

# Contents

<i>List of Tables</i>	ix
<i>List of Cases</i>	xi
<i>List of Formulae</i>	xiii
<i>List of Variables</i>	xv
<b>Introduction</b>	<b>1</b>
<b>1. The Structure of the Proportionality Test</b>	<b>7</b>
I. The four proportionality rules	8
II. The weight formula	10
<b>2. Rights, Interests, and Trumps</b>	<b>15</b>
I. Interest model	16
II. Strong trump model	17
III. Medium trump model	22
IV. Weak trump model	23
V. Results	44
<b>3. The Method of Balancing</b>	<b>45</b>
I. Definitional generosity	45
II. Rule of law	49
III. The impact of morals on balancing	51
IV. Balancing as calculation	57
V. Incommensurability	58
VI. Inviolable core content	66
VII. Correctness and adequateness	68
VIII. Overemphasis of balancing	70
IX. Results	72
<b>4. Discretion and Deference</b>	<b>75</b>
I. Structural discretion	79
II. Epistemic discretion	80
III. Results	84

# Introduction

As constitutional law is being globalized, the quest for a common grammar or ‘generic constitutional law’<sup>1</sup> becomes more pressing. That proportionality may be one element of such common grammar is both widely accepted and highly contested. In various jurisdictions worldwide, and across a broad range of areas of the law, there is a firm consensus that the proportionality test plays an indispensable role in constitutional rights reasoning.<sup>2</sup> It is often assigned the central task of reconciling conflicting rights, interests, and values. Proportionality is said to enjoy ‘central importance . . . in modern public law’<sup>3</sup> and seen as ‘by far the most important criterion for the analysis of fundamental rights’. It is characterized as ‘a universal criterion of constitutionality’<sup>4</sup> and nothing short of ‘a foundational element of global constitutionalism’.<sup>5</sup> The most essential step of the proportionality test—balancing—is ubiquitous in law,<sup>6</sup> and a cutting-edge topic in current constitutional rights scholarship worldwide.<sup>7</sup>

Ever since Aleinikoff diagnosed the ‘age of balancing’,<sup>8</sup> it is acknowledged that balancing ‘has become a dominant technique of rights adjudication in the world’,<sup>9</sup> that its spread ‘across legal systems has been particularly

<sup>1</sup> DS Law, ‘Generic Constitutional Law’, 652.

<sup>2</sup> M Kumm, ‘Political Liberalism and the Structures of Rights: On the Place and Limits of the Proportionality Requirement’, 131 f; N Emiliou, *The Principle of Proportionality in European Law: A Comparative Study*; DM Beatty, *The Ultimate Rule of Law*; W Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, 266.

<sup>3</sup> T Hickman, ‘Proportionality. Comparative Law Lessons’, 31.

<sup>4</sup> DM Beatty, *The Ultimate Rule of Law*, 162.

<sup>5</sup> A Stone Sweet and J Mathews, ‘Proportionality Balancing and Global Constitutionalism’, 160.

<sup>6</sup> R Alexy, ‘On Balancing and Subsumption’, 436; F Schauer, ‘Balancing, Subsumption, and the Constraining Role of Legal Text’, 38.

<sup>7</sup> V Afonso da Silva, ‘Comparing the Incommensurable. Constitutional Principles, Balancing and Rational Decision’, 274; J Bomhoff and L Zucca, ‘The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights’, 424.

<sup>8</sup> TA Aleinikoff, ‘Constitutional Law in the Age of Balancing’, 943.

