Local Meanings of Proportionality

Judicial Review in France, England and Greece

Afroditi Ioanna Marketou

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 19 September 2018

European University Institute
Department of Law

Local Meanings of Proportionality

Judicial Review in France, England and Greece

Afroditi Ioanna Marketou

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Examining Board

Bruno De Witte, Professor, Maastricht University/EUI (Supervisor)
Loïc Azoulai, Professor, Sciences Po Paris
Jacco Bomhoff, Associate Professor, LSE
Guillaume Tusseau, Professor, Science Po Paris

Researcher declaration to accompany the submission of written work
Department of Law – LL.M. and Ph.D. Programmes

I Afroditi Ioanna Marketou certify that I am the author of the work Local Meanings of Proportionality: Judicial Review in France, England and Greece. I have presented for examination for the Ph.D. at the European University Institute. I also certify that this is solely my own original work, other than where I have clearly indicated, in this declaration and in the thesis, that it is the work of others.

I warrant that I have obtained all the permissions required for using any material from other copyrighted publications.

I certify that this work complies with the Code of Ethics in Academic Research issued by the European University Institute (IUE 332/2/10 (CA 297).

I declare that this work consists of 228,139 words.

Statement of language correction:

This thesis has been corrected for linguistic and stylistic errors.

I certify that I have checked and approved all language corrections, and that these have not affected the content of this work.

Signature and date:

2 July 2018

Summary

Proportionality increasingly dominates legal imagination. Initially conceived of as a principle that regulates police action, today it is progressively established as an advanced tool of liberal constitutional science. Its spread, accompanied by a global paradigm of constitutional rights, appears to be an irresistible natural development. This thesis was inspired by the intuition that even though courts and lawyers around the world reason more and more in proportionality terms, proportionality can mean very different things in different contexts, even within the same legal system. While the relevant literature has paid little attention to differences in the use of proportionality, identifying the local meanings of proportionality is crucial to making sense of its spread, to assessing its success, and to appraising the possibility of convergence between legal systems. Through an in-depth study and comparison of the use of proportionality by legal actors in France, England and Greece, this work shows that the local meanings of proportionality are not simply deviant applications of a global model. Instead, they reflect the legal cultures in which they evolve, local paths of cultural change and local patterns of Europeanisation.

La proportionnalité a progressivement pris une place centrale dans l'imaginaire juridique. Initialement conçue comme un principe qui régit l'utilisation des pouvoirs de police, elle est aujourd'hui considérée comme un outil avancé de science constitutionnelle. Sa généralisation, accompagnée par le paradigme du droit constitutionnel global, est perçue comme irrésistible et naturelle. Cette recherche a été guidée par l'intuition que, même si les juristes à travers le monde raisonnent de plus en plus en termes de proportionnalité, celle-ci peut avoir des sens très différents, et ce, même au sein d'un seul système juridique. Les différentes utilisations du langage de la proportionnalité sont rarement étudiées en tant que tels. Pour autant, l'identification des sens locaux de la proportionnalité est cruciale si l'on veut comprendre sa propagation, apprécier son succès et évaluer les possibilités de convergence entre systèmes juridiques. Ce travail consiste en une étude approfondie et comparative de l'utilisation du langage de la proportionnalité parmi les acteurs juridiques en France, en Angleterre et en Grèce. Il cherche à montrer que les sens locaux de la proportionnalité ne sont pas simplement des applications imparfaites d'un modèle global. Au contraire, ils reflètent les cultures au sein desquelles ils évoluent, des chemins d'évolution culturelle propres à chaque système et des trajectoires locales d'européanisation.

"When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master — that's all."

Lewis Carroll
Alice's Adventures in Wonderland, 1865

When logic and proportion have fallen sloppy dead
And the White Knight is talking backwards
And the Red Queen's "Off with her head!"
Remember what the dormouse said:
Feed your head, feed your head!

Grace Slick and Jefferson Airplane
White Rabbit, 1966

ACKNOWLEDGMENTS

This work would have never been accomplished without the support, advice and valuable comments of Bruno De Witte, to whom I am particularly grateful. I am also very thankful to Mattias Kumm for his precious guidance during the early stages of this project.

I owe a great deal to the EUI, where I was taught how to conduct research, and where I made many friends. I am grateful to Loïc Azoulai and Claire Kilpatrick, for their comments at an early stage of my research, as well as for their stimulating seminars.

The LSE was a very welcoming and inspiring environment. I am particularly thankful to Jacco Bomhoff, Conor Gearty, Kai Möller, and Thomas Poole for valuable discussions regarding my research.

The end of this PhD became almost a pleasure due to the Laboratoire Méditerranéen de Droit Public and Mathieu Touzeil-Divina, whom I sincerely thank for his support and critical comments. I am also grateful to Antonio Marzal Yetano, Antonin Sopena, Stavros Tsakyrakis, Guillaume Tusseau, and Constantinos Yannakopoulos, for interesting discussions concerning proportionality. Special thanks to Ríán Derrig, who did the huge task of correcting language errors and making this work more intelligible, sometimes on a tight timeline.

The Institut Maurice Hauriou (University of Toulouse Capitole) has warmly hosted me during the last years. I particularly thank Sebastiaan Van Ouwerkerk for critical readings on parts of this work.

This thesis would have not even been imagined without the support and comments of Vincent Réveillère. He merits my deepest appreciation for being a source of inspiration and thought over all these years. This work is dedicated to him.

My family and friends have influenced this work much more than they know. Special thanks to Agni, Kostakis, and Maria for making life in London so merry. Loutraki and its sporadic inhabitants also merit my sincerest gratitude.

The colleagues and friends who contributed to this thesis bare no responsibility for errors and omissions in the pages that follow.

TABLE OF CONTENTS

INTRODUCTION

Popular imagination has connected proportion to justice since antiquity. In legal thought, the notion of proportion was present in the philosophy of Aristotle and was developed by legendary figures like Aquinas and Grotius. Beccaria used it to express a requirement of fairness in retribution. Still, the image of proportion has probably never been as pervasive in the minds of lawyers as in post-war constitutionalism. The principle of proportionality was first applied in German constitutional case law. During the second half of the 20th century, constitutional courts in liberal constitutional democracies all over the world have progressively interpreted their constitutions as imposing a requirement of proportionality on rights limitations. Today proportionality is much more than a metaphor that represents justice in the minds of constitutional lawyers. It is increasingly perceived as a model of legal reasoning, a theory and even an emerging global paradigm of constitutional adjudication. It is understood as an advanced tool of liberal constitutional science, and its rise appears to be an irresistible natural development. Since the beginnings of the 21st century, proportionality has been at the core of a prescriptive human rights theory first developed in the work of Robert Alexy and claiming universal application. In comparative law, proportionality is a commonly used example of a legal transplant that attests to the convergence between legal systems, if not globally, at least in Europe.

This research was inspired by the intuition that even though courts and lawyers around the world increasingly reason in proportionality terms, they do not necessarily apply the proportionality model, nor do they subscribe to the Alexyan theory. In fact, proportionality can have very different meanings in different contexts, even within the same legal system. The relevant literature, both in legal theory and comparative law, has paid little attention to differences in the use of proportionality. This is due to the widespread assumption that when legal actors around the world use proportionality terminology, they refer to the principle of proportionality as applied in Germany or to the global model theorised by Alexy and his followers. Quite differently, I argue that identifying the different local meanings of proportionality is crucial to making sense of its spread, to assessing the success of the Alexyan model and to appraising the possibility of convergence between legal systems. Following theoretical and methodological developments in comparative law, intellectual history and cultural anthropology, I propose to see proportionality as an instance of legal discourse, as a *way of speaking* that legal actors around the world have found convenient for formulating legal arguments. This entails a shift in the focus of research, from proportionality as a principle or a model of reasoning to proportionality as *language*. Through an in-depth study and comparison of the use of proportionality by legal actors in France, England, and Greece, my purpose is to show that the different local meanings of proportionality reflect the legal cultures in which they evolve, local paths of cultural change and local patterns of Europeanisation.

1. The success of proportionality

Born in Prussian administrative scholarship at the end of 18th century, proportionality was established as a method of judicial review with the creation of administrative courts in the second half of the 19th century. It migrated to constitutional law after the Second World War, in parallel with the progressive "constitutionalisation" of the legal order and the increasing "juridicisation" of politics. By the end of '60s, proportionality was announced and applied as a constitutional principle in the jurisprudence of the German Federal Constitutional Court. The German constitutional judges conceived of it as a framework, a pronged structure for balancing conflicting constitutional rights. In the following decades, courts in liberal constitutional democracies all over the world interpreted their constitution as guaranteeing the principle of proportionality. Proportionality, together with its surrounding fundamental rights discourse, spread all over Europe and far beyond. Among the jurisdictions that have adopted it we find Canada, Turkey, South Africa, Israel and New Zealand. Apart from the area of domestic public law, it is also applied in international and international humanitarian law. During the '70s, the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) pronounced proportionality a necessary condition for the validity of rights' limitations.[1]

Hence, we have entered the "age of balancing" in constitutional law.[2] Proportionality is said to be "a universal criterion of constitutionality",[3] "a foundational element of global constitutionalism"[4] and "a suitable candidate for construing a global grammar of constitutionality".[5] According to Kai Möller, it is "*the* central concept in contemporary constitutional rights law".[6] Though US exceptionalism still resists local pressure for its adoption as a general principle, the idea shared by most constitutional lawyers is that contemporary democracies are converging on a common constitutional model, in which proportionality has a central role. David Beatty has gone so far as to see in proportionality the ultimate rule on which judicial reasoning is based. He considers proportionality to be "a constitutive, immutable part of every constitution".[7] Proportionality has become somewhat of a constitutional "*grande idée*", a conceptual centre-point for a global constitutional

---

[1] On the spread of proportionality, see Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge Studies in Constitutional Law (Cambridge: CUP, 2012), 175–210; Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism," *Columbia Journal of Transnational Law* 47 (2008): 97–111.

[2] Alexander Aleinikoff, "Constitutional Law in the Age of Balancing," *Yale Law Journal* 96, no. 5 (1987): 943.

[3] David Beatty, *The Ultimate Rule of Law* (Oxford; New York: OUP, 2004), 162.

[4] Stone Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism," 160.

[5] Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford: OUP, 2012), 3.

[6] Kai Möller, "Balancing and the Structure of Constitutional Rights," *International Journal of Constitutional Law* 5, no. 3 (2007): 13.

[7] Beatty, *The Ultimate Rule of Law*, 176.

discourse.[8] The relevant studies and collective volumes abound.[9] Mattias Kumm suggests that proportionality's utility could transcend the limits of legal analysis to provide a model for political decision-making and practical reasoning.[10]

Robert Alexy's *Theorie der Grundrechte* is a reference for studying and debating proportionality. Published in 1985, the book offered a comprehensive systematisation of proportionality doctrine and anchored it to a solid theoretical background.[11] Alexy's theory met with considerable success and was translated in English in the early 2000s.[12] It has found many defenders all over the world, who have refined and developed it in many ways.[13] Inspired by Ronald Dworkin's interpretative theory,[14] Alexy and his followers purport to offer a reconstruction of the practice of constitutional courts, that is, an account that "fits" it while it coherently "justifies" it. Under this account, whenever a sub-constitutional norm restricts a constitutional right, its validity depends on the test of proportionality, comprising a check as to the legitimacy of its goal, the suitability of the means chosen, the necessity of the restrictions and their *stricto sensu* proportionality. The last stage of proportionality consists in a balancing enterprise, where the constitutional values adversely affected by the measure are weighed against the constitutional values that it advances. The mainstream literature thus describes a "proportionality structure" that is objective and neutral as to the particular substantive political-moral theory that one adopts.[15]

Because of its claim to substantive neutrality, proportionality analysis seeks general application as a model that is compatible with different types of reasonable political

---

[8] Clifford Geertz, *The Interpretation of Cultures: Selected Essays*, (New York: Basic Books, 2000), 3, citing Susanne Langer.

[9] Grant Huscroft, Bradley Miller, and Grégoire Webber, eds., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York: CUP, 2014); Vicki Jackson and Mark Tushnet, eds., "Part II: Proportionality and the United States," in *Proportionality: New Frontiers, New Challenges* (Cambridge; New York: CUP, 2017), 75.

[10] Mattias Kumm, "Democracy Is Not Enough: Rights, Proportionality and the Point of Judicial Review," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, March 11, 2009), 10, http://papers.ssrn.com/abstract=1356793. See also "Is the Structure of Human Rights Practice Defensible? Three Puzzles and Their Resolution," in *Proportionality: New Frontiers, New Challenges*, ed. Vicki Jackson and Mark Tushnet (Cambridge; New York: CUP, 2017), 30. The belief that proportionality is a useful framework for decision makers more generally is recurrent among proportionality scholars. See, for another example, Vicki Jackson, "Proportionality and Equality," in *Proportionality: New Frontiers, New Challenges*, ed. Vicki Jackson and Mark Tushnet (Cambridge; New York: CUP, 2017), 148. On the actual use of proportionality by constitutional-political actors, see Frank Michelman, "Proportionality Outside the Courts with Special Reference to Popular and Political Constitutionalism," in *Proportionality: New Frontiers, New Challenges*, ed. Vicki Jackson and Mark Tushnet (Cambridge; New York: CUP, 2017), 13.

[11] Robert Alexy, *Theorie Der Grundrechte* (Baden-Baden: Nomos, 1985).

[12] Robert Alexy, *A Theory of Constitutional Rights*, trans. Julian Rivers (Oxford; New York: OUP, 2002).

[13] For some examples, see Kai Möller, *The Global Model of Constitutional Rights*, Oxford Constitutional Theory (Oxford: OUP, 2012); Klatt and Meister, *The Constitutional Structure of Proportionality*; Xenophon Contiades and Alkmene Fotiadou, "Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation," *International Journal of Constitutional Law*, no. 10 (2012): 660; Carlos Bernal Pulido, *El principio de proporcionalidad y los derechos fundamentales*, 3rd ed. (Madrid: Centro de Estudios Políticos y Constitucionales, 2007); Julian Rivers, "Proportionality and Variable Intensity of Review," *CLJ* 65, no. 1 (2006): 174; Beatty, *The Ultimate Rule of Law*.

[14] Ronald Dworkin, *Law's Empire*, Fontana Master Guides (London: Fontana, 1986).

[15] For a more detailed analysis of the proportionality structure, see *infra*, Part I, Introduction.

moral theories.[16] Hence, while Robert Alexy's initial purpose was to provide a theory for German basic rights, the aspiration of proportionality scholarship progressively became that of offering "a prescriptive theory applicable to constitutional democracies generally".[17] Proportionality's function is to liberate courts from the constraints of classical legalistic analysis and to allow judges to engage in public and structured reasoning based on rights. In this way, according to its promoters, proportionality emphasises the need for justification of legislative action and increases transparency in judicial decisions. It involves individuals in the policy-making process, while it does not compromise the protection of rights.[18] David Beatty goes further to argue that proportionality, by focusing on facts, "can claim an objectivity and integrity no other model of judicial review can match".[19] Thus, it enables judges to mitigate conflicts between majorities and minorities on socially sensitive matters, while showing equal respect to both.[20] In Beatty's view, proportionality "serves as an optimizing principle that makes each constitution the best it can possibly be".[21]

Comparative research plays an important role in proportionality theory, since it offers an empirical basis for its claims. The relevant comparative studies include the examination of cases from a variety of legal contexts, ranging from the US and Canada, to Israel, India and Japan, passing from South Africa to Europe, the UK and international courts.[22] However, scholars do not adopt a particular comparative law approach, since their purpose is not to compare different decisions, rules or institutions in the jurisdictions they study. Rather, it is to attest to the spread of proportionality or to substantiate the analytical model they propose with concrete examples. The proportionality literature is isolated from debates on the theory and method of comparative law. To the eyes of a legal comparatist, the methodology of mainstream studies would seem poor. Scholars usually limit themselves to a frantic search for similarities, only selecting examples that confirm their hypotheses in a "cherry picking" way,[23] even distorting the meaning of local practice in their attempt

---

[16] On the structural character of the proportionality analysis, see Robert Alexy, "On Balancing and Subsumption. A Structural Comparison," *Ratio Juris* 16, no. 4 (2003): 433; Mattias Kumm, "What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement," New York University Public Law and Legal Theory Working Papers, no. Paper 46 (2006), http://lsr.nellco.org/nyu_plltwp/46.

[17] Mattias Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. A Review Essay on *A Theory of Constitutional Rights*," *International Journal of Constitutional Law* 2, no. 3 (2004): 575.

[18] See for example Mattias Kumm, "Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement," in *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart, 2007), 131; "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review," *Law and Ethics of Human Rights* 41, no. 2 (2010): 141; "Democracy Is Not Enough"; "What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement."

[19] Beatty, *The Ultimate Rule of Law*, 171.

[20] Beatty, 159 f.

[21] Beatty, 163.

[22] Barak, *Proportionality*; Bernhard Schlink, "Proportionality," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: OUP, 2012), 718; Möller, *The Global Model of Constitutional Rights*; Beatty, *The Ultimate Rule of Law*.

[23] Ran Hirschl, "The Question of Case Selection in Comparative Constitutional Law," *The American Journal of Comparative Law* 53, no. 1 (2005): 153.

to cram it into the pre-constructed categories of their theory. Appeal to proportionality by courts in different jurisdictions works as a confirmation of proportionality's success, no matter how different its application and its outcomes. In some cases, even in the absence of such an appeal and in cases of explicit rejection, local concepts and methods are presented as synonymous or equivalent to different prongs of proportionality analysis.[24]

It is generally accepted that proportionality is "one of the most successful legal transplants in the second half of the twentieth century".[25] Its success is usually explained by reference to its function in an emerging global paradigm of constitutional rights. The defenders of proportionality combine it with a vision of rights as values interpreted expansively to comprise trivial or even illegal activities, as well as the protection of social rights. Under this approach, rights are not only negative requirements of abstention, as the liberal tradition has long professed. They also impose positive obligations on state authorities and "radiate" in the regulation of private relations. In the view of proportionality scholars, "there is no area of policy-making which remains unaffected by constitutional rights".[26] In Alexy's theory, balancing and proportionality necessarily result from the structure of constitutional rights. The idea is that the ever-expanding nature of rights entails compromise as to the special priority that they traditionally enjoyed over public policy considerations; their application necessarily implies limitations to their scope. Following the Alexyan legacy then, and contrary to the liberal intuition, rights are not categorically defined rules, but principles. As such, they require optimal realisation according to the normative and factual possibilities of each case. Balancing under the proportionality framework is the method for accomplishing this task.[27]

Even scholars who contest the conceptual necessity of proportionality analysis in rights-based judicial review, argue for its desirability. According to Alec Stone Sweet and Jud Mathews, for example, proportionality is "the best available procedure" for balancing constitutional rights.[28] These authors mobilise strategic elements to account for the spread of proportionality in modern constitutional democracies and claim that

---

[24] Scholars often use examples taken from the US Supreme Court case law, while this court rejects proportionality as a generally applicable doctrine. See the analyses by Vicki Jackson, "Constitutional Law in an Age of Proportionality," *Yale Law Journal* 124, no. 8 (2015): 3094; Barak, *Proportionality*; Beatty, *The Ultimate Rule of Law*.

[25] Kumm, "Constitutional Rights as Principles," 574, 595. See also Kai Möller, "US Constitutional Law, Proportionality, and the Global Model," in *Proportionality: New Frontiers, New Challenges*, ed. Vicki Jackson and Mark Tushnet (Cambridge; New York: CUP, 2017), 103, who talks about the "global success" of proportionality.

[26] Möller, *The Global Model of Constitutional Rights*, 110.

[27] See Alexy, *A Theory of Constitutional Rights*, 66 f.; Robert Alexy, "Constitutional Rights, Balancing and Rationality," *Ratio Juris* 16, no. 2 (2003): 131. See also Klatt and Meister, *The Constitutional Structure of Proportionality*, chap. 8. On proportionality scholars' vision of rights, see *infra*, Part II, Introduction.

The necessary connection between principles and proportionality balancing has been criticised by Möller, "Balancing and the Structure of Constitutional Rights," 458. Aharon Barak also rejects the necessity of the connection between balancing and principles, in *Proportionality*, 240–41.

[28] Stone Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism," 76; Jud Mathews and Alec Stone Sweet, "All Things in Proportion? American Rights Doctrine and the Problem of Balancing," *Emory Law Journal* 60, no. 4 (2011): 5.

its function is to mitigate legitimacy problems in politically salient cases that often arise in rights-based judicial review.[29] Kai Möller offers a substantive moral theory of rights based on the concept of autonomy that justifies and promotes the global spread of proportionality.[30] Vlad Perju, focusing on the justification of judicial decisions, contends that proportionality's normative appeal lies in its "integrative ethos", that is, the fact that it aims to integrate sensitivity to fact and context within a formal structure that enhances the predictability of judicial solutions.[31] In a study with a more practical focus, Aharon Barak claims that, "while proportionality is not the only way to realize constitutional rights, it is by far the best way available".[32]

2. A lingua franca?

Efforts to identify a common core of rules in European contract law have met with vigorous criticism from comparative lawyers. The harmonisers' instrumental vision of law was impugned for inaccurately describing legal practice, for lacking attention to difference and for neglecting law's connection to local sentiments and traditions.[33] However, such criticism has not yet touched upon proportionality. Scepticism in this field is usually formulated in abstract philosophical or political moral terms. Typically, proportionality is criticised for being incompatible with liberal philosophical conceptions of rights and for favouring judicial prerogatives to the detriment of democratic decision-making.[34] In a recent paper, Mark Tushnet contested the merits of proportionality as compared to categorical methods of reasoning from an American Legal Realist perspective. According to the author, proportionality "lacks the resources for preventing skilled advocates from turning seemingly easy cases into hard ones".[35]

Criticism has pushed proportionality scholars to refine the model that they propose, so as to allow judges to take into account the special nature of certain rights or to accord broader discretion to public authorities in certain contexts. Thus, Mattias Kumm and Alec Walen stress the influence of deontological constraints, especially

---

[29] Stone Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism."

[30] Möller, *The Global Model of Constitutional Rights*.

[31] Vlad Perju, "Proportionality and freedom—An Essay on Method in Constitutional Law," *Global Constitutionalism* 1, no. 2 (2012): 350.

[32] Barak, *Proportionality*, 226.

[33] See, most notably, Pierre Legrand, "European Legal Systems Are Not Converging," *International & Comparative Law Quarterly* 45, no. 1 (1996): 52.

[34] See, for example, Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights?," New York School Jean Monnet Working Paper Series, no. Paper 9 (2008), www.JeanMonnetProgram.org; Grégoire Webber, "Proportionality and Absolute Rights," in *Proportionality: New Frontiers, New Challenges*, ed. Vicki Jackson and Mark Tushnet (Cambridge; New York: CUP, 2017), 51. On the critique of proportionality, see *infra*, Part II, Introduction.

[35] Mark Tushnet, "Making Easy Cases Harder," in *Proportionality: New Frontiers, New Challenges*, ed. Vicki Jackson and Mark Tushnet (Cambridge; New York: CUP, 2017), 309.

connected to human dignity, in the application of proportionality.[36] Scholars sometimes argue that the proportionality model is not appropriate for the adjudication of positive rights[37] or that primary decision-makers should enjoy a greater degree of discretion in this field.[38] In their book on the structure of proportionality, Matthias Klatt and Moritz Meister analyse different kinds and degrees of discretion according to the uncertainty of the moral and factual issues that proportionality raises and to the reliability of the primary decision maker's assessments on these issues.[39] Finally, Julian Rivers and Alan Brady propose institutionally sensitive approaches to proportionality, including theories of deference and restraint, to sufficiently reflect considerations of relative institutional competence and legitimacy.[40] The above studies account for contextual factors that influence the application of proportionality and propose ways to systematise and channel this influence. Thus, it is a commonly shared idea that the subject matter, the legal tradition and the institutional context surrounding each case will affect the choice of the proportionality prongs that the judge will apply, or the intensity of judicial review in concrete cases.

Due to its flexibility, proportionality acquires the characteristics of a *lingua franca* and its spread revives the "liberal aspiration for a global order of law".[41] It appears broad enough to accommodate local divergence and abstract enough to transcend institutional conflicts, both within state borders and across them.[42] The courts who speak it are given access to a "global community of judges", engaging in transnational communication and dialogue on universally shared values.[43] Its rejection, on the contrary, is attributed to a kind of misunderstanding of a courts' own practice or role in a liberal constitutional democracy. The spread of proportionality and of fundamental rights announces "an a-historical society based on universal standards".[44] Kai Möller, for instance, proposes a "global model" of constitutional rights, based on

---

[36] Mattias Kumm and Alec Walen, "Human Dignity and Proportionality: Deontic Pluralism in Balancing," in *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, ed. Grant Huscroft, Bradley Miller, and Grégoire Webber (New York: CUP, 2014), 67.

[37] Klatt and Meister, *The Constitutional Structure of Proportionality*, 89 f.; Möller, *The Global Model of Constitutional Rights*, 165 f.; Stephen Gardbaum, "Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?," in *Proportionality: New Frontiers, New Challenges*, ed. Vicki Jackson and Mark Tushnet (Cambridge; New York: CUP, 2017), 221, albeit for different reasons.

[38] Kumm, "Constitutional Rights as Principles," 586; Klatt and Meister, *The Constitutional Structure of Proportionality*, chap. 5.

[39] Klatt and Meister, *The Constitutional Structure of Proportionality*, chap. 6.

[40] Rivers, "Proportionality and Variable Intensity of Review"; Alan Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge: CUP, 2012); for an institutionally sensitive account of proportionality in international law, see Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review: A Theoretical and Comparative Study*, European Administrative Law Series (Groningen: Europa Law Pub, 2013).

[41] Paul Kahn, "Comparative Constitutionalism in a New Key," *Michigan Law Review* 101 (2004): 2679.

[42] See Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture*, Cambridge Studies in Constitutional Law (Cambridge: CUP, 2013), 103 f., making the same remark. See also Mitchel Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (Oxford; New York: OUP, 2009), 3, on human rights.

[43] Cohen-Eliya and Porat, *Proportionality and Constitutional Culture*, 134 f. The authors cite Anne-Marie Slaughter.

[44] Horatia Muir-Watt, "Globalization and Comparative Law," in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford: OUP, 2006), 729.

the reconstruction of judicial practice around the world.[45] Mattias Kumm defends the universal character of human rights as the Alexyan legacy describes them.[46] And Bernhard Schlink affirms that "[t]here is nothing inherently German about the roots of the principle of proportionality, nor is the introduction of the principle into other constitutional contexts a transfer of a German principle. It is a response to a universal legal problem".[47] Moreover, this author considers proportionality to be "part of a deep structure of constitutional grammar that forms the basis of all different constitutional languages and cultures".[48]

Legal actors in different contexts increasingly argue in proportionality terms and pressure for the adoption of the proportionality framework by courts and law-makers.[49] While initially Alexy's structure was purported to reconstruct judicial practice, today it is increasingly perceived as the correct method of legal decision-making and it increasingly constrains legal reasoning. The metaphor of law-as-proportionality is slowly "literalised"; proportionality *becomes law* and constitutes legal knowledge.[50] Much of the relevant debates focus on whether it should be embraced in the US.[51] Scholars often proceed to the schematisation of models of constitutional rights and judicial review practices. Typically, the German model, also presented as European or even global, is confronted with the exceptional American one and usually found to be more appealing[52] or better in terms of coherence, transparency or morality.[53] The US hesitations to embrace proportionality and the global paradigm of human rights are seen as peculiar resistances to what appears to be an irresistible evolution. Explanations for this phenomenon range from the traditional insularity and archaism of US constitutional law, to its historical origins and the political context that has framed its evolution.[54]

---

[45] Möller, *The Global Model of Constitutional Rights*.

[46] Kumm, "Is the Structure of Human Rights Practice Defensible? Three Puzzles and Their Resolution."

[47] Schlink, "Proportionality," 729.

[48] Schlink, 736.

[49] For a compilation of studies on proportionality in different national contexts and in Europe, see Sofia Ranchordás and Boudewijn Willem Nicolaas de Waard, *The Judge and the Proportionate Use of Discretion: A Comparative Study* (Routledge, 2015). On the US, Thomas Sullivan and Richard Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions* (Oxford; New York: OUP, 2009). Stephen Breyer, *Making Our Democracy Work: A Judge's View* (New York: Knopf, 2010), 163–71; Jackson, "Constitutional Law in an Age of Proportionality."

[50] On the literalisation of metaphors used for making sense of legal knowledge and legal reasoning, see Annelise Riles, "A New Agenda for the Cultural Study of Law: Taking on the Technicalities," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, June 27, 2004), 1008 f., http://papers.ssrn.com/abstract=558605.

[51] Jackson and Tushnet, "Part II: Proportionality and the United States."

[52] Cohen-Eliya and Porat, *Proportionality and Constitutional Culture*, Conclusion.

[53] See Mathews and Stone Sweet, "All Things in Proportion? American Rights Doctrine and the Problem of Balancing"; Möller, *The Global Model of Constitutional Rights*, 15 f.; Jackson, "Proportionality and Equality."

[54] On this issue, see Michael Ignatieff, *American Exceptionalism and Human Rights* (Princeton, NJ: Princeton University Press, 2005); Moshe Cohen-Eliya and Iddo Porat, "The Administrative Origins of Constitutional Rights and Global Constitutionalism," in *Proportionality: New Frontiers, New Challenges*, ed. Vicki Jackson and Mark Tushnet (Cambridge; New York: CUP, 2017), 75.

Nonetheless, at least until quite recently most jurisdictions did not frame questions raised through judicial review as fundamental rights conflicts, nor did they present judicial solutions as instances of proportionality balancing. This is the case in Europe too, where the global model of rights and proportionality is said to find its origins. In fact, Duncan Kennedy has shown the important influence that US private law doctrines of balancing have had on the development of proportionality rhetoric.[55] What proportionality theorists often neglect is the particularity and contingency of proportionality as they describe it. This thesis is not about the moral desirability of proportionality, nor about its merits as a method of judicial review. Simply, it is "a plea for a hint of empiricism" in the relevant debates.[56] Claims as to proportionality's global success or failure should take into account its actual use by courts and other legal actors in different contexts. Proportionality theorists also agree on the necessity for research on judicial practice.[57] Frederick Schauer describes it as "an empirical agenda that must wait for another day – and a cohort of empirically trained researchers – to investigate".[58] I am certainly not such a cohort and my purpose is not to offer a comprehensive and exhaustive empirical account of the application of proportionality around the world. More modestly, this work aims at showing through an in-depth study of three systems, that developments in the field of comparative law can offer valuable insights into the meaning of proportionality and the reasons of its spread.

3. Proportionality and difference

No one denies that differences exist in the application of proportionality in judicial practice. However, differences are not taken seriously when reconstructing proportionality's meaning.[59] Judges using the concept are typically thought to refer to the global proportionality model. Variance is often attributed to the flexibility of proportionality's structure, whose application can be limited to only some of its

---

[55] Duncan Kennedy, "A Transnational Genealogy of Proportionality in Private Law," in *The Foundations of European Private Law*, ed. Roger Brownsword et al. (Oxford; Portland, Or: Hart, 2011), 185.

[56] Paraphrasing Guillaume Tusseau, "A Plea for a Hint of Empiricism in Constitutional Theory: A Comment on Cesare Pinelli's Constitutional Reasoning and Political Deliberation," *German Law Journal* 14, no. 8 (2013): 1183.

[57] See, for example, Gardbaum, "Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?," 221 f.; Vlad Perju, "Proportionality and Stare Decisis: Proposal for a New Structure," in *Proportionality: New Frontiers, New Challenges*, ed. Vicki Jackson and Mark Tushnet (Cambridge; New York: CUP, 2017), 201.

[58] Frederick Schauer, "Proportionality and the Question of Weight," in *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, ed. Grant Huscroft, Bradley Miller, and Grégoire Webber (New York: CUP, 2014), 185.

[59] Barak, for example, points out that "[m]any legal systems use proportionality today, while filling it with their own content". This does not discourage the author from asserting in the following phrase that "the systems are very similar". His book thus describes what the author perceives as the "universal understanding of the concept of proportionality in constitutional democracies", mainly drawing on the Alexyan model. See *Proportionality*, 181 and 4 resp. In a similar vein, while Stone Sweet and Mathews stress that "judges shape PA [meaning: proportionality analysis] to their own purposes, with use", they still consider the model of proportionality and its function in judicial review to be generally similar across jurisdictions. See "Proportionality Balancing and Global Constitutionalism," 162.

prongs.[60] Another factor of variance is the fact that proportionality theory purports solely to provide an analytical structure that is neutral as to substantive outcomes. Judicial solutions in concrete cases largely depend on the substantive moral theory that complements proportionality's application and on the local perception of rights.[61] In consequence, the failures of proportionality are often attributed to excessive judicial deference, to subjective bias on the part of the judge who applied it or to "poor judging" more generally.[62] The defenders of proportionality are cautious enough to reserve evangelical claims about its function only to *correct* applications of the model. "When correctly applied", "when properly deployed" and other similar phrases are recurrent in proportionality studies. Good institutional design and strong legitimacy of the judiciary are thus important conditions for the felicity of the theory of proportionality.[63] Kai Möller for instance, stresses that judicial review and proportionality achieve their purpose only when they are exercised by "well-designed courts working under well designed procedural rules".[64]

Analyses that are more sensitive to judicial practice account for divergence in the application of proportionality, even by courts that are deemed to be pioneers in the field. Dieter Grimm contrasts the German model of proportionality with its application in Canada. He observes that the Canadian Supreme Court does not apply the balancing stage and proceeds to a more intrusive examination of the legitimate aim requirement.[65] Julian Rivers goes further, schematising two different conceptions of proportionality. The first, which he terms the "state-limiting" conception, does not involve balancing of competing interests. Instead, rights are categorically defined and are either absolute or require the protection of a minimum core. In Rivers' view, this conception, usually applied by British courts, considerably contrasts with the "optimising" conception of proportionality that one finds in the case law of European courts. The author takes as an example the ECtHR jurisprudence, where he considers balancing to be "endemic".[66] While accounting for a difference in the practice of proportionality, both Rivers and Grimm agree on their preference for the German proportionality model. Grimm concludes that "the disciplining and rationalizing effect, which is a significant advantage of the proportionality test" is reduced when its four prongs are not orderly applied.[67] In the same vein, Rivers considers the British

[60] Stone Sweet and Mathews, for example, observe that, "in its fully developed form, the analysis involves four steps", while they observe in a footnote that some important courts normally use a three part test. "Proportionality Balancing and Global Constitutionalism," 75.

[61] See, for example, different kinds of variance and their explanation by Kumm, "Is the Structure of Human Rights Practice Defensible? Three Puzzles and Their Resolution."

[62] Madhav Khosla, "Proportionality: An Assault on Human Rights?: A Reply," *International Journal of Constitutional Law* 8, no. 2 (2010): 308; Matthias Klatt and Moritz Meister, "Proportionality—a Benefit to Human Rights? Remarks on the I·CON Controversy," *International Journal of Constitutional Law* 10, no. 3 (2012): sec. 7.

[63] The term felicity is used to accentuate the performative nature of the theory of proportionality. On the felicity conditions for speech acts, see John Austin, *How to Do Things with Words*, 2nd ed. (Oxford: Clarendon Press, 1975).

[64] Möller, *The Global Model of Constitutional Rights*, 128.

[65] Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence," *University of Toronto Law Journal* 57, no. 2 (2007): 383.

[66] Rivers, "Proportionality and Variable Intensity of Review," 187.

[67] Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence," 397.

Wednesbury test to be "a rough cut version of proportionality".[68] Put shortly, in the proportionality literature, difference observed in judicial practice is invariably demoted to "a *modus deficiens* of sameness".[69]

Consensus on the desirability of the German proportionality model is connected to the pervasiveness of the balancing metaphor and to the instrumental view of law that underpins it.[70] Because legal decision-making is increasingly seen as involving balancing constitutional rights, proportionality is preferred to other reasoning models. Its analytical structure is believed to rationalise and theoretically inform legal reasoning. Alec Stone Sweet and Jud Mathews conclude their analysis of the spread of proportionality by briefly considering alternative models for rights-based adjudication. They observe that the US Supreme Court in particular has developed a "complicated, variegated approach to rights". However, in their view, the various components of the Supreme Court's doctrine are outcomes of "seminal acts of balancing that then congeal as precedent".[71] The authors express their preference for proportionality as a method of adjudication, since it renders balancing explicit and open to negotiation between the parties. In a similar vein, Julian Rivers notes that the "[t]he inevitability of balancing rights with the public interest means that in practice it creeps unnoticed" into the prongs of the "state-limiting" version of proportionality. "Since it is unnoticed", the author continues, "it is uncontrolled".[72] In contrast, the "optimising" version of proportionality increases transparency in judicial reasoning and exposes balancing to criticism.

However, to see legal reasoning as balancing and to choose proportionality as a method for this process is *in itself* not neutral nor natural. It constrains legal argumentation in a particular way, as it also creates new possibilities for it. When inserted into different legal contexts, proportionality implies a change in pre-existing rules, concepts, distinctions and patterns of reasoning that local legal actors sometimes deem fundamental.[73] Whether this change is wanted or not is not only a moral or philosophical matter, but also depends on the meaning of what proportionality replaces and on the meaning of proportionality itself. This meaning is not universal or a-temporal. In fact, a survey of the use of proportionality by legal actors shows that the instances of proportionality reasoning that *actually correspond* to the pronged framework described by mainstream scholars are rare. So rare that it appears as "*un grand hasard*", if proportionality is ever correctly applied.[74] In the different contexts

[68] Rivers, "Proportionality and Variable Intensity of Review," 187.

[69] Pierre Legrand, "The Same and the Different," in *Comparative Legal Studies: Traditions and Transitions*, ed. Pierre Legrand and Roderick Munday (Cambridge; New York: CUP, 2003), 245.

[70] On the connection between balancing and instrumentalism see Jacco Bomhoff, *Balancing Constitutional Rights. The Origins and Meanings of Postwar Legal Discourse* (Cambridge: CUP, 2013), 17–18.

[71] Stone Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism," 164.

[72] Rivers, "Proportionality and Variable Intensity of Review," 187.

[73] The term "local" legal actors is used here instead of "national" or "domestic" legal actors, in order to accentuate the contingent nature of the boundaries of legal discourses and legal systems. Indeed, the boundaries of a legal system might not coincide with national boundaries and might change over time.

[74] Montesquieu, *De l'esprit des lois*, vol. Book I (Paris: Flammarion, 1979), chap. 3, cited by Otto Kahn-Freund, "On Uses and Misuses of Comparative Law," *The Modern Law Review* 37, no. 1 (1974): 6.

where proportionality has spread, it is not necessarily understood as a pronged structure for balancing constitutional rights. In most cases it does not imply balancing or reasoning in prongs. In some cases, it is not employed in judicial review but is only used by scholars. And yet in others, proportionality is not even connected to rights at all. In a recent contribution, Jacco Bomhoff shows that proportionality, but also connected concepts like "US exceptionalism", can have very different meanings even in comparative law studies, according to the branches of law compared.[75] Therefore, the tendency to perceive proportionality as the European or even global way of "doing balancing" is misleading.

My approach differs from mainstream proportionality scholarship, in the sense that I do not purport to improve the proportionality model that already exists, nor to identify variables that affect its application in practice. Instead, I propose to consider differences in the application of proportionality as an object worthy of study in and of themselves. Roger Cotterrell observes that "differences between laws and legal systems may not be just matters of contingency; they may express profound characteristics of the cultures that produce them".[76] Law is not only instrumental to the maximisation of rights as principles nor is it only there to make democracy work. It also expresses local beliefs, values and sentiments, local ways of thinking and local expectations and aspirations. Hence, legal rules are not scientific or technical means to achieve ends imposed by a universal reason. Rather, they express particularly local representations of society, of its problems and of possible solutions, they are "part of a distinctive manner of imagining the real".[77] I propose an inquiry into law's expressive function as a "species of social imagination".[78] My purpose is to render less enigmatic local perceptions of proportionality that mainstream scholarship would perceive as deviant or incorrect, without reducing the differences that exist between them. This kind of study is ethnographic, in the sense that it attempts to make sense of law and of proportionality as they are *locally* perceived and not to explain them causally according to a pre-conceived theory or model. "Meaning, in short, not machinery", as Clifford Geertz puts it.[79]

The study of difference is crucial to understanding the spread of proportionality. While the coherence of local discourses is largely neglected in the relevant studies, it plays a major role in the version of proportionality that local legal actors have adopted and in the expectations that they have attached to it. Context shapes the meaning and

---

Montesquieu used this phrase to say that it would be very rare, a great hazard, if the laws of a nation were found to suit another one.

[75] Jacco Bomhoff, "Beyond Proportionality: Thinking Comparatively about Constitutional Review and Punitiveness," in *Proportionality: New Frontiers, New Challenges*, ed. Vicki Jackson and Mark Tushnet (Cambridge; New York: CUP, 2017), 148. The author examines the understanding of proportionality in comparative scholarship in the fields of criminal law and rights-based judicial review.

