest them upon, a foundation of policy and established adaptation to human needs.'[35] Pound advanced a socio-scientific temperament, substituting Holmesian scepticism for a method of conflicting interests balanced with the least sacrifice possible. This resonated with the philosophy of choosing the action that leads to the least dissatisfactions, a view forwarded by his friend William James, who had achieved in philosophy what was needed in law.[36]

In 1921, still committed to legal reason, Pound shaped the task of judges in his seminal paper *The Theory of Social Interest*.[37] It was not enough to get rid of mechanical jurisprudence and legal formalism. He took the reconstructive path of the law, in the sense of restoring the faith in finding meaning in legal discourse, solving societal conflicts, and making social changes, by arguing for 'a weighing or balancing of the various interests that overlap or come in conflict and a rational reconciliation or compromise.'[38] But how to achieve this reconciliation of interests? Was there an overarching interest that trumped other interests?

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[33] Oliver Wendell Holmes Jr, 'Ideals and Doubts' (1915) 10 Ill L Rev 1, 3.

[34] Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law and Ideas* (WW Norton & Co 2019) 21.

[35] Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 Colum L Rev 605, 609.

[36] William James, *The Will to Belief* (Longmans Green, and Co 1896) 206; Pound (n 35) 609.

[37] This article was rewritten and published in 1943 as Roscoe Pound, *A Survey of Social Interests*, (1943) 57 Harv L Rev 1.

[38] Roscoe Pound, 'A Theory of Social Interest' (1921) 15 Papers and Proceedings of the Am Soc Soc'y 16, 17.

Pound exchanged rights for interests as the unit of analysis in legal decision-making. He defined interests as desires that human beings seek to satisfy individually, in social groups or through political associations.[39] The way to identify interests was through social psychology, that is, the set of human instincts projecting a correlative social interest, leads, just like the maternal instinct, to the social interest of protecting domestic institutions. Pound saw the law as a projection of rooted human needs and desires. Besides social psychology, Pound provided another guide to decision-makers: a typology of social interests to sharpen up their choices.[40] He proposed the following inventory of interests:

- *Social interests of general security* which have a correlative duty to protect groups against actions that threaten their existence (general health, peace, and public order).
- *Social interests in the security of social institutions* which has a correlative duty to protect institutions from actions disrupting their functioning (domestic, religious, and political institutions).
- *Social interests in the general morals* which have a correlative duty to protect public morality from harmful influences (*boni mores*).
- *Social interests in the conservation of social resources* which have a correlative duty to preserve resources on which human life depends to thrive (natural and human resources).
- *Social interests in general progress* which have a correlative duty to promote economic, political, and cultural progress (freedom of property and freedom of industry).
- *Social interests in the individual life* so that every individual can satisfy its interests to the highest extent possible.[41]

Pound created a typology of interests canvassing a specific view of society. Pound's social ideal entails preserving forms of life, institutions, and public and cultural norms while promoting economic expansion in the form of free industry, trade, and private property. Therefore, his teleological balancing is aimed at one overarching purpose: the preservation of social order. Any control or exercise of force on individuals *should be* done to weigh social interests and reconcile them *in the way that sacrifices them the least and preserves social order the most*. Let me cite him at length:

'Looked at functionally, the law is an attempt to reconcile, to harmonize, to compromise these overlapping or conflicting interests, either through securing them directly and immediately, or through securing certain individual interests or delimitations or compromises of individual interests, so as to give effect to the greatest number of interests or to the inter-

[39] Pound (n 38) 30.
[40] Pound (n 38) 33.
[41] Pound (n 38) 33–40.

ests that weigh most in our civilization, with the least sacrifice of other interests. […] I venture to think of problems of eliminating friction and precluding waste in human enjoyment of the goods of existence and of the legal order as a system of social engineering whereby those ends are achieved.'[42]

This passage is interpreted by other genealogists as 'the archetypical statement of teleological balancing'.[43] Pound stressed a different aspect of the law, not the battleground as Holmes did, but the possibility of compromise and harmonisation, the possibility of a functional and purposeful understanding of the law. In *A Theory of Social Interests,* Pound included a *how-to manual* to achieve this cryptic goal of eliminating friction in legal decision-making. Strangely, this manual was deleted in the version published two decades later. The manual stated the following steps (which seem like a proto-proportionality test): (i) survey human interests; (ii) perceive their collisions and friction, and (iii) study how legal machinery can be adapted to reduce the friction in this context. But the balancing process was still indeterminate and vague, even though Holmes's *social advantages*, as explained above,[44] were further developed in Pound's typology of interests.

Pound rearranged the balance between freedom (self-assertion) and welfare (satisfaction of wants), preparing the advent of welfare policies in the US under Franklin Delano Roosevelt's New Deal. He inaugurated balancing as a reconstructive tool in American legal thinking, saving the law from Holmes's agonism. However, Pound was not as confident as the formalists in believing in a solution that worked *here and everywhere.* He was sensitive to the nuances and historical changes in society. 'We may reach a practicable system of compromises of conflicting human desires here and now', he argued, 'by means of a mental picture of giving effect to as much as we can, without believing that we have the perfect solution for all time and every place.'[45] His balancing model aimed to preserve social order *here* and *now.* He replaced the right answer model of classical legal thought, based on logical deduction, with another right answer model built on balancing.[46] However, this 'right' answer model is not an absolutist one. Pound is cautious about what balancing can achieve. For him, balancing is context-dependent, meaning that the setting where the choice is made will favour one purpose over others. Pound wrote,

'I do not believe the jurist has to do more than recognize the problem and perceive that it is presented to him as one of securing all social interests so far as he may, of maintaining a balance or harmony among them that is compatible with the securing of all of them. The

[42] Pound (n 38) 44.

[43] Nyquist (n 5) 841.

[44] See text to n 19.

[45] Pound (n 30) 93.

[46] This idea of switching one right-answer-model (deduction) for another right-answer-model (balancing of special sort) comes from Van Malleghem (n 5) 85–92.

last century preferred the general security. The present century has shown many signs of preferring the individual moral and social life. I doubt whether such preferences can maintain themselves.'[47]

Pound lived in a world of industrialisation, large-scale immigration, socialisation of law, and philosophical pragmatism. In Pound's age, right choices where those that satisfied human wants and social needs, preserved social order, and allowed organisms to thrive. Pound's balancing method paved the way for social policies like Roosevelt's New Deal. The economic and social vision in Roosevelt's policy 'realize[s] the shift Pound had described decades before, from an economics of freedom to an economics of satisfaction and security.'[48]

For Pound, it was possible to be a social engineer. If legal decision-makers choose *x*, they may know what will happen *in the world,* because, like engineers, they have the tools to *predict* how the law will satisfy a wide variety of interests at stake with the least sacrifice. His balancing model did not stress *opacity* or *fogginess.* He was aware of the time-bounded value he wanted to achieve by weighing conflicting interests (social order), and he knew (or assumed he knew) that the consequences of balancing were predictable. Balancing was like building bridges. If one considers all the forces at play and does the right calculations, the bridge will support the weight it is expected to hold. Pound's reconstructive taxonomy of interests and functional method moderated Holmes's scepticism by reinstating a different type of 'right answer model': a certainty that the law *could predict* its effects in the world, that it could adapt and shape itself to preserve social order based on the needs and interests we support here and now.

b) Lon Fuller – The socio-teleological model in private law

Balancing in ALT was a form of resistance to *Lochnerism* (ca 1900–1937), which represented the enshrinement of freedom of contract absolutism[49] and the formalism against which Holmes dissented with the following lines: 'General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.'[50] But balancing was about to suffer two major changes during and after the Second World War. On the one hand, Lon Fuller, labelled by Pound as 'the coming man in jurisprudence' in the US,[51] published his seminal piece *Con-*

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[47] Pound (n 30) 95–96.

[48] John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* (HUP 2007) 232.

[49] Cohen-Eliya and Porat (n 1) 279–282. See also text to nn 22–24.

[50] *Lochner* (n 21) 76.

[51] Robert Summers, *Lon L. Fuller* (Stanford UP 1984) 5.

sideration and Form (1941),[52] conceiving balancing as more than a tool to weigh social interests. Balancing was the means to deal with the conflicting functions that structure private law (conflicting considerations). Conflict was not limited to the interests secured by rights; it goes all the way down to the very structure of legal doctrine. Fuller entrenched and expanded the teleological model of balancing into contract law.

A year before publishing *Consideration and Form*, Fuller delivered the lectures *The Law in Quest of Itself* (1940), where he aired his criticism of Holmes and the legal realists for neglecting that in law 'the is and the ought are inseparably mixed.'[53] Fuller searched for a criterion to separate *the law as it is* from *the law as it should be*. He did not find one. In his search, the positivist path rejected the inner morality of the law and the fact that legal norms were purposeful. The natural law path led to occasional escapes from reality, supplanting it with natural rights written everywhere even though they weren't written in the law. Fuller was aware that both paths involved an illusion. He preferred the illusion of natural law.[54]

The illusion of natural law was seductive for it mitigates the fear jurists face when they decide a case and are asked whether that decision is their own or whether it stems from what the law demands. Natural law recognises that beyond legal norms there is a system of functions and principles towards which the norms are (and should be) striving. The jurist 'ought to be proud that his contribution is such that it cannot be said with certainty whether it is something new or only the better telling of an old story.'[55] This natural law viewpoint allowed Fuller to see beyond written norms and look for the functions such norms were expressing. Seeing the law in terms of a structure of function aiming to fulfil social purposes places him in the teleological camp.

Fuller's *Consideration and Form* captures a new phase of proportionality in ALT. It is in some sense the ending of the realist era where the law is conceived as what judges and legal officials do. Instead, Fuller expanded on the consideration doctrine (each party must incur a legal detriment to make a promise enforceable) to reveal that legal institutions have underlying conflicting functions at the formal and substantive levels. He applied a functional view to legal formalities and suggested that it was not enough to pay attention to the conflicting interests the law was aiming at, as legal structures already entail tensions and divergent functions that may require balancing. He found three formal functions in the consideration doctrine:

1. *The evidentiary function*: A form x supports the existence of a deed A. This function guarantees the interest of evidentiary security to the parties.

[52] Lon L Fuller, 'Consideration and Form' (1941) 41 Colum L Rev 799.
[53] Lon L Fuller, *The Law in Quest of Itself* (The Foundation Press 1940) 64.
[54] Fuller (n 53) 109–110.
[55] Fuller (n 53) 140.

2. *The cautionary function*: A form *x* demands that the person consenting to a deed *A* takes a moment to reflect on *A*. The cautionary function induces 'a circumspective frame of mind.'[56]
3. *The channelling function:* A form *x* serves as a sign for the interpreter facilitating the diagnosis of a deed *A* just like the stamp of a coin channels the value without weighing the coin.[57]

Where before there was one interest in securing transactions, breaking down the doctrine of consideration into three functions exposes the multiplicity of a seemingly unitary and fixed contract law doctrine. Balancing was thus displaced from the domain of interests to the domain of legal functions in doctrine. Decision-makers should not only distil the underlying interests in a legal dispute, but they should also expose the specific functions that legal institutions are securing. For instance, when called to determine whether a promise is enforceable, Fuller's answer is framed in the language of proportionality:

'We must preserve a proportion between means and end; it will scarcely do to require a sealed and witnessed document for the effective sale of a loaf of bread. […] Whether there is any need, for example, to set up a formality designed to induce deliberation will depend upon the degree to which the factual situation, innocent of any legal remolding, tends to bring about the desired circumspective frame of mind.'[58]

Here, Fuller articulates what the literature on proportionality calls the rationality requirement: a measure is proportional if the means are necessary to achieve a specific end. But he also introduces the idea that a form is needed *unless* the fact pattern contains forces making such formality superfluous or bringing about the desired goal through other means. Specifically, Fuller discusses *Waite v Grubbe,* a case where a donor declared the intention to gift a sum of money and conveyed where the money was hidden.[59] The court held that the gift was valid, despite the absence of formalities, because the fact pattern suggested enough circumspection and caution in the act of revealing such a secret.[60]

In terms of substance, Fuller did what can be called 'the one among many' move. Just like Pound asserted that freedom of contract was one among many interests at play, Fuller claimed that private autonomy is one among other purposes structuring contract law:

1. *Private autonomy* provides a reason for judicial intervention to secure enforcement of the agreement. This protects the effects of self-assertion.

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[56] Fuller (n 52) 800.
[57] Fuller (n 52) 801.
[58] Fuller (n 52) 805.
[59] *Waite v Grubbe* 43 Or 406 (Oregon 1903).
[60] Fuller (n 52) 805.

2. *Reliance* provides a reason to protect the potential harm suffered by individuals who adjusted their behaviour in reliance on the expectation of an unfulfilled promise. This protects the effects of the assertion of others.
3. *Unjust enrichment* provides a reason to rectify 'an aggravated case of loss through reliance'[61] where not only a party incurred a loss but the other party had an unjustified gain. This protects the fairness and balance of the gains and losses from assertions.

Contract law unfolds in a constant battle between private autonomy, reliance, and unjust enrichment. Fuller followed Holmes's agonistic ontology of contradicting forces animating the law and applied it to the architecture of contract law. He conceived the law as a collision of legal functions.

In terms of substance, Fuller's Contract Casebook published in 1947 opened, as Kennedy has discussed,[62] with a long quotation of a manuscript by George Gardner, which reveals that Fuller framed the field of contract as the result of the conflict between the following ideas:

'(1) *The Tort Idea*, ie, that one ought to pay for the injuries he does to another. As applied to promises this means that one ought to pay for losses which others suffer in reliance on his promises.
(2) *The Bargain Idea,* ie, that one who gets anything of value by promising to pay an agreed price for it ought to pay the seller the price he agreed.
(3) *The Promissory Idea*, ie, that promises are binding in their own nature and ought to be kept in all cases.
(4) *The Quasi-Contractual Idea*, ie, that one who receives anything of value from another ought to pay for it unless it came to him as a voluntary gift.
These ideas, which at first seem trite and wholly harmonious, are in fact profoundly in conflict […], there is no reason to think that it can ever be gotten rid of or to suppose that the present compromises of the issue will be any more permanent than the other compromises that have gone before.'[63]

A key contribution of *Consideration and Form*, therefore, 'was to develop the principle of private autonomy as a concurring and competing consideration in the development of contract doctrine'.[64] Fuller dethroned the will theory and developed the conflicting considerations model (read proportionality). He did not completely dismiss the idea of an overarching goal that will guide the legal decision-maker in the balancing process. He believed that the strategy is not to abolish this or that doctrine in private law but to reinforce the teleological model of decision making: '[w]hat needs abolition is […] a conception of

[61] Fuller (n 52) 812.

[62] Duncan Kennedy, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"' (2000) 100 Colum L Rev 94, 166–167.

[63] George Gardner, Observations on the Course in Contracts (1934) in Lon L Fuller, *Basic Contract Law* (10th edn, West Academic Publishing 2001) 5.

[64] Kennedy (n 62) 131.

legal method which assumes that the doctrine can be understood and applied without reference to the ends it serves.'[65]

After the Second World War, Fuller returned to the topic of jurisprudence. In 1946, he published *Reason and Fiat*. For our purposes, what is striking about this piece is that he believed that a natural law view paired with the teleological approach will 'not only help in leading us toward a right solution of our problems but will make for the spirit of compromise and tolerance without which democratic society is impossible.'[66] Fuller retained the spirit of compromise despite developing a conflicting consideration model in private law. He did not embrace the structural conflict in the law. He tamed it with the idea of purpose.

It is unclear what the overarching purpose in Fuller's legal philosophy was. Whether such purpose resembles Pound's preservation of social order, the protection of a democratic liberal egalitarian society, later theorised by John Rawls, or whether it is about preserving what he labelled the 'inner morality of law', requiring balancing to include legal principles securing the form of the law in every choice (ie principles of generality, promulgation, clarity, avoiding contradiction between laws, avoiding impossibility, constancy through time, non-retroactivity, and congruence between official action and declared rule),[67] is not clear.[68] What is partially clear is that in the post-war milieu, Fuller was not framing conflicting considerations, as Kennedy suggested, between private autonomy and 'fascism or communism', but as an 'intra-free world choice between liberal and conservative approaches to the mixed capitalist economy'.[69] In other words, Fuller's teleology was animated by a capitalist economy and a social order that made possible a free choice world where restitution (and not distribution) is what curtails private autonomy. Fuller's focus is on the problem of how to balance the conflicting considerations to protect a framework of transactions (not distributions) in a free-choice world where reliance, unjust enrichment, and private autonomy are to be balanced.[70] He does not take a step further and consider the inherent conflict in the law.

c) The Legal Process School

The Legal Process School, a jurisprudential school based at HLS, developed by Henry Hart and Albert Sacks, saw conflict in the legal system as extending

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[65] Fuller (n 52) 824.

[66] Lon L Fuller, 'Reason and Fiat in Case Law' (1946) 59 Harv L Rev 376, 395.

[67] Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart 2012) 25–50.

[68] Lon L Fuller, *The Morality of Law* (Yale UP 1964) 184–186.

[69] Kennedy (n 62) 174.

[70] Kennedy (n 62) 139.

beyond private doctrine and reaching the realm of institutional design. One of their main arguments was that law should not be conceived as a mechanism that distributes and allocates limited resources among conflicting parties. They (including Fuller) called this way of thinking the 'fallacy of the static pie'.[71] Rather, they thought that the law can secure human cooperation and transactions and 'enlarge the pie'.

They viewed the law's purpose as having to avoid the disintegration of the social order and maximise the satisfaction of human wants by using material and institutional resources more effectively. Yet they knew that sometimes the supply of the 'good things of life *is* limited at any one time, and *does* have to be divided among the contestants for it'.[72] The law had to balance three objectives or imperatives: (i) securing a social existence, (ii) satisfying human wants effectively, and (iii) fairly distributing limited resources. But how to manage and design institutions to achieve these objectives? Institutional settlement is their response.[73]

> 'When questions arise which in some way or other have to be settled, people find a means for settling them […]. Implicit in the problems of settling and carrying out the terms of collaboration in a society […] is the need for deciding who shall decide the various questions which arise in the process, and how they shall be decided.'[74]

For the Legal Process School, the right decision was not about finding the appropriate balance between social interests or conflicting considerations, but about finding the 'right decision maker'. Institutional settlement, therefore, became part of the balancing toolkit. As Duncan Kennedy rightly puts it, '[t]he procedure was a last resort, to be used as a general matter only when the law (viewed conceptually or teleologically or as precedent) "ran out."'[75] The focus on the *what* of the legal decision was displaced for the question of *who* decides. Balancing turned into a problem of decision-making allocation. For example, when a decision required 'reasoned elaboration', the judicial door was the right one, but when it required political discretion, the legislature was appropriate.

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[71] Hart and Sacks point out that the 'static pie fallacy' is an expression that 'Professor Lon L. Fuller and the senior editor of these materials both liked […] [and got to using] in discussions with each other. Now neither of them can remember who used it first. Perhaps they got it from someone else.' Henry Hart and Albert Sacks, *The Legal Process Materials* (The Foundation Press 1994) 102.

[72] Hart and Sacks (n 71) 111.

[73] Institutional settlement is the principle that expresses 'the judgement that decisions which are duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed'; Hart and Sacks (n 71) 4.

[74] Henry Hart, 'Note on Some Essentials' (1950) in William Eskridge and Phillip Frickey, 'An Historical and Critical Introduction to the Legal Process' in Hart and Sacks (n 71) lxxxiv.

[75] Kennedy, 'Transnational Genealogy' (n 5) 209.

Balancing can be read as prompting the fragmentation of legal thought. First, it fragmented the notion of rights into multiple interests. Then it fragmented private law doctrine into consideration models. But to stop this movement towards fragmentation and uncertainty in legal decision-making, a new line was necessary to save it from being a tragic, existential, and unstable process of decision-making. An institutional settlement was a way to add another restraint in legal decision-making, to protect parties against any form of judicial creativity, and to preserve a teleology within legal institutions: every institution has a specific function in fulfilling the ultimate purpose of the law, namely the preservation of groups which collaborate and compete in conditions of interdependence, perfecting the conditions for community life and human development.[76]

Hart and Sacks endorsed a teleological balancing view. Their contribution to balancing was not at the level of substance (although an argument could be made that *reasoned elaboration* operated at this level) but at the level of institutional design and decision-making allocation. The question of *who* decides was perhaps more important than the question of *how* to balance or *what* is to be balanced. Each dispute had a specific door, as Frank Sander, one of the promoters of alternative dispute resolution (ADR) and an HLS colleague of Fuller, Hart, and Sacks, would later put it.[77] The social problem of how to establish and perfect the conditions of community life was not the problem of 'deciding who gets what', but the problem, channelling Sander, of *who* decides what.[78] Distribution of resources was embedded in a fixed-pie mentality. They suggested that the law's purpose was to continue expanding the pie by designing procedures to settle questions guided by the appropriate institution. Their faith in production and in enlarging the pie would encounter a challenging view emerging from the loss of faith in both the unlimited expansion of the economy and the idea that there is a purpose (*telos*) in the law. More importantly, this challenging view recognises that we live in a world of struggle, not unlimited growth.

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[76] Hart and Sacks (n 71) 102 ('The social problem has been broadly described as that of establishing, maintaining and perfecting the conditions necessary for community life to perform its role in the complete development of man. If this were right, it would follow that the ultimate test of the goodness or badness of every institutional procedure and of every arrangement […] is whether it helps to further this purpose.')

[77] Frank EA Sander, 'Varieties of Dispute Processing' in A Leo Levin and Russell R Wheeler (eds), *The Pound Conference: Perspectives on Justice in the Future: Proceeding of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (West Publishing Co 1979) 65–87.

[78] Hart and Sacks (n 71) 102.

4. The Existential-Distributional Model

Duncan Kennedy's loss-of-faith-temperament came during the late 1960s when he lost confidence in Cold War liberals, the 'virtuousness of the US', and the communist threat.[79] During Kennedy's initial years teaching at HLS, Albert Sacks invited him to teach legal process, besides his other courses on contracts and legal history.[80] Kennedy had, therefore, not just capacious knowledge of the legal history of ALT, but inside knowledge of the 'utopian rationalistic' project of the Legal Process School. Hart and Sacks had contributed, according to Kennedy, to the completion of balancing through their institutional competence argument which added a new layer to rationalising legal reasoning. In Kennedy's words, '[t]he message was that the choice of an appropriate decision maker, rather than of a correct solution, was often the correct way for a judge to decide a legal question.'[81]

What he adds to proportionality, I claim, is an existential dimension that uncovers the *opacity* and *fogginess* of balancing. His move is to wake us up from our teleological slumber in which the dimension of responsibility is not felt as strongly by the legal decision-makers who believe that they are just following a 'rationalised' method to deal with legal disputes and gaps. The existential-distributive model demands departing from the expanding-the-pie-view championed by Pound, Fuller, and the Legal Process School. Kennedy acknowledges that trade-offs are built into the law-making process, and that contradiction is not just part of the ontology but also part of the semiotics of legal discourse. He holds an agonistic view of the law: groups conflict and cooperate with one another to satisfy their ideal and material interests, and legal norms are the products of these struggles. They express partial compromises of interests. These norms distribute material and ideal interests among groups.[82] This is the distributional tenet. He explicitly links his view to René Demogue. According to Kennedy, Demogue was the founder of balancing because he 'identified a trade-off that is built into the law-making process: when one thing goes up (security of transaction), something else must go down (static security)'.[83] This agonistic and distributional view requires, as Pound hinted, a logic of sacrifices. Unlike Pound's sacrifices, the sacrifices in the distributional model are not justified for an ulterior purpose

[79] David Hackney, *Legal Intellectuals in Conversation: Reflections on the Construction of Contemporary American Legal Theory* (NYU Press 2012) 20.

[80] Duncan Kennedy shared with me his job market paper on the Legal Process School, 'Utopian Rationalism in American Legal Thought' (1970).

[81] Kennedy, 'Transnational Genealogy' (n 5) 208–209.

[82] LPE Project, 'Keywords: CLS and LPE on "Political Economy" and "Indeterminacy" Symposium' (21 January 2022) <https://www.youtube.com/watch?v=7rpGK35S3ao> accessed 26 November 2022.

[83] Kennedy, 'Transnational Genealogy' (n 5) 197.

or a harmonising view. The logic of sacrifices forces the decision-maker to recognise that it is not enough to say a rule or decision *x* is good because it promotes *y* (and you can fill in the blanks with: interest, an ideal or desired society, legal function, or economic regime or legal order). To put it properly, according to Kennedy, one should add: at an acceptable cost *z* (eg value, interest, principle, or right).[84]

On top of the distributional turn, Kennedy argues for an existential turn. He suggests to adopt an ethic of responsibility, which 'holds that it may be necessary to violate that ethic without a universalizable counter-ethic that will tell you when the violation is justified.'[85] To take a phrase from Weber often used by Kennedy: '[N]o ethic in the world can say when, and to what extent the ethically good end can "justify" the ethically dangerous means and its side effects.'[86] The ethically good might be preserving social order, as in Pound; protecting free choice markets, as in Fuller; or expanding the possibilities of communities by avoiding the disintegration of social order using institutional and material resources effectively, as in the Legal Process School. Kennedy's point is that the '"good' end (or *telos*) hides what truly happens in the act of deciding, namely the selection of an ethically dangerous means and the bearing of responsibility for both its foreseeable and unforeseeable distributional consequences.

The distributional turn in proportionality starkly contrasts with the optimist and triumphalist expanding-the-pie-view of the Legal Process School. But this is only half of the story. Kennedy does not see proportionality as a move towards rationalising the law by determining the helpfulness, necessity, and appropriateness of measures and legal interventions as my provisional definition originally stated. For him, proportionality, if observed closely, is a move towards the politicisation of the law. In proportionality, there is inevitably a decision grounded not on something that already exists in the system (or outside of it) but on something that has to be created, sacrificing something that is already in the system without any ontological priority in the form of policies, principles, interests, or rights.[87] In short, for Kennedy 'balancing is an intensely controversial procedure, commonly regarded as, at least potentially, a Trojan horse for the invasion of law by ideology'.[88] And although Kennedy believes there is no alternative to balancing, I believe he posits, perhaps implicitly, an *alternative view of (or dare I say: to) balancing*: the distributional-existential model of balancing.

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[84] Kennedy, 'Transnational Genealogy' (n 5) 197.

[85] Kennedy, 'Proportionality and "Deference"' (n 5) 58.

[86] Max Weber, 'Politics as a Vocation' in Max Weber, *The Vocation Lectures* (David Owen and Tracy Strong eds, Rodney Livingstone tr, Hackett 2004) 84.

[87] Kennedy, 'Transnational Genealogy' (n 5) 187–190.

[88] Kennedy, 'Transnational Genealogy' (n 5) 190.

This model has three features. First, as I explained, it encompasses the view that law is hardwired as a system of contradictions. Kennedy agrees with Holmes that the law is a battlefield of interests, but he adds Demogue's view that trade-offs and sacrifices are also built into the very structure of the law. Second, Kennedy departs from the teleological dream according to which every conflict within the law can be harmonised, albeit partially and for the time being, according to an external value, a view of society, or an exogenous purpose. And third, Kennedy encourages approaching proportionality not necessarily as a neo-formalist tool to maintain the faith of the decision-makers in the law, albeit with its indeterminacy and inherent contradictions. He uses proportionality for the opposite purpose: to lift the veil of certainty and help decision-makers see that their balancing is a choice, an ethical decision, which will likely have unforeseen consequences. Kennedy flips the common understanding of proportionality as another path to rationalise legal decision-making and mitigate arbitrariness by arguing that proportionality might unveil the ethical, existential, and distributional dimensions of legal choices. Decisions are ethical, not in the sense of right and wrong answers, but because sometimes a sacrifice needs to be made and no hierarchy or ground will help decision-makers sleep better after making such sacrifice.

Philosopher Martha Nussbaum argues that tragic choices, as sometimes encountered in the legal domain, are useful for four reasons: (i) they help us clarify the stakes and our values; (ii) they help us recognise our moral leanings as individuals and as a society; (iii) they propel us to 'make appropriate reparations' for inevitable yet harmful conduct, and (iv) they lead us to imagine how society can be redesigned, if possible, to avoid such tragic decisions in the future.[89] Kennedy would argue that choices involving sacrifices or tragic choices under balancing are useful, but not for these reasons. He might say that the tragic dimension, at least as regards judges, appears because they stand in-between their duties to state reasons in good faith and their obligation to make justice happen. This tragic dilemma experienced as a role conflict produces discomfort and anxiety. In Kennedy's words,

> '[the decision-maker] persuades himself that (what seems to the observer) a patently false deductive or teleological argument settles the case. He does this not as a conscious strategy, as proposed above, but "in denial" of what he is "really" doing to escape the psychic pain of role conflict. This is bad faith in the particular Sartrean sense of self-deception that avoids taking responsibility for one's actions.'[90]

To avoid this conflict, Kennedy argues that the judge might make a strategic choice to solve a case under formalist grounds despite accepting that proportionality is called for mainly because the former method will not raise suspicion

[89] Martha Nussbaum, 'The Costs of Tragedy: Some Moral Limits of Cost Benefit Analysis,' (2000) 29 J Legal Stud 1005, 1017.

[90] Kennedy, 'Proportionality and "Deference"' (n 5) 54.

of ideology. Sometimes judges will tear down the distinction between politics and law, but they will have to embrace the consequences of being called usurpers and damaging the public belief in the law, thereby generating the counter-effect of packing courts with justices having a formalist view or embracing teleological balancing, who will likely lean towards conservatism. Kennedy does not prescribe one route, he simply shows that judges, like other decision-makers, will be responsible for the consequences of their decisions. Instead of adopting an ethic of conviction where the decision-maker knows what is wrong and refrains from it, an existential-distributional model of proportionality leads to an ethic of responsibility: being responsible for choosing under circumstances of *opacity* (the values and interests have no ontological primacy) and *fogginess* (we cannot predict completely the effects of our choices). Under this model of balancing, legal decision-making highlights the distributional benefits and burdens. Kennedy closes his article on *Proportionality and Deference* with an enigmatic passage that pairs balancing in ALT with existentialist thought:

> 'With Dostoyevsky, Kierkegaard and Nietzsche in the background, the Weberian judge in the post-formalist, post-absolutist age has to decide "without a warrant" and suffer the moral consequences if after the fact he turns out to have done wrong.'[91]

The genealogy of balancing in ALT uncovers that, instead of being a rationalising method of the law, proportionality/balancing has led gradually to unveiling the inner contradictions in the law and the responsibility of decision-makers. Even if proportionality evokes the idea of partial compromises, as in Jhering, Pound, Fuller, and the Legal Process School, the existential-distributional model uncovers the tragic and inescapable ethical choices legal decision-makers must face in a world of struggle where losers and winners cannot 'have their cake and eat it too'. But if we go a step further, we find that proportionality debates swung between two poles: the need to resolve legal contradictions appealing to an exogenous value, political or economic order, or an ideal society on the one hand, and the need to embrace the contradiction along with its anxiety-inducing effect it has on the decision-maker on the other. To be human is to strive for these opposing needs: overcoming contradiction (or conflict) in an utterly contradictory (or conflicting) world. To be sure, proportionality has had a timid application in American legal *practice* as Vicki Jackson has shown for constitutional law[92] and Duncan Kennedy for private law.[93] But in legal *theory*, balancing debates have animated different approaches to legal decision-making and divergent views on the law. If the owl of Minerva usually flies at dusk, it seems that when it comes to proportionality in ALT, the owl was an early bird that flew before sunset.

