Proportionality in Private Law

Edited by
FRANZ BAUER
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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

[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-

[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-

[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').