[76] Roger Cotterrell, "Is It so Bad to Be Different? Comparative Law and the Appreciation of Diversity," in *Comparative Law: A Handbook*, ed. Esin Örücü and David Nelken (Oxford; Portland, Or: Hart, 2007), 135.

[77] Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective," in *Local Knowledge: Further Essays in Interpretive Anthropology*, 3rd ed. (New York: Basic Books, 1983), 173.

[78] Geertz, 232.

[79] Geertz, 232.

function of proportionality every time. Comparative research should not sacrifice the infinite local meanings of proportionality for the sake of the integrity and coherence of a global model. A-temporal and universal staples are the product of legal theory and jurisprudence.[80] However, comparative lawyers are increasingly aware of the ethnocentrism, the "subjugation of the other to the self", that underlies any theory with pretensions to universality.[81] The merits of the study of difference lie in its pluralistic and non-hierarchical approach to alternative ways of legal thinking, in the respect that it shows for legal alterity. Therefore, it is not my purpose to make conclusions about which version of proportionality is preferable or more adapted to each of the contexts studied. Nor do I generally argue for diversity against a rising global model of proportionality and constitutionalism. Without embracing any normative approach on proportionality, rights or constitutional law, I simply suggest that things are more complex than the mainstream proportionality literature assumes. This study consists in an investigation of the "infinitely rich varieties of human experience and their specifically legal expressions" in the different local versions of proportionality.[82]

4. Proportionality as a legal transfer

Vlad Perju has shed light on the impact that local legal context can have on proportionality. This author does not consider proportionality to be inherent to the notion of constitution or necessary for the adjudication of rights, but proposes to see it as a legal transfer. He argues that as proportionality crosses borders, its form should not be taken for granted. In his view, "proportionality's distinctiveness and merits do not depend on the preservation of its current formal structure, but rather on the existence of *a* formal structure".[83] It is precisely the versatility of proportionality that has favoured its spectacular spread around the world. Perju considers that the successful transplant of the proportionality model to environments like the US requires its adaptation so as to sufficiently respond to local standards for the justification of judicial decisions. He considers the main obstacles to the success of proportionality in the US to be the particularly strong local demands for doctrinal stability. Thus, he proposes an "experimentation" with proportionality's structure by adding a final prong to the analysis.[84] This prong would require judges to compare the outcome of the previous steps against precedent and assess the disruption that such an outcome would cause to the *stare decisis* doctrine. This would allow proportionality to accomplish its

[80] Martin Krygier, "Law as Tradition," *Law and Philosophy* 5, no. 2 (1986): 237.

[81] Legrand, "The Same and the Different," 310.

[82] Cotterrell, "Is It so Bad to Be Different? Comparative Law and the Appreciation of Diversity," 152.

[83] Perju, "Proportionality and Stare Decisis: Proposal for a New Structure," 203.

[84] Perju, 203.

function of justification and transparency in US constitutional case law, while it would not compromise the rationality of proportionality reasoning.[85]

Perju's analysis shows that the literature on legal transplants can offer a framework for understanding how legal rules, institutions, concepts and ideas change as they travel across systems. During the '70s, Alan Watson pointed out that, contrary to traditional perceptions of the law as embedded in history and society, the transplantation of legal rules and institutions from one system to another is the most recurrent form of legal change since antiquity. Watson attributed this to the "socially easy" character of the transplantation of legal rules, connected to legal elites' insulation from society.[86] In his view, "usually legal rules are not peculiarly devised for the particular society in which they now operate and (…) this is not a matter for great concern".[87] By accentuating the impact of foreign influence on legal change and legal reform, Watson also provided a project for comparative legal studies: the study of others' laws could be a source of inspiration, since other systems could provide better legal solutions to problems that also exist in one's own system. The study of legal transplants is part of a broader functionalist trend in comparative law. Following this trend, similar problems arise in different legal contexts and allow for a focused comparison of the solutions given every time. The aim of comparative law is to enhance communication between national legal systems and to eventually promote their unification or harmonisation.[88]

The legal transplants literature has long been limited to the field of private law, since the embeddedness of public and especially constitutional law in local socio-political contexts was believed to hinder the transplantation of rules and institutions.[89] Yet the emergence of a global paradigm of constitutionalism has increasingly pushed comparative constitutional lawyers to think about cross-border influence. It is accepted nowadays that while transfers among constitutional jurisdictions are possible, this process is less mechanical than in private law. Comparatists have thus employed new metaphors, like borrowing, migration or cross-fertilization to express this.[90] Drawing on these analyses, Vlad Perju proposes to see proportionality as a transplant that must adapt to the needs of the host environment. While he does not take for granted the structure of proportionality, he does take for granted a lot: first of all, proportionality's meaning as a prong-structured reasoning framework, and then proportionality's function, which in his view is to enhance judicial responsiveness. The US legal culture,

---

[85] Perju, 214 f.

[86] Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed. (Athens, Ga: University of Georgia Press, 1974), 95.

[87] Watson, 96.

[88] The most well-known and influential functionalist comparative study is the one by Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Amsterdam; New York: North-Holland Pub., 1977). For an interesting account and evaluation of functionalist approaches, see Michele Graziadei, "The Functionalist Heritage," in *Comparative Legal Studies: Traditions and Transitions*, ed. Pierre Legrand and Roderick Munday (Cambridge; New York: CUP, 2003), 100.

[89] See, most notably, Kahn-Freund, "On Uses and Misuses of Comparative Law."

[90] See for example Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: CUP, 2006).

or rather environment, in the author's terms, is seen as a *variable* that can be accommodated within the model of proportionality.

However, as Roger Cotterrell observed, "in different legal systems, local values, traditions or sentiments may differently colour the definition of [legal rules, institutions or concepts'] functions, the importance attached to them and the tests of their successful fulfillment".[91] Concerning US constitutional law in particular, Jacco Bomhoff explains that balancing has been perceived as a dangerous, anti-formalist doctrine in US constitutional thought.[92] Suspicion towards balancing would be at odds with its inclusion in a rational prong-structured reasoning framework, like the one proposed by proportionality scholars. Paul Kahn also explains that US lawyers view proportionality with suspicion, as a doctrine concealing political decisions.[93] This author compares US constitutionalism to a religion and explains how the will of the sovereign people, expressed in the constitutional text, is foundational in US legal thought. The mission of the Supreme Court is to speak in the name of the people, much like a priest speaks in the name of God. This makes sense of the importance of constitutional text and precedent in American constitutional thought, sometimes to the detriment of substantive justification and considerations of justice. Vlad Perju's functionalist approach neglects the particular local meaning of proportionality and balancing in the US. Local lawyers' suspicion towards proportionality is not placed within a larger context in which it makes sense. By attributing US resistance to a general concept of proportionality to special local demands for doctrinal stability, Perju misses a lot of the "local knowledge" that this resistance embodies.[94]

Moshe Cohen-Eliya and Iddo Porat are more sensitive to local perceptions of law and to the coherence of local legal discourses. In their book *Proportionality and Constitutional Culture*, they contrast the US with jurisdictions where proportionality enjoys the status of a general constitutional principle. To do so, they draw on the distinction between two ideal-types of constitutional culture, the "culture of authority" and the "culture of justification". The authors argue that in a culture of authority legitimacy of public action results from the authorisation of a public authority to exercise power, whereas in a culture of justification it results from the rationality and reasonableness of public action. Cohen-Eliya and Porat consider proportionality to be "an indispensable – inherent – part of the culture of justification".[95] In their view, such a culture is characterised by a vision of rights very akin to Alexy's optimisation requirements. Rights as substantive values are largely detached from the constitutional text. They expand to comprise all domains of power and provide guidance to judicial review and public action. In contrast, following the authors, the US Supreme Court's refusal to embrace proportionality is explained by the culture of authority that underpins its decisions. Such a culture is hostile towards balancing. Public law consists

[91] Cotterrell, "Is It so Bad to Be Different? Comparative Law and the Appreciation of Diversity," 136.

[92] Bomhoff, *Balancing Constitutional Rights. The Origins and Meanings of Postwar Legal Discourse*.

[93] Kahn, "Comparative Constitutionalism in a New Key," esp. 2698 f.

[94] Geertz, "Local Knowledge: Fact and Law in Comparative Perspective," 231.

[95] Cohen-Eliya and Porat, *Proportionality and Constitutional Culture*, 126.

in the delimitation of state actors' spheres of competence and the constitutional text remains important in judicial review. Rights are categorically defined requirements of abstention and entire fields of public action escape judicial review.

Proportionality and Constitutional Culture is animated by the same enthusiasm about proportionality that underpins the mainstream literature. While the authors stress the particularity of proportionality and locate its historical origins in formalist Prussian doctrine, they claim that it evolved in German law to acquire a universal character. Indeed in their view, proportionality, once again understood as a prong-structured framework for balancing rights, can be easily adapted to different contexts, since it expresses universally shared ideals, like coherency, systematisation and logical structure. The authors compare proportionality to a species of bird that, despite having evolved in a particular environment, has developed certain features "that make it adaptable to all types of environments".[96] While they do not use the transplant metaphor, this analogy is not so different from the way Alan Watson has described his perception of legal transfers: "[j]ust as very few people have thought of the wheel yet once invented its advantages can be seen and the wheel used by many, so important legal rules are invented by a few people or nations, and once invented their value can readily be appreciated, and the rules themselves adopted for the needs of many nations".[97] Whether the analogy is taken from biology or technology, proportionality seems to be part of a "hidden science of constitutionalism that should unite all liberal constitutions as variations on a common theme".[98]

5. Proportionality, culture and European integration

Still, Cohen-Eliya and Porat add a key element to the discussion of proportionality's spread: the importance of culture.[99] In their analysis, law and proportionality are embedded in local perceptions of society, democracy and reason. In their view, the culture of authority is animated by scepticism regarding human rationality and by a pluralist vision of society and of the democratic process as a field of constant power struggles between interest groups. On the contrary, the perception of democracy that underpins the culture of justification is substantive, in the sense that it imposes basic requirements of rationality or morality on the expression of political claims. In this context, constitutional adjudication is animated by a rationalist perception of law and legal knowledge as a quasi-scientific enterprise. The authors suggest that the trauma of the Second World War led the turn towards a culture of justification in Europe.[100] In a recent paper, they refine this argument by observing that

[96] Cohen-Eliya and Porat, 156.

[97] Watson, *Legal Transplants*, 100.

[98] Kahn, "Comparative Constitutionalism in a New Key," 2684.

[99] The concept of culture is hardly explained in their analysis, though. For a critical review of Cohen-Eliya and Porat's book, see David Schneiderman, "Proportionality and Constitutional Culture," *International Journal of Constitutional Law* 13, no. 3 (2015): 769.

[100] Cohen-Eliya and Porat, *Proportionality and Constitutional Culture*, 122 f.

the development of constitutional law in post-war Europe built on already developed administrative law doctrine and practice. Cohen-Eliya and Porat suggest that the administrative origins of European constitutional law might explain the success of proportionality in this context in contrast to the US, where constitutional law was well-established as a discipline much before the emergence of administrative law.[101]

The embeddedness of law in culture is a core problem for the theory and method of comparative law. Most famously, Pierre Legrand criticises the legal transplant metaphor, which in his view is based on a positivist misconception of law as rules, that is, as bare propositional statements, disconnected from social ideas and values. Indeed, it is typical for comparatists in this field to consider that rules travel from one society to another and are "equally at home everywhere".[102] On the contrary, Legrand perceives legal rules as "incorporative cultural forms" whose transplantation is simply impossible.[103] In this author's view, even when a rule crosses borders, its culturally specific meaning does not. This would require the transportation of the whole language and culture. In Legrand's terms,

> as the words cross boundaries there intervenes a different rationality and morality to underwrite and effectuate the borrowed words: the host culture continues to articulate its moral inquiry according to traditional standards of justification. Thus, the imported form of words is inevitably ascribed a different, local meaning which makes it ipso facto a different rule.[104]

For Legrand, any legal transfer leads to an idiosyncratic *métissage* that results from the domestication of the initial concept, rule, institution or idea. The transplant metaphor is nothing but "a convenient variance reducer".[105]

The perception of law as a cultural construction leads Legrand to deny the possibility and desirability of effective convergence between legal systems, even in the context of European integration.[106] In his view, "any attempt at globalisation ultimately resolves itself as an original experience of "glocalisation"".[107] This is due to the incommensurability of the epistemological approaches underpinning different legal cultures. Concerning the common law and the civil law in particular, Legrand suggests that they are separated by an irreducible "*primordial* cleavage – a *summa differentia*",[108] which lies in the completely different ways in which they answer the question of what

---

[101] Cohen-Eliya and Porat, "The Administrative Origins of Constitutional Rights and Global Constitutionalism."

[102] Pierre Legrand, "The Impossibility of Legal Transplants," *Maastricht Journal of European and Comparative Law* 4 (1997): 113.

[103] Legrand, 116.

[104] Legrand, 115.

[105] Legrand, 122.

[106] Legrand, "European Legal Systems Are Not Converging," 62.

[107] Pierre Legrand, "Public Law, Europeanisation and Convergence," in *Convergence and Divergence in European Public Law*, ed. Paul Beaumont, Carole Lyons, and Neil Walker (Oxford; Portland, Or.: Hart, 2002), 251; see also Legrand, "European Legal Systems Are Not Converging" (citation omitted).

[108] Legrand, "European Legal Systems Are Not Converging," 63.

constitutes legal knowledge. This prevents mutual understanding between civil and common lawyers.[109] Legrand argues that there is no common framework for measuring and evaluating the epistemological premises that separate the civil law from the common law. These cultures are thus "irrevocably irreconcilable".[110] The denial of epistemological commensurability between different legal cultures leads Legrand to deny the possibility of legal comparison as a scientific enterprise.[111] In his view, the comparatist simply cannot understand the meaning of foreign law as local lawyers do, since immersion in a fully internal perspective is impossible to achieve in practice. Every comparative enterprise is bound to conclude in the alterity of foreign law.[112]

Legrand's approach has been criticised as too radical, animated by a "naïve epistemological pessimism".[113] Comparatists have seen in such an approach the danger of essentialising culture, of perceiving it as an over-bounded and homogeneous unity that can be opposed to any effort of social change.[114] Legrand, by accentuating the nation-state as a privileged site for the formation of cultural identity, silences the asymmetries of power and knowledge that national legal cultures maintain and reproduce. Legrand's approach encloses the danger of using culture as a "discussion-stopper" and even as a "thought-stopper".[115] Including something within the realm of legal culture would endow it with some kind of traditional nobility and exclude the possibility of contesting or reforming it, without providing further insights as to how this feature is connected to law's wider socio-political context. Further, Legrand is criticised for underestimating the importance of transnational or supranational movements and networks in shaping collective identities. Most notably, he does not seem to take seriously the EU legal order as constituting *its own, legal* culture, in which domestic actors find new resources for contesting dominant mentalities and patterns in their own legal sphere.[116] Instead, Legrand seems to assume that Europeanisation, like other instances of globalisation, "operates in a deracinating world of markets".[117]

How can comparative law account for difference and the embeddedness of law in culture without eliminating the possibility for integration through law? This is

---

[109] Legrand, 76.

[110] Legrand, "The Same and the Different," 245.

[111] Legrand, 254.

[112] Legrand, 282 f.

[113] Mark Van Hoecke, "Deep Level Comparative Law," in *Epistemology and Methodology of Comparative Law*, ed. Mark Van Hoecke, European Academy of Legal Theory Series (Oxford: Hart, 2004), 8, cited by Roger Cotterrell, "Comparative Law and Legal Culture," in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford; New York: OUP, 2006), fn. 70.

[114] David Nelken, "Comparatists and Transferability," in *Comparative Legal Studies: Traditions and Transitions*, ed. Pierre Legrand and Roderick Munday (Cambridge; New York: CUP, 2003), 446; "Disclosing/Invoking Legal Culture: An Introduction," *Social & Legal Studies* 4 (1995): 443 f.; Cotterrell, "Comparative Law and Legal Culture," 729; Patrick Glenn, "Legal Cultures and Legal Traditions," in *Epistemology and Methodology of Comparative Law: Epistemology and Methodology of Comparative Law*, ed. Mark Van Hoecke (London: Bloomsbury Publishing, 2004), 14 f.

[115] Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Cambridge, MA; London: Harvard University Press, 2002), 44, referring to the fact/value dichotomy.

[116] Neil Walker, "Culture, Democracy and the Convergence of Public Law: Some Scepticisms about Scepticism," in *Convergence and Divergence in European Public Law*, ed. Paul Beaumont, Carole Lyons, and Neil Walker (Oxford; Portland, Or.: Hart, 2002), 262 f.

[117] Legrand, "Public Law, Europeanisation and Convergence," 254.

particularly relevant in the study of proportionality. Not only because proportionality's goal is precisely the integration of minorities into the policy-making process, but also due to the crucial role of proportionality in the process of European integration. Proportionality is a core principle both in the ECHR and in the EU legal orders. Applied by supranational courts, it is one of the most important legal mechanisms for ensuring the realisation of supranational interests and values. Hence, European courts encourage domestic actors to reason in proportionality terms and sometimes even impose the application of proportionality as a supranational legal obligation. Once received as a European principle, proportionality often deconstructs domestic categories, blurs traditional distinctions and transforms well-established ways of thinking. To deny the integrative and transformative dynamic of proportionality would be to neglect one important aspect of its spread. It would also lead us to discard an important element of domestic legal cultures themselves, that is, local legal actors' vision of Europe and European integration.

Still, the fact that the adoption of proportionality in certain contexts might not be voluntary but imposed by supranational institutions does not tell us much about the way proportionality is *locally* understood and applied. Even when imposed, legal transfers do not lead to harmonisation. In different contexts, they deploy their integration dynamic according to local patterns of legal change and local visions of European integration. Thus, even within the scope of supranational treaties, proportionality will be applied differently according to whether the host culture adopts a dualist or a monist perception of the relationship between domestic law and European legal orders. Categorisations and typologies of legal transfers based on their form of adoption, while relevant when seeking to causally explain the spread of proportionality as a rule or technique, are of little help in the search for proportionality's local meanings.[118]

Gunther Teubner's autopoietic theory is an attempt to bridge the divide between legal autonomy and cultural embeddedness and to account for legal change, albeit in a particularly local way. Following Niklas Luhmann's social systems theory, Teubner sees law as a discursive system that meets society as "a fragmented multiplicity of discourses".[119] In modern societies, law's professionalization and technicity are sources of operational closure in relation to the social subsystems that it purports to regulate. Law's autonomy is expressed in the "normative self-reference and recursivity" on which the legal discourse builds.[120] Lawyers prefer arguments from legal authority and precedent to arguments on the social consequences of a certain solution. In this context, the fact that proportionality is sometimes imposed as a *legal* obligation by

[118] For such a typology, see Margit Cohn, "Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom," *American Journal of Comparative Law* 58 (2010): 591–92.

[119] Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 1998), 21, http://papers.ssrn.com/abstract=876950. Concerning the utility of Teubner's theory in the study of legal transfers, see Nelken, "Comparatists and Transferability," 459 f.

[120] Teubner, "Legal Irritants," 16.

supranational courts acquires a particular importance. Indeed, it is precisely law's autonomy that makes convergence between national legal systems possible: as Teubner remarks, "social subsystems define their borders in terms of their own logic and tradition, independent of the political definition of local, regional, or national boundaries".[121] Still, law's autonomy is only relative, since law, as every operationally closed system, is "structurally coupled to its niche" and uses influence from social, political or other context to build or to change its internal structures.[122] Law is closely tied to other fragments of society and its social ties are manifested in relatively fixed "binding arrangements" with social power structures.[123]

Teubner's approach offers tools that can be useful to the cultural study of law in apprehending the complex relationship between law and its surrounding social context. Most importantly, it offers conceptual tools that allow accounting for legal change and convergence within the context of European integration, without neglecting the distinctive logic of the legal systems studied. Indeed, while Teubner accepts the possibility of legal transfers, he rejects the transplant metaphor as too simplistic. In his view, legal transfers are better described as legal irritants, "an outside noise which creates wild perturbations in the interplay of discourses".[124] As external influences, they provoke discursive change and irritate law's binding arrangements. Still, law's social ties "reappear in new disguises in which they are barely discernible".[125] Change remains internal to the legal system and reconstructs "from scratch" the transferred rule, institution or concept itself.[126] The concept of legal irritant can thus be a useful tool in describing how a legal transfer changes local legal culture, while it is itself transformed when it meets this culture's deep structures.

6. Comparing the local meanings of proportionality: research questions

Legal transfers offer an ideal opportunity to study the embeddedness of law in its local context, since they express the internal logic of the systems involved. As Gunther Teubner observes, transfers more generally "do not create a new unity of the separate discourses involved, they only link them transcending the boundaries but respecting, even reaffirming them. In spite of their identical *nom propre* they are purely internal constructs of each discourse involved".[127] Transfers can thus provide what Pierre Legrand calls a "semantic commonality or dialogical interface", which allows for comparison and translation between different legal cultures.[128] Interestingly, this

[121] Lawrence Friedman and Gunther Teubner, "Legal Education and Legal Integration: European Hopes and American Experience," in *Integration Through Law*, ed. Mauro Cappelletti, Monica Seccombe, and Joseph Weiler, vol. I:3 Forces and Potential for a European Identity (Berlin: de Gruyter, 1986), 363.

[122] Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism," *Cardozo Law Review* 13 (1991/1992): 1446.

[123] Teubner, "Legal Irritants," 17.

[124] Teubner, 12.

[125] Teubner, 18.

[126] Teubner, 12.

[127] Teubner, "Two Faces of Janus," 1458.

[128] Legrand, "The Same and the Different," 283.

author actually uses reasonableness and proportionality as an example of such commonality, which in his view, demonstrates the irreducible difference of common law and civil law representations of judicial review. The study of legal transfers is probably the field in which comparative law can best deploy its "*fonction subversive*" in the face of well-established legal dogmas, mentalities and taboos.[129] And proportionality offers a unique chance to undertake this task, precisely due to its spectacular spread and its importance in global constitutionalism rhetoric. Differences in the use of proportionality reveal important aspects of the worldviews shared not only by national legal actors or public lawyers in particular, but also by transnational and supranational actors who use proportionality, like the ECJ, the ECtHR or proportionality theorists themselves.

Jacco Bomhoff has neatly shown how comparative research can indeed proceed through the creation of "comparable local meanings" of legal arguments.[130] The author takes the example of balancing in the US and Germany and shows that despite the commonality of the balancing metaphor, the ways that local legal actors use it are very different. The difference mainly lies in the extent to which legal actors perceive balancing argumentation to have a political nature.[131] Taking a cue from Bomhoff's analysis, the study of the use of proportionality as a *particular* balancing argument allows for a sharpening of the focus of the comparison and for the identification of other sources of difference between legal systems. Indeed, in the application of proportionality divergence might not (or not only) result from local perceptions of judicial balancing, but also from local legal taboos concerning the identification and criticism of policy aims, the evaluation of policy-making means or the consideration of facts. Proportionality, by clearly separating the stages of the balancing process, renders the identification of sources of diversity across legal systems easier. Further, due to its theoretical perception as an analytical structure, the application of proportionality expresses the relative importance that local legal actors attach to structure in legal argumentation. Divergence in the practice of proportionality reveals clashes in styles of reasoning between transnational, supranational and domestic legal actors. Finally, in the scope of European law in particular, formal pressure for the application of proportionality unravels certain instances of local practice as cases of resistance, which would be difficult to identify otherwise.

Legrand compares the process of legal transfer to an author who finds it convenient to quote from foreign authors. In his view, transfers are only "a rhetorical strategy involving the ordinary act of repetition as an enabling discursive method".[132] Thus, the study of legal actors' reactions to this strategy and, more generally, the debates that legal transfers provoke unveil local perceptions of what constitutes a

[129] Horatia Muir-Watt, "La Fonction Subversive Du Droit Comparé," *RIDC* 52, no. 3 (2000): 503.

[130] Jacco Bomhoff, "Comparing Legal Argument," in *Practice and Theory in Comparative Law*, ed. Maurice Adams and Jacco Bomhoff (Cambridge; New York: CUP, 2012), 74 f.

[131] Bomhoff, *Balancing Constitutional Rights. The Origins and Meanings of Postwar Legal Discourse*; Jacco Bomhoff, "Genealogies of Balancing as Discourse," *Law & Ethics of Human Rights*, no. 4 (April 2010): 108.

[132] Legrand, "The Impossibility of Legal Transplants," 121.

successful legal argument and local expectations of law. Bomhoff's study shows that legal discourses have their proper criteria for evaluating legal arguments and their proper alternatives for legal argumentation.[133] Therefore, the success or failure of legal transfers is relative; it depends on the point of view.[134] This is particularly relevant for the comparative study of proportionality. Due to its focus on US exceptionalism, comparative scholars tend to assume that, wherever adopted, proportionality's transplant is successful. The use of proportionality by European supranational courts has certainly nourished this belief, which is also enhanced by the fact that local legal actors themselves are often enthusiastic about proportionality and increasingly refer to the European and to the Alexyan proportionality models. Put briefly, not only *is* proportionality a legal transfer, but it is often *perceived* as such both by national and by transnational actors. This feature distinguishes proportionality from generic balancing arguments and provides it with an impressive capacity to express local imagination.

Legal actors in domestic systems often privilege this or that context as the source of proportionality, thus expressing more general local patterns of legal change. Proportionality can be presented as a transfer from Germany, from Europe, but also from France, Switzerland or even from other disciplines like philosophy, mathematics or finance. The choice of the source context will often depend on the traditional sources of influence in the legal system. It might also indicate that different characteristics of proportionality are accentuated: its analytical structure, its substantive content or the type of review that it implies. Furthermore, the version of proportionality that local legal actors choose to adopt expresses their vision as to how the local legal discourse *can* change, as well as their expectations of this transformation. Divergence observed in the use of proportionality indicates that local expectations differ both from the objectives of European integration endorsed by European legal actors, and from the aims that transnational proportionality scholarship advances. Often asymmetries in the use of proportionality exist not only across legal systems, but also within the same legal system, across branches of law and groups of legal actors (academics, judges, lawyers, or law-makers). The observation of such asymmetries is insightful as to the role that different actors might play in local processes of legal change.

This work consists in a focused case study of the use of proportionality in France, England and Greece. Practical considerations, connected to my personal knowledge of these jurisdictions and of their corresponding languages, oriented me in this choice, which also proves very fruitful from an epistemological point of view. Contrary to the mainstream focus on the US and European models of judicial review, this study focuses on jurisdictions that have already embraced proportionality, and in which proportionality is sometimes a core issue of debate or even a hegemonic method of reasoning. Comparative study thus allows the identification of similarities and differences in local processes of receiving of proportionality, in its local perceptions of, and the place that it occupies in the contexts studied. Further, France, England and

[133] Bomhoff, "Comparing Legal Argument," 84 f.
[134] See also Nelken, "Comparatists and Transferability," 452 f.

Greece are all subject to the jurisdiction of the ECJ and the ECtHR. Thus, comparison of the application of proportionality in the scope of European law reveals similarities and differences in the ways that the dynamics of European integration are locally deployed and perceived.[135] Finally, the systems chosen undergo more or less impressive socio-political shocks that are expressed in the legal sphere. The recent, two-year long state of emergency in France is testimony to a crisis in French constitutional politics. Brexit crystallises Eurosceptic tendencies that have long been rising in the UK. The Euro-zone crisis provokes social and political instability in Greece and entails a huge delegation of powers to the executive. It is interesting to investigate how these evolutions colour the local meaning of proportionality.

The cases chosen, sufficiently similar to be comparable, are sufficiently different to make the comparison fruitful. France, the archetype civil law jurisdiction, and England, the oldest common law jurisdiction, are both known for their insular legal traditions and their long and glorious past, often attracting the attention of comparative lawyers. Greece, in contrast, is a relatively new legal order that belongs to the civil law family. Domestic lawyers have built on eclectic influences coming from all over the world, with France, the US, the UK and Germany being the most common sources of legal inspiration. Greece rarely attracts the attention of non-local lawyers, probably due to language difficulties, but also to the limited influence of the Greek model of administration and judicial review. These differences are also connected to the different roles that the countries studied have played in the European integration process. France and the UK were among the founding states of the Council of Europe and have exercised important influences on the architecture and political orientation of European supranational organisations. For Greece, in contrast, the process of European integration decisively started in the mid-'70s and the country has always been part of the European periphery. The legal relationships between these jurisdictions and Europe also display differences, the UK being a dualist state, while France and Greece are monist, at least at the level of legal texts. The choice of the three countries thus allows for an investigation of how different legal cultures and European trajectories, across the common law - civil law cleavage, affect the local meaning of proportionality and shape the process of legal convergence within Europe.

The research questions that have guided this study are the following: What do French, English and Greek lawyers do when they "speak" proportionality and what are the expectations that they have attached to the use of this particular language? What do different local meanings of proportionality tell us about the legal cultures in which they have evolved and how has proportionality affected local patterns of cultural

[135] See Hirschl, "The Question of Case Selection in Comparative Constitutional Law." In this author's classification, my study would be a study of "outlier" cases (esp. 146 f.). Indeed, the application of proportionality and the membership of the EU and the Council of Europe are typically seen as factors of convergence among legal systems. Thus, divergence in the use of proportionality in France, England and Greece indicates that other factors, most notably culture, affect the application of proportionality. However, contrary to Hirschl, my purpose is not to provide a causal explanation of judicial practice.

evolution? Finally, what does the application of proportionality in the field of EU law and the ECHR tell us about local visions of Europe and European integration?

7. A cultural study of law: theoretical and methodological assumptions

Proportionality proliferates in comparative constitutional law but it is not always clear what it means. The relevant literature tends to describe it as a method, a framework, a principle, an ideal or even the ultimate rule of law. Recently, Vicki Jackson distinguished the substantive aspect of proportionality as an ideal or a principle from the structured proportionality doctrine.[136] This second meaning seems to be more important in proportionality theory, since, as we saw, most scholars connect the merits of proportionality to the particular reasoning process that it implies. Despite scholarly concern with the substance or the analytical structure of proportionality however, the unanimous affirmation of proportionality's success is commonly based on the observation of the pervasiveness of proportionality *language*.[137] Indeed, it is because courts around the world explicitly refer to proportionality as a general constitutional principle and in some cases engage in proportionality analysis that scholars consider proportionality to be a successful transplant. But while scholarship usually does not take the spread of proportionality for granted, it does generally take proportionality's meaning, form and function for granted. In other words, the relevant studies often assimilate the spread of a particular form of language into the spread of a particular pronged process of reasoning, and in some cases into the spread of a more general human rights paradigm and of a culture of justification.[138]

Quite differently, I propose to start from Pierre Legrand's sole concession to the legal transplants literature: "At best, what can be displaced from one jurisdiction to another is, literally, a *meaningless* form of words".[139] This is a good starting point because comparative lawyers, like linguists and historians, are aware that the same words might have very different meanings across jurisdictions and across time. In this minimalist view of legal transfers then, proportionality is only a particular form of language, a way of speaking, and its identification is primarily based on the use of a particular vocabulary: the term *proportion* or *proportionality*, and its translations *proportion* or *proportionnalité*, *αναλογία* or *αναλογικότητα*. In the absence of these terms, other structural features might indicate the use of proportionality language, such as prong-structured reasoning, containing formulae like *necessary and appropriate*, *nécessaire et approprié*, *αναγκαίο και κατάλληλο* or their synonyms in each context. Reference to *balancing*, *balance* or

[136] Jackson, "Constitutional Law in an Age of Proportionality," 3098.

[137] Stephen Gardbaum observes that if scholars assumed proportionality in the absence of the relevant terminology, it would mean that "the dominance of proportionality is significantly achieved by stipulation". In "Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?," 223. See Bomhoff, "Genealogies of Balancing as Discourse," 112, making the same observation about balancing and proportionality.

[138] Bomhoff calls this the "discourse/process assimilation" in "Genealogies of Balancing as Discourse."

[139] Legrand, "The Impossibility of Legal Transplants," 120.

weighing, *conciliation* or *pesée*, and *στάθμιση* might also indicate the use of proportionality language when combined with other features, like reference to German or European case law or reasoning in prongs. Understood in this way, the comparative study of the use of proportionality in different jurisdictions is not very different from practising intellectual history. Its goal is, through the reconstruction of ways of speaking, to "unravel mental worlds".[140] Only, instead of reconstructing past uses of language, comparative law reconstructs foreign ones.

Words make sense only when inserted into a discourse, in the case of law, a legal discourse. As proportionality spreads in different legal spheres, it is connected to already existing categories, concepts and reasoning techniques. It is perceived as quasi-synonymous with legal terms and formulae, like the *contrôle de nécessité* in France and the *αρχή του ήττονος επαχθούς μέτρου* in Greece, or as antithetical to others, like at times the *Wednesbury* standard in England. Only within a legal discourse does proportionality terminology acquire its function in legal argumentation, it becomes a *head of review*, *un standard*, or an *αρχή*. In other words, it is the insertion of proportionality into a broader legal language, a "structure of content", in the words of Yan Thomas[141] or "a system of signification", in Jack Balkin's terms,[142] that fills it with legal content. Any inquiry into the local meaning of proportionality should thus start from its relationship with pre-existing concepts and categories in the legal discourses where it is received.[143] Such relationships are established through the study of constitutional or legislative texts, academic writings, as well as judicial opinions, deliberations and decisions. While in practice proportionality language is often employed in the field of fundamental rights, connection to rights is not necessary. The scope of the research is not limited in this respect. All uses of proportionality as a legal language are relevant to my analysis, insofar as they can serve to make sense of its content.

This study is ethnographic, in the sense that it takes local reasoning practices and local worldviews seriously. However, it is not based on the results of field research like Bruno Latour's inquiry into the decision-making practices of the French Council of State.[144] Legal discourse is mainly found in traditional legal material, in "law's own archeological remains".[145] Legal discourse is principally used by legal actors, who often correspond to Alan Watson's legal elites. In this sense, Pierre Legrand stresses that the comparative analysis of law is also "a cratology, that is, a study of power".[146] However,

---

[140] Annabel Brett, "What Is Intellectual History Now?," in *What Is History Now?*, ed. David Cannadine (New York: Palgrave Macmillan, 2002), 128.

[141] Yan Thomas, "La Langue Du Droit Romain. Problèmes et Méthodes," *Archives de Philosophie Du Droit* 18 (1973): 111.

[142] Jack Balkin, "The Hohfeldian Approach to Law and Semiotics," *U. Miami L. Rev*, no. 44 (1990): 1121.

[143] On this method of legal semiotics, see Balkin, "The Hohfeldian Approach to Law and Semiotics"; Jack Balkin, "The Promise of Legal Semiotics," *Texas Law Review* 69 (1991): 1831. For one of the rare applications in comparative legal studies, see Bomhoff, "Genealogies of Balancing as Discourse."

[144] Bruno Latour, *La Fabrique Du Droit : Une Ethnographie Du Conseil d'État* (Paris: La Découverte, 2002).

[145] Alain Pottage, "Law after Anthropology: Object and Technique in Roman Law," *Theory, Culture & Society* 31, no. 2–3 (2014): 150.

[146] Legrand, "Public Law, Europeanisation and Convergence," 237.

national legal actors do not monopolise legal discourse and meaning. The boundaries of legal communities might be broader or narrower than state borders. I consider uses of proportionality by European courts or by transnational actors as equally *legal* and not (or not solely) as dictated by a certain economic rationality. In different settings, proportionality is appropriated by different groups of legal actors. The relevance of the different types of research material in making sense of its content varies accordingly. Thus, while in France the most sophisticated analyses on proportionality are found in academic writings, in England judges have had a more important role in developing proportionality's semantic content and only recently have scholars taken the lead in this respect. The use of proportionality language in official legal texts such as the Constitution, parliamentary statutes and administrative decisions also offers information about its content and indicates its importance for legal actors. Such use is much more current in Greece, where proportionality enjoys explicit constitutional status, than in the other cases. Finally, although this study has not focused on EU law and the ECHR, the use of proportionality language in Luxembourg and Strasbourg decisions, as illuminated by scholarly analyses, have served to identify the dynamics of European integration that these jurisdictions engage.

Legal concepts, categories and distinctions used in a particular jurisdiction reflect and constitute local lawyers' peculiar "*decoupage du monde*",[147] their way of imagining the real and of characterising social situations. Different legal worldviews are themselves based on local narratives, collectively shared representations of the past. Like myths, these narratives are used by legal actors to explain the present and to aspire to the future.[148] They shape local representations, taboos and rituals, local ways of thinking about law and producing legal knowledge, legal actors' "collective mental programmes" when interpreting legal texts and when producing legal arguments.[149] In other words, law reflects and constitutes a particular legal culture. Legal culture defines "a realm of possibility" for legal argumentation and meaning, it defines "the ultimate horizons for what can plausibly be considered rhetorically convincing and morally acceptable".[150] Proportionality, when received in different legal discourses, affects the way legal actors think about law and its relation to society. At the same time, it is itself affected by culture. It remodels local narratives and is itself reinvented within them. In different settings proportionality is understood as a ground of review, a method, or a principle, depending on what is locally perceived as important by legal actors, on local sources of law, and on local ways of producing legal knowledge, what Rodolfo Sacco calls "legal formants".[151] Proportionality's success or failure ultimately depends on local legal actors' expectations of its use and on locally prevalent criteria for evaluating legal arguments.[152] In different legal contexts, proportionality is ascribed different meanings.

---

147 Expression used by Thomas, "La Langue Du Droit Romain. Problèmes et Méthodes," 113.

148 Claude Lévi-Strauss, "The Structural Study of Myth," *The Journal of American Folklore* 68, no. 270 (1955): 430.

149 Legrand, "European Legal Systems Are Not Converging," 56.

150 Legrand, "Public Law, Europeanisation and Convergence," 241.

151 Rodolfo Sacco, "Legal Formants: A Dynamic Approach To Comparative Law," *American Journal of Comparative Law* 39 (1991): 1; 343.

152 Bomhoff, "Comparing Legal Argument," 84 f.

Apart from a principle of rights optimisation, it can also be a vector of modernisation or rationalisation. What is more, these terms themselves might be understood very differently across jurisdictions and across time.

The use of the term culture does not presuppose the internal coherence of local legal worldviews. As David Nelken insists, legal culture is a product of historical contingencies and its internal contradictions leave place for interpretation and manipulation by legal actors, for struggle and disagreement.[153] Or, in Clifford Geertz's terms, "the elements of a culture's own negation are, with greater or lesser force, included within it".[154] The practice of proportionality reflects the internal incoherency of local legal cultures. A survey of its evolution in each context shows that proportionality's meaning is constantly being negotiated and changing. At different times, proportionality is appropriated by different groups of legal actors (lawyers, judges, scholars or law-makers) and is inserted into local debates about formality, rights, European law, public prerogatives or judicial power. Asymmetries or incoherencies in its use, locally specific critiques and typically proposed alternative arguments might reverberate with more fundamental disagreements between legal ideologies within the same culture.[155] Taking the example of proportionality and reasonableness in the UK, Margit Cohn has shown that the historical survey of the evolution of legal transfers can offer a better understanding of tensions that traditionally exist in their host culture.[156] My purpose is to push the analysis further and show that locally specific stories of proportionality reflect its locally specific meaning and what local legal actors expect of its use. The comparison of different local meanings of proportionality reveals a lot about the legal cultures in which these meanings evolved and about the possibilities of legal convergence.

The use of the term culture purports to connect comparative law to developments in cultural anthropology and intellectual history. It purports to accentuate the fact that law is a symbolic system that, like science, politics, economics or religion, offers a complete vision of the world. Paul Kahn explains that, "[f]rom within law, we can look out on science and politics - law offers an understanding of both. But it does so without collapsing into either".[157] Thus, comparative law is an exercise in cultural interpretation and translation, concerned with law's own structures.[158] It does not purport to reconstruct moral theories hidden behind judicial decisions using proportionality, nor the political or other ideologies that underpin scholarly proportionality doctrines. Its aim is to understand legal cases and doctrines in their own context, to represent them in an intelligible way by displaying their culturally specific logic. Legal culture is neither

---

[153] David Nelken, "Defining and Using the Concept of Legal Culture," in *Comparative Law: A Handbook*, ed. Esin Örücü and David Nelken (Oxford; Portland, Or: Hart, 2007), 114.

[154] Geertz, *The Interpretation of Cultures*, 404 f., esp. 406.

[155] On the importance of past debates for reconstructing the meaning of legal arguments and legal actors' expectations, see Bomhoff, "Comparing Legal Argument," 81 f. The author refers to the contextualist approach in intellectual history. On the "crystallisation" of legal debates, see Jack Balkin, "The Crystalline Structure of Legal Thought," *Rutgers Law Review* 39 (1986): 1.

[156] Cohn, "Legal Transplant Chronicles."

[157] Kahn, "Comparative Constitutionalism in a New Key," 2686 f., esp. 2692.

