

## The dialectical function of the principle of proportionality: a European perspective\*

### Abstract

*Proportionality in its abstract form has never ceased to be considered as a fundamental criterion of the legitimacy of State intervention; at least in the context of the liberal democratic State. In the recent years, the globalisation and, particularly, the Europeanisation of constitutional law have brought proportionality back in the epicentre of legal debates, at least across Europe. However, in spite of the quasi-universal appeal of the principle, its polysemy and vagueness have led several scholars to downplay its heuristic value, nay its usefulness. In this paper, it will be argued that, notwithstanding the soundness of some of such criticisms, this polysemy of proportionality is actually its strongest feature. Seen from a dialectical point of view, the principle of proportionality, if used properly, can become a valuable tool, not only as a means of legal harmonisation, but also as a democratic counter-balance to a purely mechanical approach of positive law.*

### Résumé

*Depuis toujours la proportionnalité dans sa forme abstraite est considérée comme un critère fondamental en matière de légitimité de l'intervention de l'État, tout au moins dans le contexte de l'État libéral démocratique. La mondialisation et plus particulièrement l'europeanisation du droit constitutionnel ont placé le principe de la proportionnalité au centre des débats sur la théorie du droit. En effet le caractère ambigu et vague de ce dernier a conduit, malgré l'attrirance quasi universelle qu'il suscite, la dénégation par des auteurs isolés de sa valeur heuristique, voire même de son utilité. Dans l'article suivant, la thèse selon laquelle cette ambiguïté, malgré la critique en partie justifiée, représente l'un des attributs les plus forts du principe de proportionnalité. D'un point de vue dialectique le principe de proportionnalité, s'il est correctement utilisé, peut devenir un instrument précieux, non seulement en qualité de moyen permettant d'atteindre une harmonisation juridique, mais également en tant que contrepoids démocratique face à l'approche positiviste du droit.*

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## Zusammenfassung

*Die Verhältnismäßigkeit in ihrer abstrakten Form wird seit jeher als fundamentales Kriterium für die Legitimität staatlicher Eingriffe angesehen, zumindest im Kontext des freiheitlich demokratischen Staates. Die Globalisierung und besonders die Europäisierung des Verfassungsrechts haben den Grundsatz der Verhältnismäßigkeit, zumindest in Europa, in den vergangenen Jahren zurück in das Epizentrum rechtswissenschaftlicher Debatten gerückt. Allerdings haben seine Mehrdeutigkeit und Vagheit, trotz seiner quasi-universellen Anziehungskraft, dazu geführt, dass einzelne Autoren seinen heuristischen Wert, gar seinen Nutzen, herabspielen. Im vorliegenden Beitrag wird die These vertreten, dass diese Mehrdeutigkeit, ungeachtet der zum Teil berechtigten Kritik, eines der stärksten Attribute des Grundsatzes der Verhältnismäßigkeit ist. Von einem dialektischen Standpunkt betrachtet kann der Verhältnismäßigkeitsgrundsatz, richtig angewandt, zu einem wertvollen Instrument, nicht nur als Mittel der rechtlichen Harmonisierung, sondern auch als demokratisches Gegengewicht zu einem rein rechtspositivistischen Ansatz, werden.*

## I. Introduction

Proportionality in its abstract form has never ceased to be considered as a fundamental criterion of legitimacy of legal action and reaction. From the Code of Hammurabi to the Magna Carta, from Antigone to the Merchant of Venice and from Aristotle to Grotius, Beccaria, Bentham or Kant, it is difficult to find a conception of justice or fairness that is not closely interrelated with a certain idea of a necessary proportion between legal interests and the means used for their protection.

Traditionally associated with the level of justified punishment, the limits of legitimate self-defence or the use of force in international relations, proportionality has been more recently recognised and developed in continental Europe as a general constitutional principle, covering practically every domain of public action. Its use has been spread across almost every legal order and almost every type of legal discourse, albeit taking different meanings, shaped by different traditions and entailing different legal consequences.<sup>1</sup> Apart from the existence of different legal definitions, the conceptual difficulties of proportionality are further accentuated by the “inter-systemic” character of its legal expression. Indeed, the assessment of proportionality can never rely on purely legal criteria; it is always dependent on extra-legal arguments, derived from cultural, moral and imaginary assumptions (II).

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1 On the history of the concept and the spread of its use, see *inter alia* A. BARAK, *Proportionality, Constitutional Rights and their Limitations*, Cambridge: Cambridge University Press, 2012, notably 457 *et seq.*; M. COHEN-ELIYA, I. PORAT, *Proportionality and Constitutional Culture*, Cambridge: Cambridge University Press, 2013, 10 *et seq.*; E. ENGLE, “The History of the General Principle of Proportionality: An Overview”, *Dartmouth Law Journal*, 10(1), 2012, 1-11; J. G. GARDAM, “Proportionality and Force in International Law”, *American Journal of International Law*, 87(3), 1993, 391-413; A. STONE SWEET, J. MATHEWS, “Proportionality Balancing and Global Constitutionalism”, *Columbia Journal of Transnational Law*, 47, 2008, 72-164.

Such difficulties have led a considerable part of the doctrine to put the heuristic value, nay the usefulness of the concept into question, suggesting either its analytical objectification or its abandonment and its replacement by other, more determinable ones. Indeed, an excessive recourse to the principle of proportionality not only entails the risk of controversial legal decisions, but may also undermine the sovereign decision-making of legislative, administrative or judicial authorities, thus resulting in a surreptitious institutional rebalancing (III).