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[91] Kennedy, 'Proportionality and "Deference"' (n 5) 58.

[92] Jackson (n 1) 3094.

[93] Kennedy, 'Transnational Genealogy' (n 5) 187.

IV. Conclusion

Sometimes proportionality is taken as a pill that allows the decision-maker to sleep at night by cloaking the responsibility that legal decision-making entails with methods and technologies that obfuscate the gravitas of what it means to decide under *opacity* and *fogginess*. The idea of a reliable method for dealing with the utter contradiction of rights, interests, and principles in the law was comfortable. Perhaps it was bad faith, as Kennedy would put it, or the need to avoid the anxiety of deciding, or simply the fact that proportionality was occluding another important dimension of legal experience: that proportionality could not only substitute formal deduction but also reveal the *opacity* and *fogginess* under which difficult legal (and moral) decisions take place. This existential tragedy of becoming aware that there is no overarching value or viewpoint to balance conflicting interests and realising that this world is one where the pie is often divided instead of expanded wakes us from our dogmatic slumber.

Balancing, as sketched by Oliver Wendell Holmes Jr, was a legal reasoning method distinct from logical deduction, one which led lawyers to hesitate and see that sometimes it is inevitable to take 'sides upon debatable and often burning questions'.[94] This view was embedded in an antagonistic ontology according to which the law operates within a battle of interests. With the emergence of social legal thought, the law adopted an instrumental approach to reality and was used as a tool to satisfy wants. Roscoe Pound championed this approach to the law and positioned proportionality as a teleological tool to *harmonise* conflicting interests, sacrificing some to the least extent to preserve social order. After the Second World War, the teleological approach of proportionality remained, but the social (eg social interests and welfare) was to be replaced, in the domain of private law, to secure not a social welfare economy but a free-choice economy with progressive undertones in Fuller's balancing approach. Later, the Legal Process School recast balancing in the institutional sphere, where the question became how to balance decision-making allocation among different institutions. Balancing turned from a question of *what* the right choice is to the question of *who* the right decision-maker is. From Pound to the Legal Process School, balancing was largely used to achieve some purpose, often outside the law to shield it from the political spectre. Duncan Kennedy resuscitated parts of balancing's Holmesian origins. He situated proportionality in an agonistic context where trade-offs exist and distributive consequences follow. For Kennedy, proportionality will eventually lift off the veil covering the responsibility of legal choices. Holmes seems to have originated this route when he wrote:

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[94] Oliver W Holmes, 'The Path of the Law' (1897) 10 Harv L Rev 457, 468.

'We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.'[95]

Kennedy (and Holmes) remind us that legal decision-makers decide under *opaque* and *foggy* conditions and that they must embrace the moral consequences '*if* after the fact [they] turn[] out to have done wrong'.[96] Balancing will lead us to take this 'if' seriously while walking on a tightrope.

[95] Holmes (n 94) 474.

[96] Kennedy, 'Proportionality and "Deference"' (n 5) 58 (emphasis added).

Part 2

Proportionality in European Private Law

Rights and their Boundaries in European Contract Law: Abuse, Proportionality, or Both?

Johanna Stark

I. Introduction

The ownership of a right consists, on the one hand, in the arbitrary choice between different courses of action. On the other hand, the legal system does impose upon the right holder limits on the exercise of rights. One of the most important of these general limits is the requirement to act in good faith. Two major emanations of the principle of acting in good faith are the concepts of 'abuse of law' and 'proportionality'. While the abuse of law or the abuse of a particular right arguably refers to subjective qualities (such as certain intentions of the right holder), proportionality serves as an objective criterion, with its comparative view of the consequences that the right's exercise would have for the parties involved.

This contribution deals with the tension between subjective and objective elements when unpacking good faith requirements for the exercise of rights in the context of European contract law, particularly when it comes to the termination of contractual agreements. It considers a fundamental issue underlying the jurisprudence of the CJEU in the context of European private law: in this context, proportionality serves, in essence, as an objective criterion that em-

bodies a comparative perspective of the rights and interests of all parties involved. This stands in contrast with the fact that the limitations on the exercise of rights that are typically advanced based on a prohibition of abuse of law come in partly subjective terms, involving some observable degree of intent to harm the other party or to circumvent applicable law. To be sure, abuse of law and proportionality are, nevertheless, not necessarily mutually exclusive concepts – disproportionate consequences may even inform the judgment as to whether certain behaviour has to be regarded as abusive.

Against this background this article will focus on two questions:

(1) From the perspective of European contract law, is there a case to be made that the exercise of a right may be limited where its exercise would severely and disproportionately impact the interests of another party?
(2) If no such limitation on the *exercise* of a right on grounds of proportionality in light of the affected interests of the parties can be inferred from EU (secondary) law, is there an argument to be made that, for reasons of proportionality, the *consequences* of the right's exercise must in some way be limited?

Before addressing the merits of these questions, it seems advisable to clarify a methodological problem caused by the multi-levelled character of European private law with its friction-generating interplay between supranational and national legal orders.

II. Abuse of Rights and the Multi-Level Character of European Contract Law

Abuse of law provisions or principles are among the core elements of most Member States' legal orders. With a view to rights grounded in private law and their potential limits, the problem is the following: can abuse of law provisions or principles serve as restrictions on legal rights grounded in EU (secondary) law?

If so, the intended and codified reach of rights anchored in EU primary or secondary law could be undermined by national abuse of law provisions. Two examples might be helpful to illustrate the type of situation in which proportionality is invoked in the context of individual rights in contract law.[1] In both cases, the relevant legislation of the Member State was impacted by European Directives in the field of consumer protection.

[1] Both are German examples, by accident rather than by design.

In the first case, the buyer had ordered two mattresses on the seller's website via a long-distance contract.[2] When he discovered a cheaper offer from another supplier for the same type of mattresses within the cancellation period, he demanded that the seller pay him the difference from the purchase price he had already paid. In addition, he framed this demand as a condition under which he would refrain from exercising his right of withdrawal from the contract. There was no doubt as to the fact that according to the letter of the German Civil Code, the consumer had such a right of withdrawal in this particular case (under German Civil Code, ss 312g, 355, 356) and that the consequences of its exercise would involve an obligation to reverse performance of the sales contract (German Civil Code, s 357). In accordance with previous case law, the Federal Court of Justice (*Bundesgerichtshof*) did not follow the seller's argument that the consumer buyer's conduct had been abusive insofar as he had expressly announced that he would use his right of withdrawal as leverage in bargaining for a discount on a good he had already purchased.

A second group of cases that have received quite some attention both in legal practice, academia and the general media similarly concern consumers' exercise of their right of withdrawal, albeit in cases involving a withdrawal from long-term loan agreements.[3] The question of whether consumers who had been inadequately informed could still revoke a loan agreement (under German Civil code, ss 495(1), 355) long after it had been fully executed gave rise to significant debate. In most of these cases, the banks had no success with their legal strategies seeking to bar consumers' withdrawal from these loan agreements. One of the main arguments put forward by the banks in these cases ran along the lines that consumers had forfeited their right to withdraw, as the agreements had been fully performed by both sides and exercising the right would amount to its abuse. The argument of abuse was supported by a blatant mismatch of the relevant interests involved, given that the pre-contractual information deficiencies affected a massive number of loan agreements that consequently became subject to reversal in the context of interest rates that had significantly fallen since conclusion of the affected contracts.

Although these are both German cases decided by the Federal Court of Justice, they illustrate the manner in which considerations of proportionality inform the debate on whether and how limits may be set on the exercise of rights in contractual relations.

The deliberate and clear decision of the EU legislature to refrain from linking the right of withdrawal to a particular subjective situation of the consumer creates problems in the interplay between EU and national level with respect to of abuse prevention. The consumer's right of withdrawal exists regardless

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[2] BGH 16 March 2016, VIII ZR 146/15, [2016] NJW 1951.

[3] One such case was decided in BGH 12 July 2016, XI ZR 501/15, [2016] NJW 3518.

of his or her motives (even where they are to 'blackmail' the other party into agreeing to an *ex post* discount, as happened in the mattress case). This is made clear by the provision's wording, which does not even require the consumer to give any reason for the withdrawal of his or her consent to the agreement. Re-introducing additional limitations through the back door of national abuse prohibitions (such as German Civil Code, s 242) is obviously at odds, or at least stands in tension with, art 4(3) TEU.

The easiest way to solve the multilevel problem – namely that it is problematic to limit rights grounded in EU law by invoking national limitations based on abuse – is to derive such limitations from the body of European private law itself. If successful, this manoeuvre would mean that the limitation could not create a conflict with art 4(3) TEU, as it would not be Member States' legal orders restricting EU law's effectiveness but the European legal order itself with its built-in principles that limit the exercise or the consequences of particular rights in specific situations.

III. Limitations on the Exercise of Rights in European Contract Law

The primary source for information about the conditions under which European contract law itself provides for limitations on the exercise of contractual rights is the body of relevant primary and secondary law, particularly the Treaties and the Directives in the field of consumer contract law. The Directives, of course, build upon the basic legal framework set out in the Treaties, including general legal principles such as *pacta sunt servanda* and the prohibition of abuse of law.

1. Prohibition of Abuse of Rights as a Principle of European Union Law

There is an endless debate about the role and status of a prohibition of abuse of law as a principle of European Union law.[4] However, without doing justice to

[4] See, with further references, the many contributions in Rita de la Feria and Stefan Vogenauer, *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Bloomsbury Academic 2011); other recent contributions to the debate include Michael Byers, 'Abuse of Rights: An Old Principle, a New Age' (2002) 47 McGill LJ 389; Holger Fleischer, 'Der Rechtsmißbrauch zwischen Gemeineuropäischem Privatrecht und Gemeinschaftsprivatrecht' (2003) 58 JZ 865; Annekatrien Lenaerts, 'The General Principle of the Prohibition of Abuse of Rights: A Critical Position on Its Role in a Codified European Contract Law' (2010) 18 ERPL 1121; Annekatrien Lenaerts, 'The Role of the Principle *Fraus Omnia Corrumpit* in the European Union: A Possible Evolution Towards a General Principle of Law?' (2013) 32 YEL 460; Joseph M Perillo, 'Abuse of Rights: A Pervasive

all the strands of this multi-faceted debate, it nonetheless seems fair to say that a prohibition of abuse of law does play some role in the design and interpretation of the European legal order, and that it does have the status of a general, even if only an 'embryonic'[5] principle – 'latent or inchoate'[6] – in EU law.

2. Case Law References to the Prohibition of Abuse of Rights

The ECJ has regularly referred to the prohibition of abuse of rights as a general principle of European Union law. A first group of cases has been characterised as dealing with 'U-turn'[7] arrangements that typically involve two steps:[8] first, a legal subject crosses the border from Member State A to Member State B and then, in a second step, proceeds to engage in economic activity within or directed at the market of Member State A.[9] According to the letter of the TFEU, such cross-border activity falls under the protective scope of EU fundamental freedoms, thereby enabling the circumvention of legal restrictions applicable to the same economic activity had it been carried out in a purely domestic context.[10]

A different type of case deals with the problem whether national abuse of law provisions can be applied to situations that are regulated by secondary Union law. In its landmark *Kefalas*[11] ruling, the Court of Justice referred to abusive behaviour as enjoying no protection under (then) Community law:

> 'According to the case-law of the Court, Community law cannot be relied on for abusive or fraudulent ends […]. Consequently, the application by national courts of domestic rules such as Article 281 of the Greek Civil Code for the purposes of assessing whether the exercise of a right arising from a provision of Community law is abusive cannot be regarded as contrary to the Community legal order.'[12]

Legal Concept' (1995) 27 Pac LJ 37; Karsten Engsig Sørensen, 'Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?' (2006) 43 CML Rev 423.

[5] Feria and Vogenauer (n 4) 293.

[6] Neville Brown, 'Is There a General Principle of Abuse of Rights in European Community Law?' in Deirdre Curtin (ed), *Institutional dynamics of European integration* (Martinus Nijhoff Publishers 1994) 519.

[7] Anders Kjellgren, 'On the Border of Abuse – The Jurisprudence of the European Court of Justice on Circumvention, Fraud and Other Misuses of Community Law' (2000) 11 EBL Rev 183.

[8] Wolfgang Schön, 'Der "Rechtsmissbrauch" im Europäischen Gesellschaftsrecht' in Rolf Wank and others (eds), *Festschrift für Herbert Wiedemann zum 70. Geburtstag* (CH Beck 2002) 1274.

[9] Case 33/74 *van Binsbergen* [1974] ECR I-1299, ECLI:EU:C:1974:131.

[10] Schön (n 8) 1274. For a discussion of a group of cases regarding the circumvention of national legislation in the field of broadcasting, see Kjellgren (n 7) 184–186. The positive corollary to circumvention is an arrangement aimed at achieving legal privileges that would not have been applicable to the same type of activity carried out domestically.

[11] Case C-367/96 *Kefalas* [1998] ECR I-2843, ECLI:EU:C:1998:222.

In the *Diamantis* ruling, the Court expressly stated that national abuse of rights provisions could restrict rights anchored in EU law, but only in circumstances involving behaviour that would be manifestly abusive.[13] Both *Kefalas* and *Diamantis*, it must be stressed, concerned shareholder rights. The Court's wording, however, does not recognisably limit its statements to the company law context, instead regularly including cross-references to cases involving abuse of rights in various fields, such as contract, company, and tax law.[14]

More recently, the European Court of Justice in *Cussens* (another tax case) referred to the prohibition of abuse of rights as displaying a 'general, comprehensive character which is naturally inherent in general principles of EU law'.[15] In *T Danmark*,[16] the Court repeated its characterisation as a general legal principle established under 'settled case-law' and, building on *Cussens*,[17] as being applicable 'irrespective of whether the rights and advantages that are abused have their basis in the Treaties, in a regulation or in a directive'.[18]

Despite a lack of differentiation between various areas of law in the Court's own statements, the reasoning in the company and tax law cases must be read against their background, one that structurally differs from the context in which abuse is relevant in contract law. In many of these cases, abuse was based on behaviour that artificially created a set of facts that were covered by the wording of a rule, which then resulted in the application of this same rule contrary to its intended purpose.[19]

The *Messner*[20] ruling in 2009, however, concerned contract law and involved no such 'abusive triggering'. The ECJ had to deal with the question of whether a consumer who had not been properly informed could be required to

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[12] *Kefalas* (n 11) paras 20–21.

[13] Case C-373/97 *Diamantis* [2000] ECR I-1705, ECLI:EU:C:2000:150, para 44, see also below text to n 56.

[14] Case C-321/05 *Kofoed* [2007] ECR I-5795, ECLI:EU:C:2007:408, para 38: 'Thus, Article 11(1)(a) of Directive 90/434 reflects the general Community law principle that abuse of rights is prohibited. Individuals must not improperly or fraudulently take advantage of provisions of Community law. The application of Community legislation cannot be extended to cover abusive practices, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law.'

[15] Case C-251/16 *Cussens* ECLI:EU:C:2017:881, para 31 with reference to Case C-101/08 *Audiolux* [2009] ECR I-9823, ECLI:EU:C:2009:626, para 50, and numerous further references to the Court's jurisprudence on abuse of rights in paras 27–43.

[16] Case C-116/16 *T Danmark* [2019] ECLI:EU:C:2019:135, para 70.

[17] *Cussens* (n 15) paras 30–31.

[18] *T Danmark* (n 16) para 75.

[19] C Cauffman, 'The Principle of Proportionality and European Contract Law' in Jacobien Rutgers and Pietro Sirena (eds), *Rules and Principles in European Contract Law* (Intersentia 2015) 92; Schön (n 8) 1277–1279.

[20] Case C-489/07 *Messner* [2009] ECR I-7315, ECLI:EU:C:2009:502.

make compensation after withdrawing from a sales contract concerning a notebook that had been used and thus suffered a loss in value. As neither the wording of the Distance Selling Directive[21] that was in force at the time nor the respective Member State's sales law (that had transposed the Directive) provided for compensation to be paid in such a situation, the ECJ rejected an obligation for the buyer to pay compensation in the specific case. At the same time, however, the Court stated that an obligation to pay compensation would, in principle, be compatible with EU law generally and the Directive specifically, if its requirements were tailored to circumstances involving abusive behaviour or a breach of 'good faith':

'Consequently, the purpose of Directive 97/7 […] do[es] not preclude, in principle, a legal provision of a Member State which requires a consumer to pay fair compensation in the case where he has made use of the goods acquired under a distance contract in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment.'[22]

The *Messner* decision is ultimately not of decisive help with respect to the issue of whether the consumer's right of withdrawal can be outright barred or excluded in light of its potential abuse. Also, the decision was issued in relation to the Distance Selling Directive, which contains partially different provisions with regard to the right of withdrawal compared to the Consumer Rights Directive.[23] In contrast to the Distance Selling Directive, art 14(2)(2) of the Consumer Rights Directive[24] expressly excludes compensation for loss of value in cases of a pre-contractual information deficiency, which has been implemented in the German Civil Code, s 357a(1).[25]

3. Necessity of a Subjective Element?

The question of whether an abuse of rights includes a subjective intent to commit harm on the part of the right holder is problematic to the extent that

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[21] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (Distance Selling Directive) [1997] OJ L144/19.

[22] *Messner* (n 20) paras 26–27.

[23] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (Consumer Rights Directive) [2011] OJ L304/64.

[24] The Consumer Rights Directive has recently been amended by Directive 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L328/7; art 14(2)(2) Consumer Rights Directive, however, was not changed in this process; the relevant German Civil Code provision dealing with the consequences of withdrawal moved (without being changed) from s 357(7) to s 357a(1).

[25] This has been harshly criticised as disproportionately neglecting the interests of parties who contract with consumers, thereby infringing fundamental rights existing under EU law: Christiane Wendehorst, 'Ist das neue Verbraucherrecht noch zu retten?' (2015) 12 GPR 55.

such an intent to harm will – as with any subjective state of a person – invariably be difficult to prove.

There has been some debate as to whether abuse of rights as a principle of EU law necessarily includes a subjective element. The passages from the ECJ case law are ambiguous in this respect. In *Diamantis*, for example, no reference is made to a subjective element, the Court instead referring to a person's observable behaviour and its consequences.[26] In other instances of its jurisprudence, however, the ECJ does make express reference to a subjective requirement, as is the case in *Emsland-Stärke*:[27]

> 'A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved. It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it.'[28]

Even if the details of such a subjective requirement and its interplay with the objective conditions of abuse may still be unclear or disputed, there is – at least at present – no clear commitment either in EU legislation or ECJ jurisprudence to a prohibition of abuse on a purely objective basis as a general principle of EU law.[29]

That such a clear commitment is missing does not, however, preclude the possibility that (as a principle of European contract law in particular) abuse of law operates in practice on a basis that does not necessarily include a subjective element. As will be discussed in the following sections, the most promising candidate for a purely objective basis for abuse of law as a restriction of rights in contractual relationships is the principle of proportionality.

IV. Proportionality as a Principle of European Contract Law

Proportionality as a principle of EU law in general was first acknowledged in *Internationale Handelsgesellschaft*.[30] In its traditional sense, the principle helps to 'delineate the respective powers of the EU and the Member States'[31]

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[26] *Diamantis* (n 13) para 44; see also below text to n 53.

[27] Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, ECLI:EU:C:2000:695.

[28] *Emsland-Stärke* (n 27) paras 52–53; similar passages can be found in Case C-255/02 *Halifax* [2006] ECR I-1609, ECLI:EU:C:2006:121.

[29] In *Cussens* (n 15) paras 53–62, the Court makes it clear that the abusiveness of strategic behaviour resulting in a tax advantage derives from its 'objectives' (para 53, 58), ie from the favourable tax result being the 'essential aim' of the actions in question (para 60); the 'essential aim' test is applied also in *T Danmark* (n 16) para 79.

[30] Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, ECLI:EU:C:1970:114.

[31] Cauffman (n 19) 70.

along two dimensions: first, by stating that EU agencies may act only within their powers laid out in the Treaties and thus conferred upon them by the Member States (art 5(2) TEU); and second, by conditioning the legality of EU measures to their being necessary to achieve the objectives of the Treaties (art 5(4) TEU). This is the classical meaning of proportionality known from constitutional law, which limits measures of public authorities to whatever is necessary to achieve their legitimate aim.[32]

These two dimensions are, of course, relevant for the private law context in general and for the contract law context in particular: one may well ask, for example with respect to the many EU Directives in the field of consumer contract law, whether they are adequately grounded in the Treaties and, furthermore, whether they withstand the traditional proportionality test in terms of infringing Member State autonomy only to the extent that is necessary in order to achieve the 'establishment or functioning of the internal market' (art 115 TFEU).

The principle of proportionality, however, is relevant in contract law in another way that may be called 'internal', namely as concerns the rights and obligations of contracting parties and the balance between them that a contract law framework ideally achieves.[33] This dimension of proportionality differs from the 'external' public-law-related meaning, although both have overlaps and a clear-cut distinction is not easy to maintain in all cases.

Proportionality as a general principle in the private law sense does not exhibit the same three-step structure it has in the public law sense. The parallel is closest with respect to the third criterion in the public law test, ie proportionality *strictu sensu*.[34] It is this internal relevance of proportionality in European contract law that is of interest here. If proportionality has the status of a general principle governing contractual relations in European contract law, reference to proportionality may, in principle, be a proper way to limit the exercise of rights in contractual relations even if a subjective criterion (such as an intent to harm) cannot be relied upon.

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[32] The constitutional dimension of proportionality has been spelled out as involving a three-step test (although the ECJ in its decisions does not always adhere to this structure when engaging in considerations on proportionality): first, the measure must have a legitimate aim and be suitable to achieve that aim; second, it must be necessary in the sense that there must be no other less restrictive measure to achieve the aim; and third, the measure must be proportionate *sensu strictu*, meaning that there is a proper balance between the measure itself and the restrictions it imposes; see Cauffman (n 19) 72. W Van Gerven, 'The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999) 37.

[33] Cauffman (n 19) 70: '[Proportionality] also plays a role *within* contract law, in balancing the rights and obligations of the contracting parties' [emphasis in the original].

[34] Cauffman (n 19) 81.

1. Proportionality References in EU Directives

There are countless examples of proportionality in a wider sense being referred to in the Treaties, in EU Directives (including their preambles and recitals) and in the body of rulings issued by the European Court of Justice and the European Court of First Instance.

With a view to the contract law context that is the main focus here, select examples of express references to proportionality will be discussed, particularly those that illustrate the principle's *strictu sensu* meaning of balancing the rights and interests of parties to a contractual relationship.[35]

In the Anti-Discrimination Directives,[36] proportionality in the strict sense is referenced as a criterion for determining whether an instance of unequal treatment amounts to direct or indirect discrimination. Treatment is not discriminatory if it is objectively and reasonably justified by a legitimate aim, and if the means to achieve that aim are both appropriate and necessary.[37] Proportionality *strictu sensu* is not explicitly mentioned here, but its inclusion in the test follows from the requirement of an objective and reasonable justification for the aim pursued.[38]

The Unfair Terms Directive[39] that applies to standard terms set by one party vis-à-vis another party as the basis for an agreement includes in art 3(1) a direct reference to proportionality *strictu sensu*, understood as a 'significant imbalance in the parties' rights and obligations'.[40]

The Consumer Sales Directive[41] in art 3(3) and (5) references proportionality as a limit to what the consumer may require the seller to do in terms of remedies in cases of non-conformity. In the Consumer Rights Directive,[42]

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[35] Cauffman (n 19) 73–79.

[36] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22; Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

[37] In the original Directive 2000/43/EC, this proportionality test is set out in art 2(2)(b) and art 2(1)(b).

[38] Oddný Mjöll Arnardóttir, *Equality and Non-Discrimination Under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2003) 42–51.

[39] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (Unfair Terms Directive) [1993] OJ L95/29.

[40] Unfair Terms Directive, art 3(1).

[41] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (Consumer Sales Directive) [1999] OJ L171/12.

[42] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (Consumer Rights Directive) [2011] OJ L304/64.

art 14(3) sets out the obligations of the consumer in the event of withdrawal, including the obligation 'to pay to the trader an amount which is in proportion to what has been provided until the time the consumer has informed the trader of the exercise of the right of withdrawal, in comparison with the full coverage of the contract'.

Numerous references to proportionality are also found in the recitals of the recent amendment of the Consumer Rights Directive;[43] the argument from proportionality employed here, however, serves a purpose other than delineating the limits of rights granted by the Directive to consumers: recitals 4 to 16 refer to the proportionality of sanctions imposed on *traders* following infringements of consumer rights provided for in the Directive, such as 'penalties when establishing the unfair character of contractual terms'[44] or 'remedies […] available for consumers harmed by unfair commercial practices'.[45] Sanctions imposed on the business or trader party in B2C contexts must be proportionate insofar as they take into account 'the gravity and nature of the unfair commercial practice, damage suffered by the consumer and other relevant circumstances'.[46] These considerations of proportionality, however, are relevant for the position of *traders*, in particular the sanctions they may be subject to if they infringe consumer rights. They say nothing about whether rights of *consumers* might be restricted in case of unproportionate consequences.

2. Disproportionality as a Limitation on the Exercise of a Contractual Right

The substantive link between the notion of abuse of right and proportionality *strictu sensu* as a legal principle in private law is the aspect of excess:[47] the idea behind prohibiting abuse of right is to withhold legal protection from the exercise of a right that is excessive insofar as it transcends its intended scope, thereby transcending also the built-in balance of rights and interests of all who may be affected by the right's exercise. There are hints in the ECJ's judgments and in the opinions of General Advocates in prominent abuse of law cases suggesting that disproportionate consequences can be invoked as a reason for qualifying an individual's exercise of a right as abusive.

In the context of consumer withdrawal rights, this would mean that disproportionately negative effects resulting from a consumer withdrawing from a long-distance sales contract or a loan agreement long after performance has taken place could, in principle, bar the consumer from effectively exercising the right in the first place. In the German loan agreement cases the German

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[43] Directive 2019/2161 of the European Parliament and of the Council of 27 November 2019 (Enforcement and Modernization Directive) [2019] OJ L328/7.

[44] Enforcement and Modernization Directive, recital 14.

[45] Enforcement and Modernization Directive, recital 16.

[46] Enforcement and Modernization Directive, recital 16.

[47] Brown (n 6) 521.

Federal Court refrained from reaching such a conclusion, albeit for a different reason. The fact that the consumer's right to withdraw was held to exist long after performance had its roots in the fact that the consumer had not been properly informed at the time of the agreement. The sanction character of pre-contractual information obligations (as the recitals of the Directive expressly state) would have been undermined by the application of national abuse or proportionality principles to the effect that the consumer would not have been able to withdraw after all. The situation would be different, of course, were the limitation grounded in EU law itself.

Interestingly, a significant change to the withdrawal regime that had been proposed by the European Commission ahead of the recent amendment of the Consumer Rights Directive (and other Directives having relevance for consumers) was not adopted in the final version of the amending Directive 2019/2161.[48] In its proposal, the Commission had set out an amendment to art 14 Consumer Rights Directive 'removing the right of consumers to return the goods […] where those have been used more than necessary to test them subject to the obligation to pay for the diminished value'.[49]

The reasons the Commission gave for this particular amendment pointed to the losses small and medium-sized businesses suffer from having to accept such 'unduly tested goods',[50] and they include a reference to proportionality by arguing that restricting consumers' right of withdrawal in this way would lead to 'more balanced rights and obligations of traders and consumers'[51]. The criteria on the basis of which 'undue testing' is ascertained are objective in nature, as 'due testing' is defined by whatever use and testing would have been possible in an in-store purchase situation as well. The (insofar unsuccessful) proposal is significant in the present context as it would have led to a restriction of the right of withdrawal based on proportionality considerations, as opposed to the current outcome whereby the consumer is able to withdraw

[48] Directive 2019/2161 of the European Parliament and of the Council of 27 November 2019 [2019] OJ L328/7; opposition to this particular part of the proposal is documented, for instance, in an opinion of the European and Social Committee from 6 December 2018, COM(2018) 184 final, OJ C440/66, s 3.14: 'The EESC supports the concept of the right of withdrawal and recognises its role as an efficient consumer protection tool that should not be undermined. The Commission proposal risks limiting consumer rights without providing adequate evidence as to the systematic and widespread abuse of such rights.'

[49] Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules' COM/2018/0185 final, 25.

[50] Proposal of the Commission (n 49), COM/2018/0185 final, 15.

[51] Proposal of the Commission (n 49), COM/2018/0185 final, 16.

from the contract but must remunerate the seller for loss of value of the good in cases of 'undue testing'.[52]

Looking beyond the context of consumers' right to withdraw from certain contracts, the clearest, albeit cautious reference to proportionality as a basis for abuse of right can be found in *Diamantis*, the last of the series of Greek company law rulings.[53] The question here was whether minority shareholders were engaging in an abuse of rights when taking legal action against an increase in capital on the grounds that this was in conflict with art 25(1) of the Second Company Law Directive.[54] In line with its earlier rulings in similar cases, the Court stated that while it was possible in principle for the Greek court to apply a national abuse of law provision (in this case Greek Civil Code, art 281) to rights inferred by Community law, the assessment had to be made in light of the scope and the objectives of the Community provisions involved.[55] Although the Court did not see abuse in this particular case, it concluded the judgment by accepting abuse (as determined by a national provision) in cases in which 'of the remedies available for a situation that has arisen in breach of that provision, a shareholder has chosen a remedy that will cause such serious damage to the legitimate interests of others that it appears manifestly disproportionate.'[56]

Manifest disproportionality thus appears to be the threshold the ECJ sets for national abuse provisions that serve to restrict rights anchored in EU secondary law. As the *Diamantis* shareholders did not reach this threshold, the Court did not give any further explanation as to when such manifestly disproportionate consequences would be incurred. The wording of the ruling, however, is quite clear as to the lack of a subjective element in such kind of abuse: whereas reference is made to serious damage and the legitimate interests of others, there is no mention of a particular purpose, state of mind or motivation on the basis of which the shareholder has chosen among available remedies.

3. Proportionality and the Consequences of Exercising a Contractual Right

While a limitation on the exercise of a right concerns the question of *whether* it can be exercised at all, proportionality considerations come into play on a second level as well, namely as limitations regarding the *consequences* such

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[52] 'Undue testing' is the threshold that currently determines whether a correctly informed consumer has to remunerate the seller after withdrawal for a loss in the value of the good – see the discussion of the *Messner* case below, text to n 58.