<sup>9</sup> A Stone Sweet and J Mathews, ‘Proportionality Balancing and Global Constitutionalism’, 72. See also TA Aleinikoff, ‘Constitutional Law in the Age of Balancing’, 943 f: balancing has become ‘widespread, if not dominant’.

rapid',<sup>10</sup> that it was 'the predominant method of constitutional interpretation',<sup>11</sup> and that it 'now dominates major areas of constitutional law'.<sup>12</sup> According to Kumm, proportionality analysis is perhaps one of 'the most successful legal transplants in the second half of the twentieth century'.<sup>13</sup>

The 'triumphant advance'<sup>14</sup> of the principle of proportionality has led to a situation nowadays in which, all in all, constitutional rights scholarship is 'engulfed by the discourse of balancing and proportionality'.<sup>15</sup> This consensus does not only apply to constitutional theory, but also to jurisprudential practice: 'Balancing has emerged as the jurisprudential model at the centre of the modern Court's work'.<sup>16</sup> Proportionality experiences a widespread application in various areas of law and jurisdictions, eg international humanitarian law<sup>17</sup> or global constitutionalism.<sup>18</sup> It is applied in all countries of Continental Europe, including Eastern Europe, as well as in Latin America, Canada, South Africa, Israel, and New Zealand.<sup>19</sup> It is omnipresent in European human rights law,<sup>20</sup> constitutes a core principle of EU law,<sup>21</sup> and is clearly stated in the General Comments of the UN Human Rights Committee<sup>22</sup> and in the

<sup>10</sup> M Cohen-Eliya and I Porat, 'American Balancing and German Proportionality. The Historical Origins', 263.

<sup>11</sup> TA Aleinikoff, 'Constitutional Law in the Age of Balancing', 944, fn 942.

<sup>12</sup> *Ibid.*, 965.

<sup>13</sup> M Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. A Review Essay on *A Theory of Constitutional Rights*', 595.

<sup>14</sup> M Borowski, 'Limiting Clauses: On the Continental European Tradition of Special Limiting Clauses and the General Limiting Clause of Art 52(2) Charter of Fundamental Rights of the European Union', 210.

<sup>15</sup> GCN Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship', 179.

<sup>16</sup> PW Kahn, 'The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell', 3.

<sup>17</sup> G Nolte, 'Thin or Thick? The Principle of Proportionality and International Humanitarian Law'; TM Franck, 'Proportionality in International Law'.

<sup>18</sup> A Stone Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism'.

<sup>19</sup> Cf R Clayton, 'Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle'; R Clayton, 'Proportionality and the HRA 1998: Implications for Substantive Review'; R Clayton and H Tomlinson, *The Law of Human Rights*, 323 ff; T Hickman, 'Proportionality: Comparative Law Lessons'; T Hickman, 'The Substance and the Structure of Proportionality'; A Stone Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism', 112 ff; TI Harbo, 'The Function of the Proportionality Principle in EU Law', 171 ff.

<sup>20</sup> 'The search for this balance is inherent in the whole of the Convention', ECtHR, *Sporrong and Lönnroth v Sweden* (1982), Appl no 7151/75; 7152/75, para 69. Cf J Rivers, 'Proportionality and Variable Intensity of Review', 182–7; S Greer, 'Balancing and the European Court of Human Rights: A Contribution to the Habermas–Alexy Debate'.

<sup>21</sup> J Schwarze, *European Administrative Law*, 718–26; JH Jans et al, *Europeanisation of Public Law*, 146; T Tridimas, *The General Principles of EU law*, 136 f.

<sup>22</sup> CCPR General Comment No 10 (1983), para 8; CCPR General Comment No 22 (1992), para 8; CCPR/C/21/Rev 1/Add 9 General Comment No 27 (1999), para 27.

Siracusa Principles under the International Covenant on Civil and Political Rights.<sup>23</sup> Clearly this list of jurisdictions and legal systems does not nearly exhaust the global scale, and one might well wonder whether the term ‘global constitutionalism’ was at all justified in this respect. On the other hand, however, if anything was to be universally applicable across various jurisdictions at all, a formal structure like the proportionality test, being as much independent from any special set of substantial values as possible, stands out well as a suitable candidate for construing a global grammar of constitutionality.