That being said, in this paper it will be argued that, despite the soundness of some of these criticisms, it is exactly this inter-systemic and non-deterministic nature that makes proportionality so indispensable, especially in a normative framework as complex as the current European one. It will be suggested that, from a dialectical point of view, the principle of proportionality offers a powerful – yet dangerous – tool, not only for legal harmonisation, but also for a constant democratic review of positive law (IV).

## II. The legal and social polysemy of the principle of proportionality

In Europe, the last three decades have seen a regain of interest in proportionality. The largely regulatory and uncodified character of EU law, the often conflictual interactions between European and national legal systems, the arguably insufficient judicial control of administrative action, as well as the slow but undeniable harmonisation and unification of punitive rules in a growing number of legal domains, have brought the principle back to the very epicentre of legal casuistry. That being said, proportionality is not understood univocally. Beyond its most abstract – and rather tautological – definition as the requirement for any action to be proportionate to its objectives,<sup>2</sup> it takes specific forms and meanings, depending both on its legal and materiel context.<sup>3</sup>

### 1. The variability of legal notions of proportionality

As far as the legal meaning of proportionality is concerned, variations appear not only across different legal orders, but also across different legal fields; or even within the same legal order and legal field, due to different theoretical approaches.

For example, while in Germany proportionality has been, since the nineteenth century, a general constitutional principle, thoroughly analysed and defined in the case law of the higher courts, and as such it is not only confined to administrative measures but applies to legislative measures as well, in France, it has been used in a less conceptualised and more pragmatic approach, mainly as a means of review of the “in-

2 T. TRIDIMAS, *The General Principles of EU Law*, Second Edition, Oxford: Oxford University Press, 2009, 136.

3 See also J. S. SAMPAIO, “The Contextual Nature of Proportionality and Its Relation with the Intensity of Judicial Review”, in L. PEREIRA-COUTINHO, M. LA TORRE, S. D. SMITH (eds.), *Judicial Activism: An Interdisciplinary Approach to the American and the European Experiences*, Cham, Springer, 2015, 137-160.

ternal legality" of administrative acts.<sup>4</sup> In the UK, judicial review of government acts was for many years governed by the so-called "Wednesbury reasonableness" doctrine, which has been gradually replaced by the continental conception of proportionality, under the influence of the ECJ and the ECtHR.<sup>5</sup> In the US, the acceptance of proportionality as a constitutional principle is fairly limited and basically restricted into the field of criminal justice.<sup>6</sup>

In EU law, proportionality has been gradually adopted by the ECJ as a fundamental principle deriving from the Rule of Law.<sup>7</sup> The Court's conception of proportionality has been inspired by the German threefold approach, which examines the suitability, the necessity and the "*stricto sensu* proportionality" of a measure, with regard to the objectives this measure is expected to fulfil (although, in practice, no distinction is usually applied by the Court between the second and the third criterion).<sup>8</sup> Initially appeared as a ground for review of Community measures, proportionality was later developed as a ground for review of national measures affecting one of the Community's four fundamental freedoms, while, after the entry into force of the Maastricht Treaty, its scope has been extended also to the review of legislative acts of the Community, by virtue of Article 5(3) of the EC Treaty; it has been further extended by the entry into force of the Charter of Fundamental Rights, which recognises proportionality both as a fundamental principle of criminal justice (Art. 49) and as a general principle governing any limitation of human rights (Art. 52).

The principle of proportionality also occupies an important place in the case law of the ECtHR. In order to define which limitations of rights are "necessary in a democratic society" for the purposes of Articles 8 to 11 of the Convention, the ECtHR and the European Commission of Human Rights have developed a framework of interpretation,<sup>9</sup> which consists of three principal elements: the nature of democratic necessity, the question of the burden of proof, and the margin of appreciation of the contracting par-

4 See *inter alia* W. VAN GERVEN, "The effect of proportionality on the actions of Member States of the European Community: National viewpoints from continental Europe", in E. ELLIS (ed.), *The Principle of Proportionality in the Laws of Europe*, Oxford: Hart, 1999, 37-64.

5 See A. STONE SWEET, J. MATHEWS, *op. cit.*, 147.

6 See notably V. C. JACKSON, "Constitutional Law in an Age of Proportionality", *The Yale Law Journal*, 124(8), 2015, 3094-3196. On the analytical devices used by the US Supreme Court to assess proportionality in criminal cases, see Y. LEE, "Why Proportionality Matters", *University of Pennsylvania Law Review*, 160(6), 2012, 1835-1852.

7 It is widely considered that the first proportionality test has been applied by the ECJ in 1970, in the *Internationale Handelsgesellschaft* case (ECJ, Case C 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel*, [1970] E.C.R. 1125, at 1146).