[53] An in-depth account of these cases is given by Kjellgren (n 7) 188–190.

[54] Second Council Directive 77/91/EEC of 13 December 1976 (Second Company Law Directive) [1977] OJ L26/1.

[55] *Diamantis* (n 13) para 33–34.

[56] *Diamantis* (n 13) para 44; Schön (n 8) 1287.

an exercise would have. As not only the conditions under which the right comes into existence but also the consequences of its exercise are subject to legal rules, the principle of proportionality may have bearing on this second level as well.

Support for proportionality's role on this second level can be found in the ECJ's contract law jurisprudence. Although the *Messner* ruling does not support Member State provisions that would restrict the exercise of a right of withdrawal on grounds of abuse, it expressly invokes proportionality as a criterion according to which the consequences of the exercise of a right of withdrawal must be assessed.[57]

> '[I]t follows from the last part of recital 14 in the preamble to Directive 97/7 that it is for the Member States to determine the other conditions and arrangements following exercise of the right of withdrawal. That power must, however, be exercised in accordance with the purpose of that directive and, in particular, may not adversely affect the efficiency and effectiveness of the right of withdrawal. Such would, for example, be the case if the amount of compensation, such as that referred to in the previous paragraph, were to appear disproportionate in relation to the purchase price of the goods at issue […].'[58]

The amount of compensation that the consumer must pay following withdrawal (for the use of the good during the period between delivery and withdrawal) must not 'appear disproportionate in relation to the purchase price of the good'. Thus the Court reads the Directive as requiring regard for proportionality *strictu sensu* with a view to the situation and interests of both the consumer and the other party.[59] If the proportionality criterion as set out is not met, the obligation to pay compensation would amount to a violation of art 4(3) TEU in that it would 'adversely affect the efficiency and effectiveness of the right of withdrawal' set out in the Directive.

The key statement of the *Messner* decision is that while a general obligation for the consumer to pay compensation after withdrawal would have breached the Directive (because it would have dissuaded consumers from exercising their right of withdrawal),[60] an obligation to pay compensation in specific circumstances based on general principles of civil law, such as the requirement to act in good faith or the prohibition of unjust enrichment, would not be precluded.[61] According to the ECJ's wording, the corridor of options thereby opened for Member States to introduce such an obligation to

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[57] Similarly instructive in this respect is the *Weber* case that dealt with a consumer who had installed defective goods and the resulting problem of how to distribute the high costs associated with replacing the non-conforming goods in a way that respected proportionality *strictu sensu*; see Case C-65/09 *Weber* [2011] ECR I-5257, ECLI:EU:C:2011:396, and the discussion of its proportionality aspects by Cauffman (n 19) 85–90.

[58] *Messner* (n 20) paras 26–27.

[59] Cauffman (n 19) 80–81.

[60] *Messner* (n 20) paras 18–22.

[61] *Messner* (n 20) para 29.

compensate after withdrawal had to be navigated in a *proportionate* way,[62] ie in a way that properly balanced the right of the consumer to withdraw with the interest of the seller to be compensated for the loss of value incurred during the period in which the sold good was used by the consumer.

It thus appears that the two questions – first whether a right's exercise can be outright barred and second whether the consequences of its exercise can be constrained by proportionality requirements – are linked. If the consequences of a consumer's withdrawal must be designed in a way that is in line with the principle of proportionality (properly taking into account the seller's interests as well), would this requirement of proportionality hinder the *exercise* of the right of withdrawal in the first place if the consequences were not adequately calibrated and could not be interpreted as being so calibrated?[63]

This is the question that the debate about the second group of cases comes down to in the end. The situation here was that consumers, not having been informed properly when entering into a long-term loan agreement, had a right of withdrawal, which – considering the vast number of parallel cases – would have carried drastically negative consequences for affected lenders. Other than in the distance selling cases, which brought up the issue whether Member States could introduce an obligation to pay compensation, the corridor for a proportionate interpretation or a proportionate design of the consequences of withdrawal was very narrow, if not non-existent. If the Solomonic path through which Member States could properly appreciate the principle of proportionality by adapting a regime of legal consequences is barred, the remaining options are 'all or nothing'. Although the ECJ has, in *Diamantis*, indicated an openness to the 'nothing' option that would mean employing national abuse provisions so as to bar a right from being exercised solely on grounds of manifestly disproportionate consequences, it is difficult to argue for this result as being required by an abuse prohibition anchored directly in European contract law.

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[62] *Messner* (n 20) para 27.

[63] This type of argument appears to have been the motivation for the Commission's proposal to introduce an exception into the withdrawal regime that would have barred consumers from withdrawing if the goods in question had been 'unduly tested', see Proposal of the Commission (n 49), COM/2018/0185 final, 15 and text to n 48 above; the argument that EU secondary law not allowing for a proportionate calibration of consequences would amount to a violation of EU fundamental rights has also been made by Wendehorst (n 23) 65 with respect to the Consumer Rights Directive 2011/83/EU and its rules leaving the seller with no compensation at all where the consumer withdraws from a contract after even the slightest failure of the seller to comply with complex information duties: 'As a sanction, it seems to ignore basic principles of proportionality and might even be incompatible with fundamental rights at European as well as national levels'.

4. Proportionality, Good Faith, and Abuse of Rights

Apart from a limitation on the exercise of a right and on the consequences of such exercise, proportionality appears in the abuse debate in an intriguing way that is specific to the contract law context. First, proportionality figures in this reasoning as an element of acting in good faith; second, there is a close link between abuse of right and a violation of good faith. This two-step reasoning that ultimately links proportionality, good faith, and abuse of right is remarkable insofar as acting in good faith is typically understood as having both an objective and a subjective component. Proportionality in the relevant *strictu sensu* sense, however, is essentially an objective criterion: it involves a comparative view of the rights and interests of the parties involved. A proportionality assessment in the context of acting in good faith does not, crucially, depend on any particular state of mind, such as the intentions, plans, or aims of the parties involved.

The Court of First Instance in its *Citymo*[64] ruling employs an argument that can be read as linking good faith and proportionality in this way,[65] although it will be argued here that *Citymo* must be treated with caution in this context. This was a case dealing with extra-contractual liability. The Commission had been in negotiations with a potential landlord concerning the leasing of a large building in the city centre of Brussels. Despite having internally abandoned the procurement, the Commission had continued to negotiate for several months and also encouraged the landlord to carry out costly fitting-out work in the building, prompting the Court to find that 'by informing the applicant belatedly of its decision to break off the pre-contract negotiations, the Commission breached the principle of good faith to a sufficiently serious degree and abused its right not to contract'.[66]

For two reasons, caution is warranted when interpreting *Citymo* as linking good faith and proportionality: First, the Court of First Instance does not explicitly discuss the legal consequences of the Commission's action under the heading of 'proportionality'. Second, the reasoning the Court offers as a basis for awarding damages to the disappointed landlord differs from a proportionality *strictu sensu* assessment in an important respect. The Court looks primarily to the parties' *behaviour* during the relevant timeframe, ie when exactly the Commission decided to not follow through with the procurement, when exactly the landlord was informed, what the landlord reasonably expected would happen such that he decided to invest in the building.[67] The Court does not

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[64] Case T-271/04 *Citymo* [2007] ECR II-1375, ECLI:EU:T:2007:128.

[65] Cauffman (n 19) 93: 'The case makes it very likely that the principle of abuse of rights can be used to limit the excessive use of contractual rights and that abuse of contractual rights will be equated with the principle of good faith'.

[66] *Citymo* (n 64) para 137.

[67] *Citymo* (n 64) paras 141–153.

engage in a comparative assessment of the consequences that resulted for each side, particularly the negative consequences in terms of poor property investments made by the landlord. Thus, the main reason for the Court to regard the Commission as having breached the duty to act in good faith and having abused its right not to contract in the end was not the fact that disproportionate consequences resulted. Abuse of the right not to contract was based, by the Court, on the deliberate raising and reinforcement of expectations when it had become clear that there would be no contract in the end.

A far more straightforward link between proportionality and good faith, however, can be found in art 3(1) of the Unfair Terms Directive:[68]

> 'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

Art 3(1) of the Directive operates on the understanding that introducing a standard term vis-à-vis a consumer that creates a 'significant imbalance in the parties' rights and obligations' is a sufficient condition for a violation of good faith. This 'significant imbalance' can easily be read as a requirement of proportionality *strictu sensu*. Crucially, the proportionality test in art 3(1) does not involve a subjective element, as proportionality *strictu sensu* looks to the rights and interests of those affected by another person's action, not to the state of mind of the person who acts. Good faith, on the contrary, is a partly subjective concept that traditionally requires some degree of objectionable intent to establish abuse of law on its basis. If behaviour that conflicts with the principle of proportionality amounts to a violation of good faith as well, is this a route to an abuse of right limitation without the prerequisite of subjective conditions?

Despite the Directive's clear reference to proportionality as an element of dealing in good faith, no general equation of both standards is thereby established with a view to the prohibition of abuse of right. Systematically, it makes a difference whether a proportionality test is integrated into a legislative act or whether it serves as a judicial argument in restricting legal rights in specific cases. As part of a legislative act (as is the case in the Unfair Terms Directive), a proportionality requirement is part of the general legislative framework for contractual relationships from an *ex ante* perspective. An abuse of right argument employed by a court, however, delineates the rights and obligations of parties to a specific contractual relationship in an *ex post* fashion. This functional variance must be considered also with a view to the obvious tension between proportionality and abuse on the one hand and private autonomy as an undisputed legal principle of contractual law on the other hand. The dispropor-

[68] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (Unfair Terms Directive) [1993] OJ L95/29.

tionality argument referenced in the Unfair Terms Directive thus cannot be understood as a general route to abuse of right based on a violation of good faith that consists purely in disproportionate consequences.

V. Conclusion

There is agreement that abuse of law or abuse of a right does have an anchoring in European private law (or EU law generally). Considerably less agreement has been found so far as to the question whether this anchoring warrants qualifying the prohibition of abuse as a legal principle of EU law in its own right. Many questions remain also with regard to the contours of this principle, its practical implications and its interlinkages to other principles such as that of proportionality, which in itself stands on much firmer ground, albeit with a traditional range of application in the realm of public law instead of in private law contexts.

The issue whether, from the perspective of European contract law, abuse of a contractual right necessarily involves a subjective element is closely linked to considerations of proportionality, with manifest disproportionality being the most promising candidate for establishing abuse of right on an objective basis.

Proportionality considerations figure prominently in the ECJ's jurisprudence regarding the *consequences* of exercising contractual rights, such as a consumer's obligation to pay compensation after withdrawing from a sales contract on the basis of the seller having minimally breached its pre-contractual information obligations.

The picture is less clear when it comes to proportionality as a basis on which to restrict the *exercise* of a contractual right completely. One route to this result is to accept 'manifest disproportionality' of consequences as a sufficient basis for abuse *per se* – this is a strategy that appears to be employed by the ECJ in *Diamantis*,[69] although the singularity of the reference and the lack of further explanation calls for interpretative caution. The other route that would introduce manifest disproportionality as an objective basis of abuse is its equation with a violation of good faith. Evidence of such an equation is found in the Unfair Terms Directive. One must bear in mind, however, that a link between proportionality and good faith in a legislative act has a different function than proportionality as a requirement of good faith in an abuse of right principle that would serve as an *ultima ratio* vehicle to restrict contractual rights based on legislative acts themselves.

[69] *Diamantis* (n 13) para 44; Schön (n 8) 1287.

Proportionality and IP Law: Toward an Age of Balancing?

Luc Desaunettes-Barbero

I. Introduction

This chapter explores the relationship between intellectual property rights (IPR) and the proportionality principle. Analysing this relationship in the framework of a book devoted to discussing the role of the proportionality principle within private law is a welcome development. IPR are sometimes treated differently due to the specificities of the field, but its connection with proportionality is particularly strong, is evolving and appears today at the intersection of different influences and conceptions of this notion. Furthermore, because IP is an intensively harmonised field of law at the EU level, the developments in this area could foreshadow the general evolution of private law in Europe.

Generally speaking, proportionality refers to the idea of 'a proper relation or balance between two or more items and to the avoidance of exaggeration or excess in one of them'.[1] From a legal perspective, whereas proportionality is a conceptual tool that originated from German public law, the notion has a counterpart that emerged in US private law jurisprudence, referred to as bal-

[1] See Iddo Porat, 'Proportionality' in Reiner Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (OUP 2018) no 0038 para 1 <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e38#law-mpeccol-e38> accessed 15 November 2022.

ancing.[2] As a result of their different origins, the two concepts present certain analytical differences.

In its public law conception, the proportionality test was developed to systematise the courts' constitutionality assessment of government interference with interests protected by a fundamental right. Traditionally, the test is divided into three steps: After analysing the suitability of the measure to fulfil its objective, the court should verify that there are no equally effective but less impacting means available as an alternative. Finally, and if the first two inquiries are answered in the affirmative, the court is asked to verify whether the benefits targeted are not outweighed by the harm caused.[3]

Balancing on the other side, because of its development within the context of private law, is primarily aimed at resolving conflicts that might emerge between rights or interests of distinct individuals, according to the ultimate aim of a given legal system.[4] If balancing is sometimes described as lacking the structure of the proportionality test, the third step of the latter can nonetheless be regarded as analogous to the exercise operated within a balancing assessment.[5] The question of proportionality within the frame of intellectual property law seems to be torn between these two influences, especially in the framework of EU law.

Intellectual property law is an umbrella term encompassing legal mechanisms aiming at privatising certain immaterial assets. These legal mechanisms are traditionally shaped in the form of erga-omnes rights allowing their owner to exclude third parties from using the protected assets.[6] The immaterial assets enjoying protection certainly present a significant level of diversi-

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[2] For a historical and comparative perspective on the emergence and links of the notions of proportionality and balancing, see Moshe Cohen-Eliya and Iddo Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) 8 Int'l J Const L 263.

[3] Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 Ratio juris 131, 135–136.

[4] For a more detailed presentation of the development of balancing as part of the anti-formalism movement and of the influence on it by thinkers such as Holmes, Cardozo or von Jhering, see Cohen-Eliya and Porat (n 2) 277–279. For a general discussion of proportionality and balancing in US private law theory Nicolás Parra-Herrera, 'Three Approaches to Proportionality in American Legal Thought: A Genealogy', in this volume (equating the two concepts in that context).

[5] Naming the third step of the proportionality test directly as 'balancing', Alexy (n 3) 136. See also Cohen-Eliya and Porat (n 2) 268.

[6] As a matter of precision, trade secrets law relies on a different form of privatisation. Instead of the direct recognition of a right to the benefit of the owner regarding the information protected, the privatisation results indirectly from prohibitions addressed against third party conduct that could interfere with the interest of the trade secret owner. See Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Trade Secrets Directive) [2016] OJ L157/1, ch 2.

ty: inventions in the case of patents, literary and artistic works for copyright, distinctive signs when it comes to trademark, confidential information in the case of trade secrets, etc. However, what they share is their intangibility. Reduced to their quintessence, the assets which IP law aims at privatising are pieces of information that, from an economic perspective, can be classified as public goods.[7] This characteristic is fundamental in understanding the core tension that underpins this field of law and explains the peculiar role played by the notion of proportionality in this area. A piece of information is, first, non-rivalrous, which means that its consumption by one person does not affect its availability to others. This feature renders an artificial privatisation of this resource (via the law) at first glance undesirable from a welfare perspective.[8] Yet the second characteristic of these goods resides in their non-excludability: once disclosed by its developer, it is no longer possible to exclude others from consumption of these goods. Consequently, it is impossible for the originator to recoup the investments made to develop the intangible good. The possibility for third parties to free-ride over these necessary investments results in a market failure: under these conditions, despite the existence of a market demand, no rational market players would invest in developing this type of good. One of the main economic justifications for the enactment of intellectual property rights is to address this issue through the recognition of legal privileges, allowing their beneficiaries to legally control who might use the information protected and under which conditions.[9] Intellectual property is hence a field of the law built on an inherent tension: competitive restrictions are imposed to support the functioning of free market mechanisms.

Addressing this tension requires an intensive reliance on proportionality assessments. The importance of the role assumed by this principle in this field has led Robert Merges to qualify it as a 'midlevel principle', defined as a concept 'that run[s] through and tie[s] together disparate doctrine and practice'.[10] Following this idea, this chapter will first describe the role attributed to this principle when IP laws are enacted (II.), before turning to its implementation within the legal framework at both the substantive level (III.) and the enforcement level (IV.).

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[7] Joseph E Stiglitz, 'Knowledge as a Global Public Good' in Inge Kaul, Isabelle Grunberg and Marc Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (OUP 1999) 308–310.

[8] See Stiglitz (n 7) 309.

[9] For a more in-depth analysis, see William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (HUP 2003) 11–36.

[10] Robert P Merges, *Justifying Intellectual Property* (HUP 2011) 139.

II. Proportionality as a Principle of IP Legislation: More is not Always Better…

Before exploring the way in which the principle of proportionality might be used by the judiciary after IP rights have been established, it should first be mentioned that the principle plays – or should play – a role already at the level of legislative enactment as an 'ex-ante prescription for decision making'.[11] The creation and design of any IP right should be subject to a careful balancing between the purpose of granting such a right to a given owner and the restrictions it creates for others' freedoms.[12]

Though perhaps seemingly obvious, this idea has not yet fully penetrated the legislative sphere, where despite increased warnings from academia, an 'unbroken paradigm' remains according to which reliance on a more rigorous form of legal protection for intellectual achievements is thought to be automatically profitable for society.[13] Under this logic, the greater the protection of intellectual achievement, the easier it is to generate profits from them, and therefore the larger the investments that would be directed towards them.

However, this argumentation proves to be wrong, even when leaving aside ethical considerations that might also justify some limitations[14] and considering only the perspective of economic effects induced by these rights. IP law is not, *by itself*, sufficient to generate incentives for creation or innovation. If they are not intrinsic to a person, the incentives to generate new immaterial assets stem necessarily from a market demand. The best example of the incapacity of exclusive rights alone to generate incentives can be found in the lack of investments in the development of new drugs for orphan diseases by the pharmaceutical industry,[15] even though inventing a new drug would allow companies to claim a patent. From a mere economic perspective, the purpose

[11] Porat (n 1) para 10.

[12] Cf eg Graeme B Dinwoodie and Rochelle C Dreyfuss, *A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime* (OUP 2012) 9.

[13] Reto Hilty, 'The Role of Enforcement in Delineating the Scope of IP Rights' (2015) 7 Max Planck Institute for Innovation & Competition Research Paper no 15-03, 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2602221> accessed 15 November 2022; emphasising how this approach is reflected in almost all EU IP legislation, Alexander Peukert, 'Intellectual Property as an End in Itself?' (2011) 33 EIPR 67, 67–68; Rafał Sikorski, 'Towards a More Orderly Application of Proportionality to Patent Injunctions in the European Union' (2022) 53 IIC 31, 38, according to whom 'it is also often assumed in EU legislation that ensuring a high level of IP protection is a means of attracting more R&D spending and consequently more innovation'.

[14] This ethical consideration might for instance be related to the fundamental rights that might be negatively impacted by the enactment of IP rights, as for instance freedom of expression or the right to health.

[15] 'Orphan' or also called 'rare' diseases are diseases affecting only a small percentage of the population.

of IPR is not to generate incentives but is rather limited to addressing the above-mentioned market failures, which might negatively impact existing market incentives. Understanding the fundamental role played by the market (and the merely accompanying function of IP legislation) allows one to acknowledge the risk that the recognition of legal exclusivity over these immaterial assets creates with respect to the ultimate purpose of such legislation. Any form of IP right will allow its owner to control the use made of the subject matter protected and therefore amounts to a restriction of certain forms of competition.

A fundamental tension therefore exists between the need to solve identified market failures and the necessity to maintain a sufficient degree of competition on these markets. From an economic welfare perspective, the right degree of protection is therefore already a question of balance.

III. The Role of Proportionality as Part of Substantive IP Law

In addition to its essential role as *ex-ante* prescription for lawmakers, the principle also serves a fundamental purpose within the enacted legal frameworks. Generally speaking, IP legislation is built upon two elements: first, the definition of the subject matter of the IP right (ie the legal definition of the immaterial asset protected) and, second, the scope of protection conferred (ie the specification of the degree of legal exclusivity recognised).

1. Proportionality Assessments Regarding the Subject Matter Definition

It is possible to find some elements of proportionality already at the stage of subject matter definition and before examining the scope of protection. Robert Merges, for instance, argues that the 'non-obviousness requirement' of 35 USC § 103, which excludes the obtention of patents 'if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious […] to a person having ordinary skill in the art', can be regarded as an emanation of the proportionality principle.[16] One could understand this type of provision as entailing an implicit proportionality assessment, as it relies on a standard – in this case, the 'non-obviousness of the technical solution' – that needs to be calibrated by the judge. One can therefore consider this calibration exercise as requiring the court to ensure that the technical contribution is sufficient to justify the legal right at stake.[17] Similar lines of argumentation are possible when it

[16] Merges (n 10) 161. An equivalent provision exists in Europe: Convention on the Grant of European Patents (European Patent Convention), art 56.

[17] See also Justine Pila, 'Pluralism, Principles and Proportionality in Intellectual Property' (2014) 34 OJLS 181, 186.

comes to other IP rights, as, for instance, concerning the interpretation of the 'originality' requirement under copyright law[18] or of 'secrecy' and 'economic value' under trade secrets law.[19]

2. Proportionality Assessments in the Delineation of the Scope of Protection

Maybe even more prominently than at the level of the subject matter definition, proportionality assessments play a fundamental role when it comes to the definition of the right's scope of protection: ie, which types of uses of the intangible good fall under the legal exclusivity enjoyed by the IP owner. The calibration of this scope of protection is often achieved 'negatively': the IP owner is first broadly ascribed the right to control any use of the subject matter protected before constraining it through exceptions deemed to ensure that the exclusivity fits its socio-economic purpose.[20] In theory, two possible approaches exist to define these exceptions: the lawmaker can rely on either a rule-based or on a standard-based system.[21]

Under the first approach, the lawmaker must enact a catalogue of exceptions and monitor them constantly. The emergence of new factual phenomena (eg due to technological developments) might call for re-adjustments. This approach was chosen in EU copyright law, based on a strong tradition in continental IP discourse emphasising the protection of creators. The consequence is a very long list of rather strictly defined exceptions[22] that, less than

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[18] On this principle of EU law, see Thomas Margoni, 'The Harmonisation of EU Copyright Law: The Originality Standard' in Mark Perry (ed), *Global governance of intellectual property in the 21st century* (Springer 2016).

[19] See Trade Secrets Directive, art 2(1).

[20] Cf eg, in the context of copyright law, Paul Goldstein and P Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice* (OUP 2019) 349: 'No less than copyright law's exclusive rights themselves, properly calibrated limitations on copyright serve copyright law's basic goal to put copyrighted works to their most beneficial use by enabling new generations of authors to build on the works of authors who preceded them'. Christophe Geiger and others, 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law' (2008) 39 IIC 707, 709: 'Limitations and exceptions are the most important legal instrument for reconciling copyright with the individual and collective interests of the general public.'

[21] See eg Louis Kaplow, 'Rules versus Standards: An Economic Analysis' (1992) 42 Duke LJ 557.

[22] See art 5 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, presenting a very long list of exceptions encompassing *inter alia* exceptions for transient temporary acts of reproduction which are part of a technological process (no 1), for private use (no 2(b)), for the purpose of archival preservation (no 2(c)), for teaching and research activities (no 3(a)), to ensure the use of the protected work to the benefit of people with a disability (no 3(b)), and for the purpose of quotation (no 3(d)).

a decade after its enactment, was found insufficient and further extended to allow notably – and in a restrictive way – the possibility of text and data mining practices.[23] Though this type of system may present the advantage of a higher degree of legal certainty, it is dependent on regular legislative updates in reaction to new developments.[24]

Under the standard-based approach, the legislature relies on a more generally framed exception that the judges must concretise. Under this model, the need for legislative intervention is, in theory, less frequent since judges will already have the possibility to adapt the response of the legal framework when confronted with new phenomena. Because these decisions might have an important policy dimension without enjoying the same degree of democratic legitimacy as decisions by an elected assembly, judges will generally justify their solution by resorting to a balancing assessment. Since they are called on to resolve a conflict involving diverging rights or interests in a constellation where the law does not directly offer an answer, they will aim at finding a solution by balancing these rights and interests according to the ultimate aim of the relevant legal framework. This anchoring of the balancing process indeed allows linking the solution to the democratic legitimacy enjoyed by the general IP framework.

Under US copyright law, the fair use doctrine, which was first developed in the common law before being enshrined in 17 USC § 107, is exemplary in this regard:

'[…] the fair use of a copyrighted work, […] for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

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[23] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market [2019] OJ L130/92: 'Article 3. Text and data mining for the purposes of scientific research: 1. Member States shall provide for an exception […] for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access […]. Article 4. Exception or limitation for text and data mining: 1. Member States shall provide for an exception […] for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of text and data mining. […] 3. The exception or limitation provided for in paragraph 1 shall apply on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their rightholders in an appropriate manner […].' The Directive further included new exceptions for digital cross-border teaching activities (art 5) and the preservation of cultural heritage (art 6).

[24] In this regard, one can agree with Rafał Sikorsky that 'legislative changes usually lag behind the changing reality', Sikorski (n 13) 47. See also Orit Fischman Afori, 'Proportionality: A New Mega Standard in European Copyright Law' (2014) 45 IIC 889, 891–892.

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work. […]'

The US fair use doctrine is hence constructed as a general exception that applies to all different kinds of uses with all types of works and that relies on a balancing assessment considering the purpose of the use, the nature and the amount of the original work concerned and the economic impact of the use on the market value of that work. The test is an emanation of the US balancing doctrine described in the introduction of this chapter.[25] Regarding the implementation of this balancing test according to the purpose of copyright law, US case law has first come to specify that the more the use of the original material is transformative and the more it furthers the advance of knowledge or the arts, the more it is capable of being considered as fair.[26] In the same way, and concerning the last factor related to the effect of the use on the market value of the work protected, the commercial motivation of the use might be taken into consideration, and the courts will generally assess whether the use affects the original creator's ability to exploit his work, for instance by constituting a direct substitute for it. In the case of text and data mining, which, as explained, required the enactment of a specific exception under EU law, US judges concluded with relative ease that this type of usage should be allowed under the fair-use exception since it is notably transformative and promotes the progress of knowledge by offering new methods of academic inquiry.[27]

IV. The Role of Proportionality at the Level of Enforcement

Enforcement is of paramount importance in IP law.[28] Unlike in the case of material property, the exclusivity ascribed to a market player over a given subject matter relies solely on a legal fiction. Hence, without effective tools to enforce the exclusivity granted, the value of, for instance, a patent would be reduced to the value of the paper on which it is printed. This necessity of an efficient system should not, however, lead to reliance on overly rigid enforcement: to the contrary, a flexible approach always appears to be required to avoid the emer-

[25] See text to nn 2, 4–5.

[26] See eg *Campbell v Acuff-Rose Music* 510 US 569, 575 (1994), quoting US Const, art I § 8 cl 8.

[27] See eg *Authors Guild v Google* 954 F Supp 2d 282 (SDNY 2013).

[28] Despite being long neglected in academic literature, see in this regard Hilty (n 13) 10.

gence of dysfunctional effects. In this regard, the US system has again been able to rely on a balancing assessment whereas, in Europe, the role for proportionality assessments in the enforcement system appears to be uncertain.

1. The Necessity of a Flexible Approach

When it comes to private law, lawmakers have two different enforcement tools at their disposal, the choice of which impacts the level of the exclusivity recognised: injunctions and damages. Injunctive relief comprises court orders commanding or preventing an act by the defendant. In the framework of IP litigation, these injunctions might consist of ordering the cessation of the infringement or the destruction of existing infringing goods.[29] The purpose of this enforcement mechanism, generally referred to as a property model, is to restore the exclusivity recognised by the IP right. Therefore, any use of the protected subject matter requires a licence agreement with the rights owner.

On the other side, damages are granted to compensate for a loss. They might be awarded when a loss has already occurred and is not otherwise repairable. However, it is also conceivable to allow damages to be granted instead of injunctions. For instance, in the case of patents, this would mean that the infringer may continue using the invention in exchange for a payment of compensation intended to offset the royalties that would have been agreed upon in a hypothetical licensing agreement. In such a form of enforcement, referred to as the liability model, the right to exclude is transposed into a right to remuneration at the enforcement stage. In this model, it is no longer for the rights owner to decide who can use the subject matter protected and the appropriate price is not subject to market mechanisms but is instead fixed by the courts.

The choice between these two models is fundamental since it directly impacts the nature of the right recognised and, consequently, how the different parties will behave.[30] In principle, a reliance on injunctive relief is preferred, since it is the more direct transposition of the exclusivity granted by the IP right and it avoids courts being compelled to fix the value of the asset protected.[31] However, an exclusive reliance on the proprietary approach has raised several concerns over the past decades. The main criticism is that an inflexible approach, where injunctions are systematically issued in cases of violation, is responsible for the emergence of 'hold-up' situations, in which

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[29] See eg Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Enforcement Directive) [2004] OJ L157/45, arts 10 and 11.

[30] Ansgar Ohly, 'Three Principles of European IP Enforcement Law: Effectiveness, Proportionality, Dissuasiveness' in Josef Drexl (ed), *Technology and Competition, Contributions in Honour of Hanns Ullrich* (Larcier 2009) 3.

[31] Ohly (n 30) 3, characterising injunctive relief as 'the very hallmark of a property right'.

an IP owner is in a position of requesting returns that are disproportionate to the intrinsic value of the subject matter protected because of a situation of dependency on the side of the infringer.[32] A good example can be found in the mobile phone industry. It is estimated that the development of a smartphone requires resort to more than 250,000 active patents. This number renders it difficult, even for a very large company acting with diligence, to identify and clear all the relevant rights. A substantial risk therefore exists that a patent holder will reveal itself after the large-scale production of the smartphone has already started and request royalties in amounts that have no relation to the actual value of the patent.[33] To avoid such dysfunctional effects, combined models have emerged both in Europe and in the US in which a choice of the adequate enforcement tool is left to the courts. This choice should be arbitrated based on certain proportionality assessments.

2. US Balancing as an Answer

The reliance on a flexible system imposed itself rather naturally in the US legal order. This was facilitated by the existing distinction between remedies in law and equity. Injunctions, as opposed to damages, are considered an equitable remedy, creating much more flexibility and discretion for courts.[34]

The case law has come to clarify that the same principles are also applicable in the case of intellectual property. The possibility to rely on damages instead of an injunction was first confirmed by the Supreme Court in copyright law:

'[T]he goals of the copyright law, "to stimulate the creation and publication of edifying matter," Leval 1134,[35] are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use. See 17 U. S. C. § 502(a) (court "*may* … grant … injunctions on such terms as it may deem reasonable to prevent or restrain infringement") (emphasis added); Leval 1132 (while in the "vast majority of cases, [an injunctive] remedy is justified because most infringements are simple piracy," such cases are "worlds apart from many of those raising reasonable contentions of fair use" where "there may be a strong public interest in the publication of the secondary

[32] Such situations in, for instance, the patent field included complex product constellations, the case of standard-essential patents and the case of non-practising entities. For a description of these different constellations, see Luc Desaunettes-Barbero and others, 'Position Paper on the Envisaged Reform of the German Patent Act' (2020) 12 Max Planck Institute for Innovation & Competition Research Paper no 20-05, 8–10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3592465> accessed 16 November 2022. See also Sikorski (n 13) 47–50.