Apart from this, proportionality’s triumphant success has evoked severe criticism. To Webber, for example, ‘there is much to suggest that there is no promise at all in proportionality reasoning’.<sup>24</sup> On the contrary, he concludes that this success would result in ‘nothing short of a loss of rights’.<sup>25</sup> A member of the US Supreme Court has called balancing a ‘doctrinally destructive nihilism’,<sup>26</sup> and Tsakyrakis sees proportionality as ‘an assault on human rights’.<sup>27</sup> Schauer has stressed that US constitutional law stands apart from the common standard of proportionality, and argued that the US model was ‘more mature’.<sup>28</sup> According to this view, the proportionality test indicates a less mature legal system and may only play a transitional or intermediate role on the way towards a more mature constitutional law. With regard to the principles theory’s account of proportionality, Greer has challenged the view that Alexy’s model could be applicable to the European Convention on Human Rights (ECHR).<sup>29</sup> Möller has argued that the principles theory ‘fails to demonstrate that proportionality analysis and balancing have a rightful place in constitutional rights discourse’.<sup>30</sup>

<sup>23</sup> 7 HRQ 3. United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985).

<sup>24</sup> GCN Webber, ‘Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship’, 179.

<sup>25</sup> *Ibid.*, 202.

<sup>26</sup> *New Jersey v TLO*, 469 US 325 (1985) at 369 (Brennan J).

<sup>27</sup> S Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’; S Tsakyrakis, ‘Proportionality: An Assault on Human Rights? A Rejoinder to Madhav Khosla’.

<sup>28</sup> F Schauer, ‘Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture’, 68; F Schauer, ‘The Exceptional First Amendment’, 32. For an account of the differing historical origins of balancing in the US and Continental Europe, resulting in ‘a very different place’ of proportionality in both contexts, see M Cohen-Eliya and I Porat, ‘American Balancing and German Proportionality: The Historical Origins’.

<sup>29</sup> S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, 211–13; S Greer, ‘Balancing and the European Court of Human Rights: A Contribution to the Habermas–Alexy Debate’.

<sup>30</sup> K Möller, ‘Balancing and the Structure of Constitutional Rights’, 454.

In order to shed more light on the alarming tension between, on the one hand, the triumphant success of proportionality and, on the other, the severity of criticism, it is the central task of this book to engage in an in-depth analysis of this criticism. We will demonstrate that the objections against both the proportionality test and balancing are not convincing. In the course of this analysis, we will also clarify and further develop the current theory of proportionality and balancing. While we write on the basis of Alexy's principles-theory account of proportionality, which was adopted by constitutional courts 'all over the world',<sup>31</sup> we will at times suggest certain modifications and supplements to this account.

We will refer to some recent debates relevant to the issue. First and foremost, we will draw upon the most significant progress recently achieved in proportionality doctrine by Robert Alexy, the 'prophet of structured balancing'.<sup>32</sup> This progress has been achieved by means of Alexy's weight formula and his theory of judicial discretion, first presented in the postscript to his *Theory of Constitutional Rights*. It has inspired some important studies on both the rational grounds and the details of balancing.<sup>33</sup>

Secondly, we will make wide reference to the recent debate on proportionality between Tsakyrakis and Khosla in the *International Journal of Constitutional Law*<sup>34</sup> and to recent developments in the philosophy of practical reason and incommensurability, lucidly presented by Afonso da Silva.<sup>35</sup> Furthermore, we witness a broad debate on proportionality and its implications for the separation of powers in common law, following the disagreement between Lord Steyn and Lord Hoffmann as to the proper place of judicial deference under the Human Rights Act.<sup>36</sup> As Julian Rivers has demonstrated, the principle of proportionality as constructed in Alexy's

<sup>31</sup> M Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. A Review Essay on A Theory of Constitutional Rights', 595.

<sup>32</sup> L Zucca, 'Conflicts of Fundamental Rights as Constitutional Dilemmas', 28.

<sup>33</sup> R Alexy, 'The Weight Formula', 9; M Klatt, 'Taking Rights Less Seriously: A Structural Analysis of Judicial Discretion'; M Klatt and J Schmidt, *Spielräume im Öffentlichen Recht. Zur Abwägungslehre der Prinzipientheorie*; M Klatt and J Schmidt, 'Epistemic Discretion in Constitutional Law'. See also the contributions in J-R Sieckmann (ed), *Legal Reasoning: The Methods of Balancing*.