8 For a detailed analysis of the ECJ case law on proportionality, see notably G. DE BURCA, "The Principle of Proportionality and its Application in EC Law", *Yearbook of European Law*, 13, 1993, 105-150; P. CRAIG, *EU Administrative Law*, Second Edition, Oxford: Oxford University Press, 2012, 590 *et seq.*; N. EMILIOU, The Principle of Proportionality in European Law: A Comparative Study, London: Kluwer, 1996; F. G. JACOBS, "Recent developments in the Principle of Proportionality in European Community Law", in E. ELLIS (ed.), *op. cit.*, 1-22; J. SCHWARTZE, *European Administrative Law*, Revised edition, Sweet & Maxwell, 2006, 718 *et seq.*; T. TRIDIMAS, *op. cit.*, 136 *et seq.*

9 See notably ECtHR, *Handyside v. the United Kingdom*, (7 December 1976), (Application no. 5493/72); *Silver and others v. the United Kingdom*, (25 March 1983), (Application nos.

ties.<sup>10</sup> Furthermore, the Court of Strasbourg has recognised proportionality as a general principle implied both by Articles 5<sup>11</sup> and 6<sup>12</sup> of the Convention. However, the highly casuistic nature of the reasoning of the Court has as a consequence a lack of clarity and predictability of its decisions, not permitting the deduction and the elaboration of a coherent theoretical approach of the limits of – and the exceptions to – the rights guaranteed by the Convention.<sup>13</sup>

As mentioned above, important conceptual variations appear also between the understandings of the principle across different legal domains, even within the same legal order.

At the international level, different meanings of proportionality have appeared in international humanitarian law, international human rights' law, international trade law, maritime law or international criminal law.<sup>14</sup>

In EU law, the ECJ has been applying a different degree of intensity of control when reviewing community or national measures, while different standards are sometimes perceived in the different areas where the proportionality test has been applied: agricultural law, health and consumer protection, external trade, administrative penalties or protection of human rights.<sup>15</sup>

At the national level, the most important conceptual disparities in the understandings of proportionality are to be found between administrative and criminal law. This is firstly due to the stronger aspect of legality that characterises criminal law compared to the other legal domains. In criminal law, a primary proportionality assessment is *a priori* conducted by the legislature; at least in theory. Therefore, proportionality-based judicial review can either concern the law itself – which entails risks related to the principle of separation of powers – or the rather restricted margin of appreciation of criminal judges with regard to the nature and the amount of the penalty. Secondly, due to the different functions that criminal punishment and administrative action serve, the conceptions of necessity, usefulness and commensurability of measures and sanctions differ as well. Even seen from the most utilitarian point of view, criminal penalties always carry a somewhat retributive aspect and are concerned by some sort of ordinal proportionality.<sup>16</sup> Although the apparent antinomy between utilitarian and retributive rationales can be, in theory, resolved by recourse to the double negative

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5947/72, 6205/73, 7107/75, 7113/75 and 7136/75); *Lingens v. Austria*, (8 July 1986), (Application no.9815/82).

10 S. GREER, *The exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Human rights files No. 15, Council of Europe Publishing, 1997, 14.

11 See *inter alia* ECtHR, *Gatt v. Malta*, (27 July 2010), (Application no. 28221/08), 40.

12 See *inter alia* ECtHR, *Ashingdane v. the United Kingdom*, (28 May 1985), (Application no. 8225/78), 57.

13 See also J. CHRISTOFFERSEN, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention of Human Rights*, Leiden: Martinus Nijhoff, 2009, 31 *et seq.*:

14 See notably M. NEWTON, L. MAY, *Proportionality in International Law*, Oxford: Oxford University Press, 2014.

15 For a detailed analysis, see P. CRAIG, *op. cit.*, 590 *et seq.*; T. TRIDIMAS, *op. cit.*, 136 *et seq.*

16 See notably A. VON HIRSCH, "Proportionality in the Philosophy of Punishment", *Crime and Justice*, 16, 1992, 55-98; see also J. DEIGH, "Punishment and Proportionality", *Criminal Justice Ethics*, 33(3), 2014, 185-199. Contra, M. BÖSE, "The Principle of Proportionality", *European Journal of Criminology*, 1(1), 2014, 1-16.

condition expressed in the famous adage attributed to *Ortolan* “*pas plus qu'il n'est juste, pas plus qu'il n'est utile*”, in practice, the outcomes of – even moderate – utilitarian and retributive theories may differ significantly, because of their different conceptions both of “justice” and “utility”. Lastly, differences also arise from the dissimilar structure of administrative and criminal norms. While in administrative law sanctioned norms (permissive or mandatory) can be – and are in most cases – quite independent from the sanctioning ones, in criminal law sanctioned and sanctioning norms form in principle a single penal norm, which, as explained above, contains already a primary proportionality assessment. Therefore, for example, although the aforementioned threefold structure may be applicable in both fields, in the case of administrative acts or measures, what is usually most examined is their suitability and necessity, while criminal penalties are mainly subject to a strict test of proportionality.<sup>17</sup>

## 2. The inherently inter-systemic nature of the notion of proportionality

The heterogeneity of conceptions of proportionality does not only stem from the different degree and form of recognition accorded to the principle by each legal system in each legal field – or by the structural differences of the legal systems themselves – but also from the diverse sociomoral understandings of what and why should be considered proportionate or disproportionate in a given factual situation. Being largely dependent on extra-legal assumptions and considerations, the principle of proportionality, even when analysed and expressed in a detailed and logically structured way, functions as a “passage” through which positivist analysis of law opens itself to sociomoral questions and claims. Therefore, even if it were possible to come up with harmonised criteria for the legal assessment of proportionality,<sup>18</sup> the problems related to its factual assessment would remain.