[33] See eg Mark A Lemley and Carl Shapiro, 'Patent Holdup and Royalty Stacking' (2006) 85 Tex L Rev 1991, 1992.

[34] Fischman Afori (n 24) 894; Ohly (n 30) 5.

[35] Pierre N Leval, 'Toward a Fair Use Standard' (1990) 103 Harv L Rev 1105 (footnote added).

work [and] the copyright owner's interest may be adequately protected by an award of damages for whatever infringement is found")'.[36]

Due to the general flexibility of the copyright legal framework, it was not surprising that judges have been afforded a certain margin of appreciation in their decision to grant injunctions. The question was, however, debated more intensively for patents, where the legal exclusivity is much more precisely tailored by the legislature. In the 2006 landmark decision *eBay v MercExchange*,[37] the Supreme Court rejected a strict application of the property model in this area and imposed a flexible approach based on a balancing test. In its decision, the Supreme Court reversed a decision concluding that a general rule exists according to which 'courts will issue permanent injunctions against patent infringement absent exceptional circumstances'.[38] The Supreme Court disavowed the prevalence of injunctions: '[t]he decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion'.[39] Granting an injunction should therefore be subjected to the four factor test traditionally applicable for this type of remedy. Accordingly, it is therefore for the plaintiff to demonstrate:

'(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.'[40]

The first two criteria are often analysed together.[41] The courts tend to accept that the plaintiff would suffer irreparable harm if addressing the violation exclusively by way of damages would be inadequate.[42] This would often be the case in constellations where the violator is a direct competitor of the patent's owner, and where a 'causal nexus' can be established between the infringement and the suffered injury in the absence of an injunction – for instance in a case of the patent owner losing out on sales of his or her prod-

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[36] *Campbell* (n 26) 578 fn 10 (emphasis in the original). See also *New York Times Co v Tasini* 533 US 483, 505 (2001).

[37] *eBay v MercExchange* 547 US 388 (2006).

[38] *MercExchange v Ebay* 401 F3d 1323 (Fed Cir 2005).

[39] *eBay* (n 37) 391.

[40] *eBay* (n 37) 391.

[41] The two factors are sometimes even considered redundant: see John M Golden, 'United States' in JL Contreras and M Husovec (eds), *Injunctions in Patent Law: Trans-Atlantic Dialogues on Flexibility and Tailoring* (CUP 2022) 294.

[42] Golden (n 41) 294, noting that 'the first two prongs of this test are somewhat awkward at best. Regarding the first prong, the court presumably meant to indicate that the movant for an injunction must show that it *will* suffer irreparable injury if an injunction does not issue, rather than it "has suffered irreparable injury" in the past' (emphasis in the original text).

ucts.[43] The infringer's ability to pay the damages might also play a role. From a comparative perspective, the analysis conducted as regards these two factors is analogous to the first two steps of the EU constitutional proportionality assessment concerning the suitability and the lack of efficient alternative measures. The third factor, often referred to as the 'balance of hardships', consists in a balancing exercise between the interests and harms of each party regarding the injunction. At this level, consideration is to be given to the nature of the patent at stake,[44] the importance of the added value conferred by the violated patent on the infringing goods and the disruption that the injunction could have on the infringer's business.[45] Lastly, the fourth factor invites the court to move beyond the scope of the dispute and to consider the public interest more broadly within the framework of its balancing assessment. This might encompass, for instance, concerns about the protection of public health or safety. However, the interest of the public might also be less 'fundamental' and more prosaic. Hence an injunction sought against Microsoft Office and Windows was seen as risking a substantial negative effect for the public due to the massive reliance on these products.[46]

The reliance on this proportionality assessment at the enforcement level allows US courts to embrace a 'context-sensitive approach'[47] and avoid the potential emergence of dysfunctional effects by permitting 'courts to adapt to the rapid technological and legal developments in the patent system'.[48] Though the flexibility offered may, by its nature, be associated with a decrease in the legal certainty offered by the US system, this shortcoming is, as in the case of the fair use, compensated by the continued development of case law that identifies and categorises certain factual situations and suggests how judicial discretion is to be exercised.[49]

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[43] See *Apple v Samsung Elecs* 809 F3d 633 (Fed Cir 2015) 639–647.

[44] See in this regard the concurring opinion authored by Justice Kennedy in *eBay* (n 37) 397, criticising the 'burgeoning number of patents over business methods' in the US, and arguing that 'the potential vagueness and suspect validity of some of these patents may affect the calculus under the four factor test'.

[45] Golden (n 40) 296.

[46] *z4 Technologies v Microsoft Corp* 434 F Supp 2d 437 (ED Tex 2006) 443–444. The decision is also cited by Golden (n 41) 296.

[47] Golden (n 41) 291.

[48] See Justice Kennedy's concurring opinion in *eBay* (n 37) 397.

[49] It has, for instance, been shown by empirical studies that courts are more reluctant to grant injunctions in cases involving 'nonpracticing entities'; see in this regard Christopher B Seaman, 'Permanent Injunctions in Patent Litigation after Ebay: An Empirical Study' (2015) 101 Iowa L Rev 1949, 1987–1990; see also Golden (n 41) 291–292.

3. EU Uncertainty between Constitutional Proportionality and Balancing

Due to its continental tradition and the language adopted by the Enforcement Directive,[50] the European legal order was initially more reluctant to follow the US path. Furthermore, though the possibility of a proportionality control may be open within the Enforcement Directive, the analysis of the CJUE case law reveals a certain confusion regarding the nature of the control expected. The adoption and transposition of the Trade Secrets Directive[51] could, however, constitute a turning point.

a) The confusing language of the Enforcement Directive

In Europe, the Enforcement Directive, a horizontal instrument that harmonises civil remedies in instances of IP infringements,[52] is more concerned with guaranteeing strong protection of the IP owner's interests than ensuring a flexible approach.[53] Henceforth art 11 first imposes that the judicial authority be empowered to order injunctions.

'Member States *shall ensure* that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement.'[54]

Whereas with respect to damages, art 12 only creates an option for the Member States:

'Member States *may provide* that, in appropriate cases and at the request of the person liable to be subject to the measures provided for in this section, the competent judicial authorities may order pecuniary compensation to be paid to the injured party instead of applying the measures provided for in this section if that person acted unintentionally and without negligence, if execution of the measures in question would cause him/her disproportionate harm and if pecuniary compensation to the injured party appears reasonably satisfactory.'[55]

Hence, although art 12 of the Directive allows the Member States to opt for a more flexible approach, this provision is not mandatory and is very limited in scope. The non-mandatory character of art 12 led, first, to the result that a significant number of Member States, especially from the civil law tradition, left this

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[50] See n 29.

[51] See n 6.

[52] As will be explained in more detail in the following paragraph of this contribution, the Enforcement Directive does not apply to trade secret violations. The latter are indeed formally not considered IP rights, and the rules concerning their enforcement are provided by the Trade Secrets Directive.

[53] See Hilty (n 13) 13–14; Matthias Leistner and Viola Pless, 'European Union' in JL Contreras and Martin Husovec (eds), *Injunctions in Patent Law: Trans-Atlantic Dialogues on Flexibility and Tailoring* (CUP 2022) 28.

[54] Emphasis added.

[55] Emphasis added.

provision un-transposed.[56] Furthermore, some even argue that the language prescribing an absence of guilt could lead to art 12 being rendered inoperative.[57]

The existence of art 12 further raises the question of whether the option for a court not to order an injunction is limited only to the conditions specified in this article. From a systematic perspective, and following an *e contrario* reasoning, the answer appears to be in the affirmative. However, several arguments speak against such a formal interpretation. First, the same Directive also includes a general provision in art 3(2), from which a more general proportionality assessment emerges:

'*Th[e] measures […] and remedies shall also be effective,* proportionate *and dissuasive and shall be applied in such a manner* as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.'[58]

The relevance of this proportionality assessment in the case of injunctions is further reinforced by recital 17 of the Directive,[59] according to which

'[t]he measures […] and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement.'

Lastly, an interpretation limiting the possibilities for a Court not to order an injunction only to the conditions specified in art 12 would be at odds with the recognised equitable nature of the injunction in common law jurisdictions like, notably, the United Kingdom, which was still part of the EU at the time of the Directive's enactment.[60] Hence, a strict interpretation should presumably be rejected, and the possibility of a proportionality control regarding the ordering of an injunction on the direct basis of art 3(2) of the Enforcement

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[56] For a comprehensive collection of country reports, see Filip Peillion (ed), *Enforcement of Intellectual Property Rights in the EU Member States* (Intersentia 2019). This state of affairs is, however, not fixed. Germany, for instance, decided in 2021 to reform its patent law and to insert in s 139(1) of the Patent Act (PatG) the following sentence: 'The claim is precluded insofar as it would lead to disproportionate hardship for the infringer or third parties not justified by the exclusive right due to the special circumstances of the individual case and the requirements of good faith.'

[57] See for instance Hilty (n 13) 15. Observing that there is 'hardly such a thing as "guiltless" infringement', European Commission, 'Support study for the ex-post evaluation and ex-ante impact analysis of the IPR enforcement Directive (IPRED)' (2017) 113 <https://data.europa.eu/doi/10.2873/903149> accessed at 17 November 2022. See also Ohly (n 30) 7.

[58] Emphasis added.

[59] Also noted by Ohly (n 30) 7. See also Leistner and Pless (n 53) 30.

[60] Ohly (n 30) 7. Also noting at 6 in this regard that art 11 'was modelled on Article 44(1) of the TRIPS Agreement' and that 'an obligation on contracting states to provide for the grant of injunctions in every case of infringement would have been at odds with the common low tradition of treating inunctions as equitable remedies'.

Directive should be admitted. However, to date, the Court of Justice has not had the chance to decide this issue.

b) Interpretation of the notion of proportionality by the CJEU

The Court of Justice did, however, have the opportunity on several occasions to interpret the notion of proportionality entailed in art 3 of the Enforcement Directive, and an analysis of existing case law allows us to extract some interesting insights. It becomes apparent from the case law that the Court considers the principle of proportionality embedded in art 3 as relying on a normativity independent from the other provisions entailed in the Directive. This needs to be considered by national courts when applying national legislation implementing the Directive.[61]

The Court of Justice seems, however, to see this principle more as a conciliation mechanism aiming at resolving the tensions arising from the enforcement of IP rights with conflicting interests protected by fundamental rights than as an internal balancing tool intending to finetune the legal response to an IP violation.[62] Strikingly, the Court apparently feels obliged to engage in an almost systematic fundamental rights discourse when it applies the proportionality principle in art 3 of the Enforcement Directive to moderate the effects of IP enforcement. The decision *Scarlet Extended*,[63] which relates to the scope of an injunction directed toward an internet service provider (ISP), is enlightening in this regard. The Court first explains that an injunction imposing on an ISP 'a general monitoring obligation would be incompatible with Article 3 of Directive 2004/48, which states that the measures referred to by the directive must be fair and proportionate and must not be excessively costly'.[64] It then analyses the injunction at stake and estimates that it would require 'the ISP to

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[61] See also Sikorski (n 13) 46; Leistner and Pless (n 53) 31; Commission, 'Guidance on Certain Aspects of Directive 2004/48/EC of the European Parliament and of the Council on the Enforcement of Intellectual Property Rights' COM/2017/0708 final, 9–11. The recognition of the role of art 3 by the CJEU can already be regarded as an important aspect, especially when put in comparison with the long refusal of the panels and board of appeal of the WTO to recognise an equivalent normativity of arts 7 and 8 TRIPS Agreement referring to the 'objectives' and 'principles' of the Agreement. See in this regard Christophe Geiger and Luc Desaunettes-Barbero, 'The Revitalisation of the Object and Purpose of the TRIPS Agreement: The Plain Packaging Reports and the Awakening of the TRIPS Flexibility Clauses', in Jonathan Griffiths and Tuomas Mylly (eds), *Global Intellectual Property Protection and New Constitutionalism* (OUP 2021).

[62] Very clearly in this regard Martin Husovec, 'How Will the European Patent Judges Understand Proportionality?' (2020) 60 Jurimetrics 383.

[63] Case C-70/10 *Scarlet Extended* [2011] ECR I-11959, ECLI:EU:C:2011:771.

[64] *Scarlet Extended* (n 63) para 36. See also Case C-324/09 *L'Oréal v eBay* [2011] ECR I-06011, ECLI:EU:C:2011:474, para 139.

carry out general monitoring'.[65] The Court could have stopped its reasoning there. However, it then goes further into a fundamental rights dialectic – based on the right to property, the freedom to conduct business and the rights of third parties to share and access information and to have their private life protected[66] – to further justify its decision.[67]

This decision is not isolated in the corpus of Court rulings concerning the limitation of IP enforcement. To the contrary, the reliance on fundamental rights is present in all the decisions relating to a dispute concerning the moderation of injunctions' scope.[68] The only time the Court appears to have made use of the proportionality principle as an independent moderation tool distinct from fundamental rights is in the decision *Stowarzyszenie 'Oławska Telewizja Kablowa'*,[69] concerning the amount of damages awardable, and in which the Court, in an *obiter dictum,* explains:

'It is admittedly possible that, in exceptional cases, payment for a loss calculated on the basis of twice the amount of the hypothetical royalty will exceed the loss actually suffered so clearly and substantially that a claim to that effect could constitute an abuse of rights, prohibited by Article 3(2) of Directive 2004/48.'[70]

Here, the Court no longer seems to embrace the fundamental rights justification of proportionality control, finding instead that it results solely from the text of art 3 of the Directive.[71] Interestingly, the Court appears to infer the possibility of this layer of control, not directly from the notion of proportionality, but as resulting from the notion of 'abuse of rights'.[72]

Confinement as a constitutional proportionality control is arguably the result of the influence of the German and more generally of the constitutional proportionality tradition at the Court of Justice. The Luxembourg judges might be more at ease when relying on a proportionality control within a fundamental rights examination, which is more usual to them, rather than on a balancing assessment aiming at finetuning the application of a given legal framework at the enforcement stage.

This approach presents, however, an important pitfall.[73] The purpose, and therefore the resulting outcomes, of constitutional proportionality assess-

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[65] *Scarlet Extended* (n 63) para 40.

[66] *Scarlet Extended* (n 63) paras 41–53.

[67] Noting this peculiar feature of the decision Sikorski (n 13) 44.

[68] See Case C-484/14 *Mc Fadden* [2016] ECLI:EU:C:2016:689; Case C-314/12 *UPC Telekabel Wien* [2014] ECLI:EU:C:2014:192.

[69] Case C-367/15 *Stowarzyszenie 'Oławska Telewizja Kablowa'* [2017] ECLI:EU:C:2017:36.

[70] *Stowarzyszenie 'Oławska Telewizja Kablowa'* (n 69) para 31.

[71] Husovec (n 62) 386.

[72] On the relationship between abuse of rights and proportionality in EU contract law, see Johanna Stark, 'Rights and their Boundaries in European Contract Law: Abuse, Proportionality, or Both?', in this volume.

ments cannot be regarded as equivalent to those resulting from the implementation of a secondary law provision. Indeed, the constitutional proportionality test was developed to verify the compatibility of a public act with fundamental rights. This constitutional control necessarily presents certain limits: within the boundaries fixed by the fundamental rights framework, the constitutional judge must recognise that the democratically legitimised legislature disposes of a certain margin of appreciation. Respect for this margin might lead the Court to conclude that the mechanisms allowing a balancing of the different rights and interests are already contained within the pieces of legislation,[74] and to adopt a 'hands off' attitude from any interpretation that could interfere with the policy choice effected by the legislature in the first place.

Such self-restraint is not justified when it comes to a proportionality control prescribed within the piece of legislation itself. There, it is no longer a question of controlling the conformity of the legislature's decision, but simply one of applying it. The judge does not encroach on the domain reserved to the legislature but, to the contrary, obeys an instruction of the latter. This different logic behind a proportionality assessment has an important impact on its potential outcome. As noted by Martin Husovec, 'courts interpreting secondary Union law should also be able to reject certain outcomes that perfectly conform to all the human rights concerned as nonetheless undesirable because they are ineffective as a matter of the legislator's policy'.[75] This does not mean that fundamental rights have no role to play within the proportionality assessment. These rights will first serve to set the outer limits within which the proportionality assessment might take place. An outcome that would lead to an implementation of the pieces of legislation incompatible with fundamental rights should be rejected. Second, these rights might also be used within the balancing assessment as weighting tools. Because of the fundamentalisation of legal orders (ie the process aiming to establish a filiation between the subjective rights recognised to individuals with the fundamental value supporting a given legal order), it will always be possible to relate the different interests that need to be balanced against each other to particular

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[73] Martin Husovec, 'Intellectual Property Rights and Integration by Conflict: The Past, Present and Future' (2016) 18 CYELS 239, 267–268.

[74] See for instance Case C-275/06 *Promusicae* [2008] ECR I-00271, ECLI:EU:C:2008:54, para 66: 'The mechanisms allowing those different rights and interests to be balanced are contained, first, in Directive 2002/58 itself, in that it provides for rules which determine in what circumstances and to what extent the processing of personal data is lawful and what safeguards must be provided for, and in the three directives mentioned by the national court, which reserve the cases in which the measures adopted to protect the rights they regulate affect the protection of personal data. Second, they result from the adoption by the Member States of national provisions transposing those directives and their application by the national authorities'.

[75] Husovec (n 73) 268.

fundamental rights.[76] However, the fundamentalisation of the interests to be balanced should not lead the judge to refuse to conduct a precise 'fact-specific' balancing. More metaphorically, the reliance on fundamental rights should not give judges the feeling that they must use kilogram weights in a situation where lawmakers were in fact instead asking for an adjustment in terms of grams. Lastly, when referring to the fundamental rights within such a balancing, judges should be careful not to create confusion in the different natures of such balancing assessments on the one hand, and a fundamental rights control on the other. Whereas in the first case fundamental rights are only referential, in the second case other arguments that might be considered as remote from fundamental rights considerations – such as the economic efficiency of a given solution – should also be considered.

c) The Trade Secrets Directive – a turning point?

The Trade Secrets Directive,[77] adopted in 2016 to harmonise the very heterogeneous forms of national trade secrets protection within the European Union, could constitute the entry point for US balancing into the arsenal of European judges. The first two chapters of the Directive are devoted to the definition of the subject matter and the scope of protection conferred to trade secrets, but the EU legislature also decided to regulate enforcement aspects. In this regard, reliance on the Enforcement Directive was considered but ultimately rejected.[78] The main reason was namely that the Enforcement Directive was seen as not offering enough flexibility, a characteristic considered problematic in the field of trade secrets law, in which the definition of material protection is less precise than for other IP rights, presents a significant fogginess and relies massively on the judges' assessment. This particular feature of the new regime made the latter more propitious for the emergence of dysfunctional effects resulting from an over-protection.[79] Therefore, the European legislature decided to dedicate the third chapter of the Trade Secrets Directive to its enforcement.

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[76] On the constitutionalisation of private law, see Franz Bauer, 'Proportionality in Private Law: An Analytical Framework', in this volume, 23–24. On the constitutionalisation of coherence, see Philip M Bender, 'Private Law Adjudication versus Constitutional Adjudication', in this volume, 70–72.

[77] See n 6.

[78] Commission, 'Impact Assessment Accompanying the Document Proposal for a Directive on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) against Their Unlawful Acquisition, Use and Disclosure' SWD/2013/0471 final, 266–268.

[79] See SWD/2013/0471 final, 268: 'the legal instrument on the protection of trade secrets would also require the integration of rules which are not present in Directive 2004/48/EC: i.e. […] on stricter anti-abuse and safeguard rules considering the nature of trade secrets'.

This chapter has some similarities with the Enforcement Directive concerning the measures available, but it puts a strong emphasis on the necessity to conduct an in-depth proportionality assessment before ordering any corrective measures. Hence, according to art 13(1) of the Trade Secrets Directive:

'Member States shall ensure that, in considering an application for the adoption of the injunctions and corrective measures provided for in Article 12 and assessing their proportionality, the competent judicial authorities shall be required to take into account the specific circumstances of the case, including, where appropriate:

(a) the value or other specific features of the trade secret;
(b) the measures taken to protect the trade secret;
(c) the conduct of the infringer in acquiring, using or disclosing the trade secret;
(d) the impact of the unlawful use or disclosure of the trade secret;
(e) the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties;
(f) the legitimate interests of third parties;
(g) the public interest; and
(h) the safeguard of fundamental rights.'

This provision is striking in several aspects. First, it is mandatory, both regarding the obligation of the Member States to transpose it ('Member States shall ensure') and concerning the obligation for courts to proceed to the assessment ('the competent judicial authorities shall be required'). Second, it requires the judge to conduct an in-depth balancing exercise. The criteria listed are enlightening in this regard since they require the judge to make a full reassessment of the interests at stake. The factors to be considered are, hence, irrespective of the decision that the legislature might have made in the substantive part of the Directive (ie, regarding the characteristic of the trade secret concerned or the behaviour of the infringers). The interests of the trade secret holder are furthermore not privileged vis-à-vis those of the violator. And lastly, the assessments should also consider the interest of third parties and the public interest at large.

The resemblance of this approach to the US-style balancing test is not coincidental. European lawmakers were highly influenced by the US legal framework in the drafting of the Trade Secrets Directive, and art 13(1) can be regarded as a transcription of § 44(2) US Restatement (Third) of Unfair Competition,[80] a text aiming precisely at synthesising developments made in

[80] American Law Institute, *Restatement (Third) of Unfair Competition* (1995), § 44(2): 'The appropriateness and scope of injunctive relief depend upon a comparative appraisal of all the factors of the case, including the following primary factors: (a) the nature of the interest to be protected; (b) the nature and extent of the appropriation; (c) the relative adequacy to the plaintiff of an injunction and of other remedies; (d) the relative harm likely to result to the legitimate interests of the defendant if an injunction is granted and to the legitimate interests of the plaintiff if an injunction is denied; (e) the interests of third persons and of the public; (f) any unreasonable delay by the plaintiff in bringing suit or oth-

US case law regarding the award of injunctions in situations of trade secrets violation.

The impact that this provision will have could be significant for the evolution of EU private law. In a not entirely conscious way, the European legislature has indeed imported the US balancing test within European secondary legislation, which also means that courts in civil law jurisdictions will have to fully engage in this exercise. It could therefore lead European judges and the Court of Justice to become accustomed to and therefore more confident with this particular form of balancing. Once initiated, this process could naturally also influence the interpretation of the proportionality test entailed within the Enforcement Directive and hence allow the EU IP legal framework to enter into an age of balancing.

V. Conclusion

This chapter investigates the relationship between the proportionality principle and the field of IP law. It shows that the role of the former is essential and observable both at the enactment and implementation level of IP rules. A fundamental tension underpins this legal field between, on the one hand, the potential need to establish some form of legal exclusivity over creations of the mind and, on the other, the necessity to maintain a sufficient degree of market competition. Solving this tension first obliges the legislature to carry out a balancing exercise between the different interests at stake when enacting any IP legislation. However, since addressing this tension only *in abstracto* is not sufficient, proportionality assessments are also integrated at the implementation stage and are the task of judges. Whereas the European IP legal framework traditionally offers less flexibility and space for the judge to engage intensively in proportionality considerations, the recent enactment of the Trade Secrets Directive could constitute a turning point. Lastly, analysing the reliance on the proportionality principle within the field of IP law allows for highlighting some reminiscences of both the US private law and German public law traditions, which are at the origin of this principle.

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erwise asserting its rights; (g) any related misconduct on the part of the plaintiff; and the practicality of framing and enforcing the injunction'.

The Use of Public Policy Clauses for the Protection of Human Rights in the EU and the Role of Proportionality

Sorina Doroga

I. Introduction

This paper explores the use of public policy clauses by courts in an EU private international law setting when the application of foreign law or the recognition of a foreign judgment raises human rights concerns. It analyses the relevant standards of judicial scrutiny and seeks to evaluate whether the application of the principle of proportionality can serve as an adequate instrument for minimising judicial discretion. Furthermore, the article aims to clarify the content (and the source) of the proportionality analysis that domestic judges are expected to employ when considering the application of public policy clauses to protect human rights.

The paper proceeds as follows: part II discusses the characteristics of public policy as a notion of private international law and highlights the various

dimensions it takes in relation to the legal system of reference. Part III analyses the use of the public policy exception as an instrument to address human rights and synthesizes the EU approach through a review of the most relevant case-law of the ECJ on this topic. Part IV discusses the role that proportionality plays in the use of public policy clauses and its contribution to minimising judicial discretion. The paper concludes with an assessment of the various layers of discretion that persist when relying on the public policy exception and highlights the dual proportionality test that the judge is called to perform when employing the exception in a human rights context.

II. Public Policy and its Dimensions

While the concept of public policy (*ordre public* or public order) is omnipresent in private international law,[1] it continues to remain characterised by a certain vagueness.[2] It is generally described as consisting of the reserved power of a national court to refuse to apply a foreign law or to recognise or enforce a foreign judgment on grounds of inconsistency with fundamental values of the court's legal system.[3] The public policy exception may therefore be considered, at its core, an expression of sovereignty, the 'safety valve' of private international law,[4] allowing the state to define the 'outer limits of the "tolerance of difference"'[5] implicit in the existence of choice-of-law rules and rules concerning the recognition and enforcement of foreign judgments.

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[1] P Lagarde, 'Public Policy' in K Zweigert and others (eds), *International Encyclopaedia of Comparative Law, Vol. III: Private International Law, Chapter 11* (Martinus Nijhoff Publishers 1994). Public policy has even been recognised as a general principle of law, the existence of which is to be implied in private international law treaties which do not expressly refer to it. See, for instance, the Separate Opinions of Judges Badawi, Lauterpacht, and Quintana in the *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden)* [1958] ICJ Rep 55. Judge Quintana (at 107) stated that '*[o]rdre public* is indissolubly bound up with the general principles of law recognized by civilized nations […]'.

[2] Jan Oster, 'Public policy and human rights' (2015) 11 J Priv Int L 542, 544; Mark Hirschboeck, 'Conceptualizing the Relationship between International Human Rights Law and Private International Law' (2019) 60 Harv Int'l LJ 181, 192.

[3] Adrian Briggs, *The Conflict of Laws* (3rd edn, OUP 2013) 209; HP Meidanis, 'Public Policy and Ordre Public in the Private International Law of the EU: Traditional Positions and Modern Trends' [2005] Eur L Rev 95, 97.

[4] Lowrens R Kiestra, *The Impact of the European Convention on Human Rights on Private International Law* (TMC Asser Press 2014) 21.

[5] Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 J Priv Int L 201, 202.

Traditionally justified through different theories depending on the legal system of reference,[6] public policy has also been criticised for being shrouded in uncertainty. On the one hand, when national courts decide to rely on the exception, it is not always easy to anticipate the precise content of public policy (which may, in any case, change over time[7]) or the consequences of its application. On the other hand, the use of public policy clauses implies affording broad (and in the view of some, unfettered) discretion to national judges, which 'risks undermining the concern of private international law, particularly in the common law world, with meeting party expectations'.[8] It is for such reasons that Judge Burrough's famous metaphor has persisted through centuries: 'I protest arguing too strongly upon public policy. It is a very unruly horse and once you get astride it, you never know where it will carry you'.[9]

As a consequence, courts have been urged to exercise restraint and caution in employing the public policy exemption and to rely on it only in exceptional circumstances, when the application of foreign law or the recognition or enforcement of a foreign judgment would lead to unacceptable results in the system of the forum and risk affecting the fundamental values of that society. This implies, first, the observation that the fundamental values public policy is designed to protect will vary from country to country (and, as understood more recently, may also depend on the regional systems to which each country pertains). Second, while the content of public policy is inherently ambiguous, in practice the operation of the exception is clear: it may be invoked only when the result of the application of a foreign norm (and not the foreign law in general) or the effect of recognising or enforcing a foreign judgment would be manifestly incompatible with the *ordre public* of the forum state. The outcome in this situation is the exclusion of the foreign norm or the refusal to recognise or enforce the foreign judgment.[10]

Over time, the concept of public policy has been developed and employed under different connotations, which are worth exploring before delving into the notion's human rights dimension.

1. Domestic, International and 'Purely International' Public Policy

As indicated previously, public policy is designed to protect the fundamental interests of the forum. However, in private international law a distinction is

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[6] Kent Murphy, 'The Traditional View of Public Policy and Ordre Public in Private International Law' (1981) 11 Ga J Int'l & Comp L 591, 592–599; A Mills, 'The Private History of International Law' (2006) 55 ICLQ 1.

[7] Joost Blom, 'Public Policy in Private International Law and Its Evolution in Time' (2003) 50 NILR 373, 385.

[8] Mills (n 5) 202.

[9] *Richardson v Mellish* (1824) 2 Bing 229; 130 ER 294, 303.

[10] Kiestra (n 4) 22.

drawn between domestic public policy (*ordre public interne*) and international public policy (*ordre public externe*). The former refers to mandatory statutory provisions from which private parties cannot derogate and which are relevant in purely domestic situations. The latter applies to cases involving a foreign element and allows domestic courts to protect those essential values and interests of the state that cannot be disregarded even in disputes having an international dimension.[11]

Additionally, with the accelerated proliferation of international and regional instruments of cooperation between states and the emergence of supranational governance structures, another type of public policy – 'purely international' public policy – has emerged, seeking to protect fundamental values having their source in international law obligations or rules.[12] While such values also form part of the national public policy, they emerge from an international or supranational source, which places upon the state a duty to safeguard them.[13]

This distinction is relevant in the context of fundamental rights, which may be protected under the umbrella of both 'international public policy', as enshrined in the constitutional provisions of the state, and 'purely international public policy', as derived from international and regional human rights instruments such as the ECHR or the CFREU. When employed in a purely international sense, fundamental rights protection as public policy encompasses a content and a scope conferring much less discretionary power on domestic judges, since it necessarily relies on a uniform understanding of shared values and standards, as incorporated in international treaties or supranational rules. The domestic judge is in this case merely applying a 'clarified' standard of protection, derived from the relevant international instrument, with little margin for additional interpretation.

2. Substantive and Procedural Public Policy

Another classification frequently discussed in legal scholarship concerns the distinction between substantive and procedural public policy, depending on the nature of the standard which is at stake in the forum. In the context of exceptions based on human rights, the forum's substantive public policy standards will most likely be involved at the applicable law stage,[14] while the

[11] Stéphanie Francq, in Ulrich Magnus and Peter Mankowski (eds), *Brussels I Regulation* (Sellier 2007), art 34 paras 16–17.