[158] Geertz, "Local Knowledge: Fact and Law in Comparative Perspective," 218.

universal nor individual; it is connected to the identity of a particular legal community and constitutes this community's self-understanding. Of course, legal communities are situated in a certain society and at a certain moment of history. Legal culture itself is influenced by social, economic, political and other circumstances. Still, the cultural study of law does not collapse into social or political science. While science aims at explaining and predicting causes and effects, the study of legal culture aims at "making sense" of legal concepts, rules and techniques.[159] From this point of view, the study of local meanings of proportionality is very different from sociological or political analyses of its spread and of the spread of global constitutionalism more generally.[160]

This does not mean that the interpretation of legal cultures is simply interpretation of legal norms or doctrinal analysis, like the one performed by local legal actors. The purpose of the research is not to conclude on three general proportionality theories or doctrines, one for each national context, and to list similarities and differences between them. Instead, it is to expose the unstated and taken for granted elements of local legal thought, the aspects of legal reasoning that are fundamental for local lawyers but remain unnoticed, because they are deemed to be common-sensical.[161] Hence, the material of the research is not limited to what local legal actors perceive as the "great texts" or important decisions concerning proportionality. Proportionality's local meaning is also sought in features that domestic lawyers perceive as mundane. Failed proportionality arguments or theories, neglected cases and unmethodical *obiter* expressed in proportionality terms, forgotten structural transformations that proportionality has been subject to or has itself produced, and commonly shared misinterpretations of proportionality decisions are just as important as the solemn pronouncement of the principle in the Constitution. As Clifford Geertz points out, common-sense wisdom "is shamelessly and unapologetically ad hoc. It comes in epigrams, proverbs, *obiter dicta*, jokes, anecdotes, *contes morales* – a clatter of gnomic utterances-not in formal doctrines, axiomized theories, or architectonic dogmas".[162] Proportionality has an impressive capacity to express local lawyers' taken for granted assumptions, because it presents itself as common-sensical and inherent into legal reasoning. Indeed, proverbs like "*You should never use a cannon to kill a sparrow*" are often mobilised in its use.

Albeit ever-changing and difficult to grasp, the meaning of proportionality is public. It does not always coincide with what legal actors have in mind when "speaking" proportionality, nor with what their addressees finally understand. In Annabel Brett's words, "[t]he publicity of language defies its complete appropriation to the purposes of any individual agent".[163] My purpose is not to *speculate* on legal

[159] Geertz, *The Interpretation of Cultures*, 13.

[160] For an example of such a study, see Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA; London: Harvard University Press, 2004).

[161] On this aspect of culture, see Cotterrell, "Comparative Law and Legal Culture," 722; James Whitman, "The Neo-Romantic Turn," in *Comparative Legal Studies: Traditions and Transitions*, ed. Pierre Legrand and Roderick Munday (Cambridge; New York: CUP, 2003), 315.

[162] Clifford Geertz, "Common Sense as a Cultural System," in *Local Knowledge: Further Essays in Interpretive Anthropology*, 3rd ed. (New York: Basic Books, 1983), 90.

[163] Brett, "What Is Intellectual History Now?," 123.

actors' personal sources of inspiration and intellectual references when using proportionality, when such influences are not explicit or recoverable from the discursive context. Further, it is not because a judge or a scholar referred to proportionality as a principle of rights optimisation that she *actually used* it as such. Even when employing a transnational idiom and even when referring to foreign authors and doctrines, local legal actors understand and use proportionality in their peculiar way, according to the constraints that the discursive context imposes on them. As Michel Foucault put it,

> if there exist things said – and those things alone – then we should not seek the immediate reason for them in the things which are said there or in the men who have said them, but in the discursive system and in the possibilities or impossibilities of utterance which it provides.[164]

In order to identify and make sense of the local meanings of proportionality we need to get rid of our a priori ideas and beliefs concerning legal actors, but also of our perception of proportionality itself as a transplant.

This is not to say that cross-border influences do not exist. Lawyers do travel and read foreign legal writings. They translate them into their own legal language, often with the purpose of provoking legal change. The spread of proportionality itself is the perfect evidence of legal promiscuity. The cultural study of law does not exclude the possibility of observing such influences nor the possibility of legal convergence. The plural contexts in which proportionality is used inscribe their peculiar logic into it and charge it with different semantic baggage.[165] As proportionality spreads, its semantic baggage might cross borders too. In some cases, proportionality is indeed very akin to the prong-structured framework described by the mainstream proportionality literature and assumes a function of rights protection which is not very different from the one it has in the global human rights paradigm. In the case law of European supranational courts in particular, proportionality acquires its proper dynamic and postulates the adaptation of national legal discourses accordingly. However, legal actors respond differently to European or other pressures, following particular local patterns of legal change and local understandings of Europeanisation. My purpose is not to deny the European or other integration dynamics of proportionality. Rather, it is to show that they operate in much more complex ways than the dominant rhetoric of convergence assumes.

This PhD consists of three parts. **Part I** is a description of the spread of proportionality in France, England and Greece. It provides a historical account of proportionality's emergence and evolution in these contexts and of its insertion into local discursive structures. It shows that even though proportionality has provoked

---

[164] Michel Foucault, *L'archéologie Du Savoir* (Paris: Gallimard, 1969), 70, as it is translated by Brett, "What Is Intellectual History Now?," 121.

[165] See Brett, "What Is Intellectual History Now?," 123.

discursive change in the jurisdictions studied, it has rarely corresponded to a pronged structure for rights-based adjudication. In some cases, proportionality is not even used by the judge, but rather serves scholars in their reconstruction of judicial discourse. In other cases, while it is employed in judicial reasoning, it does not involve judicial balancing. And in yet others, proportionality's use is not connected to rights at all.

The purpose of **Part II** is to make sense of the three different proportionality stories described in Part I, by reconstructing the cultural contexts in which they unfolded. This Part provides three culturally specific meanings of proportionality that render differences in its local forms and functions less enigmatic. It shows that legal actors' expectations of proportionality's transfer have been very different to the optimisation of rights advanced by the mainstream proportionality literature. Even though, under the impulsion of proportionality, local cultures have been subject to change in the directions of modernisation, rationalisation and Europeanisation, the local understandings of these terms and the reactions that proportionality has provoked are very different, even opposed.

Part III focuses on the role of proportionality in the process of European integration. It shows that in the ECJ and the ECtHR case law proportionality acquires a particular function connected to the realisation of the supranational goals that these courts promote. While this creates formal pressure for the consistent application of proportionality in domestic contexts, it does not always lead to convergence or harmonisation, not even in the scope of European law. Proportionality deploys its Europeanisation dynamics differently, according to local patterns of influence and change, to local narratives of European integration, and to local visions of Europe, which themselves of course change over time.

PART I

THE SPREAD OF PROPORTIONALITY

The analytical structure of proportionality. Robert Alexy and his followers describe proportionality as a method for the optimal realisation of constitutional principles. They conceive of it as a model of legal reasoning and argumentation used when the hierarchy of norms is triggered, that is, when a statute or a lower-ranking norm restricts the realisation of a constitutional right.[166] As such, proportionality is primarily purported to serve judges. In theory, it is part of a twofold reasoning: first, the decision-maker identifies the restriction to the right in question; then, she proceeds to a concrete examination of its constitutionality according to the proportionality test. Proportionality invites the decision-maker to take into account certain types of considerations, which differ according to the stage of analysis in which she engages. It is an argumentative framework that "aims at clarifying constitutional rights concepts, thereby presenting a way to structure one's argument when reasoning about constitutional rights".[167] As we saw, proportionality claims to be neutral with regard to substantive outcomes. It merely represents a structure within which substantive moral arguments can be mobilised. It provides "little more than a check-list of individually necessary and collectively sufficient criteria that need to be met for the assessment" of the relevant arguments.[168]

Scholars generally identify a four-pronged structure as representative of the correct application of the model. Whenever a sub-constitutional norm restricts a constitutional right, its validity depends on the test of proportionality, analysed in a check as to the legitimacy of its goal, the suitability of the means chosen, the necessity of the restrictions and their *stricto sensu* proportionality. The legitimate end and the *stricto sensu* proportionality requirements aim to optimise rights within the scope of what is *normatively* possible in the legal system. The suitability and the necessity requirements aim to optimise rights to the extent that it is *factually* possible.[169] Proportionality theorists hold that the clear distinction of the various sub-tests is important, since each one performs a special function. Only after the decision-maker has verified the fulfilment of the conditions imposed by the first stage, can she move to the second one, and so on. Questions of institutional legitimacy and competence are accommodated through the variation of the intensity of scrutiny under the different prongs. On this point, the Alexyan theory considerably benefitted from development by scholars with a more institutionally sensitive approach.[170]

---

[166] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge Studies in Constitutional Law (Cambridge: CUP, 2012), 151.

[167] Kai Möller, "Balancing and the Structure of Constitutional Rights," *International Journal of Constitutional Law* 5, no. 3 (2007): 458.

[168] Mattias Kumm, "Democracy Is Not Enough: Rights, Proportionality and the Point of Judicial Review," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, March 11, 2009), 6, http://papers.ssrn.com/abstract=1356793.

[169] Robert Alexy, "Constitutional Rights, Balancing and Rationality," *Ratio Juris* 16, no. 2 (2003): 135 f.

[170] See most notably Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford: OUP, 2012), chap. 4 and 6; Julian Rivers, "Proportionality and Variable Intensity of Review," *CLJ* 65, no. 1 (2006): 174.

i. The legitimate aim requirement implies that the law-maker can limit a constitutional right only for certain reasons connected to the preservation of foundational social values. Often such reasons, or general criteria for their identification, are mentioned in the constitutional text. In any case, they must have a constitutional basis; that means that they must either be derived from a constitutional norm or be a choice that falls within the scope of the constitutionally attributed powers of the reviewed authority. In a democratic society, legitimate reasons for the limitation of rights are the pursuit of the public interest and the protection of the rights of others.[171] For the identification of the purpose of an act, interpretation is necessary. However, there is disagreement as to the method that is to be employed at this stage. Some argue that the public goal is identified objectively. Namely, even an act enacted for illegitimate reasons may be considered constitutional, if in fact it promotes a legitimate goal.[172] Others argue for a combination of objective and subjective considerations.[173] Following the proportionality theory, the legitimate goal condition is a threshold requirement, which does not entail balancing between competing principles. Legitimate aims are thus generously defined to leave broad discretion to the reviewed authorities.[174] Scholars however, observe that in practice, judges often proceed to balancing at this stage.[175]

ii. The suitability requirement is conceived of as a merely factual test, which purports to guarantee that the means chosen by the primary decision-maker are rationally connected to the goal of the reviewed act. In other words, the limitation of the realisation of a constitutional principle is unconstitutional if it does not result in a gain for another constitutional principle. Like the legitimate means test, suitability sets a threshold condition. For it to be fulfilled, it is sufficient that the measure in question promotes to a certain extent or is likely to promote in the future, the goal of the primary decision-maker. The suitability prong does not require certainty concerning the advancement of this goal. It can be translated to a requirement of reliability in relation to the primary decision-maker's factual hypotheses.[176] The suitability test is comparable to the "rational basis review" in American constitutional law. The appropriateness of means is assessed through a prognosis of factual and social probabilities. The burden of proof lies with the reviewed authority, who must provide the relevant information.

---

[171] According to the account of rights that one adopts, these categories can be broader than the category of constitutional rights or coextensive with it. Möller, for example, reconstructs the legitimate aims of public authorities as connected to the ultimate aim of protection of personal autonomy. See Kai Möller, *The Global Model of Constitutional Rights*, Oxford Constitutional Theory (Oxford: OUP, 2012), 183. Klatt and Meister accept constitutional values as legitimate reasons for rights' limitation. See Klatt and Meister, *The Constitutional Structure of Proportionality*, 23 f.

[172] See Rivers, "Proportionality and Variable Intensity of Review," 196.

[173] See Barak, *Proportionality*, 285 f.

[174] Klatt and Meister, *The Constitutional Structure of Proportionality*, 48 f.

[175] Canadian, South African and US courts are mentioned as examples of this type of reasoning. See Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism," *Columbia Journal of Transnational Law* 47 (2008): 112 f.; Barak, *Proportionality*, 245 f; 277 f.

[176] See Barak, *Proportionality*, 303 f. On issues of reliability, see Julian Rivers, "Proportionality, Discretion and the Second Law of Balancing," in *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy*, ed. George Pavlakos (Oxford: Hart, 2007), 167; Klatt and Meister, *The Constitutional Structure of Proportionality*, 109 f.

The first two stages of proportionality are thus concerned with the reviewed authority's intents. Alec Stone Sweet and Jud Mathews observe that they are often used by courts "to pay [their] respects, first, to the importance of the policy consideration generally, and, second, to the legislator's own deliberations on the proportionality of the law."[177]

iii. The next step of proportionality analysis involves necessity review. Under this prong, the judge must check for the existence of less restrictive alternatives to the reviewed act. In order to lead to the invalidation of the reviewed act, the alternative measure must provide equal advancement of the public goal pursued by the reviewed act "quantitatively, qualitatively, and probability-wise".[178] Furthermore, that alternative restriction of the right in question must be less harmful, considering "the scope of the limitation, its effect, its duration, and the likelihood of its occurrence".[179] These elements are assessed objectively and do not concern the state of mind of the reviewed authority. Thus, technological progress may cause *a posteriori* unconstitutionality of a legal statute, if it allows the advancement of the legislative purpose by less harmful means. Less restrictive alternatives must not affect other parameters, such as the cost of the pursuit of the goal, the realisation of other constitutional values or the burdens imposed on third parties. Thus, general prohibitions are generally disproportionate, but only when the option of individual examination of each case is not very costly.[180] The necessity test shares a lot with the "narrowly-tailored" requirement in American constitutional doctrine, even though it remains broader.[181] Proportionality scholars attribute particular importance to this stage and observe that in some jurisdictions it is the core requirement, since judges *de facto* engage in practical reasoning under the necessity prong.[182]

iv. Whereas the three previous subtests serve to ascertain the existence of *genuine* conflicts between constitutional principles, the requirement of proportionality in the narrow sense involves the resolution of such conflicts.[183] Under this prong, the decision-maker examines whether the limitation imposed on the constitutional right is of proportionate importance to the gain in relation to its legitimate goal. In other words, this stage of proportionality analysis consists in a balancing exercise, based on the evaluation of how severely the various alternative measures affect the constitutional right at stake.[184] The reasoning that it implies has been schematised by Robert Alexy in the famous Law of Balancing: "[t]he greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of

---

[177] Stone Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism," 163–64.

[178] Barak, *Proportionality*, 324.

[179] Barak, 326.

[180] See Barak, 317. On the suitability and necessity tests, see also the analysis by Möller, *The Global Model of Constitutional Rights*, 193 f.

[181] See Mattias Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. A Review Essay on *A Theory of Constitutional Rights*," *International Journal of Constitutional Law* 2, no. 3 (2004): 580; Barak, *Proportionality*, 333.

[182] This is the case of the ECJ and the ECtHR, for example. See Stone Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism," 163 f.

[183] See Möller, *The Global Model of Constitutional Rights*, 181.

[184] Robert Alexy, *A Theory of Constitutional Rights*, trans. Julian Rivers (Oxford; New York: OUP, 2002), 401.

satisfying the other".[185] The Law of Balancing is also illustrated by a mathematical formula, called weight formula.

Balancing has been used as a metaphor to describe practical and legal reasoning since ancient times. It is a reasoning process that consists in a comparison through weighing of the importance of competing values or principles. Balancing presupposes the establishment of degrees of satisfaction and non-satisfaction of conflicting principles. Nonetheless, the balancing enterprise professed by the proportionality theory does not presuppose Benthamite quantifications or cost-benefit analysis, but the confrontation of practical and moral arguments.[186] All rights and principles do not have the same social importance at the abstract level. The decision-maker thus assigns abstract weights to the various competing values at stake, in accordance with which values are perceived as fundamental in each society.[187] Robert Alexy proposes a triadic scale of degrees of social importance: light, moderate, or serious.[188] Therefore, at the balancing stage, the decision-maker unavoidably engages in practical reasoning. Proportionality requires judges to render explicit the substantive moral theory that they apply when deciding cases.

Proportionality theorists generally describe two types of balancing: "definitional" and *ad hoc*. The former leads to the establishment of a norm which is then applied to other cases without further balancing; the latter is applied from case to case, taking into account the particular circumstances.[189] It is this second type of balancing that Robert Alexy and his followers advance.[190] Indeed, proportionality excludes a pre-established hierarchy between constitutional norms, "freezing in place a prior act of balancing",[191] in the form of categories or precedents. Its application does not involve legal analysis of the conventional kind, based on categorical reasoning and working from authoritative legal pronouncements. This follows from proportionality theorists' particular vision of legal reasoning as a "special case" of practical reasoning, which

---

[185] Alexy, 102. The law of balancing has been reformulated and refined by many scholars, purporting to clarify the nature of the various factors taken into account. See, for example, Klatt and Meister, *The Constitutional Structure of Proportionality*; Barak, *Proportionality*, 340 f.

[186] Alexy, *A Theory of Constitutional Rights*, 13, 99, 409; Klatt and Meister, *The Constitutional Structure of Proportionality*, 57 and fn. 74. See also Jeremy Waldron, "Fake Incommensurability. A Response to Professor Schauer," *Hastings Law Journal* 45 (1994): 813. On the distinction of different types of balancing, see Möller, *The Global Model of Constitutional Rights*, 137 f.

[187] Alexy, *A Theory of Constitutional Rights*, 105; Mattias Kumm, "What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement," New York University Public Law and Legal Theory Working Papers, no. Paper 46 (2006): 21 f., http://lsr.nellco.org/nyu_plltwp/46; Klatt and Meister, *The Constitutional Structure of Proportionality*, 22 f.; Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights?," New York School Jean Monnet Working Paper Series, no. Paper 9 (2008): 5 f., www.JeanMonnetProgram.org.

[188] Alexy, *A Theory of Constitutional Rights*, 401; "Constitutional Rights, Balancing and Rationality," 136.

[189] Alexander Aleinikoff, "Constitutional Law in the Age of Balancing," *Yale Law Journal* 96, no. 5 (1987): 948, citing Nimmer.

[190] Robert Alexy, "On Balancing and Subsumption. A Structural Comparison," *Ratio Juris* 16, no. 4 (2003): 433. For a concise presentation of Alexy's theory of law, see Robert Alexy, "On the Concept and the Nature of Law," *Ratio Juris* 21, no. 3 (2008): 281.

[191] Stone Sweet and Mathews, "Proportionality Balancing and Global Constitutionalism," 87–88; see also Waldron, "Fake Incommensurability. A Response to Professor Schauer," 819–20.

obeys special formal and institutional constraints.[192] Proportionality aims to liberate judges from such constraints and to focus on the substantive justification of legal solutions. The importance of formal sources in legal argumentation varies between the different authors. David Beatty, for example, rejects arguments resulting from the strict interpretation of legal texts or from precedent and proposes to focus on the facts of each case.[193] In contrast, most scholars accept the importance of precedent and legal certainty. In a mature system of constitutional adjudication, precedents lead to "a relatively comprehensive and dense network of norms", which guides adjudication and allocates the burdens of proof and argumentation among the various parties.[194] Legal and constitutional texts are also relevant for demarcating the discretion that the primary decision-maker enjoys.

Three different stories on proportionality. The proportionality theory is underpinned by the idea that proportionality has roughly the same content in the systems where it is received. Thus, Aharon Barak's book aims to provide a "universal understanding of the concept of proportionality in constitutional democracies".[195] Vlad Perju argues that, despite differences in its application, the formal structure of proportionality analysis has remained unchanged. In his words, "[v]irtually everywhere, at least at the level of national courts, judges structure their analysis using the formal four-step structure".[196] Focusing on the method of the review, David Beatty also contends that no matter the subject matter or the nature of the right invoked, "the test is always the same".[197] And Bernhard Schlink suggests that application of proportionality has had a "standardizing effect" on different constitutional cultures.[198] Interestingly, Moshe Cohen-Eliya and Iddo Porat point out that due to its compelling appeal as "a logical, coherent and systematic doctrine" proportionality might displace local doctrines that have long been shaped and reshaped to adapt to their environment.[199] The authors call this characteristic of proportionality "doctrinal imperialism" and once again give the example of a universally adaptable species of bird "that migrates beyond its natural environment and drives out the local species in its new environment".[200]

---

[192] Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, trans. Ruth Adler and Neil McCormick, 2nd ed. (Oxford; New York: Clarendon Press; OUP, 2010), 212 f.; Klatt and Meister, *The Constitutional Structure of Proportionality*, 51 f.; Kumm, "What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement," 3 f. and 12 f.

[193] David Beatty, *The Ultimate Rule of Law* (Oxford; New York: OUP, 2004), 72 f.

[194] Alexy, *A Theory of Constitutional Rights*, 376.

[195] Barak, *Proportionality*, 4.

[196] Vlad Perju, "Proportionality and Stare Decisis: Proposal for a New Structure," in *Proportionality: New Frontiers, New Challenges*, ed. Vicki Jackson and Mark Tushnet (Cambridge; New York: CUP, 2017), sec. 1. Proportionality as Legal Transplant.

[197] Beatty, *The Ultimate Rule of Law*, 160.

[198] Bernhard Schlink, "Proportionality," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: OUP, 2012), 736.

[199] Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture*, Cambridge Studies in Constitutional Law (Cambridge: CUP, 2013), 150.

[200] Ibid.

A survey of the emergence and evolution of proportionality in France, England and Greece shows that proportionality is indeed an imperialist doctrine. As it spreads in different systems it tends to replace pre-existing methods of reasoning, or at least to reframe them. In some cases, proportionality becomes hegemonic, like a scientific legal method. The pervasiveness of proportionality gives the observer the impression of success. Since legal actors, and particularly judges, refer to proportionality, they *must* mean the global model and they *must* be applying the proportionality framework. Nonetheless, following Jacco Bomhoff, one should note that when judges use proportionality language, it does not necessarily mean that they *think* within the proportionality framework. Just as when they do not use any argument, it does not mean that they do not think at all.[201] Once we see proportionality as a form of language and we focus on the way it is inserted into local discursive structures, the impression of proportionality's success is qualified. Attention to practice reveals that the use of proportionality by local legal actors has been very different to the structure that the proportionality theory professes. In fact, the doctrinal imperialism of proportionality does not imply that it is applied in a logical, coherent or systematic way.

The purpose of this Part is to establish an *état de lieux* of the different forms and functions of proportionality language across jurisdictions and across time. The analysis consists of three different stories about the emergence and spread of proportionality as a form of legal language, that is, as a legal way of speaking. Legal actors in France, England and Greece did not always reason in proportionality terms. While in some cases homonym or quasi-homonym concepts existed in legal writings, they were not part of the domestic legal webs of significance nor did they convey a particular dynamic. Since the '70s, under the influence of fundamental rights rhetoric and the case law of European courts, proportionality acquired its own legal content in domestic contexts. But, even after its emergence, the use of the language of proportionality has not been uniform in the different systems nor stable across time. It has been determined by the discursive contexts into which proportionality was inserted and has operated. Part I provides information about proportionality's form and function in legal reasoning, its connection with pre-existing concepts, and the discursive change that it has provoked. What kind of reasoning does proportionality imply? Is it a substantive requirement, a manifest error standard, a head of review, a method for legal reasoning or a structure for legal argumentation? Is it an autonomous standard or method of reasoning or is its application combined with other rules, principles or methods? Is it accommodated by already existing concepts or heads of review or does it add new structural features to legal or judicial reasoning? How have these features changed over time?

The study of the semantic content of proportionality is complemented by a more contextual account of the role of proportionality in the domestic legal discourse, and of the reactions of public lawyers to its emergence and spread. When and in what context did proportionality appear? Was it celebrated, criticised or rejected by domestic

[201] Jacco Bomhoff, "Genealogies of Balancing as Discourse," *Law & Ethics of Human Rights*, no. 4 (April 2010): 114 f.

lawyers? Is it used by judges or by other legal actors? Is it used more in certain procedures or cases? Does proportionality enjoy positive law, or even constitutional status, or is it a theoretical concept used in the analysis and systematisation of positive law and legal practice? Is there a shift between the way courts apply proportionality and the way lawyers perceive it? This analysis is closely connected to general legal and institutional features like the role and power of courts in a particular system, judicial review concepts and procedures and their evolution, or even the existence and content of constitutional norms. The purpose in this Part is to identify possible connections between proportionality's spread and more general evolutions like the "constitutionalisation" of the legal order, the spread of fundamental rights or the intensification of judicial review.

From the point of view of comparative law, the purpose of this Part is relatively modest. Across the various chapters, I attempt to observe similarities or differences between the domestic versions of proportionality and the transnational proportionality model described in the Alexyan legacy, which at this point serves as a *tertium comparationis*. The different stories of proportionality language allow us to discern some common features in its use by legal actors across the three jurisdictions studied. Such features orient the analysis in the rest of the thesis.

The spread of proportionality in France is characterised by domestic actors' search for continuity with pre-existing concepts and methods of review. The use of proportionality language has not brought about radical changes to existing legal structures but has rather been accommodated within them (**Chapter 1**). Continuity with existing concepts and structures has also been decisive for the use of proportionality in English public law. In this context, proportionality has always been defined against the background of *Wednesbury* reasonableness, as either a departure from it, or a confirmation of it (**Chapter 2**). In contrast, existing language structures have hardly controlled the spread of proportionality in Greece. The emergence of proportionality in the Council of State case law met with the enthusiasm of domestic lawyers and soon proportionality spread in domestic legal discourse. Since 2001, proportionality is explicitly entrenched in the Constitution, and in its Alexyan version, it is a hegemonic method of reasoning in Greek legal thought. However, the use of proportionality in judicial practice is more nuanced (**Chapter 3**).

CHAPTER 1

The spread of proportionality in French public law

plus ça change, plus c'est la même chose[202]

Situating the study. If a French public lawyer were to read this work, she might be surprised, almost frustrated by the story that follows. It is a commonplace in France that limiting the study of a method to the instances where the judge *explicitly* applies it is a methodological error. This is especially the case for proportionality. Thus, starting his contribution on proportionality, Grégory Kalflèche tells us that, "while [the judge] sometimes employs the term "proportionate", it would be a methodological error to limit the instances of proportionality review to the decisions" that explicitly refer to this term.[203] Similarly, Jean-Baptiste Duclerq affirms that "[i]t is hardly doubted that, to study the "origin" of proportionality, properly speaking, by focusing on the entrenchment of a term, is a trap. The idea does not need to be named in order to have been thought of and to find application in reality."[204]

In the minds of French public lawyers, proportionality represents much more than a discourse used in judicial justifications and in legal practice. It is a value, an ideal pursued by the judge and sometimes by other public authorities that leads to the utilisation of certain methods of reasoning. It finds its source in Aristotelian thought and underpins the legal mottos used by Roman jurists.[205] Proportionality cannot be reduced to the formulas and expressions used in judicial decisions, since it exists independently of them. In order to grasp its essence, one has to search for its origins in previous case law, in other legal orders, in other historic periods or even in other disciplines. Only then can its manifestations in contemporary practice be identified and understood. Put briefly, there is a very strong and commonly shared belief among public lawyers that proportionality pre-existed its emergence as a discourse, it has long been present in case law and legislation, and continues to exist in positive law and practice, even when no explicit reference is made to it. Its contemporary use and

[202] This expression is used by Michele Graziadei, "Comparative Law as the Study of Transplants and Receptions," in *Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford: OUP, 2006), 462. The expression is inspired by a book written by Alphonse Karr, *Plus ça change et plus c'est la même chose : notes de voyage* (Nice: A. Gilletta, 1871).

[203] Grégory Kalflèche, "Le contrôle de proportionnalité exercé par les juridictions administratives," *Les Petites Affiches*, no. 46 (2009): 46, before fn. 3.

[204] Jean-Baptiste Duclerq, *Les mutations du contrôle de proportionnalité dans la jurisprudence du Conseil constitutionnel* (Paris: LGDJ, 2015), 1–2. Similarly, Xavier Philippe, *Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative françaises* (Paris: Économica, 1990), 7 f.

[205] See, for example, Petr Muzny, "Proportionnalité," ed. Joël Andriantsimbazovina, Hélène Gaudin, and Jean-Pierre Marguénaud, *Dictionnaire des droits de l'homme* (Paris: PUF, 2008).

proliferation is accepted as a natural necessity, the result of an "irresistible rise",[206] connected to the human rights turn of modern legal systems.

My approach departs from the French common-sense on proportionality in that it pays particular attention to the way thoughts are expressed, to the *language* used by lawyers in particular contexts, and to the way this language has evolved. This Chapter does not argue that similar ideas and reasoning to those that proportionality designates have not existed before the emergence of this particular language. Taking my cue from works in intellectual history and linguistics, I simply argue that *the way* ideas are expressed is important. Language itself is important, since it is constitutive of thought. As Annabel Brett put it, "[t]o use words in a particular way within a particular linguistic horizon just *is* to 'think'."[207] Ideas do not exist independently of the text in which they are expressed, they are not "contingent to the book". Thus, while ideas, methods or concepts similar or comparable to proportionality have existed before its emergence in French public law discourse, my inquiry concerns the *particular* expression of such ideas, methods or concepts *in proportionality terms*. It is only since the '70s that French public lawyers have found it opportune or convincing to express their thoughts by using the language proportionality. Why has this been so? What has this language added to already existing linguistic structures? Has it been used more in the *doctrine* than in judicial practice, and if so why? How has this language evolved since? More generally, what do French public lawyers *do* when using proportionality?

The French reader might also be surprised to see certain works by Guy Braibant, Michel Guibal, Xavier Philippe or Valérie Goesel-Le Bihan cited much more than Yves Gaudemet, Stephan Rials, Jean Rivero and other mythical figures who have shown interest in judicial methods. This is because academic analyses are studied only insofar as they employ proportionality language and this language was simply not used until the '70s. Otherwise, French public law *doctrine* and scholarship has served to make sense of the discursive context into which proportionality was inserted, and to understand the pre-existing structures, distinctions, concepts and constraints that might have influenced the use of proportionality. The fine, elegantly written analyses and explanations that French authors provide for their own system of judicial review have certainly contributed to my research and have sometimes been incorporated in the analytical framework used. Lack of systematic reference to some foundational works in French public law does not express any lack of consideration but, more modestly, it follows from my effort to delimit the scope of this study.

During the '80s and the '90s one finds very rare academic works on proportionality, usually in comparative law.[208] The abstract, almost philosophical, nature of the concept in the minds of French public lawyers rendered it an eccentric subject of research, that could easily drift away from the technicalities of the legal

---

[206] Paul Martens, "L'irrésistible ascension du principe de proportionnalité," in *Présence du droit Public et des droits de l'Homme : Mélanges offerts à Jacques Velu* (Bruxelles: Bruylant, 1992), 49.

[207] Annabel Brett, "What Is Intellectual History Now?," in *What Is History Now?*, ed. David Cannadine (New York: Palgrave Macmillan, 2002), 117.

[208] Duclerq, *Les mutations du contrôle de proportionnalité dans la jurisprudence du Conseil constitutionnel*, 17 f.

discourse and from legal research altogether. This is also connected to the fact that proportionality found little recognition in legal texts or judicial decisions. Another factor that discouraged the study of proportionality in the French context was its being perceived as a common-sensical value or a method of judicial review. Its study was conducive to little of originality, since it would necessarily affirm the existence and success of a method that everyone perceived as omnipresent. In 1997 Valérie Goesel-Le Bihan observed that proportionality was "a classical, even banal, technique".[209] Relevant research "could at most consist in registering the increasing success of a means of review coming from Germany in constitutional case law". Proportionality was deemed to exist everywhere but to have no specifically defined technical implications. Everything could be expressed in proportionality terms and any attempt for comprehensive systematisation was always subject to the critique that it did not include this or that manifestation of the principle in practice.

It is only since the end of the '90s, and especially since the end of the 2000s, that proportionality has again attracted the interest of French public law *doctrine*. This evolution is a corollary of the spread of proportionality in the discourse of domestic courts and especially in the case law of the Constitutional Council. Still, despite its affirmation as an autonomous field of study in French public law, the perception of proportionality as omnipresent has not disappeared. Thus, the first works on proportionality remain particularly important in my research because they have been cited in virtually every posterior work on the concept and are part of its commonly shared understanding in France.

The purpose of this Chapter is to describe the way proportionality emerged and evolved as a language used by French public lawyers. When did proportionality vocabulary start being employed? What was its content and how did it interact with already existing concepts, distinctions and methods of review? Did all legal actors use proportionality language in the same way? Does the use of proportionality in this context fit the global model of proportionality? France is among the "*mauvais élèves*" of proportionality, namely among the systems that for long resisted its pervasive dynamic. This is largely due to the particularities of French public law discourse and of the French system of judicial review, which impeded the reception of proportionality as a structure for constitutional adjudication. For much time proportionality had a particularly local content, very different from the one described by proportionality theorists (**Section 1**). With the spread of the fundamental rights discourse and the rise in power of courts, French public lawyers started perceiving proportionality as a fundamental rights principle coming from other legal contexts. However, local particularities in its application have persisted (**Section 2**).

[209] Valérie Goesel-Le Bihan, "Réflexion iconoclaste sur le contrôle de proportionnalité exercé par le Conseil constitutionnel," *RFDC*, 1997, 227.

1. The rise of proportionality in administrative law

Traditional features of the French system of judicial review. Judicial review in France was long limited to the review of the administration. According to the revolutionary tradition, the law, defined by Jean-Jacques Rousseau as *expression de la volonté générale*, is deemed infallible and cannot be attacked before any judge. Distrust towards the judiciary came as a reaction to the strong powers of the *Parlements* under the *Ancien Régime* and is a corollary of the strict perception of the separation of powers, traditionally attributed to Montesquieu.[210] Under this classical perception, the branches of power are specialised in the function ascribed to them by the Constitution and are independent of each other. But separation of powers does not entail any balance between the various state institutions. Instead, Parliament is supreme and the other state authorities are charged with the mission of applying the laws. The establishment of the law as supreme norm in the French legal order is commonly known as *légicentrisme*. As François Gény neatly put it, what distinguishes the French system is "*le fétichisme de la loi écrite*".[211]

The judge, described by Montesquieu as "*la bouche de la loi*",[212] decides almost exclusively based on clear and precise formal legal sources. The French legal order is imagined as perfect and complete. This image leaves no place for dissenting opinions nor for any doubt about the objectivity and truth of judicial decisions. French judgments are surprisingly laconic; they are presented as a deductive syllogism, traditionally expressed in one single sentence. Thus, they give the impression that the solution in concrete cases follows from a mechanical application of the legal code or rule. This representation of the legal system and of the judge, much criticised or even caricatured by external observers, has long comforted French lawyers against the fear of a *gouvernement des juges*.[213] Indeed, it is precisely the specialisation of judicial authorities in the loyal application of the law that has invested them with legitimacy.[214]

During the years that followed the Revolution there was no judicial power, but only a judicial authority exercised by bodies subordinated to the legislative and executive powers. In this way, the French perception of the separation of powers also

---

[210] In the Old Regime, *Parlements* were courts that enjoyed important powers. This classical perception of the separation of powers has been contested by some prominent French public lawyers. See, for example, Charles Eisenmann, "L'esprit des lois et la séparation des pouvoirs," in *Mélanges Raymond Carré de Malberg* (Paris: Duchemin, 1933), 165; Michel Troper, *La séparation des pouvoirs et l'histoire constitutionnelle française* (Paris: LGDJ, 1973).

[211] François Gény, *Méthodes d'interprétation et sources en droit privé positif* (Paris: LGDJ, 1919), 70.

[212] Montesquieu, *De l'esprit des lois*, vol. Book I (Paris: Flammarion, 1979), 278.

[213] See on this point Mitchel Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (Oxford; New York: OUP, 2009), 35 f. and 44 f.; Mitchel Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford Studies in European Law (Oxford; New York: OUP, 2004). The expression comes from Edouard Lambert, who used it to describe the US system of judicial review: see *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis : L'expérience américaine du contrôle judiciare de la constitutionnalité des lois* (Paris: Giard, 1921).

[214] The concise justification of judicial decisions has been famously criticised as a mask that serves to conceal the political power of courts: see Michel Troper, "La motivation des décisions constitutionnelles," in *La motivation des décisions de justice*, ed. Chaïm Perelman and Paul Foriers (Bruxelles: Bruylant, 1978), 287.

dictated the separation of the administrative and civil law jurisdictions. The establishment of the Council of State as a court that is independent of the administration and charged with the judicial review of public acts took place at the late 19th century and was the fruit of consuming efforts by administrative law scholars and judges. For French public lawyers it is not at all shocking to see the Council of State, judge of the legality of administration and the supreme court of the administrative law order, operate as a council of government and sometimes assume important competences of executive nature.[215] On the other hand, it is private law courts, under the supreme jurisdiction of the *Cour de cassation*, that are traditionally the guarantors of individual freedom.[216]

The *REP*. Unilateral administrative acts are attacked before the Council of State and, since 1953, before general administrative courts,[217] by individuals who are personally affected by them. The main procedure available for this purpose is called action in *ultra vires* (*recours pour excès de pouvoir, REP*). Judicial review is exercised in the name of the principle of legality and is limited to the assessment of the compatibility of state action with superior legal norms. Hence, it acquires a distinctively formal and fragmented character. Case comments have significantly contributed to the elaboration of a coherent and intelligible system of administrative law. *Les Grands Arrêts de la Jurisprudence Administrative* (*GAJA*), containing comments on milestone administrative law decisions, is one of the most important books in French public law.[218] This is related to the fact that French public law theory, the so-called *doctrine*, is not only the work of scholars, but also of practitioners. Renowned Council of State judges have often undertaken the coherent reconstruction of this court's case law. Most notably, the *commissaires du gouvernement,* members of the Council traditionally representing the executive and the general interest, have assumed a role of *faiseurs des systèmes* through their published opinions preceding the Council's decisions.[219]

The annulment of an administrative act is pronounced only in the case of certain legally defined flaws, called *cas d'ouverture.* Insofar as the formal legality of administrative acts is concerned (*légalité externe*), these flaws are lack of competence (*incompétence*) and formal or procedural vices (*vice de forme, vice de procédure*). As for the substantive legality (*légalité interne*), apart from the very rare cases of abuse of power (*détournement de pouvoir*), administrative acts are traditionally annulled either due to an error in the legal grounds of administrative action (*erreur de droit*) or due the incompatibility of the content of an

[215] The members of the Council of State are usually not trained as lawyers but as top civil servants and have often worked in administrative services and government "cabinets", before sitting as judges in the Council. On this point, see Bruno Latour, *La fabrique du droit : une ethnographie du Conseil d'État* (Paris: La Découverte, 2002).

[216] Art 66 Constitution 1958.

[217] General administrative courts were created by statute in 1953.

[218] See René Cassin et al., *Les grands arrêts de la jurisprudence administrative*, 1st ed. (Paris: Sirey, 1956). This book is written by members of the Council and academics.

[219] Jean Rivero, "Apologie pour les « faiseurs de systèmes »," *Recueil Dalloz*, 1951, 99.

act with a superior norm (*violation directe de la loi*).[220] Initially, facts had a limited role to play in the appreciation of legality, which was perceived as a confrontation of norms of different hierarchical status. However, progressively the administrative judge affirmed to herself the power to review the material existence (*existence matérielle*) and the legal characterisation (*qualification juridique*) of the facts on which the administration grounded its decision and to censure errors in this respect.[221]

As to this last *cas* of the legal characterisation of facts, the intensity of review varies, as a function of the powers that administration enjoys. In some cases, administrative competence is "bound", that is, the conditions for its exercise are clearly defined by law (*pouvoir lié*). In these cases, the judge exercises a "normal" review (*contrôle normal*) of the factual grounds of administrative decisions.[222] On the contrary, in certain cases the administration enjoys discretion in the appreciation of the grounds of its action (*pouvoir discrétionnaire*). This is especially the case where the legislator only defines the general objectives of administrative intervention, such as public utility or the preservation of public order. In these cases, the distinction between *légalité* and *opportunité* becomes crucial. The judges can still censure illegal or formally flawed public action, an abuse of power or an act that is not grounded on facts at all. However, they cannot substitute themselves for the reviewed authority in the appreciation of the adequacy of an action in relation to particular circumstances, or its political expediency in pursuit of a goal. In other words, the *qualification juridique des faits* is traditionally excluded in cases of administrative discretion.[223]

The evolution of judicial methods. Nonetheless, the shift from the liberal state to the industrial and commercial state required increasing social intervention through administration. The clear lines of liberal legality were blurred in the name of the general interest, and the balance between discretionary power, serving administrative efficiency, and legality, protecting the rights of the "administered" (*administrés*), was seriously disturbed.[224] Traditional administrative law, based on the abstract and clear definition of administrative competence by law, was perceived as more and more unsuited to the reality of administrative action. Public authorities acquired new powers, not provided for by law or not respecting the legally established procedures, which were sometimes too complex or time-consuming. As a response, the administrative judge sought new methods for the review of these powers. The evolution of

---

[220] Édouard Laferrière, *Traité de la juridiction administrative et des recours contentieux*, vol. 2 (Paris: Berger-Levrault et Cie, 1887), 496 f.; for a recent presentation, see Benoît Plessix, *Droit administratif général* (Paris: LexisNexis, 2016), 1390 f.