Certainly, there have been efforts to create formulas in order to objectify and quantify proportionality, through the establishment of a “common metric”. *Robert Alexy*, for example, sees proportionality – as every other legal principle – as a requirement for optimisation. He considers suitability and necessity as requirements related to what is factually possible and *stricto sensu* proportionality as related to what is legally possible. For *Alexy*, the first two elements are pure expressions of Pareto optimality; for the third one, he proposes a “Weight Formula”, elaborated on the basis of his “Law of Balancing”, aiming to measure the respective weight of colliding princi-

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lity and the Protection of Legal Interest”, *European Criminal Law Review*, 1/2011, 35-43, at 36, who considers proportionality as a purely utilitarian principle, refuting any retributive aspect in it.

17 See also T. TRIDIMAS, *op. cit.*, 139 *et seq.*, 234 *et seq.*

18 See, for example, E. T. SULLIVAN, R. S. FRASER, *Proportionality Principles in American Law: Controlling Excessive Government Action*, Oxford: Oxford University Press, 2008, who argue for the embracement of the European conception of proportionality by American judges. For a critical review of the book, see R. SINGER, “Proportionate Thoughts about Proportionality”, *Ohio State Journal of Criminal Law*, 8(1), 2010, 217-250.

ples in each concrete case.<sup>19</sup> Alexy's "Weight formula" has been further elaborated by *Matthias Klatt* and *Moritz Meister* in an interesting and convincing, albeit overly complex theory.<sup>20</sup> In the field of criminal policy, an interesting attempt of systematisation had been undertaken by the French *Commission de révision du Code Pénal*, who had proposed a three-grade assessment test of proportionality, based on the importance of the protected legal good, the objective gravity of the harm (*actus reus*) and the moral gravity of the conduct (*mens rea*), in order to determine in which cases the recourse to criminal law was needed and in which ones non-criminal sanctions would be more suitable.<sup>21</sup>

While such theoretical constructions can offer valuable guidelines for more rational decisions, they are not sufficient to get entirely rid of the extra-legal criteria that will finally determine any judgement on proportionality.<sup>22</sup> Even if the suitability and the necessity of some measures can be, to some extent, objectified and quantified – which is not always the case –, the exact content of the *stricto sensu* test would still remain undeterminable,<sup>23</sup> especially in the case of punitive law, where not only the harm of an offence would have to be quantified, but also the nature and amount of the optimal sanction.

Arguably, several of the empirical assumptions involved in proportionality assessments could be, to a certain extent, "objectified" by the recourse to non-legal scientific fields.<sup>24</sup> For example, the harm caused to the financial system by the various breaches of banking regulations, as well as the adequate, necessary and proportionate level of pecuniary sanctions applied for such breaches, may be analysed by economic and financial studies; the harm caused to society by the use of cannabis may be further examined by medical and sociological studies, in order to reassess the necessity of its criminalisation;<sup>25</sup> the impact that an administrative decision authorising the construction of a nuclear plant could have on the environment may be calculated only with recourse to natural sciences.

19 R. ALEXY, "Constitutional rights and proportionality", *Revus – Journal for Constitutional Theory and Philosophy of Law*, 22 (2014), 51-65; R. ALEXY, *A Theory of Constitutional Rights*, Oxford: Oxford University Press, 2010 [2002], notably 66 *et seq.*

20 M. KLATT, M. MEISTER, *The Constitutional Structure of Proportionality*, Oxford: Oxford University Press, 2012.

21 M. DELMAS-MARTY, *Les grands systèmes de politique criminelle*, Paris: P.U.F., 1992, 287 *et seq.*

22 See also J. HABERMAS, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, 1996, 259, who criticises the arbitrary and "unreflective" character of Alexy's "weighing" of principles: "Because there are no unambiguous units for measuring so-called legal values, Alexy's economic model of justification also does not help operationalize the weighing process" (n. 38). It should be noted that the non-deterministic character of the "weighing" procedure is also acknowledged by Alexy himself (*op. cit.*, 2010, 100).

23 See T.-L. HARBO, "The Function of the Proportionality Principle in EU law", *European Law Journal*, 16(2), 2010, 155-185, at 165.

24 See also M. KLATT, M. MEISTER, *op. cit.*, 109 *et seq.*

25 See also the much commented decision of the German Constitutional Court on this question: BVerfGE 90, 145 (1994), already referred to both by Alexy and Klatt and Meister.

However, on the one hand, it is practically impossible to conduct, for every single conflict of interests that is brought before the courts, extensive scientific research, which can take years and, besides, does not offer any guarantee of a unanimous outcome.<sup>26</sup> On the other hand, there are clearly situations where the judgement on proportionality is purely cultural, political, ideological, moral, strategic; therefore, subjective. The suitability, the necessity and, especially, the *stricto sensu* proportionality of forbidding the circulation of *Mein Kampf*, of criminalising blasphemy, of banning the projection of a controversial film,<sup>27</sup> of declaring a “state of emergency” after a terrorist attack or of cancelling a football match in order to prevent or to sanction phenomena of hooliganism, cannot be assessed by scientific expertise, as it cannot be assessed by purely juridical methods. In such situations, at least when the legal solution cannot be positively deduced from the letter of positive law (including previous case law), the judge will have to adjudicate, consciously or unconsciously, solely or accessorially, on the basis of morally and politically driven assumptions and considerations.