[12] See also Luigi Fumagalli, 'EC Private International Law and the Public Policy Exception: Modern Features of a Traditional Concept' (2004) 6 YPIL 171, 179.

[13] Tena Hoško, 'Public Policy as an Exception to Free Movement Within the Internal Market and the European Judicial Area: A Comparison' (2014) 10 CYELP 189, 198.

[14] See eg Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/8, art 21; Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40, art 26.

procedural ones will be relevant at the stage of recognition or enforcement of foreign judgments.[15] In practice, procedural public policy is much more frequently invoked than substantive public policy.[16] The most frequently used procedural public policy exemption invoked in a human rights setting refers to the right to a fair trial, protected under art 6 ECHR and art 47 CFREU and recognised as forming part of the general principles of the EU legal order.[17]

3. National and European Union Public Policy

The European Union legal order has gradually undergone a process of transformation, brought about by the harmonisation of rules concerning the conflict of laws as well as recognition and enforcement of judgments.[18] As far as procedural law is concerned, there is a discernible tendency towards automatic recognition of judgments within the EU.[19] Such enhanced harmonisation has led many scholars to assert that a fifth freedom has emerged in the EU: the free movement of judgments.[20] In fact, Hess and Pfeiffer emphasise that '[t]he principles of free movement of judgments and of mutual trust among the judicial authorities of the Member States are the cornerstones of the judicial cooperation in civil matters'.[21] However, the vast majority of EU legal instruments in the field of private international law and procedural law retain public policy clauses formulated in similar (albeit not identical) terms.[22]

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[15] Oster (n 2) 546. See also, for example, Regulation (EU) 215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1, art 45(1)(a).

[16] Burkhard Hess and Thomas Pfeiffer, 'Interpretation of the Public Policy Exception as Referred to in EU Instruments of Private International and Procedural Law' (European Parliament 2011), 152 <https://www.europarl.europa.eu/RegData/etudes/STUD/2011/453189/IPOL-JURI_ET(2011)453189_EN.pdf> accessed 5 May 2022.

[17] Hess and Pfeiffer (n 16) 155.

[18] Kiestra (n 4) 17; Peter Stone, *EU Private International Law* (2nd edn, Edward Elgar 2010) 4–5. See also TFEU, arts 67–89, in particular ch 3 on Judicial cooperation in civil matters (TFEU, art 81).

[19] M Jenard, *Report on the protocols on the interpretation by the Court of Justice of the Convention of 29 February 1968 on the mutual recognition of companies and legal persons and of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters* [1979] OJ C59/2, 43 (*Jenard Report*). See also Kiestra (n 4) 272.

[20] Hoško (n 13) 210. Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143, art 1 expressly uses the wording 'free circulation of judgments'.

[21] Hess and Pfeifer (n 16) 21.

[22] See Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/8, art 21; Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July

In this context, and given that the Union is a community not only of law but also of values (many of which may be considered to protect interests which are essential to its legal order), the question arises whether an EU public policy has emerged – one whose meaning and scope must be determined not at the national, but the European level, to be imposed upon Member States. In light of CJEU judgments such as *Eco Swiss*[23] and *Mostaza Claro*,[24] it appears that the European Court of Justice has indeed introduced a notion of EU public policy, designed to protect primarily the EU and its interests.[25] However, this is not a departure from the Court's established case-law in *Krombach*,[26] and it does not imply 'the creation of a European public policy as opposed to a national one; it just acknowledges that there is an EU law level in national public policy'.[27] This was also confirmed by the Giuliano and Lagarde Report on the Rome Convention: '[i]t goes without saying that this expression ['ordre public'] includes Community public policy, which has become an integral part of the public policy of the Member States of the European Community'.[28]

While not every EU norm may be considered fundamental so as to pertain to the sphere of public policy – and this remains an aspect for the CJEU to

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2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40, art 26; Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10, art 12; Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107, art 35; Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1, art 24(a); Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1, art 45(1)(a).

[23] Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-03055, ECLI:EU:C:1999:269, para 39: 'the provisions of Article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention'. For the opposite view, see Case C-38/98 *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento*, [2000] ECR I-02973, ECLI:EU:C:2000:225, para 34.

[24] Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421, ECLI:EU:C:2006:675, paras 35–39; Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-9579, ECLI:EU:C:2009:615 paras 52–55.

[25] Hoško (n 13) 201. See also Catherine Kessedjian, 'Public Order in European Law' (2007) 1 Erasmus L Rev 25, 28.

[26] See text to n 41.

[27] Hoško (n 13) 200. See also Paolo Bertoli, 'European Integration and Private International Law' (2006) 8 YPIL 375, 409.

[28] M Giuliano and P Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations* [1980] OJ C282/1, 38.

interpret – national courts will nonetheless be the ones to rely on this concept, in exceptional circumstances, when the violation of the norm is manifest and serious. Additionally, as it might be implied from the Court's reasoning in *Diageo*,[29] if it is demonstrated that the courts of a particular Member State deliberately and repeatedly infringe EU law, such persistent violations ('a pattern of national precedent'), even if not infringing a category of essential norms, could potentially lead to a refusal of recognition.[30]

III. Public Policy as an Instrument to Address Human Rights Concerns in the EU

As part of the fundamental values of the Member States and of the EU itself,[31] human rights undoubtedly fall within the sphere of public policy that national courts may rely upon under private international law rules. At the same time, the concept of public policy itself is sufficiently supple to 'take on board easily human rights concerns',[32] and indeed it has historically been the preferred instrument to 'deal with the impact of fundamental rights' on private international law.[33]

The legal order of the European Union, displaying interwoven layers of cooperation and competence allocated between the institutions and Member States, constitutes a playing field for some of the most interesting interactions illustrating the application of the public policy exception in a human rights context.

On the one hand, the EU is designed as a space for free circulation of judgments, based on the key principles of mutual trust, recognition and reciprocity, in which the vast majority of conflict-of-law rules and rules concerning recognition and enforcement of foreign judgments have been harmonised.[34] These rules include, in most cases, public policy clauses on which national courts may rely in order to safeguard the essential values and interests of their own legal systems and of the EU's legal order. On the other hand, the EU is a space of enhanced connection between the Member States, based on shared core values, among which fundamental rights are paramount. Consistent and adequate upholding of such rights at national and EU level

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[29] Case C-681/13 *Diageo Brands BV v Simiramida-04 EOOD*, ECLI:EU:C:2015:471, paras 53–54.

[30] Geert van Calster, *European Private International Law* (2nd edn, Hart 2016) 195.

[31] TEU, art 2.

[32] JJ Fawcett, 'The Impact of Article 6(1) of the ECHR on Private International Law' (2007) 56 ICLQ 1, 16.

[33] Kiestra (n 4) 20.

[34] See n 20.

may at times require carving out exceptions and going against the grain of mutual trust and recognition. The public policy exception consequently becomes the arena for balancing mutual trust and recognition against fundamental rights protection. It is against this backdrop that the ECJ case law on the use of public policy clauses for human rights concerns must be analysed.

1. Human Rights as Public Policy in the Case Law of the ECJ

In the landmark case of *Krombach v Bamberski*,[35] the ECJ had the opportunity to examine the operation of the public policy clause based on fundamental rights in the context of recognition proceedings under the Brussels Convention.[36] Mr Bamberski, a French national, had obtained a civil judgment in France against Mr Krombach, a German national, ordering the latter to pay compensation in the context of an investigation into the death of the former's daughter. In a French criminal judgment, Mr Krombach was found guilty of involuntary manslaughter and, under the civil claim, he was ordered to pay compensation to Mr Bamberski in the amount of FRF 350 000. Throughout the French judicial proceedings, although Mr Krombach had been ordered to appear in person, he refused to attend and was held in contempt. Pursuant to art 630 of the French Criminal Procedure Code, no defence counsel was allowed to appear on behalf of the person in contempt, and thus 'the Cour d'Assises reached its decision without hearing the defence counsel instructed by Mr Krombach'.[37]

In a set of enforcement proceedings regarding the French judgment in Germany, Mr Krombach 'brought an appeal on a point of law ("*Rechtsbeschwerde*") before the *Bundesgerichtshof* in which he submitted that he had been unable effectively to defend himself against the judgment given against him by the French court'.[38] The German court stayed the proceedings and submitted several preliminary questions to the ECJ, essentially requesting an interpretation of the notion of 'public policy in the State in which recognition is sought' under art 27 no 1 of the Brussels Convention.[39]

The ruling of the ECJ started by recalling that the Brussels Convention sought to facilitate the 'free movement of judgments' to the greatest extent

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[35] Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR I-01935, ECLI:EU:C:2000:164. For an extensive analysis, see the case note of Aukje AH van Hoek, 'Case C-7/98, D. Krombach v. A. Bamberski, Judgment of the Full Court of 28 March 2000. [2000] ECR I-1395' (2001) 38 CML Rev 1011.

[36] *Krombach* (n 35) para 2.

[37] *Krombach* (n 35) paras 12–15.

[38] *Krombach* (n 35) para 16.

[39] *Krombach* (n 35) para 18. Art 27 no 1. of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L 299/32 provides: '[a] judgment shall not be recognized […] if such recognition is contrary to public policy in the State in which recognition is sought'.

possible, providing for simple and rapid enforcement procedures in a system which is 'autonomous and complete' and independent of the legal systems of the Member States.[40] It then proceeded to show that 'while it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State'.[41] Consequently, national courts of the Member States are entitled to establish the content of public policy, but such competence is subject to review by the ECJ when recourse to the public policy clause would lead to a restriction of the application of the principles of mutual trust and recognition.

The importance of the *Krombach* judgment lies in its detailed analysis of the standard of application of the public policy clause in a human rights context in the EU legal order. The ECJ held that recognition or enforcement of a foreign judgment may not be refused solely based on a discrepancy between the legal rule applied in the Member State of origin and the legal system of the Member State in which recognition is sought. Rather, recourse to the public policy exception may be envisaged only in exceptional cases when such recognition or enforcement 'would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle'. Furthermore, the infringement must consist of a 'manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order'.[42]

The Court acknowledged the fundamental character of the right to a fair trial (including the right to a defence) deriving from the common constitutional traditions of the Member States and from the case law of the ECtHR. It then concluded that 'a national court is entitled to hold that a refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of a fundamental right'.[43] Consequently, while highlighting the importance of mutual recognition and reciprocity between Member States, the Court declared that those objectives could not undermine the fundamental right to a fair hearing.[44]

Providing a key analysis in a human rights context, the *Krombach* decision does not depart from the Court's previous jurisprudence concerning the interpretation of public policy clauses under the Brussels Convention. Judgments

[40] *Krombach* (n 35) paras 19–20.
[41] *Krombach* (n 35) para 23.
[42] *Krombach* (n 35) paras 36–37, 44.
[43] *Krombach* (n 35) para 40.
[44] *Krombach* (n 35) paras 44–45.

such as *Hoffman*[45] and *Hendrikman*[46] had confirmed the requirement whereby national courts must use a restrictive interpretation in the application of this exemption and rely upon it only in exceptional circumstances. Furthermore, while *Krombach* was decided under the Brussels Convention, the case law of the Court displayed continuity under the Brussels I Recast Regulation,[47] as both instruments include the public policy exception, even though the latter added the term 'manifestly' to the expression 'contrary to public policy',[48] thus codifying the ECJ's pre-existing case-law and its interpretation.[49] The strict interpretation of public policy clauses was considered necessary since 'they constitute an obstacle to the attainment of the fundamental objectives of the Regulations, which is to maintain and develop an area of freedom, security and justice for a proper functioning of the internal market'.[50]

The approach of the ECJ to public policy clauses in the context of human rights protection remained consistent under different EU private international law and procedural instruments containing similar wording. For instance, under the old Insolvency Regulation,[51] the ECJ held in *Eurofood* that 'on a proper interpretation of Article 26 [public policy] of the Regulation, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys'.[52] The same reasoning was followed in *Probud Gdynia*, where the Court also stressed that recourse to the public policy

[45] Case 145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg* [1988] ECR 00645, ECLI:EU:C:1988:61, paras 20–21.

[46] Case C-78/95 *Bernardus Hendrikman and Maria Feyen v Magenta Druck & Verlag GmbH* [1996] ECR I-04943, ECLI:EU:C:1996:380, para 23.

[47] See Case C-533/07 *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhors* [2009] ECR I-03327, ECLI:EU:C:2009:257, paras 48–51.

[48] Article 45(1)(a) of Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.

[49] Hoško (n 13) 197.

[50] Oster (n 2) 552. See also *Renault* (n 23); Case C-414/92 *Solo Kleinmotoren GmbH v Emilio Boch*, [1994] ECR I-2237, ECLI:EU:C:1994:221, paras 24–25.

[51] Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L160/1 was repealed and replaced by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2015] OJ L 141/19. Both instruments included a provision stipulating that '[a]ny Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be *manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual*' (emphasis added) – Regulation (EC) 1346/2000, art 26 and Regulation (EU) 2015/848, art 33.

[52] Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-03813, ECLI:EU:C:2006:281, para 67.

clause is 'reserved for exceptional cases', since it constitutes an obstacle to the free movement of judgments.[53] Additionally, it indicated that the public policy case law relating to the Brussels Convention was transposable to other EU recognition and enforcement instruments.[54]

While insisting on the strict interpretation of public policy clauses and on the need for the infringement of fundamental rights (or other essential values of the forum) to be manifest and serious, the ECJ gave relatively little guidance as to how the assessment of the manifest character should be conducted by national courts. The *Gambazzi*[55] judgment provides valuable insight in this direction.

In the context of the right to a fair trial and the right to be heard, the Court indicated the criteria based on which the national court must carry out its assessment of the compatibility of a foreign judgment with public policy. It first stated, relying on *Eurofood*, that such assessment must be made 'having regard to the proceedings as a whole, in the light of all the circumstances'.[56] Second, it indicated that the national court should 'confine itself to identifying the legal remedies which were available to Mr. Gambazzi and to verifying that they offered him the possibility of being heard, in compliance with the adversarial principle and the full exercise of the rights of defence'.[57] Third, the national court was required

> 'to carry out a balancing exercise with regard to those various factors in order to assess whether, in the light of the objective of the efficient administration of justice […] the exclusion of Mr Gambazzi from the proceedings appears to be a manifest and disproportionate infringement of his right to be heard'

that could justify the refusal of enforcement.[58]

The ECJ therefore imposed on the national court a duty to conduct a comprehensive and in-depth analysis of the foreign proceedings in order to evaluate whether the restriction of the fundamental right to a fair trial and the right to be heard was proportionate to the legitimate objective of efficient administration of justice or whether, on the contrary, it constituted a 'manifest and disproportionate' violation of the party's fundamental right. This task appears, in light of the exceptional character of the reliance on public policy and of its limited scope, as a potentially excessive burden placed on the national court when deciding whether to refuse the recognition or enforcement of a

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[53] Case C-444/07 *MG Probud Gdynia sp. z o.o.* [2010] ECR I-00417, ECLI:EU:C:2010:24, para 34.

[54] *Probud Gdynia* (n 53) para 34.

[55] Case C-394/07 *Marco Gambazzi v Daimler Chrysler Canada Inc. and CIBC Mellon Trust Company* [2009] ECR I-02563, ECLI:EU:C:2009:219.

[56] *Gambazzi* (n 55) paras 40–41.

[57] *Gambazzi* (n 55) para 46.

[58] *Gambazzi* (n 55) para 47.

foreign judgment. Indeed, the judgment might be understood as being specific (and confined) to the criteria regarding the right to a fair trial – in particular to the right to be heard. However, since many other fundamental rights protected under the constitutional orders of the Member States and under instruments such as the ECHR and the CFREU may be restricted for legitimate purposes, national courts might find themselves in a position where they would, in fact, be required to undertake a thorough scrutiny of the proceedings or of the rules in the state of origin on each and every occasion where public policy is invoked based on human rights concerns. This might prove excessively burdensome and could create a chilling effect for national courts seeking to rely on the public policy exception to protect fundamental rights in a certain case.

2. Synthesising the EU Approach to Public Policy Exceptions Based on Human Rights

As resulting from the ECJ's relevant case law, the determination of the precise content of the public policy exception in a conflict-of-law setting or in the recognition or enforcement of foreign judgments falls under the prerogative of the national courts of the Member States. However, it is for the ECJ to review the limits within which the courts of a Member State may have recourse to that concept. In all cases, the public policy exemption is subject to restrictive interpretation and may be relied upon only in exceptional circumstances.

As far as the operation *per* se of the exception is concerned, it may be envisaged when the application of the foreign law or when the recognition or enforcement of a foreign judgment would be at variance to an unacceptable degree with the legal order of the Member State in which enforcement is sought, including for reasons due to the infringement of a fundamental right. Such infringement must consist of a manifest breach of a right recognised as fundamental within the legal order of the Member State concerned.

The possibility to rely on the public policy exception in a fundamental rights setting is therefore a question of degree: the standard for assessing the necessary level that the infringement must reach is that of a flagrant, obvious violation which is of a serious nature. In the context of human rights which may be subject to restrictions for legitimate reasons, the breach must be manifest and disproportionate, imposing on the national court a duty to engage in a balancing exercise in order to assess whether the violation of the fundamental right in question reaches the necessary threshold to be considered manifest and serious or whether, on the contrary, it may be qualified as a justified restriction of that right.

IV. The Role of Proportionality in the Use of Public Policy Clauses and its Contribution to Minimising Discretion

As indicated in the beginning of this paper, two of the most frequent general criticisms regarding the use of the public policy exception concern the relative vagueness of its content and the broad discretion it allows national judges when scrutinising the effects of either a foreign law or the recognition or enforcement of a foreign judgment in their legal system. Certain mechanisms for reducing the degree of judicial discretion are embedded in the operation of the public policy exception itself: restrictive interpretation and the standard of a manifest and serious infringement of fundamental values protected under public policy. However, particularly in the context of human rights protection through public policy clauses, it is worth exploring the role that proportionality plays in minimising discretion, its being the standard tool to be applied in judicial balancing exercises between human rights and other conflicting general interests or values.

In order to introduce proportionality in the operation of the public policy clauses under private international law in a human rights context, an examination of the manner in which proportionality operates in other fields of EU law might prove useful. Specifically, the use of the public policy exception in internal market cases will be briefly presented in order to clarify the elements of the proportionality test and to assess whether a similar test is (or may be) employed by national judges in respect of public policy clauses under private international law for the protection of fundamental rights.

1. The Public Policy Exception in Internal Market Cases and the Role of Proportionality

Under the internal market rules set up by the Treaties, the European Union is an integrated economic community based on four essential freedoms of movement concerning goods, services, persons and capital. While the rules regarding the operation of the EU freedoms are not absolute, restrictions are subject to strict conditions and must be based on at least one of the exceptions provided by the Treaties – including, among others, the protection of public policy.[59]

[59] Art 36 TFEU includes an exception from the general rule prohibiting restrictions on imports, exports or goods in transit when the restriction is justified, *inter alia,* on grounds of public morality, public policy or public security. However, such prohibitions or restrictions must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. Art 45(3) TFEU allows for limitations on the free movement of workers when justified on grounds of public policy, public security or public health. In respect of the freedom of establishment, art 52 TFEU provides for an exception allowing special treatment of foreign nationals on grounds of public policy, public security or public health. Similar exceptions are provided for the free movement of capital and services.

Similar to public policy in a private international law setting, the public policy justification in the context of the EU economic freedoms must also be interpreted in a restrictive fashion[60] and may only be relied upon when 'a genuine and sufficiently serious threat' to one of the fundamental interests of society exists.[61] While it is for the Member States to determine the precise content of public policy in order to protect a fundamental value,[62] the restrictions imposed on the exercise of the four freedoms are subject to scrutiny by the ECJ – they must not be disproportionate and must not give rise to arbitrary discrimination.[63]

In its *Omega*[64] judgment, the ECJ confirmed that fundamental rights protection forms part of the public policy objectives which may justify restrictions on the freedom to provide services, and it conducted a proportionality analysis of the restrictive measures implemented by the German authorities in order to ensure the protection of human dignity.[65] It relied upon the 'classic' conception of the proportionality test[66] – composed of suitability (which was here implicit in the analysis of the restrictive measure), necessity and proportionality *stricto sensu* – and concluded that the contested order had been necessary and 'did not go beyond what [was] necessary in order to attain the objective pursued by the competent national authorities'.[67] Recognising that different national conceptions may exist in respect of the values falling under public policy and the adequate means to protect them, the Court also held that 'the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State'.[68]

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[60] Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR 01337, ECLI:EU:C:1974:133, para 18.

[61] Case 30/77 *Régina v Pierre Bouchereau* [1977] ECR 01999, ECLI:EU:C:1977:172, para 35.

[62] See Case 36/75 *Roland Rutili v Ministre de l'intérieur* [1975] ECR 01219, ECLI:EU:C:1975:137, para 28; Case C-54/99 *Association Eglise de scientologie de Paris and Scientology International Reserves Trust v The Prime Minister* [2000] ECR I-01335, ECLI:EU:C:2000:124, para 17.

[63] Hoško (n 13) 205–206.

[64] Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-09609, ECLI:EU:C:2004:614.

[65] *Omega* (n 64) paras 36–39.

[66] On the role of proportionality in EU law, see Ben Köhler, 'Proportionality in Private Law: A Primer', in this volume, 8–11.

[67] *Omega* (n 64) para 39. The more detailed proportionality analysis for the justification of restrictive measures based on a public policy reason may be found in the Court's judgment in Case C-434/04 *Criminal proceedings against Jan-Erik Anders Ahokainen and Mati Leppik* [2006] ECR I-09171, ECLI:EU:C:2006:609, paras 31–39.

[68] *Omega* (n 64) para 38.

Consequently, in the internal market setting, the application of the public policy exception as a restriction on the EU economic freedoms always involves a proportionality analysis. While not expressly mentioned in the relevant provisions of the TFEU, proportionality heavily influences the compatibility of the restrictive measure with the economic freedoms protected by the TFEU and constitutes a significant limitation of the national authorities' discretion.

2. Minimising Discretion in the Use of Public Policy Clauses for the Protection of Human Rights in an EU Private International Law Setting: Relevant Factors and the Role of Proportionality

With the expansion of the external sources of public policy at both the European and international level, some scholars have argued that the concept is undergoing a 'revolutionary change in its character and effects'.[69] Given the aptitude of public policy clauses to serve as instruments for human rights protection in the context of EU private international law and recognition and enforcement procedures, some opinions call for an elimination of the restrictive interpretation of public policy when employed for safeguarding human rights. For instance, Oster argues that the 'attenuated effect' of the public policy exceptions in a human rights setting is already achieved by the application of the proportionality principle by national courts: '[t]he principle of proportionality, or more precisely, the proportionality sensu stricto analysis, requires that a court, when applying foreign law, has to duly take the applicable human rights that are binding on this court into consideration'.[70]

Indeed, as resulting from the case law of the ECJ, when envisaging the application of the public policy exception for the protection of fundamental rights, a national court must necessarily engage in a balancing exercise (*stricto sensu* proportionality) by evaluating conflicting interests: on the one hand, the need to observe the principles of mutual trust and recognition inherent in the legal order of the European Union and in its private international law and procedural cooperation systems; on the other hand, the need to ensure that human rights, as core values forming part of public policy at both EU and national level, are not infringed by giving unfettered effect to the principles of mutual trust and recognition. In this sense, national courts are placed in a position of having to strike a delicate balance between competing principles governing various areas of EU law, a balance that might prove elusive.

As concerns the threshold for invoking public policy, it is important to consider the three factors which, according to Mills, may serve to contour the limits of judicial discretion in the application of the public policy exception: proximity, relativity and the seriousness of the breach.[71] Such factors may be

[69] Mills (n 5) 202.
[70] Oster (n 2) 555.
[71] Mills (n 5).

considered by judges before deciding to use their discretion in invoking public policy.

a) The proximity factor

Under the proximity factor, 'the use of public policy should depend on an examination of the connecting factors operating between the dispute and the forum state. The weaker this interest is, the more that public policy should be restricted. The stronger this interest is, the greater the degree of proximity, the greater the justification for the application of public policy'.[72]

As concerns human rights, several systems of protection are integrated within the legal orders of the Member States and of the EU itself. Art 2 of the TEU includes 'respect for human rights' as a founding value of the Union's legal order. Additionally, the TEU recognises the importance of the rights and freedoms enshrined in the CFREU, an instrument whose legal force equals that of the Treaties,[73] and also integrates the standards of protection established under the ECHR as well as under the 'constitutional traditions common to the Member States'.[74]

Consequently, under the proximity factor, national courts will in principle always have a strong interest in relying on the public policy exception. This pronounced interest of protecting fundamental rights would translate into a low threshold for invoking public policy in a case where the application of foreign law or the recognition or enforcement of a foreign judgment might involve a violation of human rights. Under the proximity factor, national judges would therefore benefit from a wider margin of discretion when relying on the public policy exception for human rights protection.

However, such discretion is moderated, according to the ECJ's reasoning in *Gambazzi*, by the requirement placed on national courts to conduct an in-depth assessment of the manifest and disproportionate character of the human rights infringement in question. This involves, as discussed under the severity factor,[75] a dual proportionality evaluation by national judges: on the one hand, an assessment of the human rights infringement with reference to the standard of normal limitation upon the exercise of the right in question and, on the other hand, a balancing of the interest in protecting human rights against a safeguarding of the principles of mutual trust and recognition applicable in the EU legal order.

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[72] Mills (n 5) 211–212.
[73] TEU, art 6(1).
[74] TEU, art 6(3).
[75] See n 81.

b) The relativity factor

The relativity factor can best be described as highlighting the 'limits of tolerance' of one national legal system in relation to foreign law (or to foreign judgments). According to Mills,

> '[t]he extent to which a public policy is shared or absolute (ought to be shared) determines the degree of relativity of the public policy concerned. The less the public policy is shared, or the greater the relativity of the public policy, the harder it is to justify its application as an "intolerant" exception to the normal rules on the application of foreign law or the recognition and enforcement of foreign judgments'.[76]

However, a different take on the relativity factor may also point to a conclusion opposite to Mills': the more relative (less shared) a public policy is, the easier it may be for national judges to invoke it, as the public policy exception highlights the differences between national legal systems and their limits of tolerance. Therefore, in the case of a more relative public policy, the invocation threshold should be lower.

On the contrary, the more shared a public policy is, the more this reflects a harmonisation and compatibility of the national legal systems and their common values. Consequently, in this case the threshold for invoking public policy should be high. National judges are less likely to justify their refusal to apply a foreign norm or judgment as threatening the core values of their legal system, as the values protected by both legal systems are already aligned.

Under the shared system of values in the European Union, in which mutual trust and recognition are paramount, the threshold for triggering the public policy exception is necessarily very high. In a fundamental rights context, the adherence of the European Union and its Member States to the systems of protection enshrined in the CFREU and in the ECHR renders the use of the public policy exception for human rights infringements even more restrictive.[77] This was the case even before the enhanced role of the CFREU and the inclusion of art 6 in the TEU since fundamental rights protected under the constitutional traditions of the Member States and the ECHR had already been recognised as forming part of the general principles of Community law.[78] Within this framework, the content of public policy (fundamental rights protection) is common to the Member States and, consequently, the invocation of public policy becomes even more exceptional.[79]

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[76] Mills (n 5) 216.

[77] Etienne Pataut, 'The public-policy exception and the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (COM(2009)154)' (European Parliament 2010), PE 432.741, 7–8 <https://www.europarl.europa.eu/RegData/etudes/IDAN/2010/432741/IPOL-JURI_NT(2010)432741_EN.pdf> accessed 5 May 2022.

[78] See *Krombach* (n 35) para 25; *Gambazzi* (n 55) para 28.

It must be noted at this point that fundamental rights protection as public policy in the EU Member States exerts a different pull, depending on the controlling factor. Proximity pulls in the direction of lowering the threshold for using the exception, since all states have a (presumed) strong interest in ensuring maximum protection of human rights. Relativity, on the other hand, pulls in the opposite direction – of raising the invocation threshold and using the exception more rarely – since the shared systems of protection to which Member States pertain ensure a common content of public policy and minimise the risk that the core values pursued by this policy will be endangered.[80] As a consequence, judicial discretion continues to exist when assessing the seriousness of the breach – the third factor – and may be diminished by resorting to a balancing exercise (proportionality *stricto sensu*).

c) The severity factor

As explained by Mills, '[t]he question of how excessive the award [or the foreign norm] needs to be before it becomes contrary to public policy is obviously a question of degree. […] The more serious the breach, the more likely and the more acceptable it becomes that public policy may be invoked'.[81] Under the seriousness of the breach parameter, the infringement of the fundamental right must reach the level of 'manifest and disproportionate', going beyond a justified restriction of the right.[82]

The severity of the infringement is therefore the main terrain of judicial discretion when employing the public policy exception for fundamental rights. It is in this respect that the national court must perform a balancing exercise (and apply proportionality *stricto sensu*) by weighing the seriousness of the infringement of the right in question against the competing interests of preserving and giving full effect to the system of mutual trust and recognition underlying the legal order of the European Union.

However, the *Gambazzi* judgment highlights that national judges should, in fact, perform two proportionality analyses – one concerning the level of infringement of the fundamental right (*in concreto* analysis) and one regarding the importance and impact of such infringement on the values protected by national and EU public policy in relation to the principles of mutual trust and automatic recognition of judgments within the EU (systemic analysis).

The *in concreto* assessment requires, as discussed above, the evaluation of all the circumstances of the case and a strict proportionality test.[83] Proportionality is employed at this stage in a classical sense, under a test similar to

[79] Pataut (n 77) 8; Mills (n 5) 217–218.
[80] See also Oster (n 2) 545.
[81] Mills (n 5) 218.
[82] *Gambazzi* (n 55) para 48.
[83] *Gambazzi* (n 55) paras 40, 47.

that for the public policy exception in internal market cases.[84] It involves an examination of (a) the necessity of the restriction on fundamental rights,[85] (b) the suitability of the restrictive measure in light of the aim pursued and (c) a *stricto sensu* proportionality assessment, requiring the national judge to establish whether the infringement of the right in another Member State (whose law is applicable or whose judgment must be recognised or enforced) constitutes a 'manifest and disproportionate infringement' or merely a legitimate interference with the exercise of that right.[86]

While the ECJ has emphasised that the assessment must be 'confined' to the steps indicated above and should not involve a review on the merits of the proceedings conducted in a different Member State,[87] it must nonetheless be noted that, in fact, national judges are required to closely scrutinise another Member State's limitation of the exercise of the fundamental right in question. Such a thorough examination of the operation of fundamental rights restrictions in a different legal system might in itself prove challenging for a national judge who, understandably, possesses limited knowledge regarding the substantive and procedural rules of the foreign jurisdiction. These difficulties are further compounded by the systemic analysis required at the second stage.