<sup>34</sup> M Khosla, 'Proportionality: An Assault on Human Rights? A Reply'; S Tsakyrakis, 'Proportionality: An Assault on Human Rights? A Rejoinder to Madhav Khosla'; S Tsakyrakis, 'Proportionality: An Assault on Human Rights?'

<sup>35</sup> V Afonso da Silva, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision'.

<sup>36</sup> Cf J Alder, 'The Sublime and the Beautiful: Incommensurability and the Human Rights', 697; TRS Allan, 'Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory'; A Kavanagh, 'Defending Deference in Public Law and Constitutional Theory'; AL Young, 'Deference, Dialogue and the Search for Legitimacy'.

principles theory is of relevance for UK human rights law.<sup>37</sup> There is also a debate in certain common law jurisdictions as to whether proportionality should be accepted ‘as a general criterion for judicial review in administrative law’.<sup>38</sup> Finally, the issue of proportionality is of great importance in solving conflicts between fundamental rights which have been addressed increasingly as a main topic in constitutional scholarship.<sup>39</sup> Although our approach is for the most part theoretical, we will refer to case law from the European Court of Human Rights (ECtHR),<sup>40</sup> the European Court of Justice (ECJ) and various national constitutional courts throughout the book in order to exemplify our argument and demonstrate its relevance for deciding concrete cases.

We will first present, in chapter 1, some basic elements of the structure of the proportionality test to which we will refer throughout the book. In chapter 2, we take up the question as to the object of balancing. We will engage in a detailed debate on the relation between proportionality and concepts like the trump model or the interest model. We will defend a weak trump model which, indeed, combines the ideas of trumping and balancing. In the course of this discussion, we will also present a new account of absolute rights, which is opposed to the standard view that balancing and absolute rights were contrarious. We then turn, in chapter 3, to the method of balancing, which we discuss in great detail. We refer to some of the standard objections to proportionality analysis—eg the arguments concerning definitional generosity, the rule of law, moral neutrality, and incommensurability—and demonstrate why these are not convincing. Chapter 4 then deals with the subject of balancing and defends the view that the proportionality test, if properly understood and combined with a theory of judicial deference or discretion, does not run counter to basic constitutional principles like the separation of powers. The remaining two chapters go into more detail as to the functioning of the proportionality test in concrete cases. In chapter 5 we will present a new account of the role of proportionality in positive rights, a fairly complex matter which nonetheless gives rise to important insights that are not easily obtained otherwise. Chapter 6 then looks more closely into a specific type of judicial deference, namely deference resulting from epistemic unreliability of the premises used in balancing. This, again, is a completely

<sup>37</sup> J Rivers, ‘A Theory of Constitutional Rights and the British Constitution’, xvii.

<sup>38</sup> P Craig, ‘Proportionality, Rationality and Review’.

<sup>39</sup> L Zucca, *Constitutional Dilemmas. Conflicts of Fundamental Legal Rights in Europe and the USA*; E Brems (ed), *Conflicts Between Fundamental Rights*.

<sup>40</sup> On proportionality analysis in the jurisdiction of the ECtHR see J Rivers, ‘Proportionality and Variable Intensity of Review’, 182–7; J Gerards and H Senden, ‘The Structure of Fundamental Rights and the European Court of Human Rights’; S Greer, ‘Balancing and the European Court of Human Rights: A Contribution to the Habermas–Alexy Debate’.

new framework for dealing with this issue which draws upon the most recent development in the principles theory's doctrine of deference. Chapter 7 gives a demonstration of how some of the abstract discussions of the book may work in a specific case analysis. Here, we will engage in a detailed discussion of the ECtHR's decision in *Otto-Preminger-Institut v Austria* and thereby both exemplify and recapitulate some of the main points of this book. Chapter 8 presents a concise summary of the whole of the book. While our analysis attends to both proportionality and balancing, its focus lies arguably with the latter, balancing being the most important prong of the proportionality test, both in practical and theoretical terms.

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