### III. The downplay of the principle of proportionality by part of the doctrine

The conceptual indeterminacy of the principle of proportionality has led to criticisms and objections of various sorts from an important number of – mainly Anglo-Saxon – scholars. Some of these concern the very essence of the principle itself, while others consist in empirical claims about the practice of the courts;<sup>28</sup> some suggest further concretisation and objectivatation of the concept through further predetermined structures,<sup>29</sup> while others opt for the minimalisation or the complete abandonment of its use.<sup>30</sup> The nature of these criticisms vary essentially according to whether proportionality is seen as a general constitutional principle, or a principle governing only criminal justice issues.

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26 The “epistemic reliability” balancing method proposed by Klatt and Meister is theoretically interesting, but probably too complex to be functional in every-day judicial practice.

27 See ECtHR, *Otto Preminger Institut v. Austria*, (20 September 1994), (Application no. 13470/87).

28 See also F. J. URBINA, “Is it Really That Easy? A Critique of Proportionality and ‘Balancing as Reasoning’”, *Canadian Journal of Law and Jurisprudence*, 27(1), 2014, 167-192, at 167-168; F. J. URBINA, *A Critique of Proportionality and ‘Balancing*, Cambridge: Cambridge University Press, 2017, *passim*.

29 See, for example, T. J. GUNN, “Deconstructing Proportionality in Limitations Analysis”, *Emory International Law Review*, 19, 2005, 465-498; K. MÖLLER, “Proportionality: Challenging the Critics”, *International Journal of Constitutional Law*, 10(3), 2012, 709-731.

30 S. TSAKYRAKIS, “Proportionality: An assault on human rights?”, *International Journal of Constitutional Law*, 7(3), 2009, 468-493.

## 1. Criticisms against proportionality in constitutional law

In constitutional theory, the main arguments in favour or against the principle of proportionality are derived from more general theoretical positions, related mainly to the ontological differences between principles and rules or, more specifically, to the question whether rights should be treated as interests or as “trumps”. Most objections to proportionality come from the sympathisers of the purest versions of the “rights as trumps” model,<sup>31</sup> who argue, on the one hand, that notions such as proportionality or balancing are irreconcilable with the absolute character of certain rights;<sup>32</sup> on the other hand, that constitutional rights are basically incommensurable, and therefore not prone to proportionality assessments.<sup>33</sup>

In a more moderate way, *Stavros Tsakyrakis* rejects the absolute incommensurability of rights and the incompatibility of their protection with any idea of balancing. He claims though that “the courts often use the language of balancing and proportionality while, in reality, they engage in substantive moral reasoning”,<sup>34</sup> in that sense, proportionality would just constitute “a misguided quest for precision and objectivity in the resolution of human rights disputes”.<sup>35</sup> *Tsakyrakis*, concludes that “the problem with the rhetoric of balancing in the context of proportionality is that it obscures the moral considerations that are at the heart of human rights issues”,<sup>36</sup> leading, besides, to solutions that are morally wrong.<sup>37</sup>

Similar arguments have been put forward by *Grégoire Webber*, who concludes that “despite the pervasiveness of balancing and proportionality in constitutional reasoning, it is not clear that recourse to these ideas is at all helpful in resolving the difficult questions involved in struggling with right-claims”.<sup>38</sup>

*Francisco Urbina* sees as the main problem of proportionality the fact that “it abandons an enterprise which is at the heart of legal practice: crafting legal categories able to express the requirements of practical reason in the different types of cases”.<sup>39</sup> According to *Urbina*, “one cannot both allow for open-ended moral reasoning [...] and

31 However, not from *Ronald Dworkin* himself. See notably J. WEINRIB, “When Trumps Clash: Dworkin and the Doctrine of Proportionality”, *Ratio Juris* (forthcoming), available at SSRN: <http://dx.doi.org/10.2139/ssrn.2832405> (30/08/2017), who argues convincingly that Dworkin’s theory of “rights as trumps” is not incompatible with the doctrine of proportionality.

32 See also T. I. HARBO, *op. cit.*, 166 *et seq.*; M. KLATT, M. MEISTER, *op. cit.*, 15 *et seq.*

33 This – not very convincing – thesis is well-resumed in the statement of US Supreme Court Justice *Antonin Scalia* in *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988): “It is more like judging whether a particular line is longer than a particular rock is heavy”.

34 S. TSAKYRAKIS, *op. cit.*, 492.

35 *Id.*, 468.

36 *Id.*, 493.

37 *Id.*, 488.

38 G. WEBBER, *The Negotiable Constitution: On the Limitation of Rights*, Cambridge: Cambridge University Press, 2009, notably 87 *et seq.*, at 87.

39 F. J. URBINA, *op. cit.* (2014), 192.

at the same time have the benefits of technicality of law which allows for legally directed adjudication".<sup>40</sup>

Several other criticisms have been raised against specific views and theories on proportionality or against the compatibility of proportionality with the particularities of specific legal traditions.<sup>41</sup>

## 2. Criticisms against proportionality in criminal law

Since proportionality is, as explained above, differently understood in general public law and in criminal law, it is not surprising that the nature of criticisms expressed in the two domains can also differ. Of course, the general arguments concerning the dangers of an excessively intrusive judicial control over the work of the legislature are particularly pertinent in criminal law as well. However, most critical objections to the use of proportionality in criminal law are mainly associated with fears of a revival of penal retributivism.

*Nicola Lacey* and *Hanna Pickard* describe the principle of proportionality as a “chimera”, which does not allow to properly consider “the institutional conditions needed to foster robust limits on the State’s power to punish”.<sup>42</sup> While they admit that proportionality may remain central to other types of penal theories (such as the semi-consequentialist approach of *H.L.A. Hart*), *Lacey* and *Pickard* consider that “the retributive revival” of contemporary criminal law “was founded on an exaggerated idea of what proportionality, in itself, could offer”,<sup>43</sup> arguing that “adequate limits to punishment need to be grounded in substantive judgements about fair and appropriate penalties which are meaningful to, and regarded as legitimate by, the populace in whose name they are imposed”.<sup>44</sup>

*Carol Steiker* critically examines the potential of using proportionality as a means of limitation of preventive justice. While she recognises some promising merits of such an idea, she highlights the difficulties in measuring future harms and she is particularly worried by the possibility of pretextual use of proportionality in order to overcome legal constraints, as well as of a more general normative hegemony of proportionality over other justification bases.<sup>45</sup>

*Joel Goh* localises the problems arising from the concept of proportionality to: (a) the vagueness of definitions and theories of proportionality in the law, (b) the irrecon-

40 *Ibidem*.

41 For an overview of the criticisms related to the incompatibility of the notion of proportionality with the US constitutional order, see *inter alia* V. C. JACKSON, *op. cit.*, 3159.

42 N. LACEY, H. PICKARD, “The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems”, *The Modern Law Review*, 78(2), 2015, 216-240, at 219. A less critical but still reluctant approach can be found in N. LACEY, “The Metaphor of Proportionality”, *Journal of Law and Society*, 43(1), 2016, 27-44.

43 N. LACEY, H. PICKARD, *op. cit.*, 219.

44 *Ibidem*.

45 C. S. STEIKER, “Proportionality as a Limit on Preventive Justice”, in A. ASHWORTH, L. ZEDNER, P. TOMILN (eds.), *Prevention and the Limits of the Criminal Law*, Oxford: Oxford University Press, 2013, 194-213, at 207 *et seq.*

cibility between proportionality and the objectives of punishment, (c) the inherently different natures of crime and punishment, (d) the underlying character of the proportionality principle as a mere reflection of sentiments. He concludes that proportionality in criminal justice is an unattainable ideal, since it “is derived not from merely considering crime and punishment on their own, but through taking into account the social sentiments towards them, as well as the values attached to crimes and punishments”.<sup>46</sup>

## IV. The double dialectical function of the principle of proportionality

Whereas many of the criticisms concerning the limited heuristic value of proportionality are formally correct, the assertions about the meaninglessness or the uselessness of the concept are much less convincing. Indeed, the absence of a fixed meaning is not tantamount to semantic emptiness. The principle of proportionality may not give a clear picture of what is proportionate and what is not; it gives though an impression and an order of magnitude, either when it is understood as necessity and suitability or as ordinal proportionality.<sup>47</sup> As a “sensitizing concept” with quasi-universal appeal, it offers “a general sense of reference and guidance in approaching empirical instances”.<sup>48</sup> Therefore, while it is true that no “scientific” method can – or should – give the principle a perfectly determinable content, proportionality may arguably function as a valuable accessory tool for the evolution of law in a harmonised and democratic context.

### 1. In search of a common language: The principle of proportionality as a vehicle of legal harmonisation

The growing success of proportionality in European law is not fortuitous. As *Michel Rosenfeld* points out, “proportionality analysis and judicial balancing, which are widely used both at the national and transnational levels, are also constitutional interpretive tools that seem adaptable to the goal of harmonisation within a multi-layered and highly segmented legal and political universe”.<sup>49</sup> In that sense proportionality is becoming an indispensable piece of the *lingua franca* of European (or global) constitutionalism.<sup>50</sup>

46 J. GOH, “Proportionality – An Unattainable Ideal in the Criminal Justice System”, *The Manchester Review of Law, Crime and Ethics*, 2, 2013, 41-71.

47 See also in that sense V. ALFONSO DA SILVA, “Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision”, *Oxford Journal of Legal Studies*, 31(2), 2011, 273–301.

48 H. BLUMER, “What is wrong with social theory?”, *American Sociological Review*, 18, 1954, 3-10, at 7; H. BLUMER, *Symbolic Interactionism: Perspectives and Method*, Berkeley: University of California Press, 1969, notably 127-182.

49 M. ROSENFELD, “Rethinking constitutional ordering in an era of legal and ideological pluralism”, *International Journal of Constitutional Law*, 6(3&4), 2008, 415-455, at 451.

50 M. COHEN-ELIYA, I. PORAT, *op. cit.*, 109.

Of course, as all the critics of proportionality have pointed out more or less successfully, no matter what legal or extra-legal criteria of objectivity jurisprudence will adopt in order to give the principle a more determined nature, proportionality will never be “a naturally existing relationship”, but rather “a product of political and social construction, cultural meaning-making, and institution building”<sup>51</sup>. Nevertheless, what such views often disregard is that legal harmonisation is itself a product of political and social construction, cultural meaning-making, and institution building.

Indeed, harmonisation and unification of law in Europe have not resulted from normative necessities or reproductive procedures inherent to the pre-existing national systems. They are the expression and the concretisation of an ongoing political project, which implies the creation of a new – and fairly original – legal order. Using for this purpose a coherent, deterministic and – consequently – overreaching normative architecture would perhaps offer significant advantages in terms of legal security. Such an option would though be realistically impossible, since it would imply a silent death of national law, for which, historically, there has been yet no common political will.

Of course, the excessively casuistic evolution of European rule-making is not without dangers for the Rule of Law (which is though still endorsed as a common meta-principle in all European countries and in the Union itself); especially, if one takes into account the institutional democratic deficit of which European institutions are often accused and the influence of powerful interest groups on the Union’s decision-making processes. Furthermore, apart from politically-driven considerations, the nature of proportionality creates obvious difficulties related to the hierarchy of norms. For example, neutralising the application of national rules of constitutional order, on the sole basis of the European requirement for proportionality of sanctions, can pose questions about the limits of the legitimate primacy of EU law.<sup>52</sup>

Nevertheless, if harmonisation of national rules is endorsed as a legitimate objective, it is difficult to imagine how this objective could be achieved without any recourse to vague normative schemes, such as the sibyllic leitmotiv found in several EU legal texts, inviting Member States to provide for “effective, dissuasive and proportionate” penalties, or the “amalgamation”<sup>53</sup> of criminal and administrative punitive law undertaken by the ECtHR and followed – at least in its general idea – both by the CJEU and national jurisdictions.<sup>54</sup> It is also difficult to disregard that, at least in European law, recourse to proportionality functions as a force of coherence and rationalisation of judicial and administrative decision-making, compensating the lack of codi-

51 N. LACEY, H. PICKARD, *op. cit.*, 216.

52 The recent Tarrico case of the CJEU and the debate it caused give a good example of such problems. CJEU, Case C 105/14, *Criminal proceedings against Ivo Taricco and Others*, ECLI:EU:C:2015:555.

53 C. E. PALIERO, “The Definition of Administrative Sanctions – General Report” in O. JANSEN (ed.), *Administrative Sanctions in the European Union*, Cambridge: Intersentia, 2013, 7.

54 As shown especially in the *Jussila* case (ECtHR, *Jussila v. Finland* (23 November 2006), (Application no. 73053/01), 29 *et seq.*), this amalgamation is in fact nothing more than a test of ordinal proportionality of punitive sanctions.

fication and dogmatic treatment found in national legal systems (at least the continental European ones).

Whether the evolution of the European legal order will go towards a more complete judge-made system of rules and principles, similar to the one found in Common Law, or it will be gradually replaced by a more codified and dogmatic system, similar to the ones found in continental European countries,<sup>55</sup> is a question that only history will be able to answer. Nevertheless, while the procedure of European rapprochement is still ongoing, the indeterminate nature of the principle of proportionality will not only remain an unavoidable reality, but can also prove to be a vehicle for a democratically legitimised evolution of law; at least, as long as the use of proportionality remains itself proportionate.

## 2. Bringing the *Demos* back in? The principle of proportionality as a vehicle of democratisation of law

Suggesting that the arbitrariness permitted by the legal use of indeterminate concepts such as proportionality may enhance the democratic character of a legal system may sound paradoxical.<sup>56</sup> The paradox lies in the fact that, in the European legal tradition, the democratic principle is merged with the principle of Rule of Law into one single principle. This merged principle of the Democratic Rule of Law contains, at least ostensibly, a fundamental antinomy: On the one hand, the Rule of Law is meant to offer rational, equal and, to some extent, predictable solutions. The deduction of legal solutions in the Rule of Law is therefore a product of *technē* or *epistêmē*. Ideally, no political or moral considerations are allowed to influence the outcomes of legal syllogisms. The democratic principle, on the other hand, in its radical form, is characterised by the openness of political decisions, which are a mere product of *doxa*. Of course, this antinomy not only can be eluded, as far as the principle of Rule of Law and the need for some degree of technicality in the legal system are endorsed by *doxa*, but is also largely superficial. Purely mechanical understandings of a perfectly predetermined and “scientific” law, as well as radical rejections of any categorical validity of positive law, are nothing but naïve, caricatural misunderstandings of positivist and realist theories respectively. However, there are situations where Rule of Law and Democracy, as rationales of decision-making, can result in quite opposite outcomes.

The fact that the use – or not use – of the principle of proportionality in judicial syllogisms may lead, because of its inherent subjectivity, to controversial decisions is undeniable. Besides, the same can be said for many legal notions whose definitions are dependent on cultural and moral elements, such as “good morals (*gute Sitten, bonnes mœurs, etc.*)”, “public order”, “human dignity”, and several others. Nevertheless,

<sup>55</sup> See also F. SCHAUER, “Freedom of expression adjudication in Europe and the United States: a case study in Comparative Constitutional Architecture”, in G. NOLTE (ed.), *European and US Constitutionalism*, Cambridge: Cambridge University Press, 2005, 49-69.

<sup>56</sup> As Jacques Derrida had pointed out, “the more confused the concept, the more it lends itself to opportunistic appropriation” (J. DERRIDA in G. BORRADORI, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida*, Chicago: University of Chicago Press, 2004, 103-104).

as Patricia Woods has pointed out, “ironically, the most controversial legal decisions may increase the political salience of the judiciary to the greatest extent; it is controversial decisions that throw the brightest spotlight of national attention on the judiciary”.<sup>57</sup> Moreover, unlike legal decisions based upon highly technical arguments, judgements on proportionality are much more accessible to public debate. Therefore, the principle of proportionality is not only capable of bringing the political back in the epicentre of the juridical discourse, but also, inversely, of bringing the juridical back to the political.

This fact, leads to a double condition of democratisation. On the one hand, it permits legal rules (including rules deducted from case law) that have lost their moral validity to be overturned under the pressure of public opinion (of course, the obsolescence of legal rules is not exclusively dependent upon questions of proportionality; but very often it is). On the other hand, it puts pressure on administrative and judicial authorities to reflect, in a justifiable manner, on the intersubjective determination of proportionality in each specific case, in order to avoid their decisions being overruled by judicial review.<sup>58</sup>

Undoubtedly, both of these aspects entail dangers, especially if proportionality-based arguments are used excessively and become predominant over other, also fundamental, legal principles. Besides, the democratic principle is not about infallible decision-making; it is just about decisions taken within democratic procedures. Neither the “public opinion” nor any judge or administrative authority can claim any kind of infallibility.<sup>59</sup> Therefore, in order to ensure some kind of rationality of legal decisions – it can be presumed that some degree of rationality of decisions is required by the democratic *doxa* –, the principle of proportionality needs indeed some kind of explicit or implicit objectification. In this process of objectification, two kinds of elements are of particular importance: Firstly, the extra-legal criteria that will determine the naturalistic conception of an “objective” proportionality (in other words, the role that will be reserved to scientific knowledge and expertise in the outcome of legal decisions); secondly, the legal criteria that will determine the normative interactions between the “intersubjective” legal construction of proportionality and other rules and principles.

A lot of ink has been spilled over efforts to construct a general theory, combining these elements in the optimal way. As mentioned above, some of these efforts have ended up with complex formulas intended to establish a common metric, in order to use proportionality as a “trump”; others, more sceptical, have ended up with the conclusion that proportionality should just remain an abstract ideal, guiding implicitly the choices of the judge or the legislator within their marge of appreciation; other, more

57 P. J. WOODS, *Judicial Power and National Politics: Courts and Gender in the Religious-Secular Conflict in Israel*, New York: State University of New York Press, 2008, 26.

58 A similar argument has been put forward by A. STONE SWEET, J. MATHEWS, *op. cit.*, 96.

59 As US Supreme Court Justice *Robert Jackson* had famously stated in *Brown v. Allen* 344 U.S. 443 (1953), “we are not final because we are infallible, but we are infallible only because we are final”.

moderate approaches end up with a circular argument, where the choice of the proper proportionality test would in fact be itself subject to sort of proportionality test.<sup>60</sup>

However, what many of these efforts fail to realise is that the notion of proportionality is in reality a sort of a Schrödinger's cat. It is simultaneously a rule and a principle; it can be simultaneously used as an abstract "interest" or a strong "trump". The concrete way in which proportionality will be used in each specific case is always dependent upon casuistic or situationist judgements; therefore, it always suffers from some degree of unpredictability. A dialectical understanding of proportionality does not, of course, offer any solution to this problem of unpredictability. It just helps to understand this unpredictability as a challenge, rather than a problem.<sup>61</sup>

## V. Conclusions

The analytical arguments against the use of the principle of proportionality, because of its indeterminacy, its subjectivity or its impermanence, may be resumed in the famous concluding proposition of *Wittgenstein's Tractatus*: "Whereof one cannot speak, thereof one must be silent".<sup>62</sup> However, the conception of law as a complete formal language with predetermined outcomes has well-known limits; especially in a historical and political context as the current one, where the European legal order is under a process of constant transformation and evolution. Therefore, whereas the concept of proportionality has little to offer to the radical positivist jurist, or the Leibnizian legal philosopher who wants to understand legal principles as Euclidian axioms,<sup>63</sup> the convenience it offers derives exactly from the incompleteness of law as a categorical normative system, as well as from the limits of the scientificity of law as an epistemological paradigm.

Of course, "proportionality is not a magic wand that judges wave to make all of the political dilemmas of rights review disappear"<sup>64</sup> and it certainly "does not constitute an independent, substantial basis according to which the judiciary can review legislative (or administrative) acts".<sup>65</sup> Nevertheless, deconstructing a legal concept is only a necessary and not a sufficient condition to suggest its abandonment; especially, when the debate is about such a prevalent concept, with such a long history and such a widespread recognition.

60 See, for example, M. KUMM, "Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement" in George Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy*, Oxford: Hart Publishing, 2007, 131-166.

61 For a similar conclusion, see A. STONE SWEET, J. MATHEWS, *op. cit.*, 163.

62 L. WITTGENSTEIN, *Tractatus Logico-philosophicus*, (translated by C. K. Ogden), London: Kegan Paul, Trench, Tubner & Co., 1922, § 7, 90.

63 See *inter alia* R. BERKOWITZ, "From Justice to Justification: An Alternative Genealogy of Positive Law", *UC Irvine Law Review*, 1(3), 611-630; R. BERKOWITZ, *The Gift of Science: Leibniz and the Modern Legal Tradition*, Cambridge: Harvard University Press, 2005, *passim*.

64 A. STONE SWEET, J. MATHEWS, *op. cit.*, 77.

65 G. DE BURCA, *op. cit.*, 106.

Therefore, in spite of its age, the debate on proportionality is likely to go on for the years to come. Far from being useless, proportionality can play a very important role in the development and the application of contemporary European law, especially as a democratic counter-balance to a merely mechanical approach of a highly regulatory – and highly uncertain – positive law. Certainly, the principle of proportionality cannot itself produce consensus. It is, though, a powerful notion, on the basis of which consensus can be built through other procedures, juridical or political, which are largely external to its semantic content. In that sense, the principle of proportionality is not only a basis for the limitation of rights, but also for the self-limitation of the law itself.