Having established that the human rights infringement is serious and that it does not qualify as a legitimate restriction of the right in question, the national court must then assess whether such violation is, from a systemic point of view, sufficiently severe as to justify the invocation of public policy and, consequently, warrant an exception from the principles of mutual trust and recognition within the EU. This systemic analysis essentially requires a *stricto sensu* proportionality test which involves weighing the interests regarding the protection of fundamental rights against the principles of mutual trust and recognition. Striking the right balance might, however, prove difficult for national judges confronted with this exercise.

This is due, on the one hand, to the importance that mutual trust has acquired in the legal system of the EU, not only in civil matters but also in other areas of the law. With the enhanced harmonisation of private international law and procedural law rules, trust and mutual recognition have become paramount in the proper functioning of the internal market and the EU's legal system as a whole.[88] On the other hand, with the recent erosion of rule-of-law

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[84] *Omega* (n 64) para 39.

[85] In *Gambazzi*, the restriction of the right was based on grounds related to the efficient administration of justice at national level, *Gambazzi* (n 55) paras 40–47.

[86] *Gambazzi* (n 55) para 47.

[87] *Gambazzi* (n 55) para 46.

[88] See generally, on the importance of mutual trust in the EU, Matthias Weller, 'Mutual trust: in search of the future of European Union private international law' (2015) 11 J Priv Int L 64.

standards in various EU Member States and doubts as to the independence and impartiality of their judiciaries, questions regarding the fair administration of justice and the protection of fundamental rights might arise more frequently in cases involving the application of foreign law or the recognition or enforcement of a foreign judgment. In such situations, proportionality *stricto sensu* remains a valuable tool for national judges in assessing, on an abstract level, the proper administration of justice by the foreign court[89] and in determining whether, in the case at hand, the infringement of the fundamental right passes the severity threshold required for the public policy exception. Nevertheless, while proportionality is important in structuring the legal arguments and ensuring that certain reasoning steps are being followed, it cannot entirely eliminate judicial discretion, instead merely being capable of providing reference points for the national court to conduct its analysis.

V. Conclusion

This paper has sought to explore the role that proportionality can play in the context of EU private international law and procedural law rules when the public policy exception is invoked on grounds related to the infringement of fundamental rights. In this sense, two preliminary observations provide an important backdrop to the use of public policy clauses in a private international law setting.

A first observation relates to the high degree of harmonisation of private international law and procedural law rules at EU level, which emphasises the importance of the principles of mutual trust and recognition within the EU legal order. While the vast majority of private international law and procedural law instruments adopted at EU level retain clauses concerning the violation of public policy, the use of such exceptions is subject to increasingly restrictive conditions. Additionally, as concerns the recognition and enforcement of judgments, the EU system has progressed towards automatic recognition, generating a so-called 'fifth freedom' – the free circulation of judgments.

A second point concerns the permeation into the essential interests protected under public policy clauses of values that are no longer limited to the domestic sphere but are specific to, and intended to safeguard, the interests of the European Union and its distinct legal order. While it is still for national courts to protect such core interests by resorting, when appropriate, to the public policy exception, the use of such clauses is justified not only on national grounds but also under EU public policy considerations.

Against this background, an exploration of the relevant case law of the European Court of Justice reveals that the Court has not offered precise parame-

[89] Weller (n 88) 69.

ters for how the public policy exception applies for human rights violations. However, landmark judgments such as *Krombach* and *Gambazzi* contain valuable guidance in assessing the 'manifest' and 'obvious' character of the human rights infringements that would justify the application of the public policy exception. In this process, it is the national courts which must assess whether resorting to the exception is necessary, but it is for the ECJ to review the limits within which that concept may be used. In all cases, the public policy exemption is subject to restrictive interpretation and may be relied upon only in exceptional circumstances, in cases when the foreign law or judgment would be at 'variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle'.[90]

In assessing the necessity of applying public policy, the three factors proposed by Alex Mills guide the analysis of the national court: proximity, relativity and severity, with the latter specifically circumscribing the area of judicial discretion that courts have to apply the exception. It is in this arena – of assessing the severity of the human rights infringement – that a proportionality approach is necessary in order to minimise judicial discretion and respond to the general concerns regarding the use of public policy clauses.

The overview of the ECJ's case law has highlighted the important role that proportionality must play for the national courts when deciding upon the use of public policy clauses in a human rights setting. In this process, the judge will perform a dual proportionality assessment. The first consists of an *in concreto* proportionality analysis, seeking to establish whether the infringement of the fundamental right is 'manifest and disproportionate' or whether, on the contrary, it constitutes a legitimate restriction of the right in question. This evaluation may be guided by the three-step proportionality test also applied in cases when the public policy exception is invoked in an internal market setting (necessity, suitability and proportionality *stricto sensu*).

The second proportionality analysis involves a balancing exercise that takes on a systemic dimension, with the national judge placed in a position of weighing the interest of protecting fundamental rights, as core values of the national and EU legal orders, against the interest of giving full effect to the principles of mutual trust and recognition, principles that are themselves important cornerstones of the EU. Performing this delicate balancing act may prove a difficult task for the national courts of EU Member States. However, while not being able to completely eliminate discretion, proportionality remains a valuable reasoning tool that can guide national courts in fulfilling their role.

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[90] *Krombach* (n 35) para 36.

Part 3

Proportionality in Procedural Law

Proportionality in Civil Procedure: A Different Animal?

Wiebke Voß

I. Introduction

The concept of proportionality has held a firm place in legal discourse for decades. Its aim of ensuring a reasonable relationship between an objective and the measures taken to attain it, originally shaped in administrative and constitutional law with a view to cases of (alleged) human rights infringements by state authorities,[1] has long been identified as pervading private law issues as well, albeit in less rigorous ways. Scholars have since endeavoured to deconstruct the analytical basis of proportionality and have, arguably, achieved some success in carving out the contextual implications, roles and meanings of proportionality in both areas of the law.

Only recently, however, a new manifestation of proportionality has emerged on the legal scene in an area of the law that had remained unaffected by the widespread aspiration to a fair balance between means and ends for a surprisingly long time: civil procedure. Having long advocated – explicitly or

[1] For a comprehensive account of the history of the concept of proportionality, see Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 Ratio Juris 131.

implicitly – a 'one size fits all' approach, the field has come to endorse a vision of *procedural proportionality*. The term has been coined to denote the quest to allocate judicial resources proportionally, measured against the issues and amounts at stake, as opposed to the orthodox strategy to apply the same set of procedural rules to all kinds of disputes. First conceived in English justice reforms against the backdrop of a persistent crisis of the justice system around the turn of the millennium,[2] this notion of proportionality is increasingly shaping civil procedure law both across continental Europe and throughout the common law world. The emergence of proportionality considerations in the realm of civil procedure has in the meantime been recognised as a fundamental shift – even a 'cultural revolution' – in the way civil litigation is perceived and practised.[3]

Nevertheless, this emerging notion of procedural proportionality remains under-investigated. Apart from its referring to a reasonable correlation between the resources allocated to the individual case and the dispute's nature, value and complexity, the principle is not easy to grasp. In particular, the in-between nature of civil procedure law, an area which pertains to the public law universe[4] but is concerned with the enforcement of private rights, is not easily reconciled with the character of procedural proportionality and the test it employs even two decades after its advent. Is procedural proportionality just another application of the traditional public law standard for the selected purposes of civil litigation, realized possibly in less rigid and rather broad brushstrokes? Or is it something entirely separate, a concept seeking an adequate equilibrium of interests between private parties? To put it plainly, what lies at the heart of the procedural phenotype of proportionality?

This article will briefly outline the basic concept of proportionality as it was framed in the context of English civil procedure (II.), before assessing whether it is at its core a public or rather a private law phenomenon, one structurally comparable to proportionality analyses in other areas of private law (III.). On that basis, the article will try and identify the substantive reference points em-

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[2] This was done in the context of the Woolf Reform and later reinforced (in terms of the practical implementation) by the Jackson Reform. In more detail, text to n 5.

[3] *Abrams v Abrams* 2010 ONSC 2703, (2010) 102 OR (3d) 645 [70] (Brown J); Trevor C Farrow, 'Proportionality: A Cultural Revolution' (2012) 1 J Civ LP 151, 153. See also John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (CUP 2014) 220 ('paradigm shift').

[4] This assignment assumes that one embraces the conceptual distinction between public and private law in the first place; overview from the English perspective at Carl Emery, 'Public Law or Private Law? The Limits of Procedural Reform' [1995] PL 450; John W Allison, 'Variations of view on English legal distinctions between public and private' (2007) 66 CLJ 698; see also Carol Harlow, '"Public" and "Private" Law: Definition without Distinction' (1980) 43 MLR 241.

bodied in the notion of procedural proportionality (IV.), before positing what really is new about this latest form of proportionate legal design (V.).

II. The Concept of Proportionality in the Procedural Context

1. Origins of Proportionate Procedural Design and Conduct

Proportionality emerged in procedural law as a brainchild of Lord Woolf in the wake of his endeavour to have the English court system meet the need for increased access to justice.[5] Confronted with the universal concern that the civil justice system had become too costly, too cumbersome and too slow to promote any justice worthy of the name, and with citizens deserting the courts in favour of ADR,[6] Woolf reckoned that a 'one size fits all' approach to the resolution of disputes would no longer be sustainable, and he sought to deploy the limited judicial resources 'in the most effective manner for the benefit of everyone involved in civil litigation'.[7] This he tried to achieve by tailoring the proceedings to the issues at stake, so as to have the design and conduct of the proceedings reflect the nature and magnitude of the dispute – which would thus be *proportionate*. Rather than concentrating exclusively on the outcome of the case as the justice system had in the past, the striving for a correct result had, according to Woolf, to be balanced against the expenditure of time and money needed to achieve it.[8] Thus, in the course of the Woolf Reform – as well as the later Jackson Reform[9] – the English Civil Procedure Rules (CPR) came to enshrine and foster the proportionality of proceedings as an overriding ob-

[5] Lord Woolf, 'Access to Justice: Interim Report' (to the Lord Chancellor on the civil justice system in England and Wales, 1995); Lord Woolf, 'Access to Justice: Final Report' (to the Lord Chancellor on the civil justice system in England and Wales, 1996).

[6] In detail on the justice crisis, Adrian A Zuckerman, 'A Reform of Civil Procedure: Rationing Procedure rather than Access to Justice' (1995) 22 J Law & Soc 155; Adrian A Zuckerman, 'Lord Woolf's Access to Justice: Plus ça Change…' (1996) 59 MLR 773; Adrian A Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (4th edn, Sweet & Maxwell 2021) paras 1.5–1.25. See also C Glasser, 'Solving the Litigation Crisis' [1994] The Litigator 14.

[7] Lord Woolf, 'Access to Justice: Interim Report' (n 5) para 4.1.

[8] Lord Woolf, 'Access to Justice: Final Report' (n 5) chs 2–5. See also Adrian A Zuckerman, 'Justice in Crisis: Comparative Dimensions of Civil Procedure' in Adrian A Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (OUP 2001) 17; Alexandra E Allan, 'Promoting Proportionate Justice: A Study of Case Management and Proportionality' (University of Cambridge 2021) 56.

[9] Michael Adler, 'The Idea of Proportionality in Dispute Resolution' (2008) 30 J Soc Wel & Fam L 309; Farrow, 'Proportionality: A Cultural Revolution' (n 3) 151. See also the addition to CPR 1.1.(1), introduced by the Jackson Reform: '[…] deal with cases justly *and at proportionate costs*' (emphasis added), now known as the 'Mark II overriding objective'.

jective: Under rule 1.1 of the CPR, dealing with cases 'justly' embodies, inter alia, the mandate to conduct civil cases in proportionate ways, as a fundamental pillar of an effective contemporary system of justice.

This philosophy of promoting a balance between the means chosen to conduct the proceedings and an (accurate) outcome for the case soon began to spread through the common law world. Facing similar crises of the justice system,[10] Canadian[11] and Australian[12] provinces, US jurisdictions,[13] Hong Kong[14] and, most recently, Israel[15] – to name but a few examples – have incorporated notions of proportionality into civil proceedings, recognizing it as a guiding or even 'fundamental' principle.[16] Also, the concept of a proportionate conduct of proceedings has left its mark on civilian legal discourse, such as that of Italy,[17] and it has come to influence even the ELI/UNIDROIT Model European Rules on Civil Procedure that explicitly advocate a 'general principle of proportionality in dispute resolution'.[18]

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[10] Farrow, 'Proportionality: A Cultural Revolution' (n 3) 156, even deems the justice system to be inaccessible in 'essentially all jurisdictions'.

[11] Code of Civil Procedure Québec, art 18; Ontario Rules of Civil Procedure, r 1.4(1.1); British Columbia Supreme Court Civil Rules, r 1-3(2). See also *Abrams* (n 3) [70] (Brown J); Anastasia Konina, 'Technology-Driven Changes in an Organizational Structure: The Case of Canada's Courts Administration Service' (2020) 11 IJCA 1, 5, with further references.

[12] Civil Procedure Act 2010 (Victoria, Australia), ss 7, 24, 25.

[13] This occurred in the US especially regarding discovery (FRCP 26(b)(1)) and case management (FRCP 16(a)); on the former, Craig B Shaffer and Ryan T Shaffer, 'Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure' (2014) 7 Fed Cts L Rev 175.

[14] Proportionality was introduced in Hong Kong, however, merely as an 'underlying objective' rather than as an overriding one; Gary Meggitt and Farzana Aslam, 'Civil Justice Reform in Hong Kong: A Critical Appraisal' (2009) 28 CJQ 111. See also Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (n 3) 221–223.

[15] The step was undertaken in the course of the reform of civil procedure law of 2021. For an overview of the reform (in English), see Efraim Weinstein Law Offices, 'Israel: The New Civil Procedure Regulation – In The Light Of The Efficiency Of The Hearing' (*mondaq*, 9 September 2021) <https://mondaq.com/civil-law/1104670/the-new-civil-procedure-regulations-in-the-light-of-the-efficiency-of-the-hearing > accessed 11 November 2022.

[16] Eg, the Supreme Court of Canada in *Marcotte v Longueuil (ville)* 2009 SCC 43, [2009] 3 SCR 65.

[17] In the course of the latest reform (D.Lgs. 10 ottobre 2022, n. 149, implementing legge 26 novembre 2021, n. 206). See also Remo Caponi, 'II principio di proporzionalià nella giustizia civile: prime note sistematiche' (2011) 65 Riv trim dir proc civ 389, 374 and the references to Italian case law in Andrea Panzarola, 'The Proportionality Principle between Anglo-Saxon Utilitarianism and Current Codes of Procedure' (2017) 3 Law J Soc & Lab Rel 155, 174–175.

[18] MERCP, pt I.2.: 'A number of overarching procedural duties that are imposed upon the court, parties and their lawyers are also articulated […]. The most significant of these duties are the duty of co-operation […] and the general principle of proportionality in

2. Dimensions and Applications of Procedural Proportionality

While even *Zuckerman*, the beacon of (English) procedural discourse, had to concede that the notion of proportionality in the CPR is 'not easy to define with precision',[19] it is accepted that it encompasses two aspects: an individual, micro-dimension of proportionality – an *inter partes* proportionality – and a collective macro-perspective which might be referred to as *systemic* proportionality.[20] While the first is concerned only with the interests of, and prejudice to, the parties to an individual case, adapting the procedure to the amount and importance of the matters at issue,[21] the latter strives to balance the judicial efforts devoted to a particular case and the resources of the civil justice system as a whole.[22] This means that, in view of civil litigation's material constraints, the procedural framework no longer focuses exclusively on individual cases but commences to consider the system's overall capacity to resolve disputes in a timely, efficient and efficacious fashion, ensuring that individual cases do not take up more judicial resources than they require.[23] Accordingly, it is more than the respective interests and benefits of the involved parties that must be factored in where, for instance, the plaintiff and defendant wish to take a case of relatively minimal value to trial. Rather, the judge's responsibility to deal with cases proportionally requires her to also consider the interests of other potential court users and the prejudice caused to the administration of justice – which could in turn call for a dismissal of the case.[24] To be precise, each case is seen as a puzzle piece that needs to fit

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dispute resolution, which has itself become an increasingly important procedural principle across Europe since the start of the 21st century […].' See also MERCP, rr 5, 6 and 8.

[19] Zuckerman, *Zuckerman on Civil Procedure* (n 6) para 1.58.

[20] Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (n 3) 167–169; Zuckerman, *Zuckerman on Civil Procedure* (n 6) paras 1.58–1.63; similarly, Allan (n 8) 87. Sometimes, reference is made instead to the 'endo-procedural' and 'pan-procedural' application of the principle of proportionality (Sergion Cruz-Arenhart and Gustavo Osna, 'Complexity, Proportionality and the Pan-Procedural Approach: Some Bases of Contemporary Civil Litigation' (2014) 4 IJPL 178, 197).

[21] Lord Woolf, 'Access to Justice: Interim Report' (n 5) para 1.3; Lord Woolf, 'Access to Justice: Final Report' (n 5) para 2.19.

[22] Lord Justice Jackson, 'Review of Civil Litigation Costs: Final Report' (2009) para 3.6. See also CPR 1.1(2)(e) and (f); *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946 [54] (Phillips LJ); *Gotch v Enelco Ltd* [2015] EWHC 1802 (TCC) [42]–[49]; similarly, *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1997] EWCA Civ J1216-15, [1998] 2 All ER 181, 191.

[23] Lord Woolf, 'Access to Justice: Final Report' (n 5) ch 2. See also Catherine Piché, 'Figures, Spaces and Procedural Proportionality' (2012) 2 IJPL 145, 149; Cruz-Arenhart and Osna (n 20) 198–199.

[24] *Jameel* (n 22) [54] (Phillips LJ); *Lloyd v Google LLC* [2018] EWHC 2599 (QB), [2019] 1 All ER 740 [104]; *Magdeev v Tsvetkov* [2019] EWHC 1557 (Comm) [28]. See

into the systemic framework, with elements such as the complexity, quantity and necessities of other cases taken into account. This consideration of the limited court resources and the impact of individual proceedings on other cases remains, of course, conditional upon a number of individual constitutional guarantees, such as the right to a fair trial under art 6 of the European Convention of Human Rights or under art 10 of the Universal Declaration of Human Rights.[25]

With these two dimensions, the individual and the collective, procedural proportionality pervades all aspects of dispute resolution in the procedural legal orders that have embraced it.[26] Under the CPR, prime examples of proportionate procedural design include the assignment of claims to three different tracks (small claims, fast track and multi-track), according to their nature and complexity;[27] the promotion of resolution other than by court judgment, consistent with the influential concept of the multi-door courthouse developed in the American access to justice-debate;[28] the introduction of a new online court, particularly for low-value consumer claims;[29] streamlined expert procedure; limited discovery; setting the amount of costs for standard orders;[30] improved case management, etc.[31]

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also *Liberty Fashion Wears Ltd v Primark Stores Ltd* [2015] EWHC 415 (QB) [53] (stressing the need to apply this principle restrictively).

[25] In this, the principle of procedural proportionality resembles the *Untermaßverbot* (translating roughly to the prohibition of inadequate state protection) espoused by German constitutional jurisprudence (BVerfG 28 May 1993, 2 BvF 2/90 and others, 88 BVerfG 203, 254. See also Claus-Wilhelm Canaris, 'Grundrechte und Privatrecht' (1984) 184 AcP 201; for more detail, see Victor Jouannaud, 'The Various Manifestations of the Constitutional Principle of Proportionality in Private Law', in this volume, 42–45.

[26] Zuckerman, *Zuckerman on Civil Procedure* (n 6) para 1.60.

[27] CPR Part 27–29. In more detail, Neil H Andrews, 'A New Civil Procedural Code for England: Party-Control "Going, Going, Gone"' (2000) 19 CJQ 19, 24–25; Paul Michaelik, 'Justice in Crisis: England and Wales' in Adrian A Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (OUP 2001) 153.

[28] Frank Sander, 'A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse' (2008) 5 U St Thomas LJ 665, 669. See also John Sorabji, 'The Online Solutions Court: A Multi-Door Courthouse for the 21st Century' (2017) 36 CJQ 88, 90, 96.

[29] Explicit reference was made to the idea of proportionality by Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (December 2015) 4.

[30] *Lownds v Home Office* [2002] EWCA Civ 365, [2002] 1 WLR 2450 (Woolf CJ). See also CPR 44.4.

[31] In detail as to proportionate case management, Trevor CW Farrow, *Civil justice, privatization, and democracy* (University of Toronto Press 2014) chs 2–3; Allan (n 8) passim. Notably, proportionate case management poses considerable challenges for the traditional adversarial nature of common law proceedings; in detail, Lord Browne-Wilkinson, 'The UK Access to Justice Report: A Sheep in Woolf's Clothing' (1999) 28 UW Austl L Rev 181; Piché (n 23) 149.

3. Distinction from a Mere Drive for Efficiency

This concept of procedural proportionality bears an undeniable resemblance to the general drive to expedite and economise civil proceedings that has been the cornerstone of virtually every justice reform over the past decades. As a strategy triggered by the 'need to focus on efficiency and economy of civil procedure in a time of austerity',[32] proportionality has inevitably been designed as a 'parsimonious principle',[33] influenced by the Benthamian utilitarian approach.[34]

Having said that, proportionality ought not be mistaken for a mere replica of 'procedural economy'. The buzzword's lack of terminological clarity notwithstanding,[35] two obvious differences between procedural economy and proportionality cannot go unnoticed. Firstly, rather than merely mandating an efficient litigation process, proportionality incorporates an additional normative aspect, evaluating the matters at stake in the proceedings in financial as well as in non-monetary terms.[36]

Secondly, unlike efficiency considerations as promoted by Pareto optimisation or the Kaldor-Hicks theorem, a proportionate procedural structure implies – *eo ipso* – a trade-off in terms of both costs *and* benefits. While the rise of procedural proportionality has been accompanied by the credo that applying a simpler process where appropriate is not a denial of justice,[37] even advocates of proportionality openly concede that the concept scales back the aspiration for justice on the merits in favour of a tolerably accurate outcome, achieved in less costly and less cumbersome ways.[38] Adopting a proportionate approach to civil proceedings invariably goes hand-in-hand with making functionalistic and structural sacrifices from what would constitute the 'ideal' – ie, a theoretically impeccable and the most forensically accurate – legal

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[32] Lord Justice Briggs (n 29) 4; similarly, Lord Neuberger, 'Justice in an Age of Austerity: Tom Sargant Memorial Lecture' (15 October 2013).

[33] *Ontario v Rothmans Inc*, 2011 ONSC 2504 [159] (Perell J).

[34] In detail, Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (n 3) 149–160; Panzarola (n 17).

[35] Christopher Newmark, '"Efficient, economical and fair": the mantra of the new IBA Rules' (2010) 13 Int ALR 165, 167 (in the context of art 9(2)g IBA Rules on the Taking of Evidence in International Arbitration); see also Ekkehard Schumann, 'Die Prozessökonomie als rechtsethisches Prinzip' in Gotthard Paulus, Uwe Diederichsen and Claus-Wilhelm Canaris (eds), *Festschrift für Karl Larenz zum 70. Geburtstag* (Beck 1973) 272–275; Franz Hofmann, 'Prozessökonomie: Rechtsprinzip und Verfahrensgrundsatz der ZPO' (2013) 126 ZZP 83.

[36] As to the relevant factors, see text to nn 62–74.

[37] Lord Woolf, 'Access to Justice: Final Report' (n 5) para 1.8; similarly (even before the Woolf Reform) Zuckerman, 'A Reform of Civil Procedure: Rationing Procedure rather than Access to Justice' (n 6) 180.

[38] In more depth, text to nn 82–84.

process available. While the (level of) correctness of judgments or rather the loss of accuracy correlating to the adoption of speedy litigation is hardly quantifiable or precisely gaugeable, there can hardly be any doubt that a thorough procedure with a full parade of measures – the 'Rolls Royce system of justice'[39] – provides the highest probability of a fair and accurate outcome.[40] A system devoted to proportionality does not deny that but simply argues that 'you might be better off trading your Rolls Royce for a lighter and more fuel efficient vehicle' rather than insisting on sophisticated procedural mechanisms too costly to operate.[41]

Against this background, recent proposals to replace the – admittedly vague – principle of proportionality with narrower tests of affordability and expedition[42] fall wide of the mark. For they imply that judges, parties and legislatures can identify a fixed sum that is 'too expensive', regardless of the importance of the case, or an amount of time from filing to judgment that is simply 'too long', irrespective of the complexity of the matters in dispute.[43] Yet, if the aim is to increase access to justice and not just access to process – the latter of which might fall short of the standards established under art 6 ECHR or under national constitutional law – there can be no predetermined limitation of judicial resources and, consequently, of the proceedings' accuracy in deference to mere economic considerations. In other words: once the unconditional pursuit of justice on the merits is abjured, proportionality becomes an essential 'norm component' in the procedural context since the legislature cannot set out the various conflicts of interests and detriments that may arise in uniform, precise terms.

III. Public Character qua Procedural Context?

Given the lack of contours for this relatively new concept of proportionality in the procedural discourse, it seems tempting to resort to well-established

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[39] John Baldwin, 'Is There a Limit to the Expansion of Small Claims?' (2003) 56 CLP 313, 314; Colleen M Hanycz, 'More access to less justice: efficiency, proportionality and costs in Canadian civil justice reform' (2008) 27 CJQ 98, 105; Andrew Higgins and Adrian A Zuckerman, 'Lord Justice Briggs' "SWOT" analysis underlines English law's troubled relationship with proportionate costs' (2017) 36 CJQ 1, 1.

[40] Hanycz (n 39) 122; Lord Neuberger (n 32) para 52; Rabeea Assy, 'Taking Seriously Affordability, Expedition, and Integrity in Adjudication' in Rabeea Assy and Andrew Higgins (eds), *Principles, Procedure, and Justice: Essays in honour of Adrian Higgins* (OUP 2020) 181; Zuckerman, *Zuckerman on Civil Procedure* (n 6) para 1.38.

[41] Wayne Martin, 'Bridging the Gap' (National Access to Justice and Pro Bono Conference, 12 August 2006) 2.

[42] Assy (n 40) 183.

[43] Allan (n 8) 206.

public law bases of comparison in order to further define and flesh out the characteristics and elements of procedural proportionality. Admittedly, procedural idiosyncrasies are certain to thwart any attempt to apply, in an unaltered fashion, the orthodox public law review of state measures that is employed to assess their detrimental effect on individual rights. Yet since proportionality in civil procedure does concern the means and methods used by a state entity in its interaction with private individuals, drawing guidance from the body of administrative or constitutional law – albeit with some modifications – would seem *prima facie* to be a legitimate approach. Or is it?

1. Established Public Law Bases of Comparison

As is well known, in public law, proportionality is a review standard for the (allegedly unlawful) exercise of power by public authorities, with the purpose of ensuring a fair balance between the aims of their actions and the rights of the individuals affected by them. First endorsed in German administrative law and shaped by the *Bundesverfassungsgericht* into a rigorously structured four-pronged test of legitimacy, suitability, necessity and proportionality *stricto sensu*,[44] proportionality has been held to be rooted in both the rule of law[45] and in fundamental rights.[46] Unsurprisingly, as an expression of the rule of law, the balancing exercise known as proportionality has become widespread in EU law,[47] the case law of the ECtHR[48] and the public law of other jurisdictions.[49] It has even left its mark on the English legal system,[50] giving

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[44] This occurred in the famous case *Apothekenurteil* BVerfG 11 June 1958, 1 BvR 596/56, 7 BVerfGE 377. It has been settled case-law ever since, BVerfG 5 March 1968, 1 BvR 579/67, 23 BVerfG 127; BVerfGE 1 March 1979, 1 BvR 532/77 and others, 50 BVerfGE 290; BVerfG 8 October 1985, 2 BvR 1150/80 and 2 BvR 1504/82, 70 BVerfGE 297; BVerfG 9 March 1994, 2 BvL 43/92 and others, 90 BVerfGE 145. See also the foundations laid in the landmark case of *Lüth* BVerfG 15 January 1958, 1 BvR 400/51, 7 BVerfGE 198). An in-depth analysis of the German concept of *Verhältnismäßigkeit* is offered by Matthias Klatt and Moritz Meister, *The constitutional structure of proportionality* (OUP 2012).

[45] BVerfG 15 December 1965, 1 BvR 513/65, 19 BVerfGE 342; Andreas Voßkuhle, 'Der Grundsatz der Verhältnismäßigkeit' [2007] JuS 429; Matthias Klatt and Moritz Meister, 'Der Grundsatz der Verhältnismäßigkeit: Ein Strukturelement des globalen Konstitutionalismus' [2014] JuS 193.

[46] BVerfG 15 December 1965, 1 BvR 513/65, 19 BVerfGE 342.

[47] Case C-331/88 *R v Ministry of Agriculture, Fisheries and Food, ex p Fedesa and others* [1990] ECR I-04023, ECLI:EU:C:1990:391 [13]. See also Cruz-Arenhart and Osna (n 20) 193.

[48] The principle is, however, stated in more lenient terms in ECtHR jurisprudence, eg, in *Sporrong and Lönnroth v Sweden* (1982) Series A no 52 [69]; *James and Others v United Kingdom* (1986) Series A no 98 [50].

[49] This was done most notably by the French *Conseil d'Etat* in *Ville Nouvelle Est* (1971) 37 CE 28 Mai 1971. See also Sophie Boyron, 'Proportionality in English Adminis-

rise to the *De Freitas* test,[51] despite the long standing common-law tradition of limiting the judicial review of public-body decisions to the *Wednesbury* test of reasonableness.[52]

2. Private Matters in Public Structures

However, these proportionality structures developed in public law do not necessarily fit the private law context.[53] While the general idea of an appropriate relationship between means and ends may be no less valid in the private law sphere than it is in the public, the principle of party autonomy dictates an alignment of proportionality tests that is fundamentally different than the containment of state power in a relationship of superiority/inferiority. When assessing the means-end-balance of private interactions, it has to be borne in mind that an agreement reached between private individuals should be upheld other than in extraordinary instances, eg, in cases of power imbalance.[54]

Even without delving into the theoretical distinction between private and public law, it is manifest that procedural law pertains *de jure* to the public law domain:[55] It comprises rules governing the conduct of proceedings and the resolution of claims by public entities (namely the courts). Yet in the case

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trative Law: A Faulty Translation' (1992) 120 OJLS 237, 244–245; from a German perspective, Lothar Hirschberg, *Der Grundsatz der Verhältnismäßigkeit* (Schwartz 1981).

[50] *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 [27] (Lord Steyn); John W F Allison, *The English Historical Constitution: Continuity, Change and European Effects* (CUP 2007) 230–232; Mark Elliott and Kirsty E Hughes, 'The Nature and Role of Common Law Constitutional Rights' in Kirsty E Hughes and Mark Elliott (eds), *Common law constitutional rights* (Hart 2020) 6.

[51] Named after the case *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69. See also (from the Canadian perspective) *R v Oakes* [1986] 1 SCR 103.

[52] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA). See also *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6, [1985] AC 374, 410. Thus, the adoption of a proportionality test had traditionally been rejected, most prominently in *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 All ER 720 (HL).

[53] Allan (n 8) 43 (referring to English private law). See also Michael Stürner, *Der Grundsatz der Verhältnismäßigkeit im Schuldvertragsrecht: Zur Dogmatik einer privatrechtsimmanenten Begrenzung von vertraglichen Rechten und Pflichten* (Mohr Siebeck 2010) 19–20 (with regard to German contract law).

[54] *Philips Hong Kong Ltd v Attorney General of Hong Kong* [1993] UKPC 3a, 61 BLR 41, 59 (Woolf LJ).

[55] See eg, Caponi (n 17) 394; Martin Trenker, *Einvernehmliche Parteidisposition im Zivilprozess: Parteiautonomie im streitigen Erkenntnisverfahren* (Manz 2020) 63; Chris Thomale, 'Materielles Zivilprozessrecht' (2022) 135 ZZP 29, 31. See also Zuckerman, *Zuckerman on Civil Procedure* (n 6) paras 1.26–1.28, who emphasises the function of civil proceedings as a public service required under the rule of law.

of civil procedure, it is not merely a relationship between parties and the court that lies at the heart of this public function of jurisdiction. The issue at hand is not a conflict of interests between state and citizens, but rather a dispute between equal subjects of private law, with the court technically exercising state power, but in essence acting merely as an intermediary.[56] The enforcement of rights accorded to the parties under substantive law by the means of court proceedings does not alter the essentially private nature of the conflict. To put it pointedly, civil proceedings are the mere continuation of private law relationships by other means.[57]

Hence, it stands to reason that the systematic categorization of civil procedure law as public law cannot offer any solutions for concrete legal questions.[58] Considerations, values and structures shaped in an administrative or constitutional context do not necessarily capture the idiosyncrasies of civil litigation. In civil litigation – as, hypothetically, in any other procedural realm that might come to adopt a proportionate approach – proportionality is not used as a standard by which the court reviews *ex post* powers exercised by external decision-making authorities; it is instead a means to determine *ex ante* affairs internal to the litigation process, the court itself being the primary decision-maker.

IV. Substance of Proportionality in Civil Procedure

The unique nature of civil procedural law forces us to adopt a different point of departure and concretise the essence of procedural proportionality on its own terms, rather than adhere to the orthodox dividing line between public and private. This will require both visualising the general structure of proportionality assessments, beyond the specificities of particular areas of the law (1.), and identifying the substantive factors and reference points relevant in the context of civil procedure (2.).

1. Malleable Nature of Proportionality

Getting to the bottom of proportionality, understood in general terms rather than as the standard of scrutiny employed in public law, is a straightforward

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[56] Wolfram Henckel, *Prozeßrecht und materielles Recht* (Schwartz 1970) 64; Zuckerman, *Zuckerman on Civil Procedure* (n 6) para 1.26.

[57] Robert Neuner, *Privatrecht und Prozeßrecht* (Bensheimer 1925) 172; Henckel, *Prozeßrecht und materielles Recht* (n 56) 62.

[58] In the context of the German debate, Wolfgang Zöllner, 'Materielles Recht und Prozeßrecht' (1990) 190 AcP 471, 484–485, 487; Hanns Prütting, in Bernhard Wieczorek and Rolf A Schütze (eds), *Zivilprozessordnung und Nebengesetze*, vol I/1 (4th edn, De Gruyter 2015) Einleitung para 140.

exercise. At its core, the concept merely refers to an appropriate relationship between two factors – means and ends – taking into account the conflicting interests concerned: 'X must be proportionate to Y'. Yet to characterise proportionality as 'notoriously vague'[59] falls short since it fails to consider the methodical nature of proportionality. Rather than being a (vague) rule applied to one area of the law or another, proportionality provides an analytical framework onto which the circumstances of any case can be superimposed. In its very essence, proportionality operates as an open-textured, malleable concept which serves to weight and bind together the mixture of objective, the means of achieving it and detriments associated with achieving it, regardless of the context.[60] It is a technical postulate of judicial reasoning that is concerned with the handling of competing rights, interests and principles. As such, it is bare of any substantive content of its own.[61] Any substantive valuation and meaning of proportionality stems solely from the interests and rights balanced in the individual case.

2. Reference Parameters in Civil Proceedings

Prima facie, the interests and rights to be matched in the context of civil proceedings might seem obvious: Procedural proportionality has been launched by jurisdictions, such as that of England, in their endeavour to strike a balance between the extensiveness of proceedings on the one hand, and the nature and needs of the individual case, the parties and the justice system as a whole on the other.[62] Yet closer examination reveals the variety of intertwined factors underlying the concept of proportionate civil proceedings: Alongside the age-old antagonism of efficiency and thoroughness loom questions about the objectives and costs of civil process, about the nature of justice provided by the system and about how to measure or even identify the importance of cases. Moreover, in the procedural context, the relevant factors

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[59] Francisco J Urbina Molfino, *A critique of proportionality and balancing* (CUP 2018) 6.

[60] In support of this prevailing opinion, see eg Franz Wieacker, 'Geschichtliche Wurzeln des Prinzips der verhältnismäßigen Rechtsanwendung' in Marcus Lutter, Walter Stimpel and Herbert Wiedemann (eds), *Festschrift für Robert Fischer* (De Gruyter 1979); Petr Muzni, *La technique de proportionnalité et le juge de la convention européenne des droits de l'homme: Essai sur un instrument néessaire dans une société démocratique* (PU Aix-Marseille 2005); Stürner (n 53) 24, 290–294; Piché (n 23) 148; Stephan Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017) 226.

[61] Arthur Kaufmann, 'Schuldprinzip und Verhältnismäßigkeitsgrundsatz' in Günter Warda and others (eds), *Festschrift für Richard Lange zum 70. Geburtstag* (De Gruyter 1976) 33; Hirschberg (n 49) 77.

[62] Victorian Law Reform Commission, 'Civil Justice Review, Report 14' (2008) para 4.1.1.

must be unravelled without recourse to the four-element analysis fashioned in German public law,[63] simply by parsing the characteristic elements inherent to any proportionality scheme: objective, benefits, detriments.

a) Objective, benefits and detriments of civil proceedings

Since procedural proportionality is employed as an *ex ante* standard for determining the appropriate means by which to conduct the proceedings, the overall frame of reference of the balancing exercise is the *civil process itself*. The objective, benefits and detriments necessarily have to be approached from a neutral procedural starting point, considering the adoption of proceedings in comparison to their unavailability – or, as the case may be, undertaking a particular procedural measure in comparison to not adopting it.[64] By contrast, a sophisticated 'Rolls Royce' system of justice is categorically ruled out as a suitable point of reference, since *the* most accurate and ideal style of proceedings against which proportionate measures could be compared cannot be determined with any certainty. What is more, hankering for sophisticated proceedings presupposes a conception of justice on the merits (as the objective of proceedings) that is by no means an axiomatic law of nature and that, thus, cannot be taken as a given benchmark.[65]

Having said that, the first element of proportionate legal thinking – the determination of the objective – already poses significant problems. When considering proportionality in the context of a particular case management decision, the objective may be simply the advantage that is likely to be gained from undertaking that procedural step. But if the whole of proceedings is subjected to considerations of proportionality, by proclaiming proportionality an overriding objective or fundamental principle[66] which pervades the entire litigation process, inevitably the subsumed question arises as to the general objective of civil process.[67] Determining the purpose of civil proceedings, however, still poses a notoriously contentious challenge that seems to escape any endeavour to overcome it, even if only heuristically. In some jurisdictions, positions on the topic range broadly, encompassing unequivocal endorsement of the enforcement of private rights as the goal of the proceedings,

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[63] Proportionality was not structured in this four-part way when it was first introduced into English civil procedure law, and, arguably, it ought not be subjected to such a rigid framework, for reasons of manageability in practice. See also Allan (n 8) 210 and, for a more general perspective, Inbar Levy, 'Simplifying Legal Decisions: Factor Overload in Civil Procedure Rules' (2017) 41 Melb U L Rev 727.

[64] Similarly, Allan (n 8) 77–82.

[65] In more detail on the justice concept, text to nn 82–85.

[66] Inter alia, CPR 1.1; Part I.2. MERCP; for the Canadian approach see n 11.

[67] In this sense, also Florian Loyal, *Ungeschriebene Korrekturinstrumente im Zivilprozeßrecht: Rechtsschutzbedürfnis und Treu und Glauben* (Mohr Siebeck 2018) 221.

placing distinct emphasis on the implementation of objective law in a concrete case and advocacy for material truth or legal certainty – or any combination of those.[68] In other legal systems, following an Anglo-American model,[69] theories as to the purpose of the civil justice system highlight the efficient resolution of disputes,[70] put emphasis on achieving accurate decisions as a matter of substantive law or even simply focus on achieving fair process.[71]

But even if a particular objective of civil process could be determined, the challenge remains to weigh the costs and benefits either of civil proceedings as a whole or of a particular procedural management decision adopted. What precisely is to be balanced, and how the opposing factors can be weighed against each other, however, eludes a straightforward answer on both sides of the scale.

On the cost-side, the expenditure can be broken down into time, money and (personnel) resources, vis-à-vis both the parties to the case (as a question of *inter partes* proportionality) and the justice system (as an issue of systemic proportionality). Yet the true financial costs of the proceedings can only be estimated. The costs legally imposed upon the parties (particularly the court fees) offer a vague clue at best, for often they are influenced by typification, cross-subsidisation and non-fiscal motives.[72] Even harder to capture are non-monetary detriments on the level of systemic proportionality, that is, costs for the operability of the justice system as a whole, which result from the usage of limited judicial resources that may be lacking in other cases as a consequence.[73]

As for the benefit-side, we find ourselves referred back to the question of the target value of civil procedure: At best, the benefits of the proceedings amount to achieving the objectives of the proceedings. Yet neither the advantage inherent to particular proceedings for the respective parties nor the overall benefit of civil justice as a supporting pillar of any modern state functioning under the rule of law can be determined with sufficient reliability.[74] Ostensibly, the benefit of the public service of providing 'civil justice' in an individual case springs from the respective substantive rights and interests at

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[68] Comprehensive overview of the state of the debate in Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press 1991) 215–218, 268–270; for a German perspective, see Herbert Roth, 'Gewissheitsverluste in der Lehre vom Prozesszweck?' [2017] ZfPW 129, 130–132, with further references.

[69] Overview in Andrew Barker, 'Ideas on the Purpose of Civil Procedure' [2002] NZ L Rev 437; JA Jolowicz, 'Civil Litigation: What's it for?' (2008) 67 CJQ 508.

[70] See, eg, *D v NSPCC* [1978] AC 171 (HL) 230 (Lord Simon).

[71] Eg, *Air Canada v Secretary of State for Trade* [1983] 2 AC 394 (HL) 439–441.

[72] See Peter L Murray and Rolf Stürner, *German Civil Justice* (CAP 2004) 614, 620; Alexander Bruns, 'Der Zivilprozess zwischen Rechtsschutzgewährleistung und Effizienz' (2011) 124 ZZP 29, 32–33; Loyal (n 67) 378–379.

[73] In detail, Loyal (n 67) 139–141.

[74] Bruns (n 72) 32–33.

stake in the proceedings, in accordance with procedure's role as 'handmaid' of substantive law.[75] What is worth noticing in a systemic context, however, is that proportionality itself is flagged as one of the objectives of civil proceedings in the jurisdiction that gave birth to it – as embodied in rule 1 of the English CPR. Expressed pointedly: Proportionality is deemed to be both an *aim* of civil litigation and the *means for achieving it*. This in turn suggests, ultimately, that the aim of civil procedure is to be deduced from procedural theory, residing in procedural justice itself.[76]

b) Incommensurability of procedural factors

The balancing exercise between means and ends is further complicated by the incommensurability of the factors relevant to the proportionality analysis. Even leaving aside the elusiveness of the costs and objectives of civil process on a systemic level, it is impossible to assign precise values to the rights and interest concerned, let alone measure them against a common scale.[77] Without a standard of comparison common to all relevant factors, the procedural proportionality analysis necessarily remains a 'somewhat rough and ready exercise'.[78]

In particular, measuring the substantive rights and interests at stake in a given case – which impact the benefits of the proceedings – poses practical as well as conceptional problems. The English CPR certainly do list some criteria for assessing the importance of particular proceedings, in the context of allocating cases to one of the three case management tracks, their including namely the financial value of the claim; the complexity of the facts, law or evidence involved; the importance of the claim to third parties as well as to the parties themselves; and the nature of the remedy sought, among others.[79] Having said that, there is no common framework against which these aspects

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[75] See as to the role of procedural law, *Coles and Ravenshear Arbitration, Re* [1907] 1 KB 1 (CA) 4 (Collins MR): 'handmaid to justice'; *NML Capital Limited v Republic of Argentina* [2011] UKSC 31, [2011] 3 WLR 273 (SC) [74] (Lord Phillips PSC): 'servant and not the master of the rule of law'; Claire E Jervis, 'Jurisdictional Immunities revisited: an analysis of the procedure substance distinction in international law' (2019) 30 EJIL 105, 108, with further references. In the German debate this is referred to as the 'dienende Funktion des Prozessrechts', Roth (n 68) 132.

[76] Arguing in favour of an intrinsic value of procedure, eg, Lon Fuller, *The Morality of Law* (2nd edn, Yale UP 1970); John Rawls, *A theory of justice* (Revised edition, HUP 1999). Similarly, Wolfram Henckel, *Vom Gerechtigkeitswert verfahrensrechtlicher Normen* (Vandenhoeck & Ruprecht 1966); see also Niklas Luhmann, *Legitimation durch Verfahren* (Suhrkamp 1969).

[77] ACL Davies and JR Williams, 'Proportionality in English Law' in Sofia Ranchordás and Boudewijn de Waard (eds), *The Judge and the Proportionate Use of Discretion: A Comparative Administrative Law Study* (Routledge 2015) 95; Allan (n 8) 47.

[78] *Jackson v Murray* [2015] UKSC 5, [2015] 2 All ER 805 [28] (Lord Reed).

[79] CPR 26.8. For more detail, see Andrews (n 27) 24–25.

could be measured and no stipulation as to how any combination of those factors relates to the components of an extensive, sophisticated process or a trimmed down, more affordable version. And only little (if anything) can be gained from falling back on the procedural standards guaranteed under art 6 ECHR. The CPR's focus on the 'complexity of the issues' as one of the key factors for the proper conduct of proceedings is mirrored in the jurisprudence of the European Court of Human Rights as regards, for example, the criteria for determining the reasonable length of proceedings.[80] In the words of Lord Justice Gibson, 'it [therefore] adds nothing to try to dress up the point as one invoking a right under the Convention.'[81]

3. Meta Level: Balance between Substantive and Procedural Justice

While juggling the interests of parties, third parties and the system itself in the pursuit of an adequate equilibrium, the advent of procedural proportionality brought about – subliminally – a sea change in the perception of justice. Conceptually, jurisdictions advocating proportionality in civil proceedings cease to focus exclusively (or even predominantly) on justice on the merits in the sense of strict and precise enforcement of substantial law. Justice is no longer assessed solely by reference to the rectitude and accuracy of the judgment. Rather, the type of justice embodied in codes such as the CPR encompasses procedural justice – in the sense that procedures themselves should be fair in light of all the circumstances – as an equally important element.[82] Viewed through the lens of proportionality, the pursuit of efficiency and expedition is no longer simply a means to promote the achievement of substantive justice;[83] rather, it is an objective and element of justice in its own right.[84] The emergence of proportionality into procedural reasoning has implied a shift away from the 'traditional [substantive] philosophy that previously dominated the administration of justice'.[85]

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[80] *Pelissier v France* (2000) 30 EHRR 715 [67]. See also *König v Germany (no 1)* (1978) Series A no 27.

[81] *Alliance & Leicester Plc v Slayford* [2001] 1 All ER (Comm) 1 (CA) [29]; similarly, *CIBC Mellon Trust Co v Stolzenberg (Sanctions: Noncompliance)* [2004] EWCA Civ 827 [161] (Arden LJ).

[82] Lord Woolf, 'Access to Justice: Interim Report' (n 5) para 26.29.

[83] This idea is, however, advanced in some early judicial opinions, *Hannigan v Hannigan & Others* [2000] EWCA Civ 159, [2000] 2 FCR 650; *Sayers v Clarke-Walker* [2002] EWCA Civ 645, [2002] 1 WLR 3095. See also *Gale v Superdrug Stores Plc* [1996] 3 All ER 468, 477–478 (Millet LJ).

[84] In detail, Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (n 3) 135–199; Adrian A Zuckerman, 'A Tribute to Lord Dyson's Conception of a Just Process' (2015) 34 CJQ 229, 231.

[85] *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1 [106].

On a meta level the type of litigation that proportionality endorses thus reflects a balance between substantive and procedural justice, the latter understood in Rawls's terminology as *impure procedural justice*:[86] Delivering justice on the merits is to be considered alongside and to be tied together with the fairness of procedures themselves. Obviously, there is potential for conflict between substance and procedure:[87] A sophisticated 'Rolls Royce system of justice' is deemed to provide the highest probability of an accurate outcome as to the merits of the case,[88] while, in light of all the circumstances, procedural justice might well call for a reduction in the expenditure of time, money and resources.[89] This is because the procedural dimension of justice itself incorporates two potentially competing aspects between which a balance must be struck as well: The assessment of a procedure as just depends on whether one focuses entirely on the rights and interests of the parties to the immediate case, or rather on the operability of the justice system as a whole. Since the notion of proportionality comprises both perspectives, a philosophy of proportionate justice incorporates a balance between individual and systemic procedural justice, alongside the struggle to balance substance and procedure. The cost and benefit to parties to a given case are to be weighed against the cost and benefit to other (potential) users of the system in other cases.[90] This plurality of justice concept – substantive and procedural, inward-looking and systemic – correlates with a multi-dimensional combination of factors and elements to be balanced.

It should not go unnoticed, however, that a theory of proportionate justice involves a risk of 'falling into the utilitarian trap of […] allowing the ends to justify the means',[91] the ends being understood in this context simply as in-

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[86] This is because there is an independent criterion for the correct outcome of the case (namely the issuance of an affirmative judgment if – and only if – the claimant is entitled to the claim he asserts under substantive law), but no feasible procedure which will guarantee this desired outcome (text to n 39). On the distinction between pure, perfect and imperfect justice, Rawls (n 76) 85–86; see also ME Bayles, *Procedural Justice: Allocating to Individuals* (Kluwer Academic Publishers 1990) 115–139; L Solum, 'Procedural Justice' (2004) 78 S Cal L Rev 181, 252–259.

[87] Zuckerman, 'A Tribute to Lord Dyson's Conception of a Just Process' (n 84) 231–232. See also, for a general discussion, Adrian A Zuckerman, 'Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments to Timely Judgments' (1994) 14 OJLS 353.

[88] See text to n 38–40.

[89] See *Holmes v SGB Services Plc* [2001] EWCA Civ 354 [38] (Buxton LJ); Zuckerman, *Zuckerman on Civil Procedure* (n 6) para 1.40.

[90] Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (n 3) 167; Zuckerman, *Zuckerman on Civil Procedure* (n 6) para 1.64; Lord Dyson, 'The Application of the Amendments to the Civil Procedure Rules: 18th Lecture in the Implementation Programme' (22 March 2013).

[91] Farrow, 'Proportionality: A Cultural Revolution' (n 3) 157.

creased efficiency or a maximisation of resources. Since the cause lingering behind the whole idea of procedural proportionality is to increase access to *justice*, and not just access to *process*, the emphasis on efficiency and on conserving resources must be subjected to boundaries if it is not to endanger the very purpose of the justice system vis-à-vis its broader role in a modern democracy and ultimately lead to erratic 'palm tree justice'.[92] Balancing substantive and procedural justice means fostering a justice system that can, within its limited resources, grant effective access to justice and, through it, vindication of individual rights and the rule of law.

V. Conclusion – *quid novi* for the Proportionality Discourse?

In civil procedure law, the need to render court proceedings more efficient and meet the changed parameters of dispute resolution in the 21st century has given rise to a new form of proportionality. Procedural proportionality bears an unmistakable resemblance to the principle as established in other areas of the law. It features the analytical quintessence characterising proportionate legal reasoning: the pursuit of an adequate balance between the objective, the means chosen to achieve it and the detriments incurred in achieving it. While the methodological arsenal developed in public law cannot be harnessed for procedural purposes in an unaltered fashion, the distinctive melange of objective, benefits gained and detriments incurred underlie the procedural proportionality test just as well as the public law standard. Neither the differing litigation configuration – one featuring disputes between private parties rather than between citizens and the state – nor the procedural idiosyncrasy of the court determining a proportionate balance *ex ante* rather than reviewing measures adopted by other public entities *ex post* affect the basic structure of the proportionate exercise.

Differences and complications arise, however, once we try to grasp the many-fold, intertwined factors and reference points pertaining to the realm of civil procedure. The notoriously debated purpose of civil proceedings, the immeasurability of the costs and detriments – especially on a non-monetary level – and, not least, the incommensurability of the values and interests at stake render the procedural proportionality analysis a rough-and-ready concept rather than an easy-to-follow guidance. Given the elusiveness of procedural frameworks, key questions, such as what is to count as a 'serious' or 'important' matter and how precisely to tailor the proceedings in a way that reflects the value of each case, are difficult to address on a conceptional lev-

[92] *Civil Procedure (White Book) 2022* (Sweet & Maxwell) vol II at 11.7; see also Panzarola (n 17) 168; Farrow, 'Proportionality: A Cultural Revolution' (n 3) 157.

el.[93] Yet it is equally questionable whether an individual judge – even the Dworkinian Hercules – could, in his management of a particular case, proficiently gauge the amount of judicial resources worth being spent, measured against the overall resources of the civil justice system.[94] As to this lack of legal certainty, it is of little solace that the court determines the proportionate procedural means *ex ante* rather than scrutinizing *ex post* a measure adopted by some other entity: Whether or not an expert statement is allowed, discovery is granted to the extent sought, or the claim itself is allowed rather than dismissed in the course of the proceedings will often be just as decisive for the outcome of the case as could be an *ex post* scrutiny over substantive questions.

And even beyond this conceptual elusiveness lingers a balancing challenge on the meta level: the monumental task of finding the proper equilibrium between substantive and procedural justice. The paradigm shift proportionality has brought about for the conception of justice is not without its pitfalls and is in need of both justification and limitation. Diluting the ambition of ensuring substantive justice in the individual case with (systemic) procedural considerations that were formerly deemed but a servant to justice on the merits[95] and trans-substantive in nature[96] is indeed a daring endeavour. The concept of procedural justice certainly lacks the 'explanatory elegance and simplicity' – let alone the intuitive validity – of a justice system concerned solely with the pursuit of substantive justice.[97] Whether procedural proportionality can rise up to the task of reconciling merits and process or ultimately turns out to be a utilitarian conundrum remains to be seen.

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[93] *Quaradeghini v Mishcon De Reya Solicitors* [2019] EWHC 3523 (Ch), [2020] 4 WLR 34 stresses that, through the lens of proportionality, there will inevitably be a range of possible case management decisions from which to choose.

[94] Panzarola (n 17) 176, 182 (fn 175). See also Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (n 3) 213, 253; Adler (n 9) 309.

[95] This is an assessment especially true under the English Rules of the Supreme Court (1883); overview in Dominic de Saulles, 'Defending the Civil Justice System: the Function of Sanctions' (2017) 36 CJQ 462, 463–464.

[96] In detail, David Marcus, 'The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure' (2010) 59 DePaul L Rev 371, 383–386; Carlo Grifo, 'Does Procedural Mean Trans-substantive? A Historical and Normative Analysis of English Civil Procedure Rules' in Rabeea Assy and Andrew Higgins (eds), *Principles, Procedure, and Justice: Essays in honour of Adrian Higgins* (OUP 2020).

[97] Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (n 3) 212.

The Influence of Proportionality in Private Law on Remedies in American Constitutional Criminal Procedure

Guy Rubinstein[*]

I. Introduction

In the United States, procedural violations in the criminal process – such as unreasonable searches or seizures, selective or vindictive prosecution, or coercive police interrogations – may entail judicially ordered remedies. Pamela Karlan identified the four most 'conventional' remedies for such procedural violations: suppression of unconstitutionally obtained evidence, dismissal of criminal charges, reversal of convictions by an appellate court, and monetary damages.[1] The first three remedies – suppression, dismissal, and reversal – may be sought within the criminal process by criminal defendants who have allegedly been victims of procedural violations. To obtain mone-

[*] I am grateful to Ben Köhler and Franz Bauer for inviting me to contribute to this important book and for their invaluable comments and suggestions. I am also grateful to the participants of the conference on Proportionality in Private Law held at the Max Planck Institute for Comparative and International Private Law for their insights, feedback, and questions, and to Haggai Porat, Jane Bestor, Michael Friedman, and Rachel Rubinstein for their important comments on advanced drafts of this paper.

[1] Pamela S Karlan, 'Race, Rights, and Remedies in Criminal Adjudication' (1998) 96 Mich L Rev 2001, 2004. Among these four remedies, suppression of evidence and monetary damages are the 'two basic remedies' for constitutional violations by the police. Erwin Chemerinsky, *Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights* (Liveright 2021) 131.

tary damages, however, alleged victims of procedural violations must pursue an independent civil action – usually against the official who has arguably violated their rights.[2]

The three conventional remedies internal to the criminal process and the one conventional remedy external to it differ from each other not only in terms of the process through which they may be obtained (criminal or civil), but also in their quality of divisibility. Monetary damages are 'infinitely divisible', and as such can always be split up into smaller and smaller units.[3] Conversely, remedies within the criminal process – particularly the conventional ones – tend in the United States to be indivisible. As Sonja Starr observed, these remedies 'are often all or nothing'.[4] In other words, '[c]onvictions are either reversed or affirmed; charges are either thrown out or let stand; evidence is either excluded or admitted'.[5]

The indivisible nature of remedies internal to the criminal process has occupied generations of scholars in the United States, especially those writing on the Fourth Amendment exclusionary rule, the focus of this paper. The Fourth Amendment to the United States Constitution protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures'.[6] The Supreme Court significantly bolstered this constitutional protection in the early 1960s, famously holding in *Mapp v Ohio* that 'all evidence obtained by searches and seizures in violation of the Constitution is […] inadmissible in a state court', and not just in a federal court, as had been the case previously.[7] More than sixty years later, scholars agree that 'while there are of course many exceptions to the exclusionary rule, the basic default established in *Mapp* – that unconstitutionally

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[2] Karlan (n 1) 2004. The primary reason that civil suits would mostly be filed against the officials themselves and not against other entities is, as summarized by Richard Fallon, that '[a]part from remedial schemes provided by state law, state officials' liability for constitutional violations depends on § 1983, under which the Supreme Court has held that states are not suable persons and that local and county governments are not subject to liability for their officials' constitutional violations absent proof of direct causal responsibility', Richard H Fallon, Jr, 'Bidding Farewell to Constitutional Torts' (2019) 107 Cal L Rev 933, 981 (footnote omitted). For this reason, my paper will focus on suits against the officials themselves. For elaboration on the general distinction between remedies internal and external to the criminal process, see Herbert L Packer, 'Two Models of the Criminal Process' (1964) 113 U Pa L Rev 1, 18, 25–28.

[3] See, eg, Akhil Reed Amar, 'Fourth Amendment First Principles' (1994) 107 Harv L Rev 757, 798.

[4] Sonja B Starr, 'Sentence Reduction as a Remedy for Prosecutorial Misconduct' (2009) 97 Geo LJ 1509, 1510–1511.

[5] Starr (n 4) 1511.

[6] US Const amend IV.

[7] 367 US 643, 655 (1961).

obtained evidence is presumptively inadmissible at trial – remains a cornerstone of American criminal procedure'.[8]

The 'sole purpose' of the exclusionary rule, per the Supreme Court, is deterrence of police officers from infringing constitutional rights.[9] In essence, the logic is that police officers who wish to avoid suppression will have an increased incentive to avoid violating the Fourth Amendment. Other possible rationales, such as preserving judicial integrity or judicial legitimacy or suppression as a form of corrective justice or compensation for the victim of the constitutional violation, do not, in the eyes of the Supreme Court, justify suppressing unconstitutionally obtained evidence.[10]

Despite its relative longevity and stability, there has never been consensus on the appropriateness of the Fourth Amendment exclusionary rule.[11] This paper addresses a common scholarly line of critique, according to which suppression of unconstitutionally obtained evidence – which can often lead to impunity for factually guilty criminal defendants – is, in essence, disproportionate. As Yale Kamisar commented, critics of the rule often 'lament that relentless application of the exclusionary rule produces "disproportionate" results […]'.[12]

'Proportionality' is defined differently in different contexts. Writing about 'remedial proportionality' in the United States, Tracy Thomas observed that '[w]hile no clear definition of proportionality emerges from the Supreme Court cases, the basic meaning is balance or equilibrium. Proportionality addresses the measure, degree, or magnitude of the remedy and prohibits extreme measures that do not fit the harm'.[13] Proportionality, according to Thomas, 'generally is applied in a mechanical way to require that a judicial remedy be properly related in size or degree to the wrong. The decisionmaker searches for the precise balance between the [injurer's] harm and the [victim's] remedy in order to avoid excess, gain, or windfall on either side'.[14]

Scholarly arguments that the exclusionary rule is disproportionate generally comport with this understanding of proportionality. In other words, suppression of evidence is usually condemned as a remedy of a magnitude that is incommensurate with certain factors that critics find important. Two such

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[8] Richard M Re, 'The Due Process Exclusionary Rule' (2014) 127 Harv L Rev 1885, 1888.

[9] *Davis v United States* 564 US 229, 236–237 (2011).

[10] See, eg, Re (n 8) 1902–1905.

[11] See, eg, Symposium, 'Law and Truth' (2003) 26 Harv J L & Pub Pol'y 1; Symposium, 'The Exclusionary Rule: Is It on Its Way Out? Should It Be?' (2013) 10 Ohio St J Crim L 341.

[12] Yale Kamisar, '"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule' (1987) 86 Mich L Rev 1, 7.

[13] Tracy A Thomas, 'Proportionality and the Supreme Court's Jurisprudence of Remedies' (2007) 59 Hastings LJ 73, 80–81 (footnote omitted).

[14] Thomas (n 13) 81.

claims tend to dominate discussion. The first claim is that the social costs of suppressing evidence – primarily the impunity of factually guilty criminal defendants – are often excessive relative to the severity or the ramifications of the constitutional violations committed by the police.[15] The second claim, the focus of this paper, is that the windfall from suppression for factually guilty criminal defendants (ie their possible impunity) is often disproportionately high relative to the severity of the police misconduct involved or to the extent of the harm the criminal defendant suffered.[16]

Some Justices of the Supreme Court have agreed with the critics. Justice Powell, for example, emphasized that the disproportionate windfall for criminal defendants may have grave ramifications for society:

> 'Application of the [exclusionary] rule […] deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.'[17]

Other Justices have disagreed. For instance, after his retirement from the Supreme Court, Justice Stewart countered this criticism, emphasizing that 'this [alleged] disproportionality is significant only if one conceives the purpose of the [exclusionary] rule as compensation for the victim'.[18] Since cor-

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[15] See, eg, Francis A Allen, 'Federalism and the Fourth Amendment: A Requiem for Wolf' [1961] Sup Ct Rev 1, 36; Richard A Posner, 'Rethinking the Fourth Amendment' [1981] Sup Ct Rev 49, 56.

[16] See, eg, William A Schroeder, 'Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule' (1981) 69 Geo LJ 1361, 1384–1385; Posner (n 15) 70; John Stanfield Buford, 'When the Heck Does This Claim Accrue? Heck v. Humphrey's Footnote Seven and § 1983 Damages Suits for Illegal Search and Seizure' (2001) 58 Wash & Lee L Rev 1493, 1501; H Mitchell Caldwell, 'Fixing the Constable's Blunder: Can One Trial Judge in One County in One State Nudge a Nation Beyond the Exclusionary Rule?' [2006] BYU L Rev 1, 1; Ronald J Rychlak, 'Replacing the Exclusionary Rule: Fourth Amendment Violations as Direct Criminal Contempt' (2010) 85 Chi-Kent L Rev 241, 243. See also Christopher Slobogin, 'A Comparative Perspective on the Exclusionary Rule in Search and Seizure Cases' in Jacqueline E Ross and Stephen C Thaman (eds), *Comparative Criminal Procedure* (Edward Elgar 2016) 302.

[17] *Stone v Powell* 428 US 465, 490–491 (1976) (footnote omitted).

[18] Potter Stewart, 'The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases' (1983) 83 Colum L Rev 1365, 1396. Decades before Justice Stewart, Judge Friendly made a similar comment: 'A defendant is allowed to prevent the reception of evidence proving his guilt not primarily to vindicate his right of privacy, since the benefit received is wholly disproportionate to the wrong suffered, but so that citizens generally, in the words of the amendment, may be "secure in their persons, houses, papers, and effects, against unreasonable searches and

rective justice for the victim is not the goal of the rule, Justice Stewart commented that he did 'not find this criticism persuasive'.[19]

Criticism of the exclusionary rule as disproportionate comes not only from proponents of crime control (or law and order) values, but also from jurists who argue that the exclusionary rule has undermined the protection of individual rights in the criminal process. According to the latter, judges wishing to avoid the release of potentially factually guilty defendants have found various ways to evade the need to suppress unconstitutionally obtained evidence. For example, courts, particularly the Supreme Court, have gradually narrowed down the scope of substantive Fourth Amendment rights,[20] and it is even claimed that courts have manipulated the facts in particular cases, for example by accepting likely perjurious testimonies of police officers according to which they obtained incriminating evidence constitutionally.[21]

This paper examines two ways in which critics of the exclusionary rule who have been seeking 'proportionate' remedies have turned to private law for answers. These critics have argued that the solution for remedying police misconduct in a proportionate manner lies in the ultimate private law remedy: monetary damages, whether as an alternative to the exclusionary rule or as an inspiration for the alternative of sentence reduction. This paper analyzes whether these remedies can serve as effective deterrents while remaining 'proportionate' and concludes that very often they cannot.

Part II shows that the first generation of critics has advocated for adopting monetary damages as the proper remedy for police violations of the Fourth Amendment in lieu of suppressing evidence. These critics have attributed the disproportionality of suppression to its indivisibility and have maintained that monetary damages, as a divisible remedy, could be adjusted and fine-tuned such that they would achieve proportionality. Nevertheless, this Part shows, if adopted as an alternative remedy to suppression of evidence, monetary damages themselves would frequently be awarded in sums disproportionate to the severity of the police violation or to the harm it inflicted upon its victim. First, it would be difficult to observe proportionality when comparing the sums that juries around the country, over time, award for Fourth Amendment violations. Juries may often award a sum of monetary damages that is quite arbitrary, due to the difficulties associated with appraising and quantifying intangible harms caused by Fourth Amendment violations and due to juries' inherently subjective views of what amounts to a proportionate sum of damages and to what

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seizures"', Henry J Friendly, 'The Bill of Rights as a Code of Criminal Procedure' (1965) 53 Cal L Rev 929, 951.

[19] Stewart (n 18) 1396.

[20] See, eg, Guido Calabresi, 'The Exclusionary Rule' (2003) 26 Harv JL & Pub Pol'y 111, 112–113.

[21] See, eg, Calabresi (n 20) 113; Tonja Jacobi, 'The Law and Economics of the Exclusionary Rule' (2011) 87 Notre Dame L Rev 585, 607–611. See also Amar (n 3) 799.

factor this sum should be proportionate. Second, since police officers frequently avoid liability for many types of Fourth Amendment violations and are only rarely ordered to pay monetary damages, punitive damages are required for effective deterrence. To deter effectively, the sum of damages awarded to the victim for constitutional violations would often have to be so considerable that few would view it as commensurate with the severity of the police misconduct or with the actual harm to the victim of the violation.

Part III focuses on the second generation of critics of the exclusionary rule. They have valued the divisibility of monetary damages but have not considered them an effective deterrent. Instead, they have identified a potential alternative divisible remedy within the criminal process: sentence reduction. Like the first-generation critics, they have hailed the potential of this remedy to be awarded commensurately with the severity of the police misconduct or with the harm inflicted on its victim. However, this Part shows that this remedy is also likely to be awarded disproportionately frequently. As in the context of monetary damages, here too subjectivity and appraisal and quantification difficulties can threaten the ability to achieve proportionality across the board. Even more importantly, according to some scholars, to deter the police from committing violations, sentence reduction would generally have to be significant enough to amount to de facto impunity of the criminal defendant – in a way that would usually prevent it from being awarded proportionately to the severity of the police misconduct or to the harm to the victim of the constitutional violation.

This paper concludes that the divisible nature of monetary damages and sentence reduction does not guarantee proportionality where Fourth Amendment violations are concerned.

II. The First Generation: Advocating for Monetary Damages as an Alternative Remedy

Many critics of the exclusionary rule argue that it is the indivisible nature of suppression of evidence that renders it inherently insensitive to the magnitude of its resulting social costs and to the extent of its windfall for criminal defendants, and therefore – often 'disproportionate.' Suppression has been described as 'clunky,'[22] 'dichotomous',[23] or 'binary'.[24] A court can either order the suppression of evidence or not; it cannot fine-tune this remedy, just as it cannot calibrate other binary remedies such as dismissal of criminal charges. For critics of the indivisible suppression remedy seeking an alternative, pro-

[22] Amar (n 3) 798.

[23] Jacobi (n 21) 627, 650.

[24] Jeffrey Standen, 'The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct' [2000] BYU L Rev 1443, 1486.

portionate deterrent, therefore, it was only natural to support adoption of the most intuitively divisible remedy that exists in the law: monetary damages.

As opposed to the exclusionary rule, monetary damages have been described as 'infinitely divisible',[25] 'flexible',[26] 'fine-tuned',[27] or 'more precise'.[28] At least in theory, the sum of monetary damages awarded for procedural violations can be adjusted and fine-tuned such that it would be commensurate with the severity of the police constitutional violation, the harm inflicted on the victim, or any other desired factor. Even Justice Stewart, an avid supporter of the exclusionary rule and opponent of monetary damages as an alternative, admitted that the latter, unlike suppression, have 'an element of proportionality because the amount of a judgment may be varied to reflect the egregiousness of the constitutional violation'.[29]

In addition to their 'element of proportionality', monetary damages have other appealing traits that can make them desirable as an alternative deterrent to the exclusionary rule. Most obvious is that the award of monetary damages for procedural violations does not have the result of releasing potentially guilty defendants onto the street, and it therefore does not trigger society's common, understandable fear of crime, condemnation of impunity, and overall increased resistance.[30] Furthermore, to establish a remedy of monetary damages for Fourth Amendment violations, no further judicial or legislative action is needed. In fact, alleged victims of constitutional violations may already seek monetary damages from the police officers who have arguably engaged in misconduct against them, primarily under section 1983 (42 USC § 1983).[31]

Nevertheless, despite their advantages, countless scholars have pointed at the many drawbacks of relying on monetary damages as an alternative deterrent to the exclusionary rule. First, it is argued, victims of police misconduct – particularly those who end up as criminal defendants – are systematically undermotivated to obtain monetary damages compared to suppression of

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[25] Amar (n 3) 798.

[26] Buford (n 16) 1501.

[27] Carol S Steiker, 'Second Thoughts About First Principles' (1994) 107 Harv L Rev 820, 848.

[28] Robert E Wagner, 'Corporate Criminal Prosecutions and the Exclusionary Rule' (2016) 68 Fla L Rev 1119, 1148.

[29] Stewart (n 18) 1387.

[30] See, eg, Steiker (n 27) 848.

[31] According to section 1983, '[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress […]'.

evidence, which may lead to dismissal of the criminal charges against them.[32] Second, and perhaps more important, individuals who are nevertheless interested in suing the police officers who arguably violated their rights will encounter substantial hurdles on their way to securing monetary damages. Thus, for instance, they will have to overcome police officers' qualified immunity, which the Supreme Court has long read into section 1983.[33] According to current qualified immunity doctrine, unless officials violated 'clearly established statutory or constitutional rights of which a reasonable person would have known', they would be 'generally […] shielded from liability for [paying] civil damages' pursuant to section 1983 to those persons whose rights they violated.[34] The Supreme Court has continuously described this doctrine as protecting 'all but the plainly incompetent or those who knowingly violate the law',[35] thereby rendering the requirements for overcoming qualified immunity very difficult to meet. Even where victims of police violations succeed in overcoming the qualified immunity hurdle, they often remain 'unsympathetic' or 'unattractive' in the eyes of juries, especially compared to the law officers whom they sue.[36] This is an issue with likely ramifications for the fate of the civil action and the amount of the damages they may receive, and with possible negative influence on the ability of these victims – many of whom are economically disadvantaged – to obtain legal representation to begin with.[37] Additionally, police misconduct in the context of the Fourth Amendment often results in harms that are not 'physical' or 'tangible'.[38] This is particularly problematic for victims of such harms, as William Stuntz observed, since '[t]he victim of police misconduct must have suffered the kind of harm that juries and judges are likely to value – the case must be "worth" something – or it will not be brought'.[39] According to Stuntz, 'neither judges nor juries would award any significant sum of money to compensate for the

[32] See, eg, Karlan (n 1) 2011; Kevin R Johnson, 'The Song Remains the Same: The Story of Whren v. United States' in Rachel F Moran and Devon Wayne Carbado (eds), *Race Law Stories* (Foundation Press 2008) 439.

[33] See, eg, Fallon (n 2) 954–957; William Baude, 'Is Qualified Immunity Unlawful?' (2018) 106 Cal L Rev 45, 50, 52.

[34] *Harlow v Fitzgerald* 457 US 800, 818 (1982).

[35] *Malley v Briggs* 475 US 335, 341 (1986).

[36] See, eg, Karlan (n 1) 2011–2012; William J Stuntz, 'The Virtues and Vices of the Exclusionary Rule' (1997) 20 Harv J L & Pub Pol'y 443, 449; Carol S Steiker, 'Criminal Procedure' in Mark Tushnet and others (eds), *The Oxford Handbook of the US Constitution* (OUP 2015) 664; Calabresi (n 20) 114–115.

[37] See, eg, Karlan (n 1) 2011–2012; Steiker (n 36) 664; Calabresi (n 20) 114–115.

[38] See, eg, Daniel J Meltzer, 'Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General' (1988) 88 Colum L Rev 247, 284; David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (The New Press 1999) 167.

[39] Stuntz (n 36) 449.

fairly trivial harm of having the trunk of one's car opened'.[40] All of these hurdles are joined by the fact that scholars have questioned the extent to which monetary damages – even when granted – actually affect the willingness of government officials to comply with the Constitution,[41] especially when they are often indemnified for the sums they are ordered to pay.[42]

For the purposes of this paper, the most pertinent fact to dwell on is that while monetary damages – as a divisible remedy – may theoretically be fine-tuned such that they can be awarded proportionately to the severity of the police's misdoing or to the harm suffered by the victim – the reality is different. First, given the frequently intangible nature of the harms caused by Fourth Amendment violations and the mixture of social interests and concerns involved, the harms that victims are seeking to remedy are usually very difficult to appraise and quantify.[43] The sum of monetary damages awarded for these harms by juries is therefore often doomed to be quite arbitrary.[44] This is at odds with the concept of proportionality and the 'consistency in awards'[45] or 'consistency across the judicial system'[46] it aims to achieve. Jeffrey Standen alluded to the effect of this arbitrariness on the ability to maintain proportional outcomes, warning that –

> 'In order to assess the value of harm, the trier of fact would presumably need to know something about the officer's state of mind in committing the violation, the difficulty of pursuing lawful means, the victim's reaction, and the exact extent of the intrusion. Such inquiries would be expensive and presumably would yield highly disparate outcomes among trials, somewhat frustrating the production of graduated penalties necessary for marginal deterrence.'[47]

To be sure, the claim here is not that harms caused by Fourth Amendment violations, even those that are intangible, should not, as a matter of policy, be remedied because they are difficult to appraise and quantify. It might even be possible, as other scholars have suggested, that the legislature would 'establish a minimum level of damages' that must be awarded for Fourth Amendment violations, independent of the magnitude of the actual harm to the vic-

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[40] Stuntz (n 36) 449.

[41] See, eg, Daryl J Levinson, 'Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs' (2000) 67 U Chi L Rev 345.

[42] Joanna C Schwartz, 'Police Indemnification' (2014) 89 NYU L Rev 885.

[43] See, eg, Pierre J Schlag, 'Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies' (1982) 73 J Crim L & Criminology 875, 909–910.

[44] See, eg, Calabresi (n 20) 115.

[45] Thomas (n 13) 96.

[46] Thomas (n 13) 121.

[47] Standen (n 24) 1475. See also William C Heffernan, 'The Fourth Amendment Exclusionary Rule as a Constitutional Remedy' (2000) 88 Geo LJ 799, 849; cf Starr (n 4) 1540 (mentioning the appraisal and quantification difficulties associated with monetary damages in general).

tim.[48] The claim here is only that given the arbitrariness likely involved in remediation for Fourth Amendment violations, it would be difficult to observe proportionality when comparing trial outcomes over time.

The promise of achieving proportionality across the board is compromised not only by the aforementioned appraisal and quantification difficulties, but also due to the 'inherently subjective' nature of proportionality more generally.[49] Different judges and juries may have different views on what amounts to a proportionate sum of damages for each Fourth Amendment violation. They may also vary with regard to the factor that the monetary damages should be proportionate to – the severity of the constitutional violation, the harm to the victim, or perhaps other factors. There is a concern that this choice – or 'the framing of the proportionality question' – may often be influenced by the subjective values and priorities of judges and juries and shaped by the result (the sum of monetary damages) that they wish to reach.[50]

Furthermore, while monetary damages, at least under the current state of affairs, are not an effective deterrent for police misconduct, it is also questionable whether they may ever potentially serve as an effective deterrent while still remaining proportionate. As mentioned above, many types of Fourth Amendment violations only very rarely lead to litigation, let alone liability of police officers for them. In such situations, to effectively deter the police from engaging in future misconduct, police officers violating the Constitution must be ordered to pay punitive damages. Today, punitive damages may be awarded by a jury to a plaintiff suing a police officer under section 1983 'when the [officer's] conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others'.[51] But in their classic article on punitive damages, A. Mitchell Polinsky and Steven Shavell argued for a different approach, demonstrating that '[w]hen an injurer has a chance of escaping liability, the proper level of *total damages* to impose on him, if he is found liable, is the harm caused multiplied by the reciprocal of the probability of being found liable'.[52]

Scholars advocating for monetary damages as an alternative to the exclusionary rule have stressed that punitive damages may be required for effective deterrence and applied a formula similar to Polinsky and Shavell's. For instance, Richard Posner – one of the most known critics of the exclusionary rule – protested that suppression 'imposes social costs that are greatly disproportionate to the actual harm to lawful interests from unreasonable searches and

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[48] Schlag (n 43) 910 fn 126.

[49] Thomas (n 13) 125–126.

[50] Thomas (n 13) 126–127.

[51] *Smith v Wade* 461 US 30, 56 (1983).

[52] A Mitchell Polinsky and Steven Shavell, 'Punitive Damages: An Economic Analysis' (1998) 111 Harv L Rev 869, 874.

seizures',[53] and that the windfall from suppression for the criminal defendant is disproportionate to the harm they suffered.[54] Posner suggested that in situations where police misconduct is 'concealable', punitive damages should be given 'to reflect the probability that [the officers] will escape [liability]'.[55] Akhil Amar, likewise, who also famously supported replacing the exclusionary rule with monetary damages, argued that '[b]ecause only a fraction of unconstitutional searches and seizures will ever come to light for judicial resolution, merely compensatory damages in the litigated cases would generate systematic underdeterrence',[56] and that therefore 'deterrence requires that the defendant must pay more than the plaintiff suffered […]'.[57] Nevertheless, Amar maintained that 'not all this amount need go directly to the plaintiff'.[58]

The probability that a police officer will be found liable for violating the Fourth Amendment in a civil suit against them varies, depending a lot on the type of violation involved. Stuntz argued that 'current Fourth Amendment damages litigation [focuses] on police violence and illegal detention,' while other types of Fourth Amendment violations – those that are generally unlikely to yield substantial damages for their victims – are much less prevalent.[59] For instance, 'lawsuit[s] challenging the search of a suspect's automobile or briefcase or jacket pocket', Stuntz claimed, 'are almost never filed'.[60] Given this and additional factors making liability scarce, the sum of damages awarded for constitutional violations would often have to be considerable enough for effective deterrence that few scholars would view it as commensurate with the severity of the police misconduct (a factor that Polinsky and Shavell consider as generally irrelevant to the proper sum of punitive damages)[61] or with the actual harm to the victim of the violation. Donald Dripps seems to have raised a similar critique almost 30 years ago when he maintained succinctly that Amar's 'argument that exclusion is disproportionate is inconsistent with Amar's plea for punitive damages'.[62]

Those objecting to the exclusionary rule in the name of disproportionality must recognize that monetary damages – if adopted as an alternative remedy – would also very often be awarded disproportionately. In fact, to effectively

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[53] Posner (n 15) 56.
[54] Posner (n 15) 70.
[55] Posner (n 15) 62–63.
[56] Amar (n 3) 814.
[57] Amar (n 3) 815.
[58] Amar (n 3) 815.
[59] Stuntz (n 36) 449.
[60] Stuntz (n 36) 449.
[61] Polinsky and Shavell (n 52) 905–910.
[62] Donald Dripps, 'Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again"' (1996) 74 NC L Rev 1559, 1623.

deter the police from violating the Fourth Amendment, they would, by design, frequently have to be awarded disproportionately.

III. The Second Generation: Inspired by Monetary Damages, Advocating for Sentence Reduction as an Alternative Remedy

Scholars who have been discontented with the exclusionary rule, on the one hand, but pessimistic about the expected deterrent effect of monetary damages, on the other hand, have attempted to devise other proposals for deterring Fourth Amendment violations. Scholars have recognized the theoretical advantages of monetary damages as a divisible remedy, which – unlike the exclusionary rule – can be calibrated and fine-tuned by judges or juries. But, as mentioned above, outsourcing the treatment of police violations – from the criminal process to the civil process – has been viewed as inimical to the ability to deter police misconduct.

For some scholars, therefore, the logical next step was to attempt to find an alternative remedy boasting the advantages of both monetary damages and suppression of evidence – namely, a remedy that is divisible like monetary damages but also internal to the criminal process like suppression. This is not an easy task. As explained earlier, the conventional remedies in the United States for procedural violations within the criminal process tend to be binary in nature. Nevertheless, one potential remedy has emerged: sentence reduction.

Like suppression of evidence, to obtain sentence reduction the victim does not have to go through the challenges associated with initiating an independent civil action against the police officer who violated their rights. Furthermore, similarly to suppression of evidence, the sentence (and therefore the remedy of sentence reduction) is almost always decided by a judge – not a jury – who may be affected less by the lack of sympathy for many of the victims of police misconduct. At the same time, like monetary damages, a sentence imposed on a convicted individual is also divisible, and can theoretically be reduced in a manner that is commensurate with the severity of the police violation, its harm to the individual, or other desired factors.[63] As such, unless the police violation is particularly severe or the harm it causes excessively great, sentence reduction is theoretically unlikely to lead to the total impunity of a dangerous criminal.

[63] Starr highlighted this quality of sentence reduction when she advocated that it should serve as a remedy for prosecutorial misconduct: 'Because a sentence reduction could be of any magnitude – from a nominal reduction to the entire length of the base sentence – it can be tailored to the wrongfulness of the prosecutor's misconduct or to the harm inflicted on the defendant', Starr (n 4) 1539.

In 2003 Guido Calabresi, a senior professor and judge of the United States Court of Appeals for the Second Circuit, famously proposed sentence reduction as an alternative remedy to the Fourth Amendment exclusionary rule.[64] While Calabresi's proposal was raised in a particularly short paper authored for a symposium on the exclusionary rule, and while even Calabresi himself referred to his proposal as 'half baked',[65] both the paper and the proposal have received considerable academic attention. Upon concluding that neither the exclusionary rule nor monetary damages can achieve optimal deterrence,[66] Calabresi turned to advocating for the remedy of sentence reduction. Calabresi argued that criminal defendants would be highly motivated to raise claims of constitutional violations even if all that a court can grant them is a shorter sentence and not full impunity.[67] Moreover, Calabresi stressed, courts would be encouraged to accept such claims, knowing that they would not have to release potentially guilty criminal defendants, but only lower their sentence.[68] All in all, according to Calabresi, if sentence reduction were the remedy for Fourth Amendment violations in lieu of suppression of evidence, the role that courts play in addressing police misconduct would likely grow, while the price that society pays to vindicate constitutional rights would decrease. Notably, Calabresi emphasized that the remedy of sentence reduction, unlike the exclusionary rule, can and should be proportionate to the severity of the police misconduct: 'Under such a system, there would be a hearing at which the court would determine whether the evidence was obtained wrongfully through negligence, gross negligence, or wanton and willful behavior. On that basis, a judge would come down two, three, or four points on the sentencing guidelines.'[69]

As a divisible remedy, sentence reduction would indeed be theoretically able to be awarded commensurate with the severity of the violation or with the harm to its victim. Nevertheless, just like monetary damages, sentence

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[64] Calabresi (n 20) 115–117. For other critics proposing sentence reduction as an alternative remedy to suppression of evidence, see, eg, Harry M Caldwell and Carol A Chase, 'The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom' (1994) 78 Marq L Rev 45, 70–75. See also Mark D Duda, 'Remedying Police Brutality Through Sentence Reduction' (2021) 107 Va L Rev Online 99. For the most famous article proposing a similar remedy for prosecutorial misconduct, see Starr (n 4).

[65] Calabresi (n 20) 115, 117.

[66] Calabresi (n 20) 112–115.

[67] While one may share Calabresi's intuition concerning the high motivation that criminal defendants have to lower their sentence, one may question whether the exact explanation that Calabresi gave regarding this motivation is fully convincing: defendants' desire to spend more of their time as 'sexually active people' outside the prison walls. Calabresi (n 20) 115–116.

[68] Calabresi (n 20) 116.

[69] Calabresi (n 20) 116.

reduction too would likely suffer from problems threatening its ability to serve as an effective deterrent while remaining proportionate. First, as in the context of monetary damages, here too arises the problem of valuation and quantification. Calabresi ruled out monetary damages as a proper alternative deterrent to the exclusionary rule, arguing, *inter alia*, that '[b]ecause damages are hard to quantify in such cases, it is almost always necessary to guess at them'.[70] But sentence reduction is no different. To decide a sentence discount for police violations, judges will also have to value and quantify various factors that they already find challenging in civil cases. Standen's warning concerning the expected 'highly disparate outcomes among trials' in the context of monetary damages in the private law would therefore apply with equal force in the context of sentence reduction in the criminal process. And, similar to the discussion concerning monetary damages, here too judges would have different ideas concerning what counts as a proportionate sentence reduction, and the choice among the various factors that the sentence discount should be proportionate to would also be prone to manipulation.[71] Given what is at stake – minimizing the duration of guilty offenders' incarceration – one might expect that such manipulations would be even more prevalent than in the context of civil suits, where the remedy is ultimately money.

Similarly, like monetary damages, it does not seem that sentence reduction can reliably serve as an effective deterrent for constitutional violations by the police while remaining proportionate. Kamisar, who harshly criticized Calabresi's proposal to give up on the exclusionary rule and adopt sentence reduction instead, argued bluntly that '[f]rom the perspective of the police, the important thing – perhaps the only thing – is that their actions resulted in the conviction of a criminal and a substantial stretch of prison time for him', and that 'it [is] hard to believe that the police care one whit whether the person convicted on the basis of their unlawful acquisition of evidence is sentenced to four years or five, ten months or twelve'.[72] In other words, according to

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[70] Calabresi (n 20) 115.

[71] For a similar discussion in the context of a proposal of sentence reduction as a remedy for prosecutorial misconduct, see Starr (n 4) 1539–1543. Specifically, Starr recognized that '[i]t is difficult to define and quantify the non-conviction-related harm done by prosecutorial misconduct, much less its degree of wrongfulness. Translating either criterion into a number of years of reduction may be even more difficult […]', Starr (n 4) 1539. She also recognized that '[t]his difficulty may introduce a new source of potentially arbitrary variation in sentencing because different judges may disagree as to how much of a reduction particular misconduct is "worth."' Starr (n 4) 1542.

[72] Yale Kamisar, 'In Defense of the Search and Seizure Exclusionary Rule' (2003) 26 Harv J L & Pub Pol'y 119, 136. See also Starr (n 4) 1512–1513; Sabine Gless and Laura Macula, 'Exclusionary Rules: Is It Time for Change?' in Sabine Gless and Thomas Richter (eds), *Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules* (Springer 2019) 372.

Kamisar, to have a chance at deterring the police, sentence reduction would have to be considerable enough that the offender's punishment would be considered by the police who violated the Constitution as de facto impunity. To use the jargon of this paper, the sentence discount, to deter future misconduct, would frequently have to be disproportionate. A sentence reduction that is arguably commensurate with the severity of the police misconduct or with the harm to the criminal defendant, Kamisar would agree, would be useless for deterrence if the penalty remains substantial. In fact, even Calabresi acknowledged that his proposal 'provides little deterrence for potential bad actors in law enforcement',[73] and therefore suggested that a judicial finding that a constitutional violation has occurred should trigger not only sentence reduction, but also 'an automatic police punishment.'[74] That is to say, Calabresi – who took pride in the ability of sentence reduction to be proportionate to the severity of the police misdoing – conceded that it cannot alone deter constitutional violations effectively (at least if ordered proportionately) without additional direct measures against police officers.

While both Kamisar and Calabresi were correct in their belief that sentence reduction alone would normally serve as a weak deterrent, their dismissal of the potential deterrent effect of this remedy may have been too broad. Kamisar, as mentioned, suggested that 'perhaps the only thing' that police officers care about is conviction of the offender accompanied by a significant punishment. But what about police officers' concern over their professional or personal reputation?

In an oft-cited article, Starr proposed that the remedy for prosecutorial misconduct be sentence reduction, instead of the current conventional strong remedies such as dismissal of criminal charges.[75] Like Calabresi, Starr too argued that 'the court could tailor the reduction's magnitude to the seriousness of the misconduct'.[76] Therefore, according to Starr, 'the remedy need not be perceived as a disproportionate judicial response',[77] and courts would be more inclined to accept claims of prosecutorial misconduct than under the current situation.[78] Starr considered Kamisar's critique of Calabresi's proposal but argued that sentence reduction is expected to deter prosecutors more than it would deter police officers:

'[E]ven if sentence reduction does not deter police misconduct, it might well deter *prosecutorial* misconduct. Unlike police, prosecutors *are* likely to care about sentence reductions. Although their motivations vary, prosecutors have many reasons to prefer longer

[73] Calabresi (n 20) 116.
[74] Calabresi (n 20) 116–117.
[75] Starr (n 4).
[76] Starr (n 4) 1521.
[77] Starr (n 4) 1521.
[78] Starr (n 4) 1520–1521.

sentences: political pressures, ideology, office policy and culture, and career interests. And even a prosecutor who lacks that preference would face embarrassment if a sentence were reduced on the express basis of her wrongdoing. To be sure, prosecutors would presumably rather have a sentence lowered than a conviction thrown out. But a less serious though more likely penalty could provide a bigger deterrent.'[79]

I agree with Starr's observation that police officers and prosecutors have different incentives to comply with the Constitution and that, overall, professional reputation may often be more important for prosecutors than for police officers. But that does not mean that police officers would not be deterred at all by a court finding that they have engaged in particularly loathsome misconduct, even if the remedy the court orders for it is only sentence reduction (or, for that matter, monetary damages). For instance, racially discriminatory policing has long been considered one of the most morally reprehensible constitutional violations in the United States.[80] A police officer – even a consciously biased one – who wishes to avoid having a court label them racially biased, may be deterred from engaging in racially selective policing regardless of the remedy, at least to the extent that they fear that such a determination would possibly hurt their reputation or career.[81]

Nevertheless, in cases where a police officer's reputation or career is not threatened by a judicial finding of misconduct on their behalf, and to the extent that Kamisar and Calabresi were correct about the incentives that practically affect police officers' willingness to comply with the Constitution, proportionate sentence reduction remains, indeed, an unpromising deterrent.

Once again, critics of the exclusionary rule who have condemned its disproportionality have sought to replace it with a proportionate alternative deterrent. They have believed that they found it in the divisible remedy of sentence reduction. But like monetary damages, this remedy is unlikely to be ordered proportionately, especially if really intended to effectively deter the police from engaging in constitutional violations.

IV. Conclusion

The indivisible character of the exclusionary rule has been argued to render it disproportionate. According to scholars, as an 'all or nothing' remedy, suppression of evidence will often result in a windfall for criminal defendants and social costs that are excessive compared to the severity of the police misconduct involved or to the extent of the harm the criminal defendant suf-

[79] Starr (n 4) 1513.

[80] See, eg, Guy Rubinstein, 'Selective Prosecution, Selective Enforcement, and Remedial Vagueness' [2022] Wis L Rev 825, 826–827.

[81] Rubinstein (n 80) 866.

fered. Scholars' intuition that only divisible remedies can achieve proportionality is therefore natural.

But monetary damages and sentence reduction – two divisible remedies commonly advocated for as alternatives to the exclusionary rule – would be unlikely to achieve proportionality. First, difficulties associated with appraising and quantifying many harms caused by Fourth Amendment violations, as well as the subjective nature of the concept of proportionality more generally, would often result in arbitrariness in remediation. This arbitrariness, in turn, would hinder the ability to observe proportionality when comparing trial outcomes around the country, over time. Second, to effectively deter the police from committing Fourth Amendment violations, these remedies would oftentimes have to be awarded in a sum or magnitude disproportionately high relative to the severity of the violation involved or its harm to the victim.

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