[221] CE, 4 April 1914, *Gomel*, no. 55125, ECLI:FR:CEORD:1914:55125.19140404, on the legal appreciation of facts. CE, 14 January 1916, *Camino*, no. 59619, ECLI:FR:CEORD:1916:59619.19160114, on the material existence of facts. On this point, see Léo Goldenberg, *Le Conseil d'État, juge du fait* (Paris: Dalloz, 1932).

[222] This classification is first found in Jean-Marie Auby and Rolland Drago, *Traité de contentieux administratif*, 2nd ed., vol. II (Paris: LGDJ, 1975) no 1176.

[223] Plessix, *Droit administratif général*, 1409–11.

[224] See for example Alain Bockel, "Contribution à l'étude du pouvoir discrétionnaire de l'administration," *AJDA*, 1978, 355; Jeanne Lemasurier, "Vers un nouveau principe général du droit ? Le principe « bilan-coût-avantages »," in *Mélanges offerts à Marcel Waline: le juge et le droit public*, vol. II (Paris: LGDJ, 1974), 551.

administrative rules and of judicial techniques was perceived as pursuit of an equilibrium between a requirement of efficiency of public action and a requirement of protection of individuals from arbitrary public decisions.[225]

Since 1933 and the *Benjamin* case, the administrative judge had imposed a requirement of strict necessity on the exercise of police powers.[226] Still, as decades passed, the lack of correspondence between the evolution of administrative practice and that of judicial methods was felt more and more among French public lawyers. The division between legality and expediency on the basis of static, all-or-nothing rules, was deemed as no longer adapted to legal reality. An alternative, institutionally sensitive discourse was developed in the analysis of judicial decisions by scholars and practitioners. This was best illustrated in the discourse of the *commissaires du gouvernement*, mediating between the formal style of judicial decisions and the anti-formalist opinions of scholars. Following their *conclusions*, the Council of State imposed new procedural requirements on public authorities, like the obligation to communicate the motives of a decision to the judge, the obligation to justify certain decisions to the administered, or guarantees ensuring the adversarial character of the administrative procedure.[227] Moreover, since the early '60s, the administrative judges affirmed their power to sanction manifest errors (*erreur manifeste*) in the factual grounds of public authorities, even in cases of discretionary power.[228] In this way, the plausibility of factual appreciations became part of the legality of administrative action.

Despite important advances in the judicial review of administration, the idea of the inviolability of law has persisted until today. Ordinary judges refuse to examine the constitutionality of legal statutes that are posterior to the Constitution. According to the theory of the "*loi écran*", whenever administrative action is confined to the implementation of clear and precise legislation, the judge must refuse her power to review its compatibility with the Constitution.[229] In the Council of State case law, this was the case for international law as well until the late '80s, despite the fact that the Constitution defined international treaties as hierarchically superior to domestic legislation.[230]

The emergence of constitutional review of legislation. Since 1958, the mission of reviewing the constitutionality of legislation has been assigned to the Constitutional Council (*Conseil constitutionnel*). Yet, for almost two decades, this institution was not perceived as a court. The refusal to recognise the Constitutional Council as a *juridiction* was due to the political character of the appointment of its members and their lack of legal expertise. Further, the procedure before the Council

[225] See, for example, Bockel, "Contribution à l'étude du pouvoir discrétionnaire de l'administration," 360.

[226] CE, 19 May 1933, *Benjamin,* nos. 17413; 17520, ECLI:FR:CEORD:1933:17413.19330519.

[227] Lemasurier, "Vers un nouveau principe général du droit ? Le principe « bilan-coût-avantages »," 553–54.

[228] CE, 15 February 1961, *Lagrange*, Rec. 121. See Marceau Long et al., *Les grands arrêts de la jurisprudence administrative*, 21st ed. (Paris: Dalloz, 2017) no 27.8.

[229] CE, 6 November 1936, *Arrighi*, no. 41221, Rec. C.E. 966.

[230] Art 55 Constitution 1958.

was not adversarial. The referral of legal statutes was typically part of the legislative process and took place only before their promulgation. This is because the Council was meant to be a watchdog of Parliament and a guarantor of the competence of the executive. Its main mission was to preserve and police the boundaries between *loi* and *règlement*. In this sense, the *Conseil constitutionnel* perfectly fit the constitutional court as imagined by Hans Kelsen.[231] Review of the constitutionality of legislation is traditionally deemed to consist in the abstract confrontation of norms, in which extra-legal considerations play no role. This has long rendered the Council's decisions impressively concise. They were composed of one syllogism, expressed in one single phrase, divided in *visas* (introducing the norms of reference) and *considérants* (introducing the syllogistic steps).[232]

The formal perception of constitutional review is also connected to the fact that, until 1971, the Constitution did not contain any catalogue of rights or freedoms for the exercise of substantive constitutional review. Neither the Declaration of the Rights of Man and of the Citizen (*DDHC*) nor the Preambles of the 1946 and 1958 Constitutions, proclaiming certain individual and social rights, initially possessed *valeur constitutionnelle*. For much time, fundamental rights language flourishing abroad did not have any significant impact on domestic constitutional discourse. Since the famous *IVG* case, the Constitutional Council has insisted on a strict separation between constitutional and international legal requirements and still refuses to review the compatibility of legislation with international conventions.[233] This is related to the traditional insularity of the French legal system, which surprises external observers. Typically, French scholars rarely read English speaking authors. Frédéric Audren and Jean-Louis Halpérin impute the insularity in French legal research to its institutionalisation in "*écoles*" and to the particularities of the *agrégation* examination for entitlement to attain the post of law professor.[234]

The evolution of constitutional case law. As counterbalance to the formalism that pervades French public law, courts have made recourse to non-written objective norms, the "general principles of law" (*principes généraux du droit*) and the "fundamental principles recognised by republican legislation" (*principes fondamentaux reconnus par les lois de la République*), mentioned in the 1946 Preamble. First, it was the Council of State that "discovered" such principles and integrated them in the *bloc de légalité*, that is, the norms by reference to which it reviews the legality of administration.[235] Then, it was for the Constitutional Council to follow the administrative court's example and to confer

[231] On the initial perception and evolution of the Constitutional Council, see Alec Stone Sweet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (New York: OUP, 1992).

[232] This comes from the terms "*vu*" (account taken of) and "*considérant*" (considering that).

[233] Decision no. 74-54 DC, 15 January 1975, *Loi relative à l'interruption volontaire de la grossesse (IVG I)*, ECLI:FR:CC:1975:74.54.DC, cons. 3 and 4.

[234] See the interesting analysis by Frédéric Audren and Jean-Louis Halpérin, *La culture juridique française: entre mythes et réalités: XIXe-XXe siècles* (Paris: CNRS, 2013).

[235] See CE (Pl.), 26 October 1945, *Aramu*, no. 77726, Rec. 213 (concerning the *droits de la défense*), CE, 11 July 1956, *Amicale des Annamites de Paris*, no. 26638, Rec. 317 (concerning the *liberté d'association*). According to mainstream scholarship, the general principles of law pre-exist their announcement by the judge, who discovers them through the interpretation of legislation or of constitutional texts.

constitutional status to the norms already recognised in administrative case law. In 1971, in the famous *Liberté d'association* decision,[236] the constitutional court entrenched the freedom of association as a "fundamental principle recognised by republican legislation" (*PFRLR*). In subsequent case law, the Council acknowledged the constitutional status of the 1958 Preamble and of the texts mentioned therein, most notably the *DDHC*. Other constitutional norms, like the "principles particularly necessary in our times" (*principes particulièrement nécessaires à notre temps*), mentioned in the 1946 Preamble, the "principles of constitutional value" (*principes de valeur constitutionnelle*) or the "objectives of constitutional value" (*objectifs de valeur constitutionnelle*), have also supported the justification of constitutional decisions. Hence, the Constitutional Council expanded its norms of reference considerably, to a set of heterogeneous texts commonly called the *bloc de constitutionnalité*.[237]

As time passed, the Constitutional Council went through significant institutional transformations.[238] A constitutional reform in 1974 played a key-role in this: the instauration of the *saisine parlementaire* gave opposition MPs the possibility to refer cases to the Council. Since, and especially in periods of *grandes réformes*, the Council has been an instrument of political opposition and a core actor in policy matters, such as nationalisations, privatisations, or reforms of the press. From a watchdog of Parliament, it became a guarantor of political appeasement and its judicial nature was progressively affirmed. No one contributed more to the "juridicisation" of the Council than the *doctrine*. A symbiotic, mutually reinforcing relationship formed between constitutional scholars and the Council. To this contributed the Council's respectful attitude towards established institutions and the fact that members of the *doctrine* were (or generally aspired to be) appointed as constitutional judges. Since the middle of the '80s, under the influence of the Aix School and the work of its *Doyen* Louis Favoreu, the Constitutional Council's case law has been systematically studied and, most importantly, rarely criticised (at least until the 2000s).[239] Since 1996, the legal service attached to the court publishes extensive comments on the Council's decisions in its official website. The *Contentieux constitutionnel* became a new branch of public law.[240]

This enhanced the development of the Council's methods and, ultimately, the normativity of the Constitution in domestic law. Like the *Grands arrêts* in administrative law, the collection of *Grandes décisions* for the Constitutional Council was first published in 1975.[241] The recurrent use of certain *considérants*, which set the basic principles

[236] Decision no. 71-44 DC, 16 July 1971, *Liberté d'association,* ECLI:FR:CC:1971:71.44.DC.

[237] Louis Favoreu, "Le principe de constitutionnalité, essai de définition d'après la jurisprudence du Conseil constitutionnel," in *Mélanges Charles Eisenmann*, 1975, 33, following on this Claude Emeri, « Le bloc de la constitutionnalité », RDP 1970, 608.

[238] Stone Sweet, *The Birth of Judicial Politics in France*; Jean Rivero, "Fin d'un absolutisme," *Pouvoirs*, no. 13 (1991): 5–16.

[239] Stone Sweet, *The Birth of Judicial Politics in France*, 94 f.

[240] Generally, on the "juridicisation" of the Constitutional Council, see Bastien François, "Une revendication de juridiction. Compétence et justice dans le droit constitutionnel de la Ve République," *Politix* 3, no. 10–11 (1990): 92.

[241] Louis Favoreu and Loïc Philip, *Les grandes décisions du Conseil constitutionnel* (Paris: Dalloz-Sirey, 1975). An important difference exists between the *GDCC* and the *GAJA*: this book is written solely by

governing the Council's scrutiny (*considérants de principe*), enhanced the consistency of constitutional case law. Influence from administrative law, and most notably the transfer of the manifest error test, made it so that the once sovereign legislator came to be perceived as a constituted institution, only enjoying a margin of discretion in the realisation of constitutional imperatives.[242] In 1985, in a well-known *obiter dictum,* the Council announced that "*voted legislation* (…) *only expresses the general will insofar as it respects the Constitution*".[243] Evolutions took place not only at the level of judicial methods but also of norms. Under the impulse of the *Doyen* Georges Vedel, member of the Council and a dominant figure of the French public law *doctrine*, the "constitutional bases" of all the branches of law were affirmed, constraining Parliament in the exercise of its powers.[244] The constitutionalisation of the legal order and the substitution of an *Etat de droit* for the *Etat légal*, in conformity with European law precepts, increased the interest of scholars from other legal branches in constitutional case law.[245]

The evolutions described above are reflected in the use of proportionality by French public lawyers and courts. Proportionality language emerged in administrative law during the early '70s, in the context of dissatisfaction with the Council of State's judicial review methods. Although the origin of proportionality as a public law concept was judicial, it is the *doctrine* that promoted the recognition of a general principle of proportionality in French administrative law (*paragraph i*). However, this idea did not at first convince the judges, anxious of trespassing beyond the limits of their competence. This did not impede scholars from analysing the methods used by public law courts as instances of proportionality analysis. In French *doctrine*, the concept of *contrôle de proportionnalité* was detached from proportionality as a norm or principle and started being used in the systematisation of case law (*paragraph ii*). In the context of constitutionalisation of the legal order, the Constitutional Council affirmed the constitutional status of proportionality as a principle in the field of sanctions and police measures. This led to a spread of proportionality language in ordinary case law (*paragraph iii*).

---

academics. More generally, the members of the Constitutional Council are not chosen on the basis of their legal expertise and are not members of the *doctrine* like State Councillors.

[242] Georges Vedel, "Réflexions sur quelques apports de la jurisprudence du Conseil d'État à la jurisprudence du Conseil constitutionnel," in *Mélanges René Chapus* (Paris: LGDJ; Lextenso, 1992), 647; Georges Vedel, "Excès de pouvoir législatif et excès de pouvoir administratif," *Cahiers du Conseil constitutionnel*, no. 1–2 (1996/1997).

[243] Decision no. 85-197 DC, 23 August 1985, *Loi sur l'évolution de la Nouvelle Calédonie*, ECLI:FR:CC:1985:85.197.DC, cons. 27.

[244] Georges Vedel, *Les bases constitutionnelles du droit administratif* (Paris: Économica, 1986).

[245] See for example Nicolas Molfessis, *Le Conseil constitutionnel et le droit privé* (Paris: LGDJ, 1997).

i. The emergence of proportionality as an administrative law concept

The absence of proportionality before the '70s. According to the mainstream proportionality narrative in French public law, despite not being explicitly acknowledged the idea of proportionality has been omnipresent in judicial decisions and legal and constitutional texts since the 1789 Revolution. It has been applied by the public law judge since the early 20th century. However, examination of the way French public lawyers and judges express themselves actually shows that before the '70s, references to proportionality were very rare, almost non-existent in this discursive field. Thus, even though *Benjamin* is known as the most emblematic application of proportionality in the French context, the Council of State did not employ proportionality terminology in this case. Nor did contemporary commentators, like Achille Mestre.[246] In the first edition of the *GAJA* in 1956, the term proportionality was not mentioned in the comment on *Benjamin*, and probably not anywhere else in the book.[247] This is because it was not until the '70s that proportionality emerged as a public law concept in France. It was first employed in the administrative law of expropriation.

The emergence of judicial balancing. The facts of the *Ville Nouvelle Est* case arose in the context of dissatisfaction with the traditional methods of judicial review. During the mid '60s, the Government decided to proceed to a "town planning experiment".[248] It consisted in the construction of a university complex and of an adjacent new urban complex of more than 20,000 residences, situated in the East of Lille. The project would cost about one billion francs and involve an area of 500 hectares, in which many dwellings were located. Following the French administrative procedure of expropriation, a public survey was engaged to certify the public utility (*utilité publique*) of the construction of the Ville Nouvelle Est. Despite the strong opposition of the local population and press, as well as the disagreement of the municipal councils concerned, the Minister declared that the project was of public utility. This act was brought before the Lille Administrative Tribunal, which annulled it on procedural grounds. The judges decided that the file on which the ministerial declaration was based did not comprise all the necessary elements, defined in a decree that dated from 1959. The administrative court's decision was contested before the Council of State.

In his observations before the Council of State Plenum, the *Commissaire du gouvernement* Guy Braibant proposed abandoning the lower court's decision. In his view the matter should not be formulated in procedural terms.[249] Instead, the problem was one of substantive legality. The plaintiffs argued that the destruction of about a

[246] Achille Mestre, "Note sous CE, 19 mai 1933, *Benjamin*," *Rec. Sirey* 3 (1934): 1.

[247] Pierre-Henri Prélot, "L'actualité de l'arrêt *Benjamin*," *RFDA*, no. 5 (2013): 1020.

[248] Guy Braibant, "Conclusions sur CE Ass., 28 mai 1971, *Ville Nouvelle Est*," *Rev.Adm.*, no. 142 (1971): 422.

[249] Braibant, 424–25.

hundred dwellings was too high a price for the realisation of the new town project, which was thus deprived of its public utility.

As Guy Braibant underscored, it would be easy to reject the plaintiffs' arguments, by simply following the Council's traditional case law. According to a constant *considérant*, the choice of the expropriated lands was an issue concerning the *opportunité* of the reviewed act which could not be contested before the Council. Indeed this court only reviews the legality of administrative action. Until 1971, in most cases the Council of State affirmed *in abstracto* the public utility of expropriation, checking only whether, according to the reviewed authority, the relevant public project served a public interest goal. The concrete localisation of the project was not taken into account in the judicial reasoning nor were its negative consequences.[250] Indeed, even though public utility was defined by the law as a ground for declaring expropriation, it was too vague and indeterminate and thus left place for administrative discretion.[251] In this particular case, another element also pointed towards judicial restraint. In the context of the administrative procedure that preceded the contested act, the competent authorities had taken into account the complaints of the local population and had accordingly changed the initial plan in order to exempt more than 200 dwellings from demolition.

However, the deferent stance of the judiciary regarding the notion of public utility was criticised at the time by the *doctrine* as too formalist, not fitting the evolution of expropriation. As Guy Braibant recalled, the procedure of expropriation could no longer be seen as simply involving a confrontation of the general interest with private property. The notion of public utility had been constantly expanding for two centuries to comprise objectives that were sometimes only indirectly connected to the public interest. Increasingly, different interests, both public and private, were hidden behind the expropriator and the expropriated. Hence, *private* interests benefitting from the expropriation could be weightier in the administrative appraisal of public utility than public interests affected by it.[252] Braibant thus proposed a redefinition of the notion of public utility, which could no longer be affirmed in the abstract, but should be appraised according to the concrete circumstances of the case. The public utility appraisal should involve "balancing the advantages [of an operation] with its disadvantages, its cost with its benefit, or as the economists would say, its disutility with its utility."[253] Braibant defined the cost of an expropriation as not only financial but also social.

---

[250] Braibant, 424 f.; Jean Waline, "Le rôle du juge administratif dans la détermination de l'utilité publique justifiant l'expropriation," in *Mélanges offerts à Marcel Waline : le juge et le droit public* (Paris: LGDJ, 1974), 817. See also the comment on the decision published in the official Council of State website: "28 Mai 1971 - Ville Nouvelle-Est," http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Les-decisions-les-plus-importantes-du-Conseil-d-Etat/28-mai-1971-Ville-Nouvelle-Est.

[251] André de Laubadère, "Le contrôle juridictionnel du pouvoir discrétionnaire dans la jurisprudence récente du Conseil d'État français," in *Mélanges offerts à Marcel Waline : le juge et le droit public* (Paris: LGDJ, 1974), 537 f; Bockel, "Contribution à l'étude du pouvoir discrétionnaire de l'administration," 366 f; esp. 367.

[252] Braibant, "Conclusions sur CE Ass., 28 mai 1971, *Ville Nouvelle Est*," 425–26.

[253] Braibant, 426.

The Council of State Plenum followed the propositions of the *Commissaire du gouvernement*.[254] In what was to become a *considérant de principe*, the judges declared that

> an operation cannot be legally declared of public utility, unless the harm to private property, the financial cost and the social disadvantages that it entails are not excessive compared to the interest that it presents.[255]

Cost-benefit analysis (*bilan-coût-avantages*) was thus explicitly announced as a method for the judicial scrutiny concerning public utility declarations. In the concrete case, after examining the elements of the administrative file, the Council of State validated the *Ville Nouvelle Est* project. According to the court, "*in the circumstances, and given the importance of the whole project*", the fact that it entailed the demolition of about a hundred dwellings did not deprive it from its public utility character.[256]

The court used the same reasoning in certain other decisions during the same year, always to declare that the disadvantages of the reviewed projects were not serious enough to deprive them of their public utility character.[257] Some saw the recognition of a new general principle in the Council of State case law.[258] Although the *bilan* did not lead to an intensive scrutiny of administrative decisions, scholars at first reacted with enthusiasm to this outburst of judicial balancing. In the instrumentalist rhetoric dominant in the French *doctrine*, the abandonment of traditional formalism for more pragmatist and efficient judicial review methods was generally seen as progress, even though judges were usually prudent in their first applications.[259]

The emergence of proportionality. Interestingly, in the beginning, it was not proportionality language that was used to describe the balancing operation to which the Council proceeded. The connection of the *bilan* to proportionality took place only one year later, in the observations of another *Commissaire du gouvernement*. Examining the public utility of a highway near Nice, Michel Morisot proposed an *in concreto* review to his colleagues.[260] Even though he observed that the preliminary procedure followed by the administration was not legally flawed, he argued for a *judicial* evaluation of the public utility of the project, which would include an appreciation of the social cost of the operation. In Morisot's words, "the notion of public utility is relative" and cannot be appreciated and scrutinised without "balancing the positive and negative aspects of an operation". In his view,

> [t]he legality of the exercise of prerogatives requires that the damage caused to public and private rights and interests remains proportionate to

[254] CE (Pl.), 28 May 1971, *Ville Nouvelle Est*, *Rev.Adm*, 427, no. 78825, ECLI:FR:CEASS:1971:78825.19710528.

[255] Ibid.

[256] Ibid, 428.

[257] See on this point Michel Morisot, "Conclusions sur CE Ass., 20 octobre 1972, *Société Sainte-Marie-de-l'Assomption*," *RDP*, 1973, 847.

[258] Lemasurier, "Vers un nouveau principe général du droit ? Le principe « bilan-coût-avantages »."

[259] Waline, "Le rôle du juge administratif dans la détermination de l'utilité publique justifiant l'expropriation," 812.

[260] Morisot, "Conclusions sur CE Ass., 20 octobre 1972, *Société Sainte-Marie-de-l'Assomption*," 843.

> the advancement of the public interest that one can expect of the imposed restriction.[261]

Proportionality was thus officially connected to judicial balancing. Morisot went on to appreciate in detail the advantages and disadvantages of the plan in question. Despite its uncontested utility for its future users and for the residents of Nice, the highway would cause very serious disturbance to a psychiatric hospital in proximity. Morisot thus concluded that, "[f]ailing to ensure the necessary reconciliation between public interests, (…) the administration had exceeded its power".[262] In the case *Société civile Sainte-Marie-de-l'Assomption*, the Council of State Plenum partially followed Morisot's *conclusions*. It found that the construction of the highway undermined the general interest and annulled the declaration of its public utility.[263] However, the court made no reference to proportionality or proportion whatsoever.

One must wait another year to see an explicit reference to proportionality in the official justification of judicial balancing. In *Grassin*, the Council of State concluded that the construction of an airport in Peyratte was not an operation of public utility. The court found that the advantages of this project would be unimportant, whereas its cost would be "*out of proportion with the financial resources of the municipality*".[264] Similarly, in 1974, the Council of State annulled the declaration of public utility of a town road plan in Corsica. According to the court, it followed from the facts of the case that the goal pursued with the town road was to connect two houses belonging to the same family with a public passage. However, while the road would not be sufficient to actually serve this purpose, it would divide the neighbouring properties, causing them "*a disturbance out of proportion*" with the advantages that it entailed. The judges concluded that the town road could not be considered to serve a public utility goal.[265]

Proportionality as a general principle in *doctrine*. In 1974, two influential academic contributions argued for the explicit recognition of the "principle of proportionality" in domestic judicial review of administrative discretionary powers.[266] The first was written by Françoise Dreyfus, at the time *Maîtresse de conférences* in Paris. The second was the work of the *Commissaire du gouvernement* Guy Braibant, who authoritatively reconstructed his own reasoning in *Ville Nouvelle Est* as an application of the principle of proportionality. In these writings, proportionality required a relation of "fair proportion" between three elements: the factual situation, the administrative

---

[261] Morisot, 848.

[262] Morisot, 853.

[263] CE (Pl.), 20 October 1972, *Societe civile Sainte-Marie-de-l'Assomption*, no. 78829, ECLI:FR:CEASS:1972:78829.19721020.

[264] CE, 26 October 1973, *Sieur Grassin*, no. 83261, ECLI:FR:CEASS:1973:83261.19731026.

[265] CE, 4 October 1974, no. 86978, ECLI:FR:CESJS:1974:86978.19741004.

[266] Françoise Dreyfus, "Les limitations du pouvoir discrétionnaire par l'application du principe de proportionnalité: à propos de trois jugements du Tribunal Administratif de l'O.I.T," *RDP*, 1974, 691; Guy Braibant, "Le principe de proportionnalité," in *Mélanges offerts à Marcel Waline: le juge et le droit public*, vol. II (Paris: LGDJ, 1974), 297.

decision, and its goal.[267] In other words, it designated a legal requirement of adequacy of administrative action, which was to be appreciated according to the particular factual circumstances, the *motifs de fait*, that justified the decision. However, Braibant underscored that proportionality was "not only a matter of efficiency" but also of "common-sense".[268] He connected the principle to equity and to the protection of individuals, using Georg Jellinek's well-known image of killing a sparrow with a canon.[269] In the same vein, Dreyfus perceived proportionality review as a method for eliminating administrative abuses and for "separating the just and the unjust".[270] A similar idea can be found in Louis Dubouis' study of the abuse of power.[271]

Both Dreyfus and Braibant "read" the development of the Council of State's methods of judicial review since the '30s as expressing the idea of proportionality. Hence, most notably, the necessity review of individual freedoms' restrictions; the manifest error test; or the scrutiny of exceptional circumstances invoked by the administration, were perceived as instances of proportionality review. In the words of Braibant, French administrative judges were applying the principle "without knowing it, or more precisely, without saying it".[272] In this way, proportionality was connected to pre-existing methods of review and established coherence in the evolution of French administrative case law.

In the views of Dreyfus and Braibant, the *explicit* recognition of a general principle of proportionality as an autonomous legal norm would be a fortunate evolution "in the current state of the Council of State case law".[273] In this regard, the authors encouraged the supreme administrative court to follow the example of foreign courts. Dreyfus referred to three decisions by the ILO Administrative Tribunal, where proportionality had been applied in the field of disciplinary sanctions. She held that even though traditionally the Council of State was perceived as a source of inspiration for foreign and international legal systems, principles developed in these systems could be "imported" and applied in domestic law without disturbing its fundamental traits.[274] Braibant also underscored that proportionality had been applied by the ILO Administrative Tribunal (though he did not fail to point out that the *Conseiller d'Etat* Letourneur presided over the tribunal), and that it was recognised as a general principle of constitutional status in Germany and Switzerland. Both authors emphasised that this would not be the first time that the French Council of State was inspired by foreign

[267] Braibant, "Le principe de proportionnalité," 298; Dreyfus, "Les limitations du pouvoir discrétionnaire par l'application du principe de proportionnalité: à propos de trois jugements du Tribunal Administratif de l'O.I.T," 695–96.

[268] See for example Braibant, "Le principe de proportionnalité," 298.

[269] Braibant, 298.

[270] Dreyfus, 703.

[271] Louis Dubouis, *La théorie de l'abus de droit et la jurisprudence administrative* (Paris: LGDJ, 1962), 402.

[272] Braibant, "Le principe de proportionnalité," 299.

[273] Dreyfus, 699.

[274] Dreyfus, 691–92.

jurisdictions. Only some years before, the manifest error of appreciation had been imported from Geneva.[275]

Instituting proportionality as a public law concept. The 1974 academic contributions, and especially the one written by Braibant, consolidated the linking of proportionality to necessity and judicial balancing in domestic public law. Proportionality was inscribed in the instrumentalist rhetoric that surrounded the practice of judicial review. Thereafter, it became part of reflection on the limits of administrative discretion. Braibant's *conclusions* in the *Ville Nouvelle Est* case became a point of reference concerning the study of the concept in French public law. They have been cited in virtually every analysis on the matter ever since.

In this way, proportionality acquired an autonomy as an administrative law concept and started being the object of technical scholarly systematisations. In 1978, in an article named "*De la proportionnalité*", Michel Guibal used the concept to criticise the practice of domestic courts.[276] He defined proportionality as a value pursued through public decision-making, whose realisation was conditioned by institutional and other constraints. According to Guibal, the correct judicial scrutiny of proportionality consisted in balancing the costs and the benefits of administrative decisions, following the methods of other sciences. The author identified several "degrees" of proportionality scrutiny: at a first level, the judge only sanctioned manifest disproportionality between the factual situation that justified the reviewed decision and the decision itself. At a second level, the judge sought a reasonable proportion, a certain balance between the costs and the advantages of the reviewed decision. At a third level, the judge checked whether the costs and the advantages of an administrative decision were in a relation of "strict concordance".[277] Based on this conception, Guibal characterised the review exercised by the Council of State as "virtual and fictitious, at best embryonic".[278] One year later, Jean-Jacques Bienvenu also expressed the idea of variable intensity of proportionality review by using the term "proportionality scale (*échelle de proportionnalité*)",[279] which is still common among French public lawyers.

Thus, by the late '70s proportionality had become an autonomous concept in French public law and had acquired its first enthusiasts. Yet it was much more important in scholarship than in the actual reasoning of public law courts. The asymmetry between the scholarly perception of proportionality and its use in practice persisted at least for a decade.

---

[275] Dreyfus, 692; Braibant, "Le principe de proportionnalité," 306.

[276] Michel Guibal, "De la proportionnalité," *AJDA*, 1978, 477.

[277] Guibal, 485.

[278] Guibal, 485.

[279] Jean-Jacques Bienvenu, *L'interprétation juridictionnelle des actes administratifs et des lois: sa nature et sa fonction dans l'élaboration du droit administratif*, vol. II (Paris II: thèse, 1979), 116.

ii. Conspicuous despite its absence

The failure of proportionality in judicial practice. Despite scholarly expectations and pressure, proportionality long remained unannounced as a general principle in the Council of State case law. Proportionality terminology was often used in town planning and expropriation decisions, as well as in cases concerning taxation or the remuneration of public employees. However, it usually represented a mathematic equation. Rather than a general principle concerning administrative restrictions, at most proportionality translated to a general requirement of financial prudence. According to a typical formula used by the court, an operation was deprived of its public utility character if it was "*out of proportion with the resources*" of the municipality or the public enterprise that undertook it.[280] In some cases the Council used the phrase "*out of proportion with the interest that [the operation] presents*", adding directly afterwards "*given the financial cost of the operation*".[281] The use of proportionality as a concept involving moral-legal (and not mathematical) evaluations in the review of onerous administrative measures was very rare, almost inexistent.[282]

Proportionality was not announced as a general principle in legislation either. In certain contexts it had acquired a particular autonomy that made some scholars speak of "a particular principle".[283] This was especially the case for the *proportionnalité de l'impôt*, where the concept preserved its arithmetic nature. However, it was only in some rare legal texts that a legal requirement of proportionality was included. Even when applying these texts, courts did not use the vocabulary of proportionality. Instead, they preferred more classical methods of reasoning like the manifest error standard or necessity review. In labour law for example, legislation mandated that restrictive measures imposed by an employer on her employees be proportionate to their goal. This was translated into a strict necessity scrutiny by the Council of State.[284] In consumer law, legislation demanded that restrictive measures on the fabrication and market diffusion of dangerous products be proportionate to the risks at stake. This was translated into a manifest error review of the relevant administrative assessments.[285] Furthermore, since 1978 the Council of State had accepted the task of reviewing the content of disciplinary sanctions.[286] In scholarship such review was deemed to result from a requirement of proportionality of sanction. However, the court invariably applied a manifest error test. Clearly, though proportionality was a

[280] CE, 6 July 1977, no. 00267, ECLI:FR:CESSR:1977:00267.19770706.

[281] CE, 13 February 1981, nos. 14148, 14170, 14171, 14172, ECLI:FR:CESSR:1981:14148.19810213.

[282] One case was found before 1990: CE, 21 October 1988, *Syndicat des avocats de France*, no. 70066, ECLI:FR:CESSR:1988:70066.19881021; See also CE, 2 October 1991, no. 65758, ECLI:FR:CESSR:1991:65758.19911002.

[283] Philippe, *Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative françaises*, 88.

[284] CE, 12 June 1987, no. 75276, ECLI:FR:CESSR:1987:75276.19870612, applying article L.122-35 of the code of labour.

[285] See for example CE, 28 January 1987, no. 37945, ECLI:FR:CESSR:1987:37945.19870128, applying article 1 of a statute dating from 10 January 1978 on the protection and information of service and product consumers.

[286] CE, 9 June 1978, *Sieur Lebon*, no. 05911, ECLI:FR:CESJS:1978:05911.19780609.

term commonly used by French public lawyers, it did not correspond to a *particular* reasoning structure or method of review in the Council of State's decisions.

The same goes for the Constitutional Council. The rising fundamental rights language in the Council's decisions seemed apt to the employment of proportionality terminology. Some scholars even saw proportionality as a method for the reconciliation of constitutional rights. Proportionality was deemed to be the principle applied behind the manifest error review exercised by the constitutional judge since the early '80s.[287] Yet the judges never expressed their review in proportionality terms. Proportionality was sometimes employed as a mathematic assessment of representation, be it in the administrative councils of public enterprises[288] or in local and national elections.[289] However, it did not designate a constitutional principle, rule or structure of reasoning. In some cases, judges explicitly refused to acknowledge the existence of a strict proportionality requirement imposed on the legislator. In the words of Georges Vedel, "The legislator in the republican tradition has never respected a millimetred equality".[290] The Council sometimes invoked "*the arithmetic difficulties that the strict respect of proportionality would entail*" to justify its deference to legislative choices, without even applying a manifest error test.[291]

Proportionality in administrative law *doctrine* during the '80s. Lacking anchorage in positive law, proportionality did not attract much interest from French academics, at least during the '80s. Although its application through other judicial methods was a commonplace among French public lawyers, its structure or content was not specified, contrary to the meticulous and technical analyses of legal concepts that generally pervades the French *doctrine*. Writing in 1990, Xavier Philippe was surprised by academics' lack of interest in, or indifference to, a notion which was deemed as given and understood.[292] Significantly, the two major studies on proportionality during the '80s were framed in a transnational context. The first, written by Francis Teitgen, an eminent lawyer in Paris, was presented at a conference in 1982 on "the general principle of proportionality in the European legal order" and was included in a collective volume, in which most chapters were written in German.[293] The second, written by Jean-Paul Costa, a member of the Council of State, later

[287] Dominique Turpin, "Le traitement des antinomies des droits de l'homme par le Conseil constitutionnel," *Droits*, no. 2 (1985): 94, cited by ; Guillaume Drago, "La conciliation entre principes constitutionnels," *D.*, 1991, 265; See also Jean-Jacques Bienvenu, "Note sous Décision n° 85-192 DC," *AJDA*, 1985, 485.

[288] Decision no. 83-162 DC, 20 July 1983, *Loi relative à la démocratisation du secteur public*, ECLI:FR:CC:1983:83.162.DC.

[289] Decision no. 86-218 DC, 18 November 1986, *Loi relative à la délimitation des circonscriptions pour l'élection des députés*, ECLI:FR:CC:1986:86.218.DC.

[290] See the relevant deliberation of the Constitutional Council, 7 July 1987, 39, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/decisions/PV/pv1987-07-07.pdf.

[291] Decision no. 83-162, cited above, cons. 63.

[292] Philippe, *Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative françaises*, 7.

[293] Teitgen, "Le principe de proportionnalité en droit français."

member and President of the ECtHR, was initially a speech, presented during a meeting between the Council of State, the Constitutional Council and the ECtHR.[294]

Strangely, both studies affirmed the existence of a principle of proportionality in French positive law: "*[M]ais le principe existe bien*".[295] In these writings proportionality represented an "unwritten rule for which [judges] use[d] periphrases".[296] Broadly perceived as some kind of relation between the "trilogy" of the factual situation, the contested decision and the goal of public action, proportionality was deemed to be among those "transversal concepts that imprint, implicitly, the whole of administrative action and largely overlap with the review exercised on it by the administrative judge".[297] The notion was presented as conspicuous, despite the absence of its explicit recognition as a legal concept, rule or method. Proportionality was perceived as synonymous with methods used for the judicial review of administrative discretion, and most notably necessity and manifest error. Interestingly, the *bilan* was increasingly left aside in its study. Appealing to some kind of moral-legal ideal or quality, proportionality established coherence between the different judicial review methods and justified their evolution.

Xavier Philippe's thesis on proportionality. Contiguous to the above contributions, an influential thesis was published in 1990. Its author, Xavier Philippe, is a member of the Aix School, influenced by the trend to which he belongs. Philippe certainly situated himself in the progressive, anti-formalist camp of French public law research. Without following the traditional *deux parties, deux sous-parties* model, dedicating fifteen pages to the study of "social sciences" and another thirty to the study of foreign and supranational legal systems, Philippe defined proportionality broadly, as "a requirement of a rational and coherent relation between two or more elements".[298] Proportionality was inherent in concepts like necessity, normal, harmony, balance, and excess. Hence, it was omnipresent, "likely to slide into the most recurrent legal rules".[299] The concept expressed nothing more and nothing less than the relativity of legal norms; the fact that, in their announcement or in their application, every public authority (and especially the judge) should be guided by extra-legal considerations.

Xavier Philippe described proportionality as a "diluted and disparate notion" that could take many forms.[300] The author's major contribution to the study of the concept was the distinction between two facets of proportionality. On the one hand the *principle* of proportionality represented a value pursued through public action. It corresponded to a standard of coherence, rationality or efficiency, a "non-written rule" imposed on every norm-producing authority.[301] On the other hand, the *scrutiny* of proportionality

[294] Jean-Paul Costa, "Le principe de proportionnalité dans la jurisprudence du Conseil d'État," *AJDA*, 1988, 434.
[295] Costa, 434.
[296] Costa, 434.
[297] Costa, 434.
[298] Philippe, *Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative françaises*, 8.
[299] Philippe, 7.
[300] Philippe, 61.
[301] Philippe, 9; 24 f.

(*le contrôle de proportionnalité*) designated something even more vast. While it comprised the instances where the judge monitored the proportionality of the reviewed decision to its ends, it further included all the cases in which proportionality was itself a means, an instrument used by the judge to increase the efficiency of judicial review. In other words, proportionality scrutiny was an element of judicial reasoning, part of the *méthodes* of the administrative judge, even though this was not expressed in the reasoning structures of administrative case law.[302]

The distinction between *principe* and *contrôle* consolidated the shift between the scholarly perception of proportionality and the use of the term in practice. According to Philippe, proportionality was mainly monitored through the methods of substantive judicial review, like the scrutiny of the material exactness of facts, the manifest error, the *bilan*, or the necessity test.[303] It is the malleable character of proportionality that rendered it "an ultimate weapon" against abuses on the part of public authorities.[304] What mainly characterised proportionality review was the quest for an equilibrium, be it at an institutional level, between the powers of the judge and those of the reviewed authority, or at a substantive level, between antagonistic norms of the same scope.[305] Hence, proportionality established continuity between distinct methods of review and supported the scholarly systematisation of case law, so dear to the Aix School at the time.

Another major contribution of Philippe's thesis was the introduction of reflection on proportionality in constitutional law. Situating himself in a narrative typical of the *École d'Aix* (which has now become mainstream in French public law), Philippe stressed that the constitutional judge was inspired by the Council of State in the exercise of judicial review and in the application of proportionality in particular.[306] In this way, proportionality was perceived as a common-sensical requirement imposed both on the administration and on the legislator. Although the legislator enjoyed a larger "discretionary power",[307] this power was circumscribed by constitutional rules and by the proportionality scrutiny of the Constitutional Council. In other words, just like the administration, the legislator should be coherent, rational and efficient. It is indicative that Philippe talks about a principle of "good legislation" in the model of "good administration".[308] In this way, proportionality performed a "function of unification" of all the branches of public law.[309]

Taking his cue from administrative law analyses on the matter, Philippe stressed the importance of the circumstances surrounding the application of proportionality.

---

[302] Philippe, 9–10; this idea already preexisted in certain analyses of the concept. See especially Teitgen, "Le principe de proportionnalité en droit français."

[303] Philippe, *Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative françaises*, 159 f.

[304] Philippe, 420.

[305] On the quest for a balance or equilibrium, see for example Philippe, 109–110; 113–115; 198 f.

[306] See Philippe, 436 f.

[307] Philippe, 147.

[308] Philippe, 412.

[309] Philippe, 427.

In his view, proportionality scrutiny should not be automatized, since the concept of proportionality itself "rejects any spirit of systematisation".[310] The intensity of the review should vary as a function of requirements of institutional expertise, which are more present in particular subject matters like economic intervention.[311] In constitutional law proportionality was a more significant role in the area of fundamental rights and freedoms, where the substantive aspect of the Constitution was more pronounced.[312] Inherent in the notion of fundamental rights and freedoms, proportionality assumed a crucial function of intermediary (*relais*) between the perception of a right and the reconciliation of its exercise with countervailing values.[313]

Philippe's thesis is a major academic work on proportionality in French public law and part of the commonly shared understanding of the principle among French public lawyers. It is unanimously credited as a pioneer work, since it predicted and enhanced subsequent evolutions in the judicial review of legislation. It certainly established as mainstream the analysis of the methods of the Constitutional Council in proportionality terms. Since 1990 proportionality is commonly perceived as a technique for the reconciliation of competing constitutional values.[314] The Council's reference to "*excessive interferences*"[315] with or to "*excessive hindrances*"[316] to constitutional rights and imperatives, or to "*the equilibrium that the respect of the Constitution imposes to ensure*"[317] began to be perceived as implicit and variable instances of judicial balancing.[318] In other words, Philippe's work connected proportionality to fundamental rights discourse rising at the time in French constitutional law. The study comprises certain crucial characteristics of the transnational fundamental rights language: the rejection of legal formalism, an aspiration towards coherence and equilibrium, and taking comparative law seriously. In parallel with these evolutions, the Constitutional Council explicitly affirmed proportionality as a constitutional principle, albeit with a more limited scope and function.

---

[310] Philippe, 416.

[311] Philippe, 395.

[312] Philippe, 342 f.

[313] Philippe, 83; 105 f.

[314] Drago, "La conciliation entre principes constitutionnels."

[315] Decision no. 92-316 DC, 20 January 1993, *Loi relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques*, ECLI:FR:CC:1993:92.316.DC, cons. 16 ; Decision no. 93-323 DC, 5 August 1993, *Loi relative aux contrôles et vérifications d'identité*, ECLI:FR:CC:1993:93.323.DC, cons. 16.

[316] Decision no. 93-325 DC, 13 August 1993, *Loi relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France*, ECLI:FR:CC:1993:93.325.DC, cons. 104.

[317] Decision no. 93-323 DC, cited above, cons. 15. Décision no. 97-389 DC, 22 April 1997 *Loi portant diverses dispositions relatives à l'immigration*, ECLI:FR:CC:1997:97.389.DC, cons. 72.

[318] See for example Goesel-Le Bihan, "Réflexion iconoclaste sur le contrôle de proportionnalité exercé par le Conseil constitutionnel"; Dominique Rousseau, *Droit du contentieux constitutionnel*, 6th ed. (Paris: Montchrestien, 2001), 137.

iii. Affirming the constitutional basis of proportionality

Proportionality and necessity of penalties. While, until the '70s, proportionality did not constitute a public law concept, it was not unknown to French public lawyers. During the '60s, Georges Vedel had mentioned proportionality as a principle guaranteed by article 8 *DDHC*.[319] This indicates that, before its application as a technique in the field of judicial balancing, proportionality had another content, which was much more morally charged. It corresponded to a requirement of moderation concerning criminal punishment, expressed in the work of modern philosophers, most notably Beccaria, and connected to the French Revolutionary texts. However, the Council of State had consistently refused to apply proportionality in this sense in the scrutiny of administrative sanctions.[320] This aspect of proportionality long remained a moral-political ideal, rejected by French public law judges and forsaken by French public law scholars.

It is thus not surprising that, until the mid '80s, the connection of proportionality to the *DDHC* was not explicit in the case law of the Constitutional Council. Indeed, though article 8 *DDHC* had already been invoked before the constitutional court, it was usually the principle of *legality* of penalties and not proportionality that was at stake, even when it was the severity of a sentence that was contested.[321] As the process of constitutionalisation of the legal order advanced, the constitutional basis of proportionality as an administrative law principle was affirmed by the Constitutional Council.

The first applications of proportionality in constitutional case law. The first reference to proportionality in constitutional case law is found in decision 86-215 DC.[322] The bill brought before the Council was purported to "fight criminality and delinquency" and, among other repressive provisions, it defined a "safety" period (*période de sûreté*) during which the convicted individuals could not obtain adjustment of their sentence. Opposition senators contested the compatibility of the legislation with the principle of necessity of punishment. According to the *Rapporteur* of the decision, Léon Jozeau-Marigne, the main constitutional problem was whether the principles of the 1789 Declaration were applicable in the execution of sentences or whether they only concerned their pronouncement. In his view, the principle at stake in this case was proportionality of punishment. He thus proposed a *considérant de principe*, in which

---

[319] Georges Vedel, "Note sous CE, 12 février 1960, *Société Eky*," *J.C.P.* II (1960): 11629.The author includes proportionality among the principles entrenched in article 8 DDHC and imposed in the domain of criminal law.

[320] CE, 13 October 1967, no. 71629, ECLI:FR:CEORD:1967:71629.19671013; CE, 12 July 1969, no. 72648, ECLI:FR:CEORD:1969:72648.19690712;

[321] See, for example, Decision no. 84-176 DC, 25 July 1984, *Loi modifiant la loi du 29 juillet 1982 sur la communication audiovisuelle et relative à certaines dispositions applicables aux services de communication audiovisuelle soumis à autorisation*, ECLI:FR:CC:1984:84.176.DC.

[322] Decision no. 86-215 DC, 3 September 1986, L*oi relative à la lutte contre la criminalité et la délinquance*, ECLI:FR:CC:1986:86.215.DC.

the Council would announce the extension of the application of proportionality to the execution of the penalties.[323]

Interestingly, the judge held the application of proportionality in the *pronouncement* of penalties as given, despite the absence of any explicit reference to the principle in constitutional case law. This did not escape the attention of Georges Vedel, at the time member of the Council. While Vedel agreed in substance with the *Rapporteur's* arguments, he objected to the formulation of the decision in the way Léon Jozeau-Marigne had proposed. He stressed that proportionality was not written in the constitutional text and that, until then, relevant decisions were pronounced under the principle of necessity, which comprised proportionality in certain of its aspects. In the view of the *Doyen* Vedel, in the area of criminal law the relevant appreciations are delicate and touched the evolution of public morality. Thus, "the Council should not appear to give lessons to the legislator."[324] In the absence of a manifest error in appreciation, the court should not exercise an intrusive review of legislation. Hence, Vedel proposed that the Council limit itself to an application of the principle of necessity. Applied in the review of administrative police measures, necessity was part of the tradition of objective review exercised by French public law courts. On the contrary, according to the judge, reference to proportionality would echo some kind of appeal to morality. Though the *Doyen* observed that during the '60s he himself had argued for the connection of proportionality to the *DDHC*, he considered proportionality of punishment to be a moral value and not an enforceable constitutional norm. He thus argued against what he saw as an audacious invocation of proportionality.[325]

Vedel's proposition was finally adopted in the official justification of the decision. Proportionality was not mentioned as a general principle. However, the Council affirmed that

> in the absence of manifest disproportionality between the offence and the incurred penalty, it is not within the competence of the Constitutional Council to substitute its proper appreciation for that of the legislator concerning the necessity of the penalties attached to the offences defined by law (…) no provision of the first title of the law is manifestly contrary to the principle entrenched in article 8 of the Declaration of 1789 (…).[326]

Despite the lack of explicit entrenchment as a principle, for the first time proportionality was connected to the manifest error test. Thus, it explicitly acquired a legal-constitutional content in the Council's reasoning. Manifest disproportionality became a criterion for censuring unnecessary sanctions.

---

[323] See the deliberation of the members of the Constitutional Council, 3 September 1986, 19. I am grateful to Vincent Réveillère for giving me a copy of this deliberation, which is not accessible online.

[324] Ibid, 20.

[325] Ibid, 21.

[326] Decision no. 86-215, cited above, cons. 7.

The application of the manifest disproportionality standard in decision *Loi de finances pour 1988*, was perceived by contemporary scholars as the first explicit application of the principle of proportionality in French constitutional law.[327] The bill brought before the Constitutional Council prohibited the publication of individuals' revenues or tax contributions in the press. In an evident effort to dissuade potential offenders, the bill specified that violation of the prohibitions would be punished with an administrative fine equal to the amount of the disclosed revenues or tax contributions. Opposition MPs contested this provision by appealing to the principle of necessity of penalties, the principle of equality before the law and the freedom of expression. The Council had expanded the application of the principle of necessity to administrative sanctions in previous case law.[328] In continuity with these cases, the Council stated that the scope of article 8 *DDHC* did not only comprise criminal law but "*every sanction having a punitive character*", even when Parliament had delegated the competence to pronounce it to a non-judicial authority.[329] The judges went on to state that

> by prescribing that the fiscal fine (…) will be, in every case, equal to the amount of the disclosed revenues, article 92 of the law edicts a sanction that could have, in certain cases, a manifestly disproportionate character.[330]

Having announced manifest disproportionality as a criterion for the manifest violation of necessity in previous case law, the court now applied the standard to censure sanctions that in certain circumstances could be excessively severe.

The announcement of proportionality as a constitutional principle. The constitutional entrenchment of proportionality as a principle more than a year later came as natural and was not celebrated nor even debated by French public lawyers. In the decision *Conseil supérieur de l'audiovisuel*, the judges accepted in principle the power of an independent administrative authority to impose sanctions, while setting conditions on its exercise. Among these conditions, they included a requirement of proportionality, even though no reference to the principle can be found in the claimant MPs' argumentation. In the words of the Council,

> Considering that the power to impose the sanctions enumerated in article 42-1 is conferred on the Conseil supérieur de l'audiovisuel which is an independent authority; that from the terms of the law it follows that no sanction is automatically imposed; that, as article 42-6 requires, every

---

[327] Decision no. 87-237 DC, 30 December 1987, *Loi de finances pour 1988*, ECLI:FR:CC:1987:87.237.DC.

[328] Decision no. 82-155 DC, 30 Decembre 1982, *Loi de finances rectificative pour 1982*, ECLI:FR:CC:1982:82.155.DC, cons. 33. In Decision no. 86-215, cited above, the Council started by stating that the principle announced in article 8 *DDHC* did not only concern criminal penalties, but was also applicable during the period of preventive detention (cons. 3). See also Bruno Genevois, "L'application du principe de proportionnalité aux amendes fiscales (à propos de la décision du Conseil constitutionnel no. 87-237 DC du 30 décembre 1987)," *RFDA* 2, no. 4 (1988): 353–54.

[329] Decision no. 87-237 DC, cited above, cons. 14-15.

[330] Ibid, cons. 16.

> decision imposing a sanction must be justified; (…) that the principle of proportionality must be applied for any of the sanctions enumerated in article 42-1; (…) that the same fault cannot ground but one administrative sanction, be it imposed by law or contract; that it results from the title of article 42-1 (3°) that a pecuniary sanction cannot be cumulated with a criminal sanction.[331]

Proportionality was thus solemnly recognised by the constitutional judges as a requirement of constitutional legality imposed on administrative sanctions. Commenting on the decision, Bruno Genevois, a well-known judge and at the time secretary general of the Constitutional Council, perceived the above *considérants* to lay down an "overall theory of administrative sanctions".[332] This theory followed on the application of the constitutional guarantees until then specific to criminal law, "mainly resulting from article 8 *DDHC*", to the whole of public sanctions.[333] Proportionality, as part of this theory, demanded the administration to choose a sanction that corresponded to the seriousness of the impugned fault. Ever since, constitutional judges have applied this version of proportionality both in criminal and in administrative sanctions, while in certain decisions the content of the principle was further specified.[334]

Clearly, the version of *proportionnalité des peines* applied by the Constitutional Council was very different from the Alexyan proportionality model, despite them sharing a quasi-identical *nom propre*. The French constitutional court's version of the principle did not imply reasoning in prongs and was only indirectly connected to the realisation of constitutional rights. Besides, the entrenchment of proportionality as a general principle in this context was not so much the result of external influence. Rather, it could be read as part of the process of "constitutionalisation" of the legal order that the *Doyen* Vedel had predicted decades ago. Proportionality, as one of the "constitutional bases" of administrative law, was to become part of a "unique conceptual system" that would serve in the analysis of the different branches of law.[335] Still, external influence was not completely absent from this evolution either. Indeed,

---

[331] Decision no. 88-248 DC, 17 January 1989, *Loi modifiant la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication*, ECLI:FR:CC:1989:88.248.DC, cons. 30.

[332] Bruno Genevois, "Le Conseil constitutionnel et la définition des pouvoirs du Conseil supérieur de l'audiovisuel," *RFDA*, 1989, 222.

[333] Genevois, 223. The author considered that the only difference between necessity and proportionality is that necessity also implied the retroactive application of the more favourable criminal legislation.

[334] See for example Decision no. 89-260 DC, 28 July 1989, *Loi relative à la sécurité et à la transparence du marché financier*, ECLI:FR:CC:1989:89.260.DC, cons. 22. In this case, the judges specified the content of proportionality in case of a plurality of sanctions. For other Constitutional Council decisions where proportionality is applied in this way, see for example Decision no. 93-325 DC cited above, cons. 37 f.; Decision no. 94-345 DC, 29 July 1994, *Loi relative à l'emploi de la langue française*, ECLI:FR:CC:1994:94.345.DC, cons. 26 f; Decision no. 99-411 DC, 16 June 1999, *Loi portant diverses mesures relatives à la sécurité routière et aux infractions sur les agents des exploitants de réseau de transport public de voyageurs*, ECLI:FR:CC:1999:99.411.DC; Decision no. 97-395 DC, 30 December 1997, *Loi de finances pour 1998*, ECLI:FR:CC:1997:97.395.DC, cons. 39.

[335] Georges Vedel, "Introduction," in *L'unité du droit: mélanges en hommage à Roland Drago* (Paris: Economica, 1996).

the extension of criminal law principles to sanctions more generally was in conformity with the precepts of Strasbourg case law evolving at the time. In a quite paradoxical way, while being a systemic evolution of French public law, proportionality at the same time connected it to European fundamental rights case law.

The application of proportionality as a principle for the protection of public freedoms. Four years after its *Conseil supérieur de l'audiovisuel* decision, the Council recognised the constitutional basis of the principle of proportionality in the field of restrictive public action as well. In *Loi d'orientation et de programmation relative à la sécurité*, the contested bill empowered the administration to enact police measures for maintaining public order.[336] The bill provided for the possibility of video surveillance and authorised the seizure of objects that could serve as weapons, especially during protests. The application of proportionality as a requirement of necessity, invoked by the plaintiff MPs, was not contested by the Government.[337] The court started by declaring that the maintenance of public order and the search for criminals had the status of constitutional objectives, since they were necessary for the protection of other constitutional rights and principles. Parliament could thus empower the administration to enact restrictive police measures in order to achieve them. However, administrative discretion should be accompanied by guarantees for individuals.

It is among these guarantees that we find proportionality. According to the Council, the administrative police measures must be strictly limited in space and time and "*must remain proportionate to the necessities of the circumstances*".[338] Proportionality was thus explicitly recognised as a "narrowly tailored" requirement imposed by the Constitution on restrictive administrative action. This requirement led the Council to announce a *réserve d'interprétation*: in the words of the court, "*the legislator must be understood*" as having limited the scope of the relevant legislative provisions in light of proportionality. However, the Council still held that the law was unconstitutional. According to the judges, even though the legislator had the power to prohibit the carrying of objects that could possibly serve as weapons during protests, the extension of this prohibition to "*all objects that can be used as projectiles*", rendering them subject to seizure by the administration, was "*by nature by its general and imprecise formulation likely to lead to excessive interferences with individual freedom*", and was contrary to the Constitution.[339]

Thus, proportionality was announced as a principle for the protection of constitutional freedoms. While its function was quite akin to the Alexyan proportionality model, its structure and application was not: proportionality was a standard of necessity primarily addressed to the *administration*. Therefore, it was to be

[336] Decision no. 94-352 DC, 18 January 1995, *Loi d'orientation et de programmation relative à la sécurité*, ECLI:FR:CC:1995:94.352.DC, cons. 17.

[337] See the *recours*, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1995/94-352-dc/saisine-par-60-senateurs.103240.html and the observations by the Government http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1995/94-352-dc/observations-du-gouvernement.103239.html

[338] Decision no. 94-352 DC, cited above, cons. 17.

[339] Ibid, cons. 18.

applied by the ordinary judge, and most notably the Council of State. The constitutional entrenchment of proportionality led to a more recurrent use of proportionality language before ordinary courts. The Council of State adopted proportionality in the review of disciplinary sanctions for manifest error (established since 1978).[340] The manifestly disproportionate standard also spread to the review of the newly instituted administrative sanctions.[341] In certain cases, influence of constitutional case law was almost explicit.[342] Minimal review under the manifest disproportionate standard has persisted until today in the scrutiny of general administrative sanctions,[343] while it was recently abandoned in favour of a full review under a unitary standard of proportionality in the field of discipline.[344] Proportionality language also began to be used in the traditional necessity review of police action.[345]

Still, the above developments did not radically change the Council of State case law until then and were perceived as being in continuity with it, even though they progressively led the court to a more intensive scrutiny of facts. Despite its newly affirmed constitutional status, for example, the application of proportionality in the field of sanctions remained a question of fact. Thus, even after 1989, the supreme administrative court typically rejected proportionality review in cassation, since "*the judge of cassation does not appreciate whether the pronounced sanction is proportionate to the seriousness of the fault*".[346] This case law was not abandoned until very recently.[347] This is because for a long time proportionality did not entail any value-laden judicial balancing of rights, but rather functioned as a unitary standard concerning the necessity or reasonableness of the reviewed measures. Proportionality's potential was constrained by the traditional formalism of French judicial review and by the laconic style of French judgements. It seems that the decisive impulse for the spread of proportionality in French public law came from abroad.

2. The reception of proportionality as a principle from abroad

External pressure on French judicial review. As time passed, it became clear that the French legal system could not remain indifferent to European pressure. Both the ECJ and the ECtHR had insisted on the application of their case law by domestic courts, and they both required fundamental changes to the most basic assumptions of

[340] CE, 13 October 1989, no. 84133, ECLI:FR:CESJS:1989:84133.19891013.

[341] CE, 8 December 1995, no. 158676, ECLI:FR:CESSR:1995:158676.19951208.

[342] CE, 28 July 1999, nos. 202606, 203438, 203487, 203541, and 203589, ECLI:FR:CESSR:1999:202606.19990728, where the Council annuls the contested act by declaring that the sanctions instituted by it can be "*in number of cases, manifestly disproportionate*".

[343] Yves Gaudemet, *Droit administratif* (Paris: LGDJ : Lextenso, 2015), 425.

[344] CE (Pl.), 13 November 2013, no. 347704, ECLI:FR:CEASS:2013:347704.20131113.

[345] CE, 21 January 1994, no. 120043, ECLI:FR:CESSR:1994:120043.19940121; CE, 20 October 1995, no. 154868, ECLI:FR:CESSR:1995:154868.19951020.

[346] CE, 1 March 1989, no. 86306, ECLI:FR:CESSR:1989:86306.19890301; CE, 14 November 1990, no. 100899, ECLI:FR:CESSR:1990:100899.19901114.

[347] CE (Pl.), 30 December 2014, no. 381245, ECLI:FR:CEASS:2014:381245.20141230.

the French style of legal reasoning.[348] Since the mid-'80s, condemnations from Strasbourg have resonated strongly among French public lawyers.[349] At the level of ordinary courts, in 1975 in the famous *Jacques Vabre* decision,[350] the *Cour de cassation* refused to apply a legal statute posterior to the European Treaties and incompatible with them. The Council of State followed this case law more than 10 years later, in the *Nicolo* decision in 1989.[351] Ever since, whenever a statute that is applicable in a certain case falls within the scope of an international treaty, plaintiffs can invoke its incompatibility with the treaty through an *exception d'inconventionnalité*. If their arguments are accepted, the court will disapply the statute. As for administrative acts, ECHR-incompatibility leads to the annulation of the act or to the enjoinment of the administration to withdraw it. Supranational treaties have served as a bill of rights, which, even though not home-grown, has been increasingly invoked by plaintiffs. Since the '90s, fundamental rights language has rapidly expanded in the French legal system.[352]

At the level of constitutional law, the Council maintained the strict separation between the review of convention-compatibility and the review of constitutionality. Thus, compliance with European rights standards was sought through the interpretation and application of constitutional norms. Since the '80s, the language used by the court expressed the timid but increasing influence of fundamental rights discourse.[353] More and more, the Council has presented the Constitution as an order of values and legislative decision-making as an instance of pragmatic reconciliation between competing constitutional requirements. Progressively, the formal French Constitution appeared to address the "users of constitutional justice", namely citizens and public opinion.[354] Under the impetus of the Aix School, comparative law began to be a key means of making sense of constitutional case law. Scholars have sought the coherence of domestic constitutional decisions outside French borders. The once little valued Constitutional Council was increasingly compared to powerful European courts like the Italian, the Spanish and the German constitutional courts.[355]

---

[348] For a more thorough analysis of the external pressures to the French legal order, see Lasser, *Judicial Transformations* chapters 3 and 4.

[349] France recognised the right to individual petition before the ECtHR in 1981. The first decision in 1986 declared French law incompatible with the Convention. See ECtHR, *Bozano v France*, 18 December 1986, no. 9990/82. More generally, on the evolution of the application of the ECHR by French courts and public officials, see Didier Girard, *La France devant la Cour européenne des droits de l'Homme: contribution à l'analyse du comportement étatique devant une juridiction internationale*, Logiques juridiques (Paris: L'Harmattan, 2015).

[350] Cass, 24 May 1975, *Société des cafés Jacques Vabre*, no. 73-13556, *Bull. ch. mixte,* no. 4, 6.

[351] CE (Pl.), 20 October 1989, *Nicolo*, no. 108243, ECLI:FR:CEASS:1989:108243.19891020.

[352] Lasser, *Judicial Transformations*, 247 f.

[353] On the expansion of fundamental rights discourse in constitutional case law, see Samuel Etoa, "La terminologie des « droits fondamentaux » dans la jurisprudence du Conseil constitutionnel," *CRDF*, no. 9 (2011): 23.

[354] Georges Vedel, "Le Conseil constitutionnel, gardien du droit positif ou défenseur de la transcendance des droits de l'homme," *Pouvoirs* 45 (1988): 152.

[355] For some examples, see Georges Xynopoulos, *Le contrôle de proportionnalité dans le contentieux de la constitutionnalité et de la légalité en France, en Allemagne et en Angleterre* (Paris: LGDJ, 1995); Thierry Di Manno, *Le juge constitutionnel et la technique des décisions « interprétatives » en France et en Italie* (Paris: Economica, 1999);

The rise in the power of courts. These developments have generated profound changes in the French perception of law and courts. The protection of fundamental rights has become a source of legitimacy *par excellence* for the judiciary.[356] Once a purely technical text, since the 2000s the Constitution started to be described by some as a "*charter of rights and liberties of judicial inspiration*".[357] Mainstream scholars have progressively abandoned the once dominant legalist paradigm of French public law. Theoretical movements that deny the binding force of formal legal sources, like legal hermeneutics[358] or the *théorie réaliste de l'interprétation*, have become influential.[359] Progressively, courts began to be perceived as political institutions struggling for power and subject to strategic analyses.[360]

This is a corollary of an increasing affirmation of the norm-making power of courts in positive law. For example, the possibility for the Council of State to address injunctions to the administration was legally recognised. Further, the court affirmed to itself the power to report the effects of its decisions.[361] Most importantly, after numerous condemnations by Strasbourg in this respect, the *référé liberté* procedure, instituted in 2000, allowed for the effective prevention of fundamental rights violations through the suspension of manifestly illegal administrative acts that harm public freedoms.[362] Similar evolutions took place for the *Cour de cassation*.[363] As for the Constitutional Council, this tendency can be observed since the mid '80s with the more and more recurrent use of the *réserve d'interprétation* technique. This technique, imported from Italy, allows the court to announce authoritative interpretations of the legal provisions brought before it. It is indicative that since the 2000s the Constitutional Council does not hesitate to cite itself in the reference norms of its decisions.[364]

The rise in the power of courts created pressure for more active participation of citizens in the judicial decision-making procedure, and thus for the insertion of adversarial elements to the traditionally inquisitorial procedure before public law courts. Taking the impetus from the ECtHR, the role of the *commissaire du gouvernement* has been considerably transformed, at least at the level of appearances. Now renamed

---

Jean-Jacques Pardini, *Le juge constitutionnel et le « fait » en Italie et en France* (Aix-en-Provence: Presses universitaires d'Aix-Marseille, 2001).

356 See also Lasser, *Judicial Transformations*, chap. 10; see for example Dominique Rousseau, "La démocratie continue," *Le Débat*, no. 96 (1997): 73.

357 Dominique Rousseau, *Droit du contentieux constitutionnel*, 9th ed. (Paris: Montchrestien, 2010), 449; in the same vein, cf. Bertrand Mathieu and Michel Verpeaux, *Contentieux constitutionnel des droits fondamentaux*, Manuels (Paris: LGDJ, 2002), 19.

358 See for example Rousseau, *Droit du contentieux constitutionnel*, 2010, 144 f.; 445 f.

359 Michel Troper, *Pour une théorie juridique de l'État*, Leviathan (Paris: PUF, 1994).

360 Jacques Meunier, *Les pouvoirs du Conseil constitutionnel. Essai d'analyse stratégique* (Paris; Bruxelles: LGDJ; Bruylant, 1994).

361 CE (Pl.), 11 May 2004, *Assoc. AC ! et autres*, no. 255886, ECLI:FR:CEASS:2004:255886.20040511.

362 On the evolution of the role of the Council of State, see Jean-Marc Sauvé, "Le Conseil d'État, une cour suprême administrative," 2014, http://www.conseil-etat.fr/Actualites/Discours-Interventions/Le-Conseil-d-Etat-une-cour-supreme-administrative.

363 This evolution is described by Lasser, in *Judicial Transformations*.

364 Decision no. 2004-490 DC, 12 February 2004, *Loi organique portant statut d'autonomie de la Polynésie française*, ECLI:FR:CC:2004:2004.490.DC.

rapporteur public, the Government's representative no longer has the right to vote in judicial deliberations, but only to attend them.[365]

The *QPC*. Still, for a long time the refusal on the part of constitutional judges to examine the compatibility of domestic legislation with the Convention entailed that certain measures contrary to fundamental rights were censured by ordinary courts in their application of the Convention and not of the Constitution. The ironic slogan "*constitutional pre-eminence, jurisdictional impotence*" is testimony to the "malaise" that this situation provoked among French public lawyers.[366] The constitutional reform of 2008 sought to remedy this with the instauration of a procedure of *a posteriori* constitutional review, the *question prioritaire de constitutionnalité* (*QPC*). The new article 61-1 of the Constitution gives the opportunity to every individual to bring a legal statute applied in his case before the Constitutional Council, in order to assess its compatibility with "the rights and freedoms guaranteed by the Constitution".[367] In this process, ordinary courts function as filters, filtering out questions that are not serious or on which the Council has already pronounced.[368] Unconstitutional statutes are abrogated for the future, with the possibility for the Council to report the effects of its decisions.

Undoubtedly, the *QPC* brought about a shift of focus of the constitutional order to the individual. It is indicative that the decisions issued following this procedure are not just attributed a number but also a name, usually the name of the plaintiffs in the proceedings where the preliminary question arose. Since 2016, the "*considering that*" in the beginning in the Council's phrases has been suppressed, ameliorating the impression of a continuous syllogism and making the court's decisions more accessible to the public. The Council's fact finding capacities were reinforced through the establishment of a minimal adversarial procedure and the conferral of some investigatory powers.[369] Further, the *QPC* enhanced the Council's openness abroad, since it subjected its case law to the jurisdiction of supranational courts. In 2013, the Council overruled case law that it had maintained for almost 40 years and sent a preliminary reference to the ECJ.[370] Looking outside French borders also increased the Council's visibility abroad. Translations of the most important decisions by the Council are found in several European languages.

The *QPC* procedure had as a goal the re-appropriation of fundamental rights by the domestic constitution. Some months after its entry into force, the President of the Council celebrated that "(…) our *Etat de droit* has been accomplished, conventionality

[365] ECtHR, *Kress v France*, 7 June 2001, no. 39594/98.

[366] Denys de Béchillon, "De quelques incidences du contrôle de la conventionnalité internationale des lois par le juge ordinaire (malaise dans la Constitution)," *RDA*, 1998, 225.

[367] Article 61-1 Constitution 1958.

[368] Dominique Rousseau and Julien Bonnet, *L'essentiel de la QPC: mécanisme et mode d'emploi, commentaires des principales décisions* (Paris: Gualino; Lextenso, 2011).

[369] Dominique Rousseau, "Le procès constitutionnel," *Pouvoirs* 137 – La question prioritaire de constitutionnalité (2011): 47.

[370] Decision no. 2013-314P QPC, 4 April 2013, *M. Jeremy F.*, ECLI:FR:CC:2013:2013.314P.QPC.

review has found again its subsidiary place".[371] The *QPC* entered into force in 2010 and has had incredible success since. In something more than seven years, the Constitutional Council has pronounced more than 650 decisions, compared to the total number of 750 decisions pronounced in *a priori* review during the 60 years of its existence.[372] The amount of scholarly studies on the new procedure is more than impressive and most scholars have been enthusiastic about the "*big bang constitutionnel*" that the *QPC* provoked.[373] Still, general enthusiasm about the *QPC* is qualified by the restraint that the Council shows in its application. After five years of application, among the *QPC* decisions, less than a fifth had declared a legal rule totally or partially unconstitutional. To this one should add that only 20% of the plaintiffs' unconstitutionality claims are actually referred to the Council by the supreme courts.[374]

The decline of fundamental rights discourse. The rise of fundamental rights in French constitutional law has been abruptly interrupted by the shock of recent terrorist attacks. Since 2015 a general decline of the language of rights and freedoms can be observed in French constitutional politics and constitutional law. This is mostly apparent in the declaration and prolongation of a state of emergency, at the margin of constitutional legality and of European rights standards. The state of emergency, declared on the 14th November 2015, ended on the 1st of November 2017, but some important police powers provided for in the relevant decrees were transferred into normal legislation. This movement is accompanied by a general decline of scholars' institutional faith in the Constitutional Council. Contemporary studies that perceive constitutional case law as producing a coherent constitutional discourse that can be of pedagogic import for ordinary courts or the political branches of government have become increasingly rare.

This changing context has affected the use of proportionality by domestic public lawyers. In parallel to the constitutionalisation of the French legal order, the operation of European law in the domestic sphere gave a new impetus to proportionality language. With the opening up of the French legal order to European law, proportionality acquired a new meaning as a European method of review. Though this provoked a generalisation and intensification in proportionality scrutiny, it did not bring about any radical change in the methods of the French public law judge (*paragraph i*). Since the mid-'90s proportionality benefitted in particular from the rising importance of comparative law in French constitutional argumentation. As a corollary

[371] Jean-Louis Debré, "Protection des libertés et QPC" (Conseil national des Barreaux, Nantes, 2011), http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/discours_interventions/2011/JLD-Nantes-21102011.pdf.

[372] Based on a research on the Council's official website, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2017/sommaire-2017.148476.html, on 18 July 2017.

[373] Dominique Rousseau, "La question prioritaire de constitutionnalité: un big bang juridictionnel?," *RDP*, no. 3 (2009): 631.

[374] Cristine Maugue, "La QPC : 5 ans déjà, et toujours aucune prescription en vue," *Cahiers du Conseil constitutionnel*, no. 47 (2015): 11.

of the progressive spread of fundamental rights language, constitutional scholars started reconstructing the Council's case law as instances of three-pronged proportionality analysis. Soon, proportionality analysis was transferred into case law as a method for the adjudication of constitutional rights (*paragraph ii*). However, a survey of the Council's practice on proportionality reveals that, even though it might lead to more intrusive review of legislation, the use of proportionality language has brought about no radical changes in judicial reasoning. Proportionality is inconsistently applied and in no case does it involve a value-laden balancing in constitutional case law (*paragraph iii*).

i. The application of proportionality in the contrôle de conventionalité

The emergence of proportionality in convention-compatibility review. We saw that until the '90s, proportionality had no specific legal content in the Council of State's case law. This was the case within the scope of European law as well. The law, *expression de la volonté générale*, escaped judicial scrutiny on the basis of international treaties. Further, the theory of the *loi écran* impeded contestation of the convention-compatibility of important administrative acts. But even when the compatibility of an administrative act with an EC freedom was examined by the Council of State, the question was formulated as a matter of illegitimate discrimination on the basis of nationality. In other words, it was rather the intention of the reviewed authority to discriminate that was sanctioned and not the proportionality of the domestic measures. The actual effects of domestic rules on free movement were not examined.[375] As for the ECHR, the Convention was not directly applied by administrative courts nor was it much invoked by claimants, since its abstract precepts were not deemed to impose specific constraints on domestic legislation. Besides, Strasbourg case law long remained unknown to French public lawyers, who adopted a literal interpretation of the Convention.[376] The *Cour de cassation* also refused to review the proportionality of domestic public acts, even when claimants invoked the EC or ECHR principle.[377] It is only with the enforcement of the supremacy of international treaties against legislation by the Council of State in 1989 that proportionality found new scope for application in French public law, within the context of the *contrôle de conventionalité*.

This evolution began in the field of Convention rights. The first time that the Council of State annulled an administrative measure on the basis of article 8 ECHR was in 1991, in the *Belgacem* and *Babas* cases, decided the same day. Indeed, prior to this the supreme administrative court had constantly refused to review expulsion orders under the Convention. Traditionally, in this domain of "*haute police*", public authorities

[375] See for example, CE, 17 December 1986, nos. 76115 and 77265, ECLI:FR:CESSR:1986:76115.19861217.

[376] Girard, *La France devant la Cour européenne des droits de l'Homme: contribution à l'analyse du comportement étatique devant une juridiction internationale*, 25.

[377] See for instance Cass. crim., 12 March 1991, no. 90-83545, unreported, on EC law; 11 July 1990, no. 89-86852, unreported, on the ECHR.

enjoyed broad discretionary powers.[378] After the conviction of Mr Belgacem for petty crimes, the immigration police ordered his expulsion. Mr Belgacem contested the compatibility of this measure with the Convention claiming that, even though he was of Algerian nationality, he was born in France and had no family elsewhere. Indeed, all his brothers and sisters lived in France and so did his father, whose charge Mr Belgacem had partially assumed. Following the observations of the *Commissaire du gouvernement*, the Council of State abandoned its deferent stance towards immigration police authorities and concretely examined the situation of the applicant. The court held that,

> it results from the file that the measure of expulsion against Mr Belgacem has exceeded what was necessary for the preservation of public order, given his behaviour after the inflicted condemnations (…), and taking into account the seriousness of the interference with his family life.[379]

In a similar way, the Council applied the Convention in the case of Mme Babas, albeit without annulling the reviewed decision. The judges concluded that Mme Babas' deportation while she was pregnant "*did not disproportionately restrict [her] right for the respect of her family life*".[380] Ever since, the Council has applied the disproportionality standard in its reasoning under article 8. This has produced an ever-increasing source of litigation, the *contentieux des étrangers*. The supreme administrative court expanded this kind of review to other rights guaranteed by the Convention, like the freedom of expression.[381] During the '90s, the *Cour de cassation* also adopted proportionality terminology in criminal law, and in the adjudication of Convention rights like the right to property.[382] By the late '90s, proportionality had acquired a new content in French public law, that of a European method of review, applied by domestic courts in the ambit of the EC Treaties and the ECHR. This considerably increased the powers of ordinary courts.[383]

Proportionality as synonymous with domestic methods. *Belgacem* and *Babas* are generally thought of as the first applications of proportionality in its version of a European fundamental rights principle.[384] However, one will notice that it is only in

---

[378] Jean-Marc Sauvé, "Le Conseil d'État et l'application de la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales," 2010, http://www.conseil-etat.fr/Actualites/Discours-Interventions/Le-Conseil-d-Etat-et-l-application-de-la-Convention-europeenne-de-sauvegarde-des-droits-de-l-homme-et-des-libertes-fondamentales.

[379] CE (Pl.), 19 April 1991, *M. Belgacem*, no. 107470, ECLI:FR:CEASS:1991:107470.19910419.

[380] CE (Pl.), 19 April 1991, *Mme Babas*, no. 117680, ECLI:FR:CEASS:1991:117680.19910419.

[381] Paul Cassia and Emmanuelle Saulnier, "Le Conseil d'État et la Convention européenne des droits de l'Homme," *AJDA*, 1997, 411, section "Les modalités d'utilisation de la CEDH par le Conseil d'Etat."

[382] Cass. comm., 1 October 1996, no. 94-18845, unreported; Cass. civ. 3, 19 June 1996, no. 94-70323, unreported; Cass. comm., 8 December 1992, nos. 90-20258, 90-20271, 90-20273, 90-20282, 90-20286, 90-20287, 90-20306, 90-20314, 90-20350, 90-20351, and 90-20352, Bull. 1992, no. 404, 283.

[383] The term is used in this sense in Cassia and Saulnier, "Le Conseil d'État et la Convention européenne des droits de l'Homme"; Jean-Paul Markus, "Le contrôle de conventionnalité des lois par le Conseil d'État," *AJDA*, 1999, 99.

[384] See, for example, Jean-Marc Sauvé, "Le principe de proportionnalité, protecteur des libertés" (Aix-en-Provence, 2017), http://www.conseil-etat.fr/Actualites/Discours-Interventions/Le-principe-de-proportionnalite-protecteur-des-libertes, note 50.

the *Babas* case that proportionality terminology was *actually* used. Instead, in *Belgacem* the application of article 8 ECHR only implied an extension of the traditional necessity review. In other words, the standard of necessity used in *Belgacem* and the standard of disproportionality used in *Babas* are understood as synonymous in French public law. This indicates that despite the fact that proportionality acquired a new content as a European principle or technique, its application did not bring about any radical change when compared with pre-existing judicial methods. Proportionality was understood as another instance of the *contrôle de proportionnalité* exercised by domestic judges.

This idea was expressed in certain studies contemporaneous with *Belgacem* and *Babas*. In his article on the principle of proportionality, Michel Fromont, a specialist of German law, argued that the principle of proportionality that was applied by European courts underpinned domestic judicial methods too, especially the necessity review of police measures. Hence, according to Fromont, the main difference between European and domestic proportionality was the lack of explicit recognition of the principle in French public law, which compromised its effective and consistent application.[385]

Assimilation of European and domestic proportionality scrutiny was more obvious in cases where a disproportionality standard was already employed by domestic courts. In the field of administrative sanctions for instance, whenever the Convention was invoked by the claimants, the Council applied its traditional manifest disproportionality test. Often it did so without referring to the Convention in the body of its judgment, though it did mention it in the *visas* of the decision.[386] The invocation of European law in such cases sometimes led the Council of State to abandon its traditional manifest error scrutiny and to exercise a full proportionality review.[387] Apart from an intensification of the pre-existing *contrôle de proportionnalité*, the operation of the ECHR in the domestic sphere produced a spill-over of proportionality terminology into purely domestic cases involving individual rights.[388]

The application of proportionality in EU law. The above observations apply to the operation of EU law in the domestic sphere as well. A process of generalisation and intensification of proportionality scrutiny was prompted under the influence of

---

[385] See Michel Fromont, "Le principe de proportionnalité," *AJDA*, no. spécial (1995): 156. In the same vein, Markus, "Le contrôle de conventionnalité des lois par le Conseil d'État." Talking about the *contrôle de proportionnalité* and *conventionnalité*, Markus seems to see them as being in continuity with traditional Council of State methods for the review of the administration. See also Jacques Ziller, "Le principe de proportionnalité," *AJDA*, no. spécial (1996): 185. While Ziller is more sensitive to difference, he still rejects the idea of a French exceptionalism and affirms that French courts apply proportionality. He does not see the different proportionality methods as leading to different substantive outcomes.

[386] See for example, CE, 28 July 1999, nos. 202606, 203438, 203487, 203541, 203589, ECLI:FR:CESSR:1999:202606.19990728.

[387] CE, 12 March 1999, nos. 181976, 182549, 182572, and 182624, ECLI:FR:CESSR:1999:181976.19990312.

[388] See for example CE, 6 December 1993, no. 124984, ECLI:FR:CESSR:1993:124984.19931206: the Council talked about an "*atteinte disproportionnee*" to the (domestic) freedom of movement; CE, 12 July 1993, no. 121337, ECLI:FR:CESSR:1993:121337.19930712: the Council considered that a public project disproportionately infringed the property rights of the claimants and denied for this reason its public utility.

European law.[389] This can be illustrated through an example from consumer law. In 1999, an administrative decision suspended the market distribution of certain products destined for oral use by infants for one year. The claimant companies contested the decision before the Council of State, invoking both domestic and European legislation. Since the '70s, domestic legislation allowed for such measures on the condition that they were "proportionate to the danger caused by the products". The law had been amended to further specify that restrictive measures "could have no other goal but to prevent or put end to a danger, in order to guarantee the safety that consumers legitimately expect, while respecting the international obligations of France".[390]

Following previous case law on the matter, the proportionality requirement imposed by French legislation typically translated into a review of the domestic authorities' factual considerations under the manifest error standard. In this instance the court pointed out that according to scientific research, the products in question contained substances that were potentially dangerous for the health of infants. Hence, by suspending their distribution, the administration had not proceeded to a manifestly erroneous appreciation of the danger the products generated. The judges, however, went on to affirm that the reviewed measures were "*not disproportionate with regard to the risks [that the products produced] for the health of young consumers*".[391] The employment of proportionality language in domestic consumer law testifies to the spill-over effect generated by the operation of EU law in the domestic sphere.[392]

Having ascertained the compatibility of the administrative act with domestic law, the Council responded to the claimants' allegations concerning the violation of EC Treaty freedoms and of the Council Directive no 92/59/CEE. It observed that both the EC Treaties and the Directive allowed for restrictive national measures justified by the protection of health when these measures did not have a latent discriminatory nature. It pointed out that such measures should be appropriate to ensure product safety, proportionate to the seriousness of the risk, and should not exceed the limits set by the Treaty. Further, the court observed that article 8 of the Directive explicitly allowed for restrictive measures on products constituting a serious and immediate risk to consumer health and security. The discretion left to domestic authorities by European law was sufficient for the court to conclude that "*the impugned act, justified by the need for protection of the health of young children and by the risks that the relevant products cause, does not violate the terms of articles 28 and 30 CE, nor the objectives fixed by Directive no 92/59/CEE*". Interestingly, the judges did not exercise a separate proportionality review under Community law nor did they consider it necessary to send a preliminary reference to the ECJ on the matter.

[389] Jean Sirinelli and Brunessen Bertrand, "La proportionnalité," in *L'influence du droit européen sur les catégories du droit public*, ed. Jean-Bernard Auby (Paris: Dalloz, 2010), 628.

[390] See article L-221-9 code des consommateurs.

[391] CE, 28 July 2000, nos. 212115 and 212135, ECLI:FR:CESSR:2000:212115.20000728.

[392] See also CE, 29 December 1999, no. 206945, ECLI:FR:CESSR:1999:206945.19991229.

The deferent application of proportionality. For a long time, the merging of domestic and European proportionality review was usual in French case law.[393] While sometimes this sometimes led domestic courts to a more intrusive review than the one they previously exercised, it apparently came at a cost to the European test's structure and rigour. Full-fledged proportionality analysis was incompatible with the laconic and formal style in which French courts traditionally expressed themselves. In the Council of State decisions, proportionality did not correspond to a pronged test similar to the one applied by European courts. Instead, it implied a threshold review, based on the particular factual circumstances of the case. In family life cases, the field of application of proportionality *par excellence,* the Council typically took into account the duration and the importance of the family relations invoked by the claimant, her attachment to her country of origin and the risk that her remaining in France caused to public order. In *Babas*, for example, in order to reach its decision on the proportionality of the measure, the court considered "*all the circumstances of the case, and especially the time and the conditions of Mme Babas' stay in France*", as well as "*the effects of the measure of deportation*".[394] The judges had access to these elements indirectly, through the file compiled by the administration in the procedure preceding the contested act.

Proportionality remained a factual matter primarily considered by the administration. Hence, the traditional restraint of French courts also characterised the application of proportionality in the field of European law. The use of the term disproportionate did not involve any balancing of competing values. In *Babas*, the court appraised the proportionality of the contested deportation by reference "*to the goals in view of which the decision (…) was taken*". However, nowhere in the Council's justification were these goals specified. As a negative standard, disproportionality only rarely led to the annulment of the impugned decision. After a survey of article 8 case law, Paul Cassia and Emmanuelle Saulnier described the Council as being convinced that, "by nature, immigration police measures did not infringe the family life of the foreigner, since no one prohibits her family from leaving the [French] territory after her".[395]

The above observations apply to the application of proportionality in the field of EU law too. In some EU law cases the Council of State has followed the reasoning of the ECJ more closely and has exercised a more searching proportionality scrutiny, even referring to the different prongs of the test.[396] However, these cases are quite rare, since generally the Council of State did not see the application of the proportionality test as an obligation, even when the ECJ invited it to do so.[397] Besides, it is doubtful whether

---

[393] See for example CE, 15 April 1996, no. 142020, ECLI:FR:CESSR:1996:142020.19960415, on environment and freedom of movement; CE, 6 January 1997, no. 162553, ECLI:FR:CESJS:1997:162553.19970106, on Orly airport flying time slots.

[394] See CE (Pl.), 19 April 1991, *Mme Babas*, cited above.

[395] Cassia and Saulnier, "Le Conseil d'État et la Convention européenne des droits de l'Homme," note 71; citing Martine Denis-Linton, "Conclusions sur CE, 10 avril 1992, *Aykan*, *Marzini* et *Minin*," *RFDA*, 1993, 543.

[396] CE (Pl.), 8 April 1998, no. 161411, ECLI:FR:CEASS:1998:161411.19980408.

[397] See for example, decision ECJ, C-100/01, 26 November 2002, *Oteiza Olazabal*, ECLI:EU:C:2002:712, paras 43-44, where the court invites the Council to apply the appropriateness, necessity and proportionality prongs. In application of this decision, the Council of State proceeds to

the use of the proportionality structure affected the intensity of the judicial scrutiny. Typically, the court examined the legitimacy of the legislative aim and contented itself with affirming the proportionality of the domestic measures, without any justification at all. This is why domestic scholars characterise the proportionality review in European market freedom cases as "superficial", "perfectly dogmatic", and "arbitrary".[398]

Formalism, judicial restraint and lack of justification also characterised the application of proportionality by the *Cour de cassation*.[399] Furthermore, due to its factual nature, proportionality was to be primarily considered by inferior judges. This limited the possibilities for its invocation before the cassation judge considerably.[400]

Neglecting structural differences between domestic and European proportionality. During the '90s, structural differences between domestic and European versions of proportionality were generally neglected in French *doctrine*. French public lawyers are typically more attentive to the content of legal rules and principles than to the structure of legal concepts and their function in patterns of judicial reasoning. In the most elliptic of the Council of State's formulations, scholars saw instances of a "full proportionality review", involving the balancing of competing values.[401] Proportionality was perceived as a unitary principle or ideal, despite its variable application by domestic, foreign and European courts. Thus, the *Cour de cassation* sometimes referred to the "*general principle of proportionality of the sanction to the fault, guaranteed by the European Convention for the protection of human rights and fundamental freedoms, the Treaty of Rome and the Declaration of the Rights of Man and of the Citizen*".[402] For mainstream public law scholarship, proportionality corresponded to an objective liberal principle prescribing the moderation of public power and connected to a common European perception of individual rights. The accentuation of the liberal and European character of proportionality meant the *bilan* case law, which was technical, particularly French and not necessarily connected to rights, was increasingly left aside in the study of the principle.[403]

While the operation of European law did not radically change domestic judicial methods, it did establish proportionality as a method primarily defined by reference to European or comparative law. More and more, French public lawyers looked abroad for the correct content and application of proportionality.

---

an unstructured reasoning, following which it affirms the proportionality of the contested measures without justification. See CE, 23 April 2003, no. 206913, ECLI:FR:CESSR:2003:206913.20030423.

[398] Sirinelli and Bertrand, "La proportionnalité," 636.

[399] See for example Cass. crim., 18 May 1994, no. 92-86386, Bull. crim., 1994, no. 190, 434, concerning the application of EC law. For an example of the application of the ECHR, see Cass. crim., 19 March 1996, no. 94-81420, Bull. crim., 1996, no. 117, 340.

[400] Cass. crim., 10 March 1993, no. 91-86197, Bull. crim., 1993, no. 108, 261.

[401] Markus, "Le contrôle de conventionnalité des lois par le Conseil d'État" before note 129.

[402] Cass. civ. 1, 13 February 1996, no. 93-12750, Bull. 1996, no. 73, 47.

[403] Cf. Fromont, "Le principe de proportionnalité"; Ziller, "Le principe de proportionnalité." Both Fromont and Ziller argued that French scholars should categorise as proportionality scrutiny only case law that corresponds to the European notion of proportionality.

ii. The transfer of proportionality analysis as a pronged structure

The use of the German theory of proportionality in scholarship. The rise of comparative research and the progressive spread of fundamental rights discourse, opened the way for the transfer of the structure of proportionality in French constitutional law. Since the mid-'90s, French scholars started using the three-pronged structure of proportionality analysis applied in German law in the systematisation of domestic constitutional case law. The first to do so was Georges Xynopoulos in his comparative study of the application of the principle in German, French and English public law.[404] Though the author adopted a French-centred analysis based on the concept of discretionary powers, he understood proportionality as a technique for the balancing of competing values or interests. Thus, Xynopoulos regrouped different methods of review employed by French public law judges, such as necessity or the *bilan*, under the label of proportionality. In this context, proportionality was taken as naturally connected to the new role of the judiciary as the protector of fundamental rights. Its function was that of a method for imposing the realisation of fundamental rights on the legislator and on other public authorities.

Since 1997, Valérie Goesel-Le Bihan also started using the three-pronged test to reconstruct constitutional case law. Following her allegedly "iconoclastic" hypothesis, the intensity of proportionality scrutiny and the prong applied varied according to the importance of the right at stake, but also according to other factors, such as the status of the legislative goal or whether legislation implemented or restrained a constitutional objective. The different intensities of proportionality scrutiny led to the employment of different methods of constitutional review, such as manifest error, manifest inappropriateness, necessity or appropriateness review. Goesel-Le Bihan thus argued that proportionality analysis provided a new framework through which the theory of fundamental rights that presumably underpinned Constitutional Council decisions could be revisited.[405]

While these authors had different objectives, they both used proportionality to reconstruct judicial reasoning in line with the representation of the constitutional judge as a protector of fundamental rights. This attributed a new prestige to the Council's decisions and to the Council as an institution itself. Soon, doctrinal interest in proportionality led to its actual application as a fundamental rights principle in constitutional case law.

The application of proportionality as a fundamental rights principle. In 2000, Parliament had voted for legislation imposing restrictions on the concentration of TV channels. The measures were contested by the opposition as "disproportionate

---

[404] Xynopoulos, *Le contrôle de proportionnalité dans le contentieux de la constitutionnalité et de la légalité en France, en Allemagne et en Angleterre*.

[405] Goesel-Le Bihan, "Réflexion iconoclaste sur le contrôle de proportionnalité exercé par le Conseil constitutionnel."

with respect to the constitutional objective of pluralism".[406] Criticism of the disproportionate character of legislation had been a recurrent phenomenon in French constitutional law since the '90s. However, it did not usually lead the Council to express its scrutiny in proportionality terms. Instead, the court preferred categorical methods of justification, for example by referring to the "*substance*" of the rights at stake.[407] Particularly in freedom of enterprise case law, after announcing that this freedom is not general or absolute, the Council typically checked whether the contested legislation had "*perverted its scope*".[408]

However, in this particular case the constitutional judges followed a quite different reasoning. After affirming the constitutional status of the freedom of enterprise, guaranteed by article 4 DDHC, they announced that the legislator can impose restrictions when they are "*justified by the general interest or connected to constitutional requirements*". The Council held that Parliament has the power to reconcile the competing rules and principles, having taken into account "*the specific technical constraints and economic necessities related to the general interest in the field of audio-visual communication*".[409] Nonetheless, legislative power in this field is not limitless. In the words of the Council, the legislator, when fixing the applicable rules in the field of media,

> should ensure that their application does not limit the freedom of enterprise in excessive proportions with regard to the constitutional objective of pluralism.[410]

Proportionality was thus announced as a method for the reconciliation of competing constitutional values, according to the technical, economic and other circumstances. While its form remained that of a threshold requirement, its function was much akin to the one described by the Alexyan theory.

Moreover, again following the Alexyan model, the language used by the Council indicates that the intensity of proportionality review varied according to institutional and other circumstances. The judges held that, not having Parliament's general power of appreciation and decision, they could not seek for alternative, less restrictive measures that could advance the legislative objectives. Hence, they contented themselves with ascertaining that the measures in question were not "*manifestly inappropriate*" for preserving media pluralism.[411] The manifestly inappropriate standard, until then applied independently of proportionality, was thus employed as one of the proportionality prongs, implying a minimal review of the appropriateness of the contested measures. In the exercise of this review, the court took into account the "*new*

---

[406] Decision no. 2000-433 DC, 27 July 2000, *Loi modifiant la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication*, ECLI:FR:CC:2000:2000.433.DC, cons. 38.

[407] See for example Decision no. 90-284 DC, 16 January 1991, *Loi relative au conseiller du salarié*, ECLI:FR:CC:1991:90.284.DC, cons. 2-3.

[408] Decision no. 89-254 DC, 4 July 1989, *Loi modifiant la loi n° 86-912 du 6 août 1986 relative aux modalités d'application des privatisations*, ECLI:FR:CC:1989:89.254.DC, cons. 5.

[409] Decision 2000-433 DC, cited above, cons. 40.

[410] Ibid.

[411] Ibid, cons. 41 f.

technical data" brought about by digital TV and finally deferred to the legislative choices.[412]

A few months later, the constitutional court applied proportionality to censure the choices of Parliament. A bill authorised local authorities in Paris, Lyon and Marseille to impose an administrative license requirement on central shops for changes in the nature of their commercial activity. The court declared that, while "*the preserving of the commercial diversity of neighbourhoods*" corresponded to a general interest goal, by imposing the contested restrictions, the legislator had committed infringed upon the right to property and on the freedom of enterprise to an extent "*that was disproportionate to the objective pursued*".[413]

Proportionality was progressively established as a method for constitutional rights adjudication. According to the constant constitutional case law on freedom of enterprise since 2000,

> the legislator is free to impose restrictions on the freedom of enterprise (…) connected to constitutional requirements or justified by the general interest, under the condition that the resulting infringement is not disproportionate with regard to the objective pursued.[414]

Soon, proportionality review spread in other fields as well, most notably in the review of derogations to the principle of equality.[415] In this field the Council typically required that derogations from the principle of equality pursue a general interest, follow objective and rational criteria connected to the legislative goal and are not disproportionate with respect to their expected result.[416] More and more, the Council's reasoning was akin to a prong-structured proportionality analysis.[417] European influence became increasingly explicit in the documents taken into account by the Council in its various decisions. The transfer of the three-pronged structure of proportionality in French constitutional law was not long to come.

The reception of proportionality as a three-pronged test. Extra-legal considerations being decisive in proportionality analysis, the instauration of the *QPC* procedure was expected to provide a new impetus for its application. Nonetheless, it was in the *a priori* review that the Council first announced proportionality analysis as a pronged structure of reasoning. The *Rétention de sûreté* case concerned contentious

---

[412] Ibid, cons. 42.

[413] Decision no. 2000-436 DC, 7 December 2000, *Loi relative à la solidarité et au renouvellement urbain*, ECLI:FR:CC:2000:2000.436.DC, cons. 20.

[414] Decision no. 2000-439 DC, 16 January 2001, *Loi relative à l'archéologie préventive*, ECLI:FR:CC:2001:2000.439.DC, cons. 13.

[415] Decision no. 2001-452 DC, 6 December, 2001, *Loi portant mesures urgentes de réformes à caractère économique et financier*, ECLI:FR:CC:2001:2001.452.DC, cons. 7.

[416] Decision no. 2007-555 DC, 16 August 2007, *Loi en faveur du travail, de l'emploi et du pouvoir d'achat*, ECLI:FR:CC:2007:2007.555.DC, cons. 3.

[417] Decision no. 2005-528 DC, 15 December 2005, *Loi de financement de la sécurité sociale pour 2006*, ECLI:FR:CC:2005:2005.528.DC, cons. 15; Decision no. 2007-555 DC, cited above, cons. 3 f.

measures of post-sentence preventive surveillance and detention, instituted in 2008.[418] The restrictive measures were applicable to individuals convicted for particularly serious crimes and considered dangerous due to a severe personality disorder. The possibility of imposing such measures was pronounced by the jury of a criminal court simultaneously with the verdict.

Opposition MPs contested the constitutionality of the measures, arguing that they violated the principles of necessity and proportionality of punishment, the rule of *ne bis in idem*, and the presumption of innocence. In their view, alternative measures for the prevention of recidivism, like the procedure of judicial follow up, were already available in the code of criminal procedure. The Council rejected the criminal law arguments of the claimants, since it did not consider the post-sentence preventive detention a *criminal* sanction. In the judges' view, the measures aimed to prevent the commission of criminal offenses by persons suffering from severe personality disorder. Hence, their application did not depend on the culpability of the condemned but on her personality.[419]

Still, the opposition deputies alternatively claimed that if the measures' punitive character was not admitted, they still constituted an unnecessary restriction to individual rights. Responding to these arguments, the Council imposed a necessity requirement on legislative choices. According to the wording of the decision, "*post-sentence preventive detention and surveillance should respect the principle resulting from article 9 of the 1789 Declaration and 66 of the Constitution, following which personal freedom should not be hindered by restrictions that are not necessary*".[420] The Council stressed that it is within the competence of the legislator to "*reconcile* (…) *on the one hand, the prevention of public order disturbance, which is necessary for the protection of rights and principles of constitutional value and, on the other hand, the exercise of constitutionally guaranteed freedoms*".[421] The judges went on to state the criteria that the legislative reconciliation should fulfil: "*hindrances to the exercise of these freedoms must be adapted, necessary and proportionate to the objective of prevention pursued*".[422]

Proportionality analysis was thus announced as a judicial review method in the field of individual freedom. More surprising than the announcement of the proportionality prongs was the actual structuring of the court's reasoning. The Council divided the remaining 10 *considérants* of its decision in a successive analysis of the adequacy, the necessity and the proportionality of the legislative measures at stake, which was notably long and detailed by the reasoning standards of the court. The influence of foreign constitutional courts, and especially Karlsruhe, was even explicit

[418] Decision no. 2008-562 DC, 21 February 2008, *Loi relative à la rétention de sûreté et à la déclaration d'irresponsabilité pénale pour cause de trouble mental*, ECLI:FR:CC:2008:2008.562.DC.
[419] Ibid, cons. 1-12.
[420] Ibid, cons. 13.
[421] Ibid.
[422] Ibid.

in the official comment on the decision published in the Council's website.[423] Moreover, the file of the legal documents taken into account in the deliberations reveals how the text of the ECHR and the Strasbourg case law were taken into consideration by the constitutional judges.[424]

The proliferation of proportionality. The instauration of *a posteriori* constitutional review presented new possibilities for the application of proportionality. Since 2008, the Council has applied the proportionality prongs in more than twenty decisions, most of them issued in the context of the *QPC* procedure. The test sometimes leads to a detailed scrutiny of legislation, since it is applied distinctly to every legislative provision contested by the plaintiffs. Its application usually concerns the reconciliation of constitutional objectives, especially public order necessities, with constitutional freedoms, such as the freedom of expression and communication, personal freedom, freedom of movement and the respect to private life. Apart from constitutional rights cases, the proportionality structure has been applied in other fields, like in the review of electoral ineligibilities[425] or of derogations to the principle of equality.[426] In certain fields proportionality analysis has replaced the categorical methods of reasoning of the Constitutional Council, most notably the "*effet cliquet*" protection which had sometimes been applied in the field of the freedom of press.[427]

The Council of State also adopted the three-pronged structure of proportionality, both in the conventionality review of public action and in the application of domestic legislation.[428] As for the *Cour de cassation*, while it does not use proportionality language in its review, it often requires searching and structured proportionality scrutiny from lower courts.[429] Proportionality language proliferates in the arguments of lawyers, in the case law of ordinary courts, and in Constitutional Council decisions. Its importance is rising in judicial practice, and an explosion of academic interest in the principle can be observed during the last decade.[430] Scholars often criticise the domestic application

[423] See the official comment on the decision, "Commentaire de la décision n° 2008-562 DC du 21 février 2008", *Les Cahiers du Conseil constitutionnel,* no. 24, p. 5, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2008562DCccc_562dc.pdf.

[424] *Dossier doccumentaire*, Décision no. 2008-562 DC, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2008562DCdoc.pdf.

[425] Decision no. 2008-24 ELEC, 28 May 2008, Observations du Conseil constitutionnel relatives aux élections législatives des 10 et 17 juin 2007, ECLI:FR:CC:2008:2008.24.ELEC.

[426] Decision no. 2016-620 QPC, 30 March 2017, S*ociété EDI-TV [Taxe sur la publicité diffusée par les chaînes de télévision]*, ECLI:FR:CC:2017:2016.620.QPC.

[427] Decision no. 2009-580 DC, 10 June 2009, *Loi favorisant la diffusion et la protection de la création sur internet*, ECLI:FR:CC:2009:2009.580.DC, cons. 15.

[428] CE (Pl.), 16 October 2011, *Association pour la promotion de l'image et autres*, no. 317827, ECLI:FR:CEASS:2011:317827.20111026, in the review of compatibility with the ECHR. CE (Pl.), 21 December 2012, *Société Groupe Canal Plus et autres*, no. 362347, ECLI:FR:CEASS:2012:362347.20121221, concerning proportionality as a domestic principle. On the adoption of the proportionality structure, see Sauvé, "Le principe de proportionnalité, protecteur des libertés."

[429] See for example Cass. soc., 11 May 2010, no. 08-45307, Bull. 2010, no. 105; Cass. soc., 17 March 2015, no. 13-27142, Bull. 2015, no. 53; Cass. civ. 1, 14 April 2016, no. 14-29981, Bull. 2016. See also Emmanuel Jeuland, "Réforme de la Cour de cassation. Une approche non utilitariste du contrôle de proportionnalité," *La Semaine Juridique*, Regards d'universitaires sur la réforme de la Cour de cassation – conférence débat 24 novembre 2015, supplément au no 1-2 (2016): 20.

[430] See Conseil constitutionnel, "La proportionnalité dans la jurisprudence constitutionnelle" (5ème Conférence des Chefs d'institution de l'Association des Cours constitutionnelles ayant en partage l'usage

of proportionality in contradistinction to foreign and European jurisprudence and urge French courts to apply it in a more coherent and transparent way.[431]

Though proportionality long remained a concept mainly used by public lawyers,[432] its tripartite structure has transcended the borders of public law and has now become common knowledge among *privatistes* and *publicistes*. Particularly in private law, proportionality acquires a pervasive dynamic. Some consider it a major instrument for the radical institutional transformation that the *Cour de cassation* is undergoing, following the model of other Continental and common law courts. Indeed it is often remarked that, contrary to the Roman model of adjudication, in which the application of legal sources is presented as mechanical, proportionality requires extensive argumentation and consideration of the facts.[433] This raises important institutional challenges, and proportionality is at the centre of current debates concerning the reform of the *Cour de cassation*.[434] It seems that, after a long period of resistance, the French legal order has entered the era of proportionality … but in its own special way.

iii. Proportionnalité « à la française », especially in a state of emergency

The expulsion of facts from proportionality analysis. How did the transfer of the proportionality structure affect French judicial review? The first element that strikes the reader of the *Rétention de sûreté* decision is the absence of facts. Adequacy

---

du français, Libreville, 2008), http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/Bilan_2008/confV_accpuf_libreville_juillet2008.pdf; *Les Petites Affiches*, no. 46 (2009); Rhita Bousta, "La spécificité du contrôle constitutionnel français de proportionnalité," *RIDC*, no. 4 (2007): 859; Christina Koumpli, "Un essai sur la clarification de l'inférence: État de droit - principe de proportionnalité" (Constitution et des principes, Mexico, 2010); Valérie Goesel-Le Bihan, "Le contrôle de proportionnalité exercé par le Conseil constitutionnel," *Cahiers du Conseil constitutionnel*, no. 22, Dossier : Le réalisme en droit constitutionnel (2007); Valérie Goesel-Le Bihan, "Le contrôle de proportionnalité exercé par le Conseil constitutionnel, technique de protection des libertés publiques ?," *Jus Politicum* 7 (2012); Prélot, "L'actualité de l'arrêt *Benjamin*"; Duclerq, *Les mutations du contrôle de proportionnalité dans la jurisprudence du Conseil constitutionnel*; Christophe Jamin, "Juger et motiver. Introduction comparative à la question du contrôle de proportionnalité en matière de droits fondamentaux," March 30, 2015, https://www.courdecassation.fr/cour_cassation_1/reforme_cour_7109/juger_motiver._31563.html; Denys de Béchillon, "Observations sur le contrôle de proportionnalité," *La Semaine Juridique*, Regards d'universitaires sur la réforme de la Cour de cassation – conférence débat 24 novembre 2015, supplément au no 1-2 (2016): 27; Jeuland, "Réforme de la Cour de cassation. Une approche non utilitariste du contrôle de proportionnalité"; Sauvé, "Le principe de proportionnalité, protecteur des libertés"; Vincent Vigneau, "Libres propos d'un juge sur le contrôle de proportionnalité," *D.*, 2017, 123.

[431] Rhita Bousta, "Contrôle constitutionnel de proportionnalité: la « spécificité » française à l'épreuve des évolutions récentes," *RFDC*, 2011, 913; Goesel-Le Bihan, "Le contrôle de proportionnalité exercé par le Conseil constitutionnel, technique de protection des libertés publiques ?"; Jamin, "Juger et Motiver"; Duclerq, *Les mutations du contrôle de proportionnalité dans la jurisprudence du Conseil constitutionnel*; Jeuland, "Réforme de la Cour de cassation. Une approche non utilitariste du contrôle de proportionnalité."

[432] Jean-Baptiste Seube, "Le contrôle de proportionnalité exercé par le juge judiciaire : présentation générale," *Les Petites Affiches*, no. 46 (2009): 86.

[433] Frédéric Zenati-Castaing, "La juridictionnalisation de la Cour de cassation," *RTD Civ.*, 2016, 511; see also Jamin, "Juger et motiver."

[434] On this, see *La Semaine Juridique*, Regards d'universitaires sur la réforme de la Cour de cassation – conférence débat 24 novembre 2015, supplément au no 1-2 (2016).

review was confined to scrutiny of the scope of the legislative provisions in question. The Council started by observing that post-sentence detention is only applicable to particularly dangerous persons highly likely to commit new crimes. It identified the aim of the placement of these persons in a judicial centre, which in its view was to provide medical, social and psychological treatment that would eventually allow for their rehabilitation. Still, the judges observed that due to the restrictive character of the measure, its application should be related to the existence of a personality disorder. After an examination of the types of criminals subjected to the measure, the court concluded that "*the scope of application of the preventive detention appears to be adequate to its goal, account taken of the extreme seriousness of the concerned crimes and of the importance of the penalty pronounced by the criminal court*".[435]

Procedural guarantees played also a role in the Council's conclusion: the code of criminal procedure provides for the examination of the affected individuals by an expert commission at least a year before the end of their sentence. This commission proposes the placement of the convicted persons under special surveillance for at least six weeks, in order to evaluate the danger that they present. Two medical experts participate in this process. According to the court, "*these provisions constitute guarantees that are adequate in order to reserve preventive detention solely to persons that are particularly dangerous because they suffer from a serious personality disorder*".[436] The appropriateness of the measures was thus affirmed, without any recourse to statistical or other data that show their actual effectiveness.

Similarly, the necessity review remained at the level of scope and guarantees. The Council underscored that post-sentence preventive detention will only be imposed exceptionally, in cases of very serious crimes when recidivism is highly probable. It also took into account the fact that the law requires that already existing measures be insufficient to prevent the convicted persons from committing serious crimes. On this point, the Council announced a *réserve d'interprétation*:

> it will be within the competence of the regional court (…) to verify that the convicted person has effectively been in a position to benefit from the measures and care that are adapted to the personality disorder from which he suffers, during the service of his sentence.[437]

The judge thus contented herself with demanding the strict necessity of the application of the post-sentence detention, leaving aside the scrutiny of its effectiveness in the rehabilitation of convicted persons or any search for less restrictive alternatives for the prevention of recidivism.

Proportionality as a "narrowly tailored" test. Contrary to the impact-based reasoning professed by the defenders of the proportionality model, the review exercised by the Council is solely concerned with norms: scope and guarantees play a

[435] Decision no. 2008-562 DC, cited above, cons. 14-15.
[436] Ibid, cons. 16.
[437] Ibid, cons. 21. Similarly, particularly concerning the duration of the measures, cons. 23.

major role in the court's final deference to legislative choices. Scholars talk about a French "specificity" in the application of proportionality[438] and see a formal interpretation or a "proceduralisation" of the principle in constitutional case law.[439] In reality it is not the *impact* of the contested measures on individual rights that is examined, nor the effectiveness of the measures in the advancement of their aim (an examination that, especially in *a priori* review, is difficult). Judicial review in *Rétention de sûreté* consisted in an examination of the "narrowly tailored" character of the contested provisions and of the procedure that preceded their application.[440] The reasoning that the different proportionality prongs implied is difficult to distinguish, leading the court to wearisome repetitions in its judgement.

Nonetheless, "narrowly tailored" scrutiny and procedural guarantees are anything but new in the Council's reasoning. They have been among the court's methods of review since the beginnings of its constitutional rights case law and long before the use of proportionality language.[441] Most importantly, these methods fit perfectly the traditional image of judicial review as a syllogism only concerned with norms. They also fit the image of the Council as a "watchdog" of Parliament. While announcing a new method of review, the Council was constrained in its traditional role of distribution of competences between the various state authorities: it is the duty of executive and judicial authorities to ensure the proportionate character of the contested measures in the application of the law.[442]

The expulsion of values from proportionality analysis. As for the *stricto sensu* proportionality prong, the reasoning of the Council consisted, again, in a survey of the guarantees provided for by the law. The court reiterated the role of the expert commission, and examined the composition of the regional court competent to pronounce the measures, as well as the procedural rights provided to individuals concerned. It also accorded importance to the fact that the judiciary can lift the restrictive measures at any point. The court concluded that

> the legislator accompanied the procedure of placement in preventive detention with guarantees that are appropriate to ensure the reconciliation to which he should proceed between, on the one hand, individual freedom (…) and, on the other hand, the pursued objective of prevention of recidivism.[443]

---

[438] Bousta, "La spécificité du contrôle constitutionnel français de proportionnalité."

[439] Bousta, 875.

[440] In the same vein, Bousta, "Contrôle constitutionnel de proportionnalité: la « spécificité » française à l'épreuve des évolutions récentes."

[441] For a well-known example on the right to strike, see Decision no. 79-105 DC, 25 July 1979, *Loi modifiant les dispositions de la loi n° 74-696 du 7 août 1974 relatives à la continuité du service public de la radio et de la télévision en cas de cessation concertée du travail*, ECLI:FR:CC:1979:79.105.DC.

[442] See also Bousta, "La spécificité du contrôle constitutionnel français de proportionnalité," 866–67.

[443] Decision no. 2008-562 DC, cited above, cons 22.

Hence, the Council's application of proportionality involves no balancing of competing constitutional values as it does in Karlsruhe or in the global model. It is the legislator and not the court that should proceed to the reconciliation of various constitutional rules and principles. In conformity with the traditional French perception of proportionality, the principle is analysed in a factual requirement of adaptation to the circumstances. Thus, it is the authorities who are closer to the facts of the case that are entrusted with its application.

More generally, what is specifically French in the application of proportionality is that it does not entail any principled contestation of the legislative choices. The legitimate aim test is not part of the proportionality prongs. Usually, the legitimacy of the objectives pursued by Parliament is affirmed by the Council in an abstract way, through indeterminate notions such as public order, the objectives of constitutional value or the general interest.[444] The Council, "*which does not possess a general margin of appreciation and of decision of the same nature as Parliament*", does not contest legislative appraisal concerning the legitimacy of the legislative goal,[445] or the rationality and the necessity of the measures adopted for its achievement.[446] It is indicative that the *Rétention de sûreté* decision is among those that have provoked the quasi-unanimous criticism of constitutional scholars, and this, despite its inclusion in the *Grandes décisions* collection. This is because the long and detailed proportionality review to which the judges proceeded did not lead to any significant censure of Parliament's choices, despite the fact that preventive detention challenged the punitive character of criminal measures which is traditionally deemed a fundamental feature of French criminal law. Deference to important value choices of Parliament is combined with the formalist and fragmented examination of the scope of certain provisions. All this gives the impression of a constitutional review "filtering out mosquitos to open the way to camels".[447]

Proportionality under the state of emergency. Formalism and judicial restraint are accentuated in the series of cases concerning the broad police powers provided to administration under the recent state of emergency. Restrictive measures, such as administrative searches and seizures or house arrests, have been contested through the *QPC* procedure by individuals subjected to them. The Council recognises that these measures generally interfere with the plaintiffs' constitutional rights, such as the freedom of movement, the inviolability of the home, the freedom of communication

[444] Bousta, "Contrôle constitutionnel de proportionnalité: la « spécificité » française à l'épreuve des évolutions récentes"; Bousta, "La spécificité du contrôle constitutionnel français de proportionnalité."

[445] See for example Decision no. 2010-2 QPC, 11 June 2010, *Loi dite "anti-Perruche"*, ECLI:FR:CC:2010:2010.2.QPC, cons. 4.

[446] See for example Decision no. 2008-564 DC, 19 June 2008, *OGM*, ECLI:FR:CC:2008:2008.564.DC, cons. 34; Decision no. 2012-249 QPC, 16 May 2012, *Société Cryo-Save France [Prélèvement de cellules du sang de cordon ou placentaire ou de cellules du cordon ou du placenta]*, ECLI:FR:CC:2012:2012.249.QPC, cons. 7-8.

[447] Jean Rivero, "Note sous Décision no. 80-127 DC," *AJDA*, 1981, 275; Patrick Wachsmann, "Des chameaux et des moustiques. Réflexions critiques sur le Conseil constitutionnel," in *Billet d'humeur en l'honneur de Danièle Lochak*, ed. Véronique Champeil-Desplats and Nathalie Ferré (Paris: LGDJ, 2007), 279 Véronique Champeil-Desplats, "Le Conseil constitutionnel a-t-il une conception des libertés publiques ?," *Jus Politicum*, no. 7 (2012).

and respect for private and family life. However, the judges never scrutinise the legislative choices in principle. According to consistent case law on this matter,

> the Constitution does not exclude the possibility of the legislator providing for a state of emergency regime. In this context, it is within his competence to ensure the reconciliation between, on the one hand, the prevention of hindrances to public order, and on the other hand, the respect of rights and freedoms recognised to all those who reside on the territory of the Republic.[448]

In certain cases the Council has appeared to set limits on the legislator by repeating that the state of emergency is "*a regime of exceptional powers, whose effects must be limited in time and space and which contributes to the prevention of an imminent danger or of the consequences of a public calamity to which the country is exposed*".[449] However, this statement never has led the constitutional judges to a detailed scrutiny of the necessity of the state of emergency, which lasted for almost two years on French territory. Arguably, the Council's attitude is quite different from what one would expect of a constitutional court in a "culture of justification".

Since the reconciliation of competing constitutional values is a competence of Parliament, the Council's proportionality scrutiny has been limited to a review of the procedural guarantees offered by legislation.[450] The court has sometimes pronounced *réserves d'interprétation* concerning the scope of the contested measures.[451] The formal review exercised by the Council has sometimes led to the censure of certain legislative provisions.[452] Notwithstanding this, more often the enforcement of the principle of proportionality has been delegated to ordinary courts. The Council has typically required that the restrictive measures "*be justified and proportionate to reasons that ground the measure in the particular circumstances that led to the declaration of the state of emergency.*" It holds that "*[t]he administrative judge is charged with ensuring that this measure is adapted, necessary and proportionate to the goal that it pursues*".[453] Following this reasoning, the Council has usually

---

[448] Decision no. 2015-527 QPC, 22 December 2015 *M. Cédric D. [Assignations à résidence dans le cadre de l'état d'urgence]*, ECLI:FR:CC:2015:2015.527.QPC, cons. 8; similarly, Decision no. 2017-624 QPC, 16 March 2017, *M. Sofyan I. [Durée maximale de l'assignation à résidence dans le cadre de l'état d'urgence]*, ECLI:FR:CC:2017:2017.624.QPC, cons. 13; Decision no. 2016-536 QPC, 19 February 2016, *Ligue des droits de l'homme [Perquisitions et saisies administratives dans le cadre de l'état d'urgence]*, ECLI:FR:CC:2016:2016.536.QPC, cons. 5; Decision no. 2016-600 QPC, 2 December 2016, *M. Raïme A. [Perquisitions administratives dans le cadre de l'état d'urgence III]*, ECLI:FR:CC:2016:2016.600.QPC, cons. 6.

[449] Decision no. 2016-536 QPC, cited above, cons. 12.

[450] Ibid, cons. 9-11.

[451] Decision no. 2017-624 QPC, cited above, cons. 17.

[452] This was most notably the case for the possibility of administrative authorities to copy and use computer data without judicial authorisation and without any legislative constraints to this respect: see Decision no. 2016-536 QPC, cited above, cons. 14. Similarly, for the possibility to conserve the copied data without any time limit, see Decision no. 2016-600 QPC, cited above, cons. 16. In a recent decision, the Council censured the criminalisation of the habitual visit of terrorist websites. See Decision no. 2016-611 QPC, 10 February 2017, *M. David P. [Délit de consultation habituelle de sites internet terroristes]*.

[453] Decision no. 2015-527 QPC, cited above, cons. 12; Decision no. 2017-624 QPC, cited above, cons. 17; Decision no. 2016-536 QPC, cited above, cons. 10. See also CE (Pl.), 6 July 2016, no. 398234, ECLI:FR:CEASS:2016:398234.20160706.

held that the broad police powers grounded on the state of emergency do not violate the right to private and family life or the freedom of communication.

The introduction of proportionality language to the Council's case law did not radically affect the traditional formalism and judicial restraint that characterises this court's decisions. Values and facts are external to proportionality analysis. Attentive commentators thus observe that its announcement as a method of review in 2008 corresponded to a "tricky appearance of innovation".[454] Besides, the fact that proportionality was first announced in the context of *a priori* review indicates precisely this: proportionality entails an abstract and objective reasoning, and brings about no revolutionary changes to already existing judicial methods. It seems that the only change that the *Rétention de sûreté* decision brought about is the establishment of the proportionality structure, without involving value-laden balancing.

The inconsistent application of proportionality. However, in subsequent case law, the proportionality structure is not consistently applied. Deprived of its main function as a framework for the balancing of competing constitutional values, proportionality lacks any structural integrity. The use of proportionality language does not correspond to a particular form or intensity of review. Rarely does the announcement of different proportionality prongs lead the judge to structure her reasoning around them. When their application is not delegated to ordinary courts, the fulfilment of the adaptation, necessity and proportionality requirements is usually jointly affirmed or refuted by the constitutional court after an examination of the contested provisions' aim and scope.[455] In most cases, proportionality is limited to a review under the disproportionate standard, whose fulfilment is deemed to be self-evident and does not involve any justification. The absence of transparency in the Council's proportionality reasoning is accentuated by the fact that the court alternates between full proportionality review and the application of the manifest disproportionality standard, without providing any justification in this respect.[456]

In certain subject matters, one can discern reasoning patterns in constitutional case law. Especially concerning the right to private life, the court has often required that restrictions be "*justified by general interest grounds and applied in a way that is adequate and proportionate with regard to its objective*".[457] In property cases, after a review of the eventual deprivation of the right, the judge has also required that restrictions on its exercise be "*justified by general interest grounds and proportionate*".[458] However, even these succinct

[454] Bousta, "Contrôle constitutionnel de proportionnalité: la « spécificité » française à l'épreuve des évolutions récentes," 14.

[455] Decision no. 2008-571 DC, 11 December 2008, *Loi de financement de la sécurité sociale pour 2009*, ECLI:FR:CC:2008:2008.571.DC, cons. 14.

[456] See for example Decision no. 2010-71 QPC, 26 November 2010, *Mlle Danielle S. [Hospitalisation sans consentement]*, ECLI:FR:CC:2010:2010.71.QPC, cons. 32, where the Council uses the manifest disproportionate standard. Similarly, Decision no. 2013-318 QPC, 7 June 2013, *M. Mohamed T. [Activité de transport public de personnes à motocyclette ou tricycle à moteur]*, ECLI:FR:CC:2013:2013.318.QPC, cons. 14.

[457] See, for example, Decision no. 2016-591 QPC, 21 October 2016, *Mme Helen S. [Registre public des trusts]*, ECLI:FR:CC:2016:2016.591.QPC, cons. 3.

[458] Decision no. 2015-524 QPC, 2 March 2016, *M. Abdel Manane M. K. [Gel administratif des avoirs]*, ECLI:FR:CC:2016:2015.524.QPC, cons. 14.

proportionality patterns were abandoned in the cases concerning administrative searches and seizures under the state of emergency. In those cases, the court has generally contented itself with stating, without further justification, that "*the legislator operated a reconciliation between [the constitutional rights at stake] and the objective of constitutional value of the preservation of public order that is not manifestly unbalanced*".[459]

Apart from its function in the adjudication of fundamental rights, proportionality preserves its traditional form as a rule in the field of taxation or sanctions.[460] In the *Loi de finances pour 2003* decision, the Council even applied proportionality as a financial prudence principle, in what looks like an echo of the *bilan* case law in constitutional law.[461] Since 2005, the *Charte de l'environnement* was inscribed in the Preamble of the Constitution. Article 5 imposes on public authorities to adopt "temporary and proportionate" measures, in order to prevent serious and irreversible environmental damages. Thus, another version of proportionality was added in domestic constitutional discourse.[462]

Even though proportionality proliferates in French constitutional law, its form and function result from the circumstances of each case rather than from a commonly shared meaning of the term among French public lawyers. The spread of proportionality in constitutional case law was not combined with a more general constitutional rights theory.[463] Everything seems to depend on the way the judge will choose to formulate the constitutional problem at stake. Even scholars that were the most faithful in seeing coherence in constitutional case law doubt the actual rationality of the Council's choices.[464] As for sceptics, most notably "normativists" and legal "realists",[465] if they are interested in proportionality at all, they perceive it as nothing but an argumentative weapon for legitimising the norm-making power of the constitutional judges.[466] Just like the fundamental rights discourse surrounding it, proportionality in the Constitutional Council's decisions leaves its readers with an

---

[459] Decision no 2016-536 QPC, cited above, cons. 12; Decision no. 2016-600 QPC, cited above, cons. 21.

[460] Decision no. 2008-564 DC, cited above, cons. 34.

[461] Decision no. 2002-464 DC, 22 December 2001, *Loi de finances pour 2003,* ECLI:FR:CC:2002:2002.464.DC, cons. 34.

[462] Decision no. 2008-564 DC, cited above, cons. 18.

[463] Goesel-Le Bihan admits in 2012 that proportionality is not a fundamental rights principle in the Constitutional Council case law, in "Le contrôle de proportionnalité exercé par le Conseil constitutionnel, technique de protection des libertés publiques ?"

[464] Goesel-Le Bihan, "Le contrôle de proportionnalité exercé par le Conseil constitutionnel," 277: « La complexité du tableau que dessine la jurisprudence récente n'en est pas moins réelle, au point que l'existence d'une rationalité – consciente ou non – de détail de la jurisprudence constitutionnelle peut parfois être mise en doute ».

[465] Both terms are used in the sense that French public lawyers give to them: normativists are the adepts of the Kelsenian pure theory of law; French realists can be described as a "heretic" branch of Kelsenian theory, developed by Michel Troper and the Nanterre University, which exposes judicial interpretation as a norm-producing activity, limited by legal and extra-legal constraints (*contraintes*).

[466] Koumpli, "Un essai sur la clarification de l'inférence: État de droit - principe de proportionnalité" for the normativists; Pierre Brunet, "Le juge constitutionnel est-il un juge comme les autres? Réflexions méthodologiques sur la justice constitutionnelle," in *La notion de "justice constitutionnelle,"* ed. Institut de recherches Carré de Malberg (Paris: Dalloz, 2005) for the realists. Brunet does not refer to proportionality but to balancing more generally.

"impressionist" depiction of the concept and of its function in judicial reasoning: it is casuistically constructed by the judge and imposed as self-evident on the addressees of constitutional justice.[467]

The general confusion surrounding proportionality is aggravated by its diffusion in the case law of ordinary courts. In private law, the application of the principle is characterised by "*tâtonnements, approximations et hésitations*" both concerning its form and its scope of application. For example, it is not certain whether proportionality is applicable in private relations.[468] Besides, the *Cour de cassation* does not apply proportionality at all, a practice that recently provoked Strasbourg criticism.[469] While French private lawyers call for a proportionality test "*propre à la Cour de cassation*",[470] such a test has not been yet invented. French lawyers themselves see proportionality as an equity method that raises problems for legal certainty.[471] In administrative law, the inconsistent application of proportionality gives the impression of a method that is "*protéiforme et en mutation*".[472] Public lawyers' thirst for coherence results in highly technical and complex systematisations that provoke "vertigo" and "headaches" among their audience.[473] The adoption of the three-pronged proportionality structure did not correspond to any substantial change in the Council of State's reasoning.[474] Both in administrative law and in private law, proportionality remains a matter of facts and circumstance, the appreciation of which is a competence of lower courts or of the reviewed authorities.[475] In interim measures cases concerning restrictions to freedoms in particular, the Council of State will usually avoid proportionality evaluations and will limit its scrutiny to the actual existence of risk for serious public order disturbance.[476]

---

[467] Champeil-Desplats, "Le Conseil constitutionnel a-t-il une conception des libertés publiques ?", esp. section I.

[468] Seube, "Le contrôle de proportionnalité exercé par le juge judiciaire : présentation générale," 86.

[469] ECtHR, *Henrioud c. France*, 5 November 2015, no. 21444/11.

[470] Jeuland, "Réforme de la Cour de cassation. Une approche non utilitariste du contrôle de proportionnalité," 20.

[471] For some examples, see Loïc Cadiet, "Introduction," *La Semaine Juridique*, Regards d'universitaires sur la réforme de la Cour de cassation – conférence débat 24 novembre 2015, supplément au no 1-2 (2016): 13; Bertrand Louvel, "Réflexions à la Cour de cassation : Contribution à la refondation de la justice," *La Semaine Juridique*, Regards d'universitaires sur la réforme de la Cour de cassation – conférence débat 24 novembre 2015, supplément au no 1-2 (2016): 1. *Contra* de Béchillon, "Observations sur le contrôle de proportionnalité."

[472] Kalflèche, "Le contrôle de proportionnalité exercé par les juridictions administratives."

[473] Seube, "Le contrôle de proportionnalité exercé par le juge judiciaire : présentation générale," 86.

[474] Sauvé, "Le principe de proportionnalité, protecteur des libertés."

[475] See Cass. civ. 1, 5 July 2017, no. 16-22183, Bull. 2017; CE, 9 November 2015, *Le Mur* (*Dieudonné*), no. 376107, ECLI:FR:CESSR:2015:376107.20151109, cons. 6.

[476] See CE ord., 9 January 2014, *Ministre de l'intérieur c/ Société Les Productions de la Plume et M. Dieudonné M'Bala M'Bala*, ECLI:FR:CEORD:2014:374508.20140109, no. 374508, cons. 5 f.; CE ord., 6 February 2015, 6 février 2015, *Commune de Cournon d'Auvergne*, no. 387726, ECLI:FR:CEORD:2015:387726.20150206, cons. 5 f., both on the show performed by Dieudonné; see also CE ord., 26 August 2016, *Ligue des droits de l'homme et autres - association de défense des droits de l'homme collectif contre l'islamophobie en France*, nos. 402742, 402777, ECLI:FR:CEORD:2016:402742.20160826, cons. 5 f., on the prohibition of the *burkini* and CE ord., 27 January 2016, *Ligue des droits de l'homme et autres*, no. 396220, ECLI:FR:CEORD:2016:396220.20160127, cons. 8, on the extension of the state of emergency.

Proportionality in French public law did not acquire the form nor the function that the Alexyan model attributes to it. Instead of increasing transparency in judicial reasoning, its varying application has instead provoked confusion. Instead of leading to a value-laden balancing of competing constitutional values, it leads judges to a formalist reasoning akin to the one they performed before the emergence of proportionality language. Finally, the deferent stance of French courts vis-à-vis public authorities provokes doubt as to whether the introduction of proportionality discourse in French public law has enhanced the protection of fundamental rights.

***

Plus ça change, plus c'est la même chose. The most important advances in French judicial review have occurred without recourse to proportionality terminology. And where this terminology finally spread in the language used by courts, it has not brought about important changes to pre-existing judicial methods. Even the introduction of the three-pronged proportionality structure did not lead French courts to engage in value-laden reasoning, nor has it entailed a more fact-sensitive approach to judicial review. The proliferation of proportionality has not radically changed the formal style of judicial reasoning, nor has it enhanced the transparency of judicial value-judgments, even though it has affected the length and detail of official justifications. Besides, proportionality has no precise function in judicial reasoning and its application is not necessarily connected to fundamental rights. The use of proportionality language in France is very different from that instantiated in the Alexyan model. Scholars even talk about a French specificity in this field.

This has not impeded French public lawyers from perceiving proportionality to be an omnipresent notion and a key feature in the evolution of judicial review, both at an administrative and at a constitutional level. While for decades it did not attract much academic interest, since its emergence in the domestic legal discourse during the '70s proportionality has been widely accepted and cherished by the *doctrine*. In reality it has been much more useful in *scholarly* analysis and the reconstruction of case law than in the justification of judicial decisions. Proportionality, understood as a method used by judges, has designated the pragmatist application of the law in the search for equilibrium or balance. This is why, in this context, the concept of *contrôle de proportionnalité* has been at least as important as the concept of *principe de proportionnalité*.

It seems that in French public law, rather than a judicial tool, proportionality represents some kind of knowledge or common-sense shared by lawyers. In other words, proportionality is one among the conceptual tools by which French public lawyers make sense of the practice of courts, reconstruct or even guide it. Its main function has been to establish the continuity of judicial review methods and the coherence of public law case law, through an appeal to some kind of moral-legal ideal. This is quite different from what is observed in the English context, where

proportionality is a concrete judicial tool with its own well-defined function in judicial reasoning that constitutes a rupture with existing structures.

CHAPTER 2

The spread of proportionality in English public law

continuity and change[477]

Situating the study. The story of proportionality in English public law is a story of constant transformation. Transformation of the meaning, form and function of proportionality in the domestic legal discourse; but also of the culture in which proportionality operates. Initially proportionality was a marginal element to which domestic lawyers rarely turned their attention. Today however, it is a core feature of domestic legal debates and an engine of cultural change. This chapter attempts to present the story of how proportionality became a core concept in English public law.

The analysis presented here focuses on judicial discourse and generally corresponds to the mainstream domestic narrative on the spread of proportionality. In contrast to their French colleagues, who perceive proportionality as some kind of value or ideal pursued by legal decision-making, English public lawyers perceive proportionality as a concrete judicial tool. Thus, they have paid much attention to the structural changes that it brings about in judicial reasoning, especially in judicial review cases.[478] In studies concerning the domestic application of proportionality, English lawyers have generally looked for similarities or differences between proportionality, and existing patterns of reasoning, review standards and concepts, most notably *Wednesbury* unreasonableness. The form and function of proportionality in judicial practice have always been part of the domestic conceptual content of proportionality. Scholarly analyses have long been loyal to the practice of courts, to the detriment of the construction of a coherent theory on proportionality and its application in domestic judicial review. Hence, domestic lawyers will experience no surprises in reading this chapter.

Perhaps the main difference from a mainstream English study on proportionality is the detail with which certain stages in the evolution of proportionality are analysed, as well as the absence of an explicit position in the "proportionality v *Wednesbury*"

---

[477] This expression is often used by domestic lawyers to describe the evolution of the British constitution. See John Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge: CUP, 2007), 205; Mads Qvortrup, ed., *The British Constitution: Continuity and Change: A Festschrift for Vernon Bogdanor* (Oxford: Hart, 2013).

[478] It is indicative that, in a study on the French system of judicial review in 1986, John Bell distinguished the manifest error from proportionality review. In this way, he departed from the French common-sense at the time, namely the perception of proportionality as synonymous with the manifest error. See John Bell, "The Expansion of Judicial Review over Discretionary Powers in France," *PL*, 1986, 99.

debate.[479] Even though it is a common preoccupation of English lawyers, the question of the spill-over of proportionality in common law judicial review cases will be discussed in Part II.

Since English law famously comprises no separate public law system and courts, the first uses of proportionality terminology are studied with equal attention even when they emerged in private law cases. Very soon however, debates on proportionality acquired particular importance in the context of judicial review. Proportionality started being perceived by English lawyers as a public law concept, even when used in private law cases. Today, it is in public, even constitutional law that proportionality exerts its transformative dynamic. This explains the title chosen for this chapter, even though following the advice of Lord Wilberforce, the term "English public law" is used with caution. In this context, it does not designate a separate category of norms and procedures like the one found in civil law systems. The reader should keep in mind that, "*typically, English law fastens not on principles but on remedies*".[480] Certain authors attentive to the common law tradition even deem the public/private law divide to be an "ill-considered transplantation" of a distinction with foreign roots in the English context.[481]

Further, the reader might have noticed that this analysis focuses on *English* public law. While similar observations might often apply to Wales, Northern Ireland, or even Scotland, their consideration would necessarily bring into play institutional, doctrinal and cultural particularities of these countries. This would certainly render the analysis more complete, but also more complicated, while it would add little in clarifying its main points and arguments. Therefore, the choice to exclude the devolved territories from the scope of this research is connected to its purposes and implies no claim whatsoever as to the interest that their study might present.

English public lawyers' interest in proportionality is characterised by an impressive *crescendo*. During the '70s there are no relevant academic writings, but only some sparse judicial uses of the term. While the first proportionality enthusiasts appeared during the '80s, proportionality language was still in limited use, both in case law and in scholarship. During the '90s proportionality began to interest domestic lawyers and to appear in most administrative law handbooks. However, the rejection of its application in domestic judicial review impeded its conceptual development. Indeed, a theory of proportionality that would be detached from the patterns of reasoning observed in judicial decisions made no sense for domestic lawyers, traditionally concerned with the analysis of case law. The spread of proportionality in English public law was initially restricted by the analytical formalism that is characteristic of the common law tradition

[479] For the mainstream narrative on the spread of proportionality in this context, see for example Anne Davis and JR. Williams, "Proportionality in English Law," in *The Judge and the Proportionate Use of Discretion: A Comparative Study*, ed. Sofia Ranchordás and Boudewijn Willem Nicolaas de Waard (Abington: Routledge, 2015), 73.

[480] *Davy v Spelthorne Borough Council* [1983] 3 All ER 278 (HL, 13 October 1983) at 285, cited by John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford; New York: OUP, 1996), 12.

[481] Allison, 108.

(**Section 1**). It is only since the incorporation of the ECHR in the domestic sphere that proportionality acquired its proper dynamic in English public law. Today it is a major issue of concern for domestic lawyers; its importance is crucial, both in scholarship and in practice (**Section 2**).

1. The emergence of proportionality as a public law concept

The Diceyan legacy. English law offers a well-known case of resistance to the spread of proportionality. The Diceyan tradition is the "usual suspect", to which this and other instances of English exceptionalism are imputed.

While his writings were perceived as eccentric by contemporary commentators, Albert Venn Dicey has had a huge influence on English public law and on the common law tradition more generally, to the point that today he is considered "the high priest of orthodox constitutional theory".[482] The basic tenets of the Diceyan account of English constitutional law are parliamentary sovereignty and the rule of law. The principle of parliamentary sovereignty enshrines the legislative sovereignty of the Crown-in-Parliament. Its justification lies in the belief that the political process, being democratic, ensures citizens' freedom. Hence, any kind of constitutional review is excluded. Besides, the UK possesses no written constitution and parliamentary acts cannot bind future Parliaments. Checks and balances internal and external to the parliamentary process ensure the protection of civil liberties and exclude arbitrary power. As for the rule of law, traditionally it has no substantive content. This means that it imposes no particular values on public action; it is more of a political aspiration. It mainly implies equality before the law and the absence of arbitrary power or punishment, the exclusion of the *raison d'Etat*, and the uniformity of courts charged with the resolution of disputes. In short, as Martin Loughlin explains, the rule of law means the *universal* rule of *ordinary* law.[483]

The principle of equality is central in the Diceyan tradition. It is formally understood and excludes the separation between private and public law *à la française*. Public officials are brought for judgement before ordinary courts and are liable under normal rules. Dicey famously criticised French administrative law and rejected the importation of a separate body of rules, applied by specialised courts that would ensure the privileges of public officials. Under the English constitution, it is only the Crown (and at times its officers) that enjoys immunity. And, while the Crown Proceedings Act 1947 curtailed certain immunities, it attributed a private personality to the Crown in judicial proceedings.[484] All this explains the hostility with which English public lawyers

[482] Martin Loughlin, *Public Law and Political Theory* (Oxford; New York: Clarendon Press; OUP, 1992), 140; cited by Mark Walters, "Dicey on Writing the Law of the Constitution," *Oxford Journal of Legal Studies* 32, no. 1 (2012): 23.

[483] Martin Loughlin, *The British Constitution : A Very Short Introduction*, Very Short Introductions (Oxford: OUP, 2013), 31 f.

[484] On the concept of the Crown and its evolution under the influence of the European continent, see Allison, *The English Historical Constitution*, 46–73.

first met the creation of administrative tribunals in the beginning of the 20th century. Tribunals are public bodies charged with the adjudication of administrative disputes in special fields. Their creation was purported to enhance the efficiency and legitimacy of ever-growing administrative powers. While their function is similar to that of ordinary courts, they are subject to different rules and procedures. This is why the Lord Chief Justice at the time interpreted their function as a form of "new despotism".[485]

A separate system of rules applying to state officials was difficult to conceive in English law, also because it long comprised no such concept as the state.[486] Hence, legal language in the English context comprises no such term as the German *Rechtsstaat*, the French *Etat de droit*, or the Greek *Κράτος Δικαίου*. This is connected to another distinctive feature of English legal thought, its traditional aversion to abstractions and theory. The French Constitution has been the product of rupture with the *Ancient regime*, which led to the top-down establishment of an administrative structure based on rationalist principles. In contrast, the evolution of the English constitution has been incremental. Edmund Burke imagined the constitution as something mystic, apprehended by society.[487] While Dicey did not share Burke's "religious enthusiasm", he attributed considerable importance to constitutional conventions and principles of constitutional morality.[488] In John Allison's words, the English constitution

> accommodates change or innovation but is reassuring in the formal continuity it entails. Its justification is pragmatic. It involves a conservation of forms for the sake of appearance and gradual progress, a partial and apparent retention of the old while the new is established, tested and refined or further developed.[489]

English legal thought is animated by a pragmatist, utilitarian approach to law, which was "long regarded as the sober, workmanlike English manifestation of the European enlightenment."[490]

***Ultra vires* and the corrective function of courts.** The common law does not contain "those declarations or definitions of rights so dear to foreign constitutionalists".[491] The only rights traditionally recognised by courts are private rights resulting from tort, contract etc. English administrative law has traditionally focused on the competences of public authorities (what English lawyers often call

---

[485] Gordon Hewart, *The New Despotism* (Westport, Conn: Greenwood Press, 1945). The book first appeared in 1929.

[486] Interestingly, Dicey used the term "government" to designate Parliament rather than the Crown. See Allison, *A Continental Distinction in the Common Law*, 72 f.

[487] Loughlin, *The British Constitution*, 7–9.

[488] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 9th ed. (London: Macmillan and Co, 1939), cxxvi.

[489] Allison, *The English Historical Constitution*, 72.

[490] Herbert Hart, *Essays in Jurisprudence and Philosophy* (Oxford; New York: Clarendon Press; OUP, 1983), 48, cited by Patrick Atiyah, *Pragmatism and Theory in English Law* (London: Sweet & Maxwell, 1987), 2; more generally, see Atiyah, 1 f.

[491] Dicey, *Introduction to the Study of the Law of the Constitution*, 197, cited by Atiyah, *Pragmatism and Theory in English Law*, 23 note 53.

jurisdiction) and on these authorities' duties in case of wrong. Under the Diceyan account, thus, the *ultra vires* principle is the justification for judicial review. The role of courts is supervisory: they ensure that the administration respects the sovereign will of Parliament and does not exceed the powers provided for by statute. Therefore, judicial review was initially limited to administrative decisions and delegated legislation. According to the Diceyan orthodoxy, when statute has granted unfettered discretion to a public body, the courts cannot review its exercise. Courts can become appellate jurisdictions only when Parliament itself has allowed.

Parliament's will is sought in what Parliament said, the plain meaning of the words used in statute, and not in what Parliament meant. Statutory interpretation is thus literal and not purposive. In Lord Scarman's words, "*We are to be governed not by Parliament's intentions but by Parliament's enactments*".[492] This general rule finds more concrete and technical manifestations: Article 9 of the Bill of Rights on parliamentary privilege has been long interpreted as excluding any judicial reference to the *Hansard*, as English lawyers call the official transcription of debates in Parliament. The omnipotent Parliament need not provide any justification for its acts. Referring to a Minister's speech in statutory construction would be to attribute supreme norm-making power to a member of the Cabinet.

Until recently then, constitutional orthodoxy held that courts implement and not supplement parliamentary intent. This has long maintained parliamentary sovereignty and the English understanding of the separation of powers. In the English legal tradition, judges do not take part in policy-making and, contrary to civil lawyers' commonly shared vision of common law systems, they deny their norm-producing powers too. Even when developing the common law, courts have traditionally claimed that they simply declared it.[493] Griffith observed that English judges "do not regard their role as radical or even reformist, only (on occasion) corrective."[494] The "mistake avoidance" function[495] of domestic judicial review makes sense of its focus on remedies. Indeed, the applicants usually use judicial review procedures to seek the issuance of prerogative orders, traditionally called *writs*. The most common writ is *certiorari*, which annuls an *ultra vires* decision. *Prohibition* and *mandamus* address prohibitions and instructions to public authorities respectively, in conformity with the law. Prerogative writs traditionally belonged to the supervisory powers of the Crown, which still appears as a party in the relevant judicial decisions, acting on behalf of the real applicant. General common law remedies, such as declarations, injunctions and damages, might also be sought through judicial review applications.[496]

The judge as a referee. Remedies are personal and, traditionally, private rights function as "gateways" to administrative law. Hence, this field has an individualistic orientation, expressed in the adversarial system of fact-finding. Judges depend on the

[492] *Duport Steels LTD vs Sirs* [1980] 1 All ER 529 (HL, 3 January 1980).
[493] John Griffith, *The Politics of the Judiciary*, 2nd ed., Fontana Originals (London: Fontana, 1981), 281.
[494] Griffith, 7–8.
[495] Paul Craig, *Administrative Law*, 8th ed. (London: Sweet & Maxwell, 2016), chap. 1.
[496] Craig, chap. 25.

parties' claims for access to the issues at stake in judicial review proceedings. Judicial review is exercised by ordinary courts and resembles a game, in which the judge is commonly described as a referee.[497] As it is often said judicial review deals with the decision-making process and not the substance of the decision, judges were long concerned solely with issues of competence and procedure. They ensured that the reviewed authority had acted within the limits of its jurisdiction, provided for by statute. Once the public body's competence was ascertained, courts traditionally only ensured that the administration had complied with principles of procedural fairness, called natural justice. Moreover, natural justice principles were traditionally imposed only on public bodies' judicial proceedings and not on the whole of administrative action.[498] As to the exercise of administrative discretion, courts interfered only in very exceptional cases and traditionally English administrative law did not even contain an abuse of powers head of review. Lord Greene's dicta in *Wednesbury* enjoy world-wide fame: courts would only quash a decision "*so unreasonable that no reasonable authority could ever have come to it*".[499]

The image of the judge as a referee is connected to the crucial role of judicial independence and impartiality in English public law. Patrick Atiyah observed that there is a "profoundly English belief that an independent judiciary, and a judiciary with the power to issue practical orders, [is] more important than any number of grand theoretical declarations about the Rights of Man".[500] Still, unlike civil law systems, judicial independence is not deemed to be ensured through a formal separation of powers. It is well known that the House of Lords was long the supreme court in certain matters, as well as the upper chamber of Parliament, composed by hereditary and appointed peers. Though judicial functions were only attributed to the Appellate Committee of the House of Lords, the Law Lords were also members of Parliament and sometimes participated in its legislative function after having quit the Appellate Committee. Similarly, functional confusion traditionally characterised the office of the Lord Chancellor, who, apart from being a high-ranking government officer and a member of the upper chamber of Parliament, was also ascribed important judicial functions, most notably the presidency of the Appellate Committee of the House of Lords. Instead of being founded on specialisation and expertise, the independence of English judges has rather been drawn from their partnership with Parliament in the enforcement of the rule of law.[501]

The construction of English public law. Progressively however, the traditional basis of judicial review ceased to correspond to the actual institutional landscape. While the Diceyan orthodoxy presumed the omnipotence of Parliament and its effective control over the administration, in reality the Prime Minister enjoyed "a new type of monarchical status", accumulating democratic legitimacy and control over the MPs of

[497] Allison, *A Continental Distinction in the Common Law*, 216.

[498] Craig, *Administrative Law*, 2016, paras 12-001 f.

[499] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA, Civil Division, 7 November 1947), 234.

[500] Atiyah, *Pragmatism and Theory in English Law*, 22.

[501] Loughlin, *The British Constitution*, 90–95.

her party and Government.[502] After World War II an alternative justification for judicial review began to emerge: the avoidance of the abuse of power by public bodies.[503] Martin Loughlin neatly describes the progressive transformation of the rule of law from a political aspiration left to the prudence of Parliament, to a juridical principle enforced by the judiciary.[504] Judicial review was progressively perceived as a general constitutional requirement, independent of the existence of statute. Moreover, statutory language and the will of Parliament ceased to be decisive in judicial interpretation. Perhaps the case that best manifests the above tendencies is *Anisminic*.[505] In this case, the House of Lords reinterpreted an ouster clause to affirm its judicial reviewing powers, in clear contradiction with the wording of the statute and the will of Parliament.

Judicial review became more intrusive and courts started to impose principles of fairness on administrative action. In *Ridge v Baldwin*, the House of Lords extended the play of natural justice principles to non-judicial administrative action.[506] In *Padfield* the Law Lords accepted the fettering of the exercise of administrative discretion, even when defined widely by statute.[507] In *Anisminic*, courts affirmed their power to sanction all errors of law, even when they do not concern the competence of the reviewed authorities itself, but its exercise.[508] Ever since, courts evaluate the fulfilment of the factual conditions set by enabling legislation for the exercise of administrative powers (collateral fact doctrine, similar to the French *qualification juridique des faits*). Still, eventual errors of law concerning these conditions should be apparent without any further evidence requirements, or, as English lawyers would say, *on the face of the record*. "The 'Holy Trinity' of '60s cases"[509] marked the judicial construction of English public law. This period gave birth to the first systematic analyses of administrative law and judicial review.[510] Public law was progressively affirmed as a distinct field of legal analysis and an academic journal was dedicated to its study.[511]

A system of judicial review. The distinction between private and public law was progressively established, not only at a conceptual but also at a procedural level. Since the late '70s, judges applied Order 53 of the Rules of the Supreme Court to imply a special judicial review procedure, through which applicants could obtain the issuance of prerogative writs. Some years later, the Senior Courts Act 1981 confirmed this

---

[502] Loughlin, 53 f., esp. 62; see also Craig, *Administrative Law*, 2016, paras 1-002 to 1-0016.

[503] See the influential lectures by Alfred Denning, *Freedom under the Law* (London: Stevens and Sons, 1949).

[504] Loughlin, *The British Constitution*, 98.

[505] *Anisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6 (HL, 17 December 1968).

[506] *Ridge v Baldwin* [1964] AC 40 (HL, 14 March 1963).

[507] *R v Minister of Agriculture and Fisheries, ex parte Padfield* [1968] UKHL 1 (HL, 14 February 1968).

[508] *Anisminic*, cited above. On the similarity between the collateral facts doctrine and the French review of the *qualification juridique des faits*, see Part II, Chapter 5(1).

[509] Thomas Poole, "The Reformation of English Administrative Law," *CLJ* 68, no. 1 (2009): 142.

[510] Stanley Alexander De Smith, *Judicial Review of Administrative Action* (New York: Oceana Publications, 1959); William Wade and Christopher Forsyth, *Administrative Law* (Oxford; New York: Clarendon Press; OUP, 1961); Stanley Alexander De Smith, *Constitutional and Administrative Law* (London: Penguin Books, 1971).

[511] *Public law*, published by Sweet & Maxwell, first appeared in 1956.

evolution and established a two-stage judicial review procedure. First, the High Court examines whether the applicant proves a sufficient interest in contesting the decision in question. If so, it grants leave to apply for judicial review before the Queen's Bench Division. A special section of this court was created for this purpose, the Crown Office list, replaced by the Administrative Court in 2000. Appeals against judicial review decisions are introduced before the Court of Appeal and, in last resort, before the Appellate Committee of the House of Lords. Since 2009, the judicial competences of the upper house of Parliament have been transferred to the Supreme Court.

The special judicial review procedure aimed to preserve certain procedural safeguards for administrative authorities. For example, strict time limits are imposed on applications for judicial review and cross examination is in principle excluded, affidavits being the main instruments for establishing facts before the court. This is why in *O'Reilly v Mackman* Lord Diplock even announced the "exclusivity principle": public law decisions could now only be challenged by way of judicial review.[512] Still, in contrast to what was traditionally the case in Continental systems, English public law does not adopt an organic or formal criterion for the delimitation of judicial review. The nature of the functions of the body in question is taken into account.[513] Further, in spite of the *O'Reilly* exclusivity principle, public law issues can be raised as a defence in civil or criminal law proceedings without bringing a separate judicial review application.

Not only does judicial review imply a specific procedure, but it also entails specific grounds of control, systematised by Lord Diplock in 1984, in *GCHQ*. In his words, "*The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety*".[514] The illegality ground comprises errors of law, that is, misinterpretation of the enabling statute, as well as erroneous material appreciations or erroneous legal characterisation of the collateral facts. This head concerns the construction of the content and scope of the power or duty conferred upon the primary decision-maker. It progressively evolved to comprise cases of abuse of discretion, that is, use of discretionary powers without due regard to the statutory purpose. Further, the consideration of irrelevant factors or the failure to consider relevant factors are also sanctioned under this head of review.[515] Irrationality corresponds to the traditional *Wednesbury* unreasonableness standard. As for procedural impropriety, it sanctions the principles of procedural fairness imposed on administrative action, previously called natural justice. Specific heads of judicial review sometimes imply the recognition of public law rights or interests. This has most notably been the case in relation to

[512] [1983] UKHL 1 (HL, 25 November 1983).

[513] *R v Panel on Takeovers and Mergers, ex parte Datafin PLC* [1987] QB 815 (CA, Civil Division, 5 December 1986).

[514] *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HL, 22 November 1984) at 950, *per* Lord Diplock. This case is also known as *GCHQ*, and this name will be used here.

[515] Graham Taylor, "Judicial Review of Improper Purposes and Irrelevant Considerations," *CLJ* 35, no. 2 (1976): 272; see also Craig, *Administrative Law*, 2016, paras 17-001 f.; 17-009 f.

legitimate expectations concerning the procedure to be followed by a public body for issuing a decision.[516]

In 1963, Lord Reid had declared, quite apologetically: "*We do not have a developed system of administrative law – perhaps because until fairly recently we did not need it*".[517] By the mid-'80s, in contrast, English administrative law had acquired its own system, a sophisticated "bricolage" of existing common law concepts, doctrines and judicial instruments. This system acquired its proper dynamic too. Judicial review has been expanding and becoming increasingly intrusive. Its evolution has sometimes defied well-established traditions inherited from the monarchical regime. In *GCHQ*, Lord Diplock stated that administrative powers of government are subject to the overarching supervision of the common law courts, even when they do not have their source in statute.[518] In this way, the House of Lords reversed a long lived tradition of immunity for the royal prerogative.

The rising influence of European rights. Since the '70s, the evolution of supranational legal orders has further enhanced judicial review. The European Communities Act 1972 (ECA) incorporated EC Treaties in the domestic sphere. Section 2(1) provided:

> All (…) rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.[519]

The provision, which has remained almost unchanged until today, rendered European primary and secondary rules directly enforceable. European rights and freedoms were increasingly invoked before domestic judges. Section 3 of the Act disposes that English courts should interpret any point of European law in accordance ECJ case law and introduces the preliminary reference procedure in domestic law.

The formal influence of EU law was combined with the informal (from a domestic point of view) influence of another growing legal order, the ECHR. In 1965, the way was opened for individual petitions in Strasbourg. Since then ECtHR decisions against the UK have provoked shock among domestic lawyers. With the number of such decisions increasing, it was progressively felt as "wrong and embarrassing" that the Convention protected rights better than the common law.[520] A legal and political

[516] *O'Reilly v Mackman*, cited above and *GCHQ*, cited above.
[517] *Ridge v Baldwin*, cited above, 72, *per* Lord Reid.
[518] *GCHQ*, cited above, *per* Lord Diplock.
[519] http://www.legislation.gov.uk/ukpga/1972/68/contents.
[520] Craig, *Administrative Law*, 2016, para 18-003.

campaign for the incorporation of Convention human rights standards in the domestic sphere attracted increasing public attention.[521] In 1974, in his extra-judicial writings Lord Scarman claimed that international human rights instruments "reflect a rising tide of opinion which, one way or another, will have to be accommodated in the English legal system".[522] In the absence of incorporation, Strasbourg precepts were taken into account by judges in the judicial evolution of the common law. A concept began to emerge in the case law of English courts: the concept of fundamental human rights.[523] In the presence of such rights, judges exercised intrusive scrutiny of public action, what came to be commonly called "anxious scrutiny". By the mid '90s, fundamental rights also appeared in administrative law handbooks.[524]

However, the judicial entrenchment of fundamental rights values found a major obstacle in English public law: the principle of parliamentary sovereignty. In judicial review, this principle has found exemplary expression in the distinction between review and appeal. Except from cases where statute has provided so, courts do not enjoy an appellate jurisdiction, their role remains supervisory. Hence, judges cannot evaluate the outcomes of administrative decisions and cannot substitute their view as to whether the decision is objectively justified for that of the primary decision-maker, except if Parliament has wanted so. While in the field of EU law the ECA has provided statutory basis for the effective realisation of EU rights since the '70s, the lack of incorporation of the ECHR long impeded the effective application of the rights pronounced therein. Put briefly, following constitutional orthodoxy in English public law, merits review is taboo, no matter how severely an act infringes fundamental rights.

The role of proportionality in domestic legal discourse has largely depended on these evolutions. Proportionality emerged in the context of judicial review, at a time when English public law was under construction. Diceyan formalism long hindered its dynamism as an autonomous concept. Initially, proportionality was nothing but a shade of reasonableness, accommodated by the traditional judicial review structures (*paragraph i*). With the openness of English law to the EC legal order, proportionality emerged as an autonomous head of review, applied in the scope of the EC Treaties and by reference to the ECJ case law (*paragraph ii*). The connection of proportionality to the ECHR vested it with a new dynamic; proportionality emerged as a judicial balancing method for the adjudication of fundamental rights and acquired certain fervent promoters. This created uncertainty as to its scope of application (*paragraph iii*). Nonetheless, proportionality was finally rejected by the House of Lords in domestic

[521] See for example Michael Zander, *A Bill of Rights?* (London: Rose in association with the British Institute of Human Rights, 1979).

[522] Leslie Scarman, *English Law: The New Dimension*, Hamlyn Lecture Series (London: Stevens Publishing, 1975), 14; cited by Tom Hickman, *Public Law after the Human Rights Act* (Oxford: Hart, 2010), 18, fn. 25.

[523] See *Bugdaycay v Secretary of State for the Home Department* [1986] UKHL 3 (HL, 19 February 1986). John Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?," *Commonwealth Law Bulletin* 18 (1992): 1385.

[524] See for example Paul Craig, *Administrative Law*, 3rd ed. (London: Sweet & Maxwell, 1994), 421.

judicial review cases. English lawyers and judges thus sought continuity between the Convention and common law concepts and methods, without necessarily pursuing the recognition of an independent proportionality head. This came at a cost for the conceptual clarity and structural integrity of proportionality itself (*paragraph iv*).

i. A shade of reasonableness

Proportionality as reasonableness. The first time that proportionality appeared in judicial writings was in 1976, in a case named *Hook*.[525] Mr Hook, a trader in a local market in Barnsley, urinated on the side street after the market lavatories were closed. A security officer rebuked him and they exchanged insults. The next day, the market manager terminated Mr Hook's licence to trade, and thus Mr Hook lost his job. The case was brought before the High Court, which refused to quash the decision. The Court of Appeal reversed the lower court's decision. To reach this conclusion, Denning LJ and Sir John Pennyquick took into account procedural considerations of natural justice, but also the asymmetry between the triviality of Mr Hook's offense and the severe punishment that it received. According to Denning LJ, "*the court can interfere by certiorari if a punishment is altogether excessive and out of proportion to the occasion*".[526] Similarly, Sir John Pennyquick argued that "*the isolated and trivial incident at the end of a working day is manifestly not a good cause justifying the disproportionately drastic step of depriving Mr Hook of his licence, and indirectly of his livelihood*".[527]

In the following years, proportionality language infiltrated cases outside the context of judicial review, especially involving balancing of competing interests and considerations by the court. It was employed in criminal sentencing,[528] allocation of costs for judicial proceedings,[529] as well as cases where power was not exercised by a public authority but by a private person, like in family law,[530] property law[531] or contract law.[532] In *Louisville*, for example, proportionality was applied to contractual relationships. The case concerned the refusal by a landlord to consent to an assignment of the lease by the tenant.[533] Balcombe LJ, in one of his first judgments in the Court of Appeal, stated that

---

[525] *R. v Barnsley MBC, ex parte Hook* [1976] 1 W.L.R. 1052 (CA, Civil Division, 20 February 1976).

[526] Ibid, 1057.

[527] Ibid, 1063.

[528] See *R. v Slater (Terence Clifford)* (1979) 1 Cr App R (S) 349 (CA, Criminal Division, 4 December 1979); *R. v Thompson (David William)* (1983) 5 Cr App R (S) 303 (CA, Criminal Division, 5 September 1983).

[529] *A Co v K Ltd* [1987] 3 All ER 377 (CA, Civil Division, 8 July 1987).

[530] *Roman v Roman*, (CA, Civil Division, 1989), unreported.

[531] *Customs and Excise Commissioners v Viva Gas Appliances Ltd* [1984] 1 All ER 112 (HL, 24 November 1983).

[532] *St Marylebone Property Co Ltd v Tesco Stores Ltd & Others* [1988] 27 EG 72 (HC, Chancery Division, 9 October 1987).

[533] *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] 1 Ch. 513 (CA, Civil Division, 20 November 1985).

> while a landlord need usually only consider his own relevant interests, there may be cases where there is such a disproportion between the benefit to the landlord and the detriment to the tenant if the landlord withholds his consent to an assignment that it is unreasonable for the landlord to refuse consent.[534]

Usually, proportionality was employed as synonymous with reasonableness. Indeed, as Tom Hickman observes, reasonableness has been a requirement for the lawful exercise not only of administrative discretion, but in certain cases of private rights as well.[535]

Proportionality of penalties in judicial review. In contrast to the occasional use of proportionality in private law, the term was forgotten in judicial review for almost a decade. Proportionality started being employed as a domestic standard in certain judicial review cases since 1984. These cases had in common the existence of some kind of punishment or sanction for previous misconduct or failure. In *Benwell,* the disciplinary sanction of dismissal against a prison officer was challenged as disproportionate on the basis that the trade union activities of the officer were a determining factor for the Secretary of State's decision.[536] Proportionality language was also employed in *Assegai*, which concerned a local authority's decision to exclude an individual from its premises.[537] Finally, in *Nolan*, the Board of Examiners of Manchester Metropolitan University had decided to fail a student for cheating and the student challenged the proportionality of the decision.[538] During the late '80s, this version of proportionality also appeared in some administrative law textbooks.[539]

Proportionality of penalties, then, as in … *proportionnalité des peines et des sanctions* ? Maybe so, since Denning LJ had expressed admiration for French law in his extrajudicial writings.[540] In any case, what is important is that proportionality was perceived as synonymous with pre-existing domestic standards of review. In *Hook*, the leading case, Denning LJ invoked authority to support courts intervening by certiorari in cases of excessive and unreasonable punishments. Thus, the judge equated "*out of proportion*" to what in older decisions had been referred to as "*excessive*" and

---

[534] Ibid, 521.

[535] Hickman, *Public Law after the Human Rights Act*, 194 f., chap. 7: "Reasonableness."

[536] *R v Secretary of State for the Home Department, ex parte Benwell* [1985] 1 Q.B. 554 (HC, Queen's Bench Division, 24 May 1984).

[537] *R v London Borough of Brent, ex parte Assegai*, *The Times*, 18 June 1987 (CA, Civil Division, 11 June 1987).

[538] *R v Manchester Metropolitan University, ex parte Nolan*, (HC, Queen's Bench Division, 15 July 1993), unreported. See also *R v Warwick Crown Court*, *ex parte Smalley* [1987] 1 W.L.R. 237 (HC, Queen's Bench Division, 10 June 1986). Interestingly, in this case Sir John Laws was counsel for the part pleading against the application of proportionality. Generally, see Paul Craig, "Unreasonableness and Proportionality in UK Law," in *The Principle of Proportionality in the Laws of Europe*, ed. Evelyn Elllis, 1st ed. (London: Bloomsbury Publishing, 1999), 91 f.

[539] See Paul Craig, *Administrative Law*, 2nd ed. (London: Sweet & Maxwell, 1989), 287, who only talks about proportionality of punishment.

[540] Denning, *Freedom under the Law*, 115 f.; 122 f.; cited by Allison, *A Continental Distinction in the Common Law*, 178.

"*unreasonable*".[541] In *Benwell,* Hodgson J applied a very high threshold test requiring a disciplinary sanction "*so disproportionate to the offence as to be perverse*".[542] By referring to perversity, the judge connected disproportionality to the *Wednesbury* unreasonableness standard. In *Smalley*, Woolf LJ explicitly equated proportionality to an indication of *Wednesbury* unreasonableness. In his words,

> whether one approaches the matter on the basis of the *Wednesbury* decision, the *Cinnamond* decision or on the test of proportionality, if that test is as yet part of the law of this country so far as the powers of this court are concerned in exercising its jurisdiction in judicial review, I have come to the conclusion that the answer must be the same (…)[543]

According to the same judge's dicta in *Assegai*, *"[w]here the response is out of proportion with the cause to this extent, this provides a very clear indication of unreasonableness in a Wednesbury sense*".[544] Finally, in the *Nolan* decision by the Queen's Bench Division, Sedley J used the terms "rational" and "proportionate" as synonymous.[545]

The conceptual "absorption" of proportionality. Initially then, in judicial review cases proportionality lacked conceptual autonomy. It was absorbed by the domestic concept of reasonableness and applied interchangeably with it. Or, put better, disproportionality was synonymous with unreasonableness.[546] In administrative law in particular, disproportionality, just like unreasonableness, needed to be so apparent as to be self-evident, without the need for further explanations from the judge. As defined by Lord Greene, *Wednesbury* unreasonableness was tautological: the courts can interfere only when the decision is "*so unreasonable that no reasonable authority could ever have come to it*".[547] The anomaly should catch the eye of any reasonable person examining the case. Indeed, due to its exceptional nature, in administrative law unreasonableness acquired a different meaning from the one it had in other legal domains or in ordinary life. This is manifested in the frequent use of the epithet "*Wednesbury*" before the word unreasonableness, when the term is used in this sense.[548] In *Smalley, Pegasus* and *Else* disproportionality was also employed as a self-evident test, and was applied without further justification. Responding to the parties' allegations, the court restated the reasonable considerations taken into account by the primary decision-maker and concluded that the decision was not so disproportionate as to be unreasonable.

---

[541] The judge referred to *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 K.B. 338 (CA, Civil Division, 19 December 1951), at 350. See *Hook*, cited above, 1057.

[542] *Benwell*, cited above, 569.

[543] *Smalley*, cited above, 245.

[544] *Assegai*, cited above.

[545] *Nolan*, cited above.

[546] This content of proportionality is mentioned in Quintin Hogg, ed., "Proportionality," *Halsbury's Laws of England* (London: Butterworths, 1989).

[547] *Wednesbury*, cited above. See Jeffrey Jowell and Anthony Lester, "Beyond Wednesbury: Substantive Principles of Administrative Law," *Commonwealth Law Bulletin* 14 (1988): 861.

[548] Michael Taggart, "Reinventing Administrative Law," in *Public Law in a Multi-Layered Constitution*, ed. Nicholas Bamforth and Peter Leyland (Oxford; Portland, Or: Hart, 2003), 251.

In its first applications in English law, then, proportionality corresponded to a negative standard, a unitary concept, a threshold, and not a prong-structured test. Disproportionality, just like unreasonableness, was an exception, whose function was to confine administrative authorities in the "four corners" of their powers. Constrained by existing concepts and doctrines, proportionality had quite limited application and did not attract scholarly attention for some time. It was not even mentioned as a category of unreasonableness in the long catalogue of such categories included in William Wade's and Christopher Forsyth's *Administrative Law* handbook.[549] It is through its connection to European law that proportionality acquired its proper content and dynamic in judicial reasoning.

ii. An independent EC law head of review

The first application of proportionality as an EC law principle. The ECA provided a statutory "gateway" for the transfer of proportionality as a test for the protection of Community law rights and freedoms. While it had already appeared in the argumentation of the parties, the first time that proportionality was actually applied by an English court as an EC principle was *Goldstein*.[550] An Act dating from 1968 prohibited the importation of radios emitting a certain frequency. The ban was justified by public interest reasons, since the use of the particular wave band would affect some important devices used by airports, hospitals, the police and other public services. Mr Goldstein was accused of fraudulently importing such apparatus. In the first instance, he claimed that the prohibition was contrary to article 30 TEC. The judge accepted that the measures constituted a quantitative restriction in the terms of that article and went on to examine the question of their proportionality. He was convinced that the restriction was justified and held Mr Goldstein guilty of the fraudulent evasion of the prohibition.[551]

On appeal, Mr Goldstein argued that the first instance judge failed to properly consider whether the measures were necessary or whether alternative, less detrimental measures could have been employed to achieve the statute's purpose. Examining his allegations, the Court of Appeal deduced from article 36 TEC a necessity requirement. Though the substance of the problem was not under consideration before the House of Lords, Lord Diplock found the occasion to announce for the first time in English law the three stages of the principle of proportionality:

---

[549] William Wade and Christopher Forsyth, *Administrative Law*, 6th ed. (Oxford; New York: Clarendon Press; OUP, 1988), 416 f.

[550] *Regina v Goldstein* [1982] 1 W.L.R. 804 (CA, Criminal Division, 2 April 1982); [1983] 1 W.L.R. 151 (HL, 20 January 1983).

[551] Even so, it is interesting to note the difference with French courts' approach to the question of quantitative restriction to trade. As we saw, for long French judges sanctioned such restrictions under EU law, only when they pursued protectionist goals. Thus, they did not engage in a proportionality test under article 30 TEC.

> in order to enable a state to avail itself of the derogation from article 30 for which article 36 provides, it is necessary to adduce factual evidence (1) to identify the various mischiefs which the challenged restrictive measures were intended to prevent, (2) to show that those mischiefs could not have equally effectively been cured by other measures less restrictive of trade, and (3) to show that the measures were not disproportionately severe having regard to the gravity of the mischiefs against which they were directed. This last mentioned consideration involves the concept in Community law (derived principally from German law) called "proportionality." In plain English it means "You must not use a steam hammer to crack a nut, if a nutcracker would do."[552]

The application of proportionality by reference to the ECJ case law. Despite its formulation in Lord Diplock's dicta, in subsequent case law the test of article 36 TEC did not always imply a three-pronged proportionality analysis. One year later, in *Bell Line*, for example, proportionality was applied as a necessity test, concerned with the intents of the primary decision-maker.[553] In this case, national regulations had banned the importation of milk from two ports that were the most convenient to Irish importers. The Government had justified the measures on grounds of public health, and had designated some "meat" ports instead, with experience in performing health controls. The High Court declared the measures contrary to Community law: the exclusion of the two ports was unnecessary, especially in view of the fact that the Government had already imposed certification for the protection of public health through licence requirements. The court considered the existing restrictions as sufficient to ensure the protection of health. It held that no objective requirements justified the exclusion of the only two ports with experience in milk importation. Thus, the court quashed the Secretary of State's decision as a disguised restriction to trade.[554] Similarly, in *Pharmaceutical Society*, proportionality was only mentioned as excluding blanket prohibitions, when alternative less restrictive measures are available.[555] In *Roberts*, Popplewell J equated proportionality to an appropriateness and necessity test.[556]

The equation of proportionality to a strict necessity review is not surprising, if one considers that this is how the ECJ applied the test when European economic freedoms were at stake.[557] Indeed, at this stage of evolution in English law, the content of proportionality was mainly determined *by reference* to the ECJ case law. Proportionality was invested the form that the ECJ gave to it each time, as a function of the subject matter: penalties, non-discrimination, discretionary policy decisions, economic

---

[552] *Regina v Goldstein* (HL), cited above, 154-5.

[553] *R v Minister of Agriculture, Fisheries and Food, ex parte Bell Line* [1984] 2 C.M.L.R. 502 (HC, Queen's Bench Division, 9 April 1984).

[554] Ibid, paras 18 f., esp. para 26.

[555] *R v The Pharmaceutical Society of Great Britain, ex parte Association of Pharmaceutical Importers* [1987] 3 C.M.L.R. 951 (CA, Civil Division, 30 July 1987).

[556] *R v Minister of Agriculture, Fisheries and Food, ex parte Roberts* [1991] 1 C.M.L.R. 555 (HC, Queen's Bench Division, 11 November 1990).

[557] On this point, see *infra*, Part III, Chapter 8(1).

freedoms etc.[558] Parallelism was bolstered by the recurrent citations and thorough consideration of ECJ decisions in English judicial opinions, as well as by the repeated references to the ECJ on the issue.[559] The application of proportionality by reference to the ECJ was normal, since proportionality was itself an EC law head of review: it was applied through the "gateway" of the ECA 1972 and only in EC law cases. It emerged and developed under the exhortation and influence of big companies' barristers, who sought to exempt their clients from restrictions to trade or relative sanctions and penalties.[560] It was a test for assessing the validity of national measures in the scope of EC law.

Most importantly, as far as administrative law was concerned, proportionality was perceived in European cases as *different* to domestic standards of judicial review, and especially *Wednesbury* unreasonableness. This difference was accentuated by the court, even in the intent-based test applied in *Bell Line*. Forbes J admitted that he "*would find it perhaps difficult if this were purely a question of the ordinary Wednesbury principles to say that the Minister had gone wrong in such a way that his decision should be interfered with*".[561] But he did not consider it necessary to deal with this question, since a different, more intrusive standard of review applied in this decision. *Bell Line* was followed in subsequent case law. Even when a margin of appreciation was due to national public authorities, proportionality was deemed to impose a more intensive standard of review than irrationality.[562] In *Roberts*, Popplewell J accepted that the appropriate standard of review was a correctness standard, "*by way of original jurisdiction*", "*as if it were a civil action*".[563] As time passed, the distinction between EC law and common law concepts and heads of review became increasingly solid. Progressively, proportionality analysis was less concerned with the intent of the reviewed authorities and instead focused on the impacts of domestic measures on economic freedoms.[564]

---

[558] See for example *Rainey v Greater Glasgow Health Board* [1987] IRLR 26 (HL, 27 November 1986); *R v Secretary of State for Education, ex parte Schaffter* [1987] IRLR 53 (HC, Queen's Bench Division, 1 January 1987).

[559] See *Customs and Excise Commissioners v ApS Samex (Hanil Synthetic Fiber Industrial Co Ltd, third party)* [1983] 1 All ER 1042 (HC, Queen's Bench Division, 14 December 1982). For only some of the numerous preliminary references, see *R v Minister of Agriculture, Fisheries and Food and another, ex parte Fédération Européenne de la Santé Animale (Fedesa) and others* [1988] 3 C.M.L.R. 207 (HC, Queen's Bench Division, 19 February 1988); *R. v Intervention Board for Agricultural Produce, ex parte ED&F Man (Sugar) Ltd* [1984] 3 C.M.L.R. 633 (HC, Queen's Bench Division, 18 June 1984); *Rochdale Borough Council v Anders* [1988] 3 All ER 490 (HC, Queen's Bench Division, 23 May 1988); *Pharmaceutical Society,* cited above.

[560] Most prominently, Arthur Vaughan QC repeatedly used proportionality in his argumentation during the first years of the principle's evolution in EC law. See for example, *Bell Line*, *Pharmaceutical Society*, and the Sunday trading litigation, on which see *infra*, Part III, Chapter 8(3).

[561] See *Bell Line*, cited above, para 17.

[562] See for example *R v Secretary of State for the Environment, ex parte NALGO* [1992] 5 Admin.L.R. 785 (HC, Queen's Bench Division, 20 December 1991), 800-801. See Nicholas Green, "Proportionality and the Supremacy of Parliament in the UK," in *The Principle of Proportionality in the Laws of Europe*, ed. Evelyn Elllis (London: Bloomsbury Publishing, 1999), 145, esp. 150, citing relevant case law.

[563] *Roberts*, cited above, para 79. In this case, however, the question of proportionality did not determine of the outcome of the case.

[564] *WH Smith Do-It-All Ltd v Peterborough City Council* [1991] 4 All ER 193 (HC, Queen's Bench Division, 4 June 1990).

Fact-finding issues. The intensity of review that proportionality implied necessarily entailed fact-finding. This sometimes troubled English judges, especially in criminal law cases, where special issues of evidence arise. The question was raised in the first application of the principle, in *Goldstein*. When the issue of proportionality arose, the first instance judge heard evidence adduced by the Crown as to the existence and the importance of the public interest served by the statute, considering that it was a legal question for the judge alone and not for the jury. Mr Goldstein complained that the proportionality question was a mixed question of law and fact, and thus one for the jury to decide. Both the Court of Appeal and the House of Lords rejected his contention. Section 3(1) of the ECA 1972 declares:

> For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).

The situation was complicated because the ECJ itself required that the competent authority -the Crown in this case- must adduce substantial evidence to prove that a certain measure was proportional and justified. Lord Diplock, who was followed by his colleagues on this point, resolved this apparent contradiction, by observing that proportionality is "*a question as to the meaning and effect of one of the Treaties. It thus falls fairly and squarely within section 3 (1) of the European Communities Act 1972*".[565]

The fact-finding that proportionality entailed also irritated the traditional perception of the role of judges in judicial review cases. Indeed, the adversarial English system was perceived as ill-adapted to resolving the polycentric and complex fact-finding issues that certain public law disputes entail.[566] In *Bell Line*, Forbes J rejected that the court, by virtue of EC law, had become "*a fact-finding tribunal or anything of that kind*". Still, he stressed that the Court of Justice had declared that the justifiability of national restrictions is for the national court to decide and that he would find it "*very remarkable (…) if there were no court in this country which was able to take up the invitation of the European Court*".[567] Forbes J went on to say:

> It is plain that this court is, some may think unfortunately but nevertheless ineluctably, being drawn into the business of fact-finding. Indeed, there are pronouncements in the House of Lords which make it clear that the provisions for cross-examination of deponents on affidavits and so on and so forth mean that in certain cases this court can be required to find facts at least if it is necessary to find certain facts in order to define its jurisdiction. I do not believe that this country should be left in a

[565] *Goldstein* (HL), cited above, 156.
[566] On this role, Allison, *A Continental Distinction in the Common Law*, 183 f.
[567] *Bell Line*, cited above, para 20.

> situation where, if it were plain that a decision of a Minister was one which was contrary to Community law, or that part of Community law which becomes part of this country's domestic law, those persons with rights arising under Community law should be denied any means of enforcing them.[568]

Still, the factual or legal nature of proportionality continued to confuse English lawyers. In subsequent cases, the problem of the competence of the ECJ in the preliminary reference procedure arose. According to consistent case law, the facts of the case should be decided *before* the domestic court introduced a preliminary reference to the ECJ.[569] However, the fact-finding issues raised by proportionality led the Court of Appeal to introduce an exception to this rule in *Pharmaceutical Society*. This case concerned a guidance note issued by the Pharmaceutical Society of Great Britain, requiring that chemists meticulously follow the doctor's prescription and not substitute drugs imported from EC member states to therapeutically identical drugs prescribed in the UK. Determining the facts of the case thus implied complicated considerations as to the impacts of the notice on trade and the equivalent effect of the drugs in question. The court held that, exceptionally, a preliminary reference to the ECJ could be made without consideration of the merits.[570]

Despite the complex issues that its application raised, proportionality did not attract much scholarly attention until the late '90s. This is because it was not likely to spill over the rest of English law. The application of proportionality by reference to the relevant ECJ case law attributed integrity to the concept and certainty as to its scope of application. The meaning of proportionality as an EC law head of review was commonly shared among English public lawyers and was mentioned as such in legal dictionaries.[571] Meanwhile, however, yet another meaning for proportionality emerged, with a more contested content and a more radical potential in English law.

iii. The connection of proportionality to the ECHR

From continuity to change. Interestingly, the application of proportionality through the "gateway" of the ECA enhanced the use of proportionality language in domestic law as well. As we saw, it was only in the mid-'80s that English judges rediscovered the *Hook* case and started using proportionality in judicial review. In the beginning, proportionality's European origin did not necessarily exclude it being synonymous with the domestic *Wednesbury* standard. In some early cases, the EC

[568] Ibid, 21. In this case Forbes J found necessary to reformulate the *Wednesbury* rule in order to make it fit the standard applied. See para 27.

[569] *Bulmer (HP) Ltd v Bollinger SA* [1974] 2 All ER 1226 (CA, Civil Division, 22 May 1974), *per* Lord Denning Master of the Rolls.

[570] Concerning the competence of the ECJ in the matter, see the *Pharmaceutical Society* case, cited above, paras 28-30.

[571] See "Proportionality," *Halsbury's Laws of England* (London: Butterworths, 1989).

principle itself was translated into a reasonableness requirement.[572] This was sometimes expressed in the ECJ case law. In *Henn and Darby*, for example, Advocate General Van-Gerven stated that, in certain contexts, "'*reasonableness' and 'proportionality' are the same concept*'.[573]

As time passed however, proportionality was progressively distinguished from *Wednesbury*, even in domestic judicial review cases. It was connected to a concept emerging in the case law of English courts: fundamental human rights. Moreover, since no bill of rights existed in the English constitution, proportionality was connected to another growing international legal order, the rights order of the ECHR. In *Handyside* and *Sunday Times*, Strasbourg had condemned the UK for not respecting the freedom of speech.[574] This was received as a shock among English lawyers, who were accustomed to praising the common law as the cradle of civil liberties. Interestingly, these ECHR decisions were among the first Strasbourg decisions where the doctrine of proportionality was used.[575] After their issuance, English courts paid more and more attention to Strasbourg case law and progressively adopted balancing language and the requirement of a pressing social need for restrictions upon human rights.[576]

The Spycatcher affair. It was in the *Spycatcher* litigation that the European principle of proportionality found its first application as an ECHR principle. This was mainly the achievement of certain well-known barristers and judges. In this famous series of cases, the *Guardian* and the *Observer* wanted to publish information contained in *Spycatcher,* a book written by a former agent of the British Security Service. This information involved, among other facts, details about the penetration of the Service by foreign agents. The Attorney General, who had sought to restrain the publication of the book in Australia, was also seeking interim injunctions against the British newspapers. Anthony Lester QC and David Pannick, representing the newspapers, built a defence against the restrictions on the fundamental right to freedom of press and expression protected by article 10 ECHR.[577] In the first decision on the case in 1987, Millett J granted the injunctions after weighing the relevant conflicting public interests: the freedom of the press to inform the public, especially when unlawful conduct by civil servants was suspected; and the need for an effective and leak-proof secret service in the interests of national security. The judge stated that "*the restrictions imposed by the court should not go beyond the strict requirements of the interest which it is sought to*

---

[572] Neville Brown, "General Principles of Law and the English Legal System," in *New Perspectives for a Common Law of Europe = Nouvelles perspectives d'un droit commun de l'Europe*, ed. Mauro Cappelletti and Neville Brown, Publications of the European University Institute (Leiden; London: Sijthoff, 1978), 177.

[573] C-34/79, 14 December 1979, *Henn and Darby*, ECLI:EU:C:1979:295, [1981] A.C. 850, 879, citing Neville Brown, above.

[574] ECtHR, *Handyside v The UK*, 7 December 1976, no. 5493/72; *The Sunday Times v The UK,* 26 April 1979, no. 6538/74.

[575] On the ECtHR proportionality case law, see *infra*, Part III, Chapter 7(1).

[576] *Schering Chemicals Ltd. v Falkman Ltd. and Others* [1982] Q.B. 1 (CA, Civil Division, 27 January 1981); *Attorney General v British Broadcasting Corporation* [1980] 3 W.L.R. 109 (HL, 12 June 1980).

[577] I only refer here to the interim injunctions series of cases. The *Spycatcher* litigation is much more complex and also involved main proceedings on breach of confidentiality, as well as proceedings for contempt of court against certain newspapers.

safeguard".[578] Thus, he exempted from the injunction information disclosed in open court in Australia.

On appeal, Sir Donaldson Master of the Rolls confirmed Millett J's decision expressly referring to the principle of proportionality. In his words,

> Where there is confidentiality, the public interest in its maintenance has to be overborne by a countervailing public interest, if publication is not to be restrained. In some cases the weight of the public interest in the maintenance of the confidentiality will be small and the weight of the public interest in publication will be great. But in weighing these countervailing public interests or, perhaps more accurately, those countervailing aspects of a single public interest, both the nature and circumstances of the confidentiality and the nature and circumstances of the proposed publication have to be examined with considerable care. This is what is sometimes referred to as the principle of proportionality—is the restraint or lack of restraint proportionate to the overall assessment of the public interest.[579]

Proportionality was thus explicitly used as a guiding principle for the "balance of convenience", that is, the judicial assessment of the pros and cons for granting an injunction according to the circumstances of the case. In Sir Donaldson's dicta it designated a kind of judicial reasoning that involved the balancing of "*countervailing public interests or, perhaps more accurately, those countervailing aspects of a single public interest*". In this process, the judge took into account both normative and factual considerations. Thus, proportionality's function in the adjudication of the freedom of press was very akin to the Alexyan balancing structure. It led to an intensive scrutiny of rights' limitations, even though the freedom of press was not explicitly qualified as a right.[580]

In July 1987, *Spycatcher* was published in the US and individual copies were obtainable in the UK. At the same time, the *Sunday Times* published extracts from the book. The *Guardian* and the *Observer* applied to have their injunctions discharged because of the new circumstances. Meanwhile, the Attorney General started proceedings against the *Sunday Times* for contempt of court. The causes were examined together by Sir Browne-Wilkinson Vice-Chancellor. Citing Sir Donaldson's dicta on the principle of proportionality, the Vice-Chancellor observed that the harm to the national security that the Attorney General was seeking to prevent had already been produced, because the book was accessible to anyone who was interested in buying it. In his words, *"[t]he purpose ha[d] been destroyed*".[581] However, the Attorney General also

---

[578] *Attorney General v Guardian Newspapers Ltd and Others, Attorney General v The Observer Ltd. and Others* [1989] 2 F.S.R. 3 (interlocutory injunction, HC, Chancery Division, 11 July 1986 – CA, 25 July 1986), 14.

[579] Ibid, 22.

[580] On this, see *infra*, Part II, Chapter 5(2).

[581] *Attorney General v Guardian Newspapers Ltd and others; and related appeals* [1987] 1 W.L.R. 1248 (interlocutory injunction, CA, Civil Division, 24 July 1987 - HL, 13 August 1987) at 1269, *per* Browne-Wilkinson V-C.

invoked another purpose. He claimed that further dissemination of the book in the UK would encourage others who wanted to follow the example of the author of the *Spycatcher*. Still, Sir Browne-Wilkinson found this public interest too trivial compared to the importance of the freedom of the press. Even though this freedom is not absolute, restraint in press publication should not be inflicted unless it is unavoidable. Thus, after balancing the competing considerations the judge concluded that no "*sufficient degree of public interest*" had been shown, and discharged the injunctions.[582]

However, his decision was reversed by the Court of Appeal. The Lord Justices decided that since the Attorney General had an arguable cause in the main trial, his rights should be preserved. Thus, they granted the injunction and even deleted Millett J's exemption concerning the Australian proceedings. When the case arrived before the House of Lords, Anthony Lester and David Pannick finished their address on behalf of the *Sunday Times* with the following words: "This case cries out for a sense of proportion".[583] With a 3 to 2 majority the Lords confirmed the Court of Appeal's decision. Lord Brandon and Lord Ackner again referred to the fact that the Attorney General had an arguable cause and thus his interests should be preserved until the case was tried. Lord Templeman went even further and, citing the ECHR and the *Sunday Times* decision, declared that the restrictions were "*necessary in a democratic society*" in the interests of national security.[584] In his view, the allegations included in the *Spycatcher* might not be true, and the honest members of the security service would not be able to defend themselves without breaching their duty of confidentiality.

The aftermath of *Spycatcher*. Lord Bridge, dissenting, had foreseen that "*[i]f the government are determined to fight to maintain the ban to the end, they will face inevitable condemnation and humiliation by the European Court of Human Rights in Strasbourg*".[585] Indeed, condemnation and humiliation were not long in coming. In its 1991 decision on the issue, the ECHR applied a proportionality test and declared that the restrictions on publication imposed by the English authorities after July 1987 were unjustified.[586] It stated that the interests of national security invoked by the Government, and the interests of the Attorney General as a litigant were not sufficient to legitimate an interference with article 10. The fact that the Lords of Appeal had taken the Convention into account did not save their decision.

In the end, the *Spycatcher* litigation is not remembered as a landmark for the application of the Convention in English law. However, it did bring about an important contribution in this respect. It was in this case that the link between the ECHR and proportionality was for the first time authoritatively established. Since this, the meaning of proportionality as a principle for the adjudication of fundamental rights spread in scholarship and became dominant in English law. While the main *Spycatcher*

---

[582] Ibid, 1270.

[583] *Attorney General v Guardian Newspapers Ltd and others; and related appeals*, cited above (HL, 13 August 1987), mentioned by Lord Ackner at 1300.

[584] Ibid, 1297, *per* Lord Templeman.

[585] Ibid, 1286, *per* Lord Bridge.

[586] ECtHR, *Observer and Guardian v The UK,* 26 November 1991, no. 13585/88.

case was pending, an article written by Anthony Lester and another famous barrister, Jeffrey Jowell, appeared in the *Commonwealth Law Bulletin*.[587] The two lawyers called for the adoption of a doctrine proportionality to sanction the unjustifiable limitation of fundamental rights and avoid violations of the ECHR. The same connection of proportionality to fundamental rights language, which was emerging in English law, is seen in a contribution by Jeffrey Jowell and Dawn Oliver,[588] as well as in the extra-judicial writings of Sir John Laws.[589] In this way, proportionality acquired its first enthusiasts. Pressures for its application increased both in scholarly writings and in courtrooms. While in interlocutory injunctions cases the application of proportionality was possible within the "balance of convenience", things were much more complicated in judicial review.

Calling for change. Clearly, the application of proportionality as an aspect of irrationality in domestic judicial review cases compromised its function considerably. This was noticed by the defenders of proportionality, who perceived it as a substantive requirement of equity, fairness or justice.[590] It was claimed that, though a decision may not meet the *Wednesbury* standard of perversity, it could still constitute an abuse of power. This is why these authors typically defined proportionality *by opposition* to the *Wednesbury* standard, as a standard that goes "beyond" it.[591] Hence, proportionality as a European rights principle could only be applied through an *additional* head of review. This had already been envisaged by Lord Diplock in the famous *GCHQ* case:

> Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community;[592]

The *GCHQ* decision provoked confusion as to whether proportionality constituted a ground separate from irrationality. While in some cases it was applied as an aspect of the *Wednesbury* test, in others its application was simply rejected since no

---

[587] Jowell and Lester, "Beyond Wednesbury."

[588] Jeffrey Jowell and Anthony Lester, "Proportionality: Neither Novel nor Dangerous," in *New Directions in Judicial Review*, ed. Jeffrey Jowell and Dawn Oliver, Current Legal Problems Series (London: Stevens, 1988), 51.

[589] Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?"

[590] Tom Bingham, "'There Is a World Elsewhere': The Changing Perspectives of English Law," *ICLQ* 41 (1992): 513.

[591] Jowell and Lester, "Beyond Wednesbury," 860.

[592] *GCHQ*, cited above, at 950.

authority existed for it.[593] *Pegasus*, for example, concerned the suspension of the licences of certain Romanian pilots flying charters to and from the UK after their failure in an examination set by the UK Civil Aviation Authority.[594] The pilots' representative invoked proportionality as "one aspect of reasonableness". Schiemann J acknowledged the European pedigree of proportionality and translated it into a requirement of proper balance between individual rights and public interests. Still, he concluded that it was not such an intensive standard that was to be applied in the case before him. Instead, equating a "*total lack of proportionality*" to a lack of reasonableness in the *Wednesbury* sense, he only applied "*an aspect of the Wednesbury rule*".[595] It is in *Brind* the House of Lords gave clear guidance on the matter.

iv. The rejection of proportionality as a domestic head of judicial review

The *Brind* affair. *Brind* concerned directives issued by the Home Secretary refraining the British Broadcasting Corporation (BBC) and the Independent Broadcasting Authority (IBA) from broadcasting speeches by members of Northern Ireland organisations deemed terrorist. The public interest invoked in justification of the restrictions was public safety, the prevention of crime and the protection of the rights of others. According to an affidavit provided by a member of the Secretary of State, the broadcasting of direct speeches of suspected terrorists was likely to offend its listeners or even to encourage crime and lead to disorder. The applicants, represented by Lester and Pannick, claimed that this decision was contrary to the ECHR as it was out of proportion with the mischief that it sought to avoid.

In the Queen's Bench Division, even though Watkins LJ accepted that the Minister should have regard to article 10 ECHR in the exercise of statutory powers, he declined to apply proportionality as an independent ground of review. In his view, proportionality would lead the court to substitute its view for that of the Minister. Still, Strasbourg case law did play a role in the judicial evaluation of the legality of public action. The judge examined whether the Minister had invoked a pressing social need for limiting the freedom of speech, and if he had adduced *prima facie* evidence for its existence. Otherwise, the court contented itself with sanctioning only manifest disproportionality, as an indicator of unreasonableness in the *Wednesbury* sense. According to Watkins LJ such disproportionality did not exist in the case, thus the Minister's decision was approved.[596]

In the Court of Appeal, Lord Donaldson Master of the Rolls was even more reluctant to follow the precepts of Strasbourg. He stated that even though treaty

---

[593] See, for example, *R v Bournemouth Crown Court, ex parte Jobson and another* (HC, Queen's Bench) CO/1917/89.

[594] *R v Secretary of State for Transport, ex parte Pegasus Holidays (London) Ltd and another* [1989] 2 All E.R. 481 (HC, Queen's Bench Division, 7 August 1987).

[595] Ibid.

[596] *R v Secretary of State for the Home Department, ex parte Brind & another*, *The Times*, 30 May 1989 (HC, Queen's Bench Division).

obligations may be taken into account in case of ambiguous statutory provisions, they cannot be deemed to supplement the intent of Parliament when it has conferred a power to another public authority. Consequently, the judge concluded that "*the doctrine of proportionality had no place in English law as a separate ground for the judicial review of administrative action since it was but one aspect of the test of reasonableness*".[597]

Irritating the fundamental assumptions of English judicial review. The House of Lords confirmed this decision.[598] In the judges' view,

> [u]nless and until Parliament incorporates the Convention into domestic law, a course which it is well-known has a strong body of support, there appears (…) to be at present no basis upon which the proportionality doctrine applied by the European Court can be followed by the courts of this country.[599]

The matter thus firstly concerned the incorporation of international treaties in the domestic sphere. The judges held that if they imposed on the Minister the obligation to have regard to the Convention they would be incorporating it "*by the back door*".[600] Hence, at the heart of the judicial rejection of proportionality one finds the doctrine of parliamentary sovereignty. If treaties were operative in domestic law without incorporation, the executive would legislate by simply signing them.[601]

Parliamentary sovereignty also impeded the application of proportionality as a separate domestic ground of review. This is because such application would confer to the court an appellate jurisdiction, without statutory empowerment in this respect. Indeed, proportionality would lead the court to substitute its own view to that of primary decision-makers, who were "*very often elected*".[602] Contrary to the will of Parliament, proportionality irritated a distinction that is fundamental in English judicial review: that of review and appeal. According to Lord Ackner,

> in order to invest the proportionality test with a higher status than the Wednesbury test, an inquiry into and a decision upon the merits cannot be avoided. Mr. Pannick's (Mr. Lester's junior) formulation - could the Minister reasonably conclude that his direction was necessary - must involve balancing the reasons, pro and con, for his decision, albeit allowing him "a margin of appreciation" to use the European concept of the tolerance accorded to the decision-maker in whom a discretion has been vested.[603]

---

[597] *R v Secretary of State for the Home Department, ex parte Brind* [1990] 1 All ER 469 (CA, Civil Division, 6 December 1989).

[598] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 A.C. 696 (HL, 7 February 1991).

[599] Ibid at 762 (*per* Lord Ackner). See also *per* Lord Lowry and Lord Roskill.

[600] Ibid at 762 (*per* Lord Ackner).

[601] Murray Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart, 1997), 7 f.

[602] *Brind* (HL, 7 February 1991) at 762 (*per* Lord Ackner).

[603] Ibid.

The adoption of proportionality would blur the distribution of competences long effectuated by the English constitution and solidified in the *Wednesbury* criterion.[604] Proportionality as a judicial balancing test was in contradiction with the most fundamental precepts of English judicial review. As far as the merits of a decision were concerned, *Wednesbury* was thus the "touchstone of legitimate judicial intervention".[605]

The *Brind* decision was followed by lower courts. In *Absalom,* a police constable challenged as disproportionate the decision by the chief constable of Kent requiring him to retire from the police force for misconduct. Popplewell J reminded that the courts' function was supervisory and refused to apply proportionality independently. Moreover, he did not find that the decision was perverse in the *Wednesbury* sense.[606] The same judge rejected the proportionality argumentation advanced by a prisoner whose provisional release date had been cancelled in *Cox*.[607] Similarly, in *Colman*, a registered doctor wished to practise holistic medicine outside the national health system and to advertise his practice in order to attract clients. The General Medical Council refused him permission to advertise and he challenged this decision as disproportionate. The Court of Appeal, recalling its supervisory function, refused to apply proportionality in the review of the General Medical Council's decision.[608]

Conceptual fragmentation. The rejection of proportionality as an autonomous domestic ground led to its conceptual fragmentation in case law. Where it enjoyed statutory basis, as it did whenever the ECA was in play, proportionality was applied as an independent ground. Whenever the common law principles applied however, proportionality was rejected as an independent ground and, at most, was applied as an aspect of reasonableness. The dichotomy between European and domestic proportionality is obvious in Popplewell J's judgment in *International Stock Exchange*.[609] In this case, the International Stock Exchange had delisted the shares of Titaghur Plc., after more than two years of suspension. The decision was taken without inviting the company's shareholders to make representations. The judge accepted that "*so far as English domestic law is concerned [proportionality] is not a free-standing principle, nor is it appropriate for a judge at first instance to take the first step to incorporate the doctrine*".[610] He thus took the principle into account only as an aspect of *Wednesbury* irrationality. Then, he went on to apply a more stringent proportionality standard, concerning the Community law aspect of the case.[611]

---

[604] See also Mark Elliott, "The Human Rights Act 1998 and the Standard of Substantive Review," *CLJ* 60, no. 2 (2001): 301.

[605] Craig, *Administrative Law*, 2016, para 21-004.

[606] *R v Chief Constable of Kent and another, ex parte Absalom*, (HC, Queen's Bench Division, 6 May 1993), unreported.

[607] *R v Secretary of State for the Home Department, ex parte Cox*, *The Independent*, 8 October 1991.

[608] *R v General Medical Council, ex parte Colman [*1990] 1 All ER 489 (CA, Civil Division, 6 December 1989). See also *NALGO*, cited above.

[609] *R v International Stock Exchange of the UK and the Republic of Ireland Ltd, ex parte Else* [1993] B.C.C. 11 (HC, Queen's Bench Division, 20 July 1992).

[610] Ibid at 26.

[611] Ibid at 25 f. See also *R v Secretary of State for Health, ex parte Eastside Cheese Company (a firm)* [1999] 3 C.M.L.R. 123 (CA, Civil Division, 1 July 1999).

Conceptual fragmentation was also apparent in the fact that proportionality could invest different forms and accomplish different functions, according to the circumstances of the case. In private law, for example, where courts were charged with the balancing of competing interests, proportionality was applied as a principle for the protection of fundamental rights developed in Strasbourg case law.[612] The same applied whenever there was an ambiguity in the common law, and thus recourse could be made to the Convention.[613] In *Derbyshire*, for instance, in the presence of conflicting decisions as to whether a local authority was entitled to sue a newspaper for libel, the Court of Appeal applied article 10 ECHR. The Lord Justices followed Strasbourg case law and engaged in proportionality balancing. They concluded that attributing such a standing right to local authorities would excessively restrict the freedom of expression.[614]

Still, the spread of proportionality as a fundamental rights principle was held back and this was reflected in scholarship. In administrative law manuals, proportionality was mainly analysed as an EC law principle.[615] In the minds of English public lawyers it remained a concept of limited application, "a foreign will-o'-the wisp".[616] Apart from analyses by its defenders, who pushed for its adoption as a principle, English scholarship was not much preoccupied with the "Euro-speak" of proportionality.[617] Even more, the rejection of proportionality as an autonomous domestic ground menaced its conceptual autonomy. In a 1992 article, Sophie Boyron considered proportionality as synonymous the French *erreur manifeste d'appréciation*. She suggested that the transfer of the principle into English administrative law would be a "faulty translation", since she located its origins in the Anglo-Saxon notion of reasonableness.[618] Similarly, in an extra-judicial contribution in 1999, Lord Hoffmann suggested that the classification of proportionality as an additional ground to irrationality is an "analytical error" and that proportionality is only a method to explain how a certain decision is irrational.[619]

Seeking for continuity. The '90s was thus a "frustrating time" for English judges, who could not apply proportionality in domestic law but knew that their decisions would be held as wrong in Strasbourg.[620] Indeed, in many cases the ECHR

---

[612] See for example *Attorney General v The Observer Ltd and Others*, analysed above.

[613] See *Brind* (HL), cited above. On the limited instances where courts could rely on the ECHR before the HRA, see Hunt, *Using Human Rights Law in English Courts*.

[614] *Derbyshire County Council v Times Newspapers Ltd. and Others* [1992] Q.B. 770 (CA, Civil Division, 19 February 1992) at 813.

[615] See Craig, *Administrative Law*, 1994, 411 f.; Wade and Forsyth, *Administrative Law*, 1961, 403; Stanley Alexander De Smith et al., *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995) at 13-070 f.

[616] Michael Taggart, "Proportionality, Deference, Wednesbury," *NZLR*, 2008, 424.

[617] Leonard Hoffmann, "The Influence of the European Principle of Proportionality upon UK Law," in *The Principle of Proportionality in the Laws of Europe*, ed. Evelyn Elllis, 1st ed. (London: Bloomsbury Publishing, 1999), 109.

[618] Sophie Boyron, "Proportionality in English Administrative Law: A Faulty Translation?," *Oxford Journal of Legal Studies* 12, no. 2 (1992): 237.

[619] Hoffmann, "The Influence of the European Principle of Proportionality upon UK Law." 109.

[620] David Neuberger, "The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK Experience," 2014, https://www.supremecourt.uk/docs/speech-140808.pdf no 4.

reproached the lack of proportionality of English measures.[621] English courts tried to align the domestic case law to the ECHR without explicitly engaging in proportionality analysis. Since it was impossible to comply with Strasbourg case law at the level of judicial reasoning structures, continuity was sought at the level of judicial methods.

In *Brind*, for example, Lord Bridge advocated that, when examining the reasonableness of the Secretary of State's decision, judges are "*perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it*".[622] Similarly, Lord Templeman engaged in a review akin to proportionality, as equivalent to the test imposed by the common law on the matter, though without explicitly referring to the term.[623] In *ITF* Lord Cooke after stressing the tautology in Lord Greene's dicta in *Wednesbury* said: "*judges are entirely accustomed to respecting the proper scope of administrative discretions. In my respectful opinion they do not need to be warned off the course by admonitory circumlocutions*". So he proposed a loosened formula of the *Wednesbury* test: "*Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the Chief Constable has struck a balance fairly and reasonably open to him*".[624] In *Chesterfield Properties*, Laws J stressed that the *Wednesbury* "*principle*" requires the primary decision-maker to balance the competing rights and public interests at stake. The reviewed decision can subsequently be quashed if it is irrational, that is, if the decision-maker has not provided substantial justification for infringing a constitutional right.[625] This, as we will see, is not very different from some applications of proportionality by the ECHR and the terminology employed in the above decisions echoes Strasbourg case law.[626] Scholars have described the "heightened" application of traditional judicial review standards as proportionality "in all but name".[627]

Continuity of domestic judicial review standards was not only established with the ECHR but also with EC law.[628] Indeed, despite their perception as distinct grounds of review, proportionality under the ECA and *Wednesbury* unreasonableness were perceived to imply the same kind of judicial enquiry when EC law left a margin of appreciation to the reviewed public authority. In *ITF*, for example, Lord Slynn referred to the distinction between proportionality and irrationality as standards of review that the House of Lords had established in *Brind*. However, according to the judge, due to

---

[621] *Campbell v The UK*, 25 March 1992, no. 13590/88; *McLeod v The UK*, 23 September 1998, no. 24755/94.

[622] See *Brind* (HL), cited above, at 748-749.

[623] Ibid, *per* Lord Templeman.

[624] *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd (ITF)* [1998] UKHL 40 (HL, 11 November 1998), *per* Lord Cooke.

[625] *Chesterfield Properties Plc v Secretary of State for the Environment* [1998] 76 P. & C.R. 117 (HC, Queen's Bench Division, 24 July 1997), 132.

[626] On this point, see *infra*, Part III, Chapter 7(1).

[627] Hunt, *Using Human Rights Law in English Courts*, 216; Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: CUP, 2009), 268; Craig, *Administrative Law*, 2016, 624 f. See *infra*, Chapter 5(4).

[628] EU law and ECHR proportionality were often perceived as leading to the same judicial reasoning. See *Gough and another v Chief Constable of the Derbyshire Constabulary* [2002] EWCA Civ 351 (CA, Civil Division, 20 March 2002), paras 62 f.; *B v SSHD* [2000] Imm. A. R. 478 (CA, Civil Division, 18 May 2000).

the margin of appreciation that the ECJ usually accords to national authorities, "*whichever test is adopted, and even allowing for a difference in onus, the result is the same*".[629] This marks an important difference with the first applications of the EC principle of proportionality, like for example in *Bell Line*, where despite the existence of a margin of appreciation, proportionality was explicitly applied as more stringent test than *Wednesbury*.

The rejection of proportionality as an independent ground of review led to its diffusion and dilution in domestic judicial review standards. Proportionality was perceived as a doctrine that was applied through domestic concepts. This deprived the concept of its clarity and integrity in judicial practice. The incorporation of the ECHR in the domestic sphere attributed conceptual autonomy to proportionality again.

2. The application of proportionality under the HRA

Common law constitutionalism before the HRA. While the debates about the application of proportionality in English public law did not lead to the recognition of a separate head of review, they did manifest a significant change – the emergence of fundamental rights discourse. Since the late '80s, fundamental rights ceased to exist solely in the realm of philosophy and were widely promoted by certain scholars and practitioners,[630] as well as by leading judges in their extrajudicial writings.[631] The idea became more and more current that human rights values should not, or not necessarily, be recognised by legislation or through incorporation of the ECHR, but could take place incrementally, through the judicial application of indigenous common law concepts. This idea was expressed in case law too. In *Leech*, for example, a common law right that was characterised fundamental: the prisoner's right to legal professional privilege, which implied free communication with her lawyer.[632] The recognition of substantive common law rights was inspired by the idea that the common law should keep up with international human rights instruments, but it had wider conceptual implications. The rule of law progressively acquired a substantive content. This evolution had been advocated by certain scholars, most notably Trevor Allan and Jeffrey Jowell, who were influenced by interpretative legal theories.[633]

---

[629] See *ITF*, cited above.

[630] Jowell and Lester, "Proportionality: Neither Novel nor Dangerous"; Jowell and Lester, "Beyond Wