Proportionality in Private Law

Edited by
FRANZ BAUER
and BEN KÖHLER

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Franz Bauer is a Research Associate at the Max Planck Institute for Comparative and International Private Law, Hamburg.

Ben Köhler is a Senior Research Fellow at the Max Planck Institute for Comparative and International Private Law, Hamburg.

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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

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-

[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

[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-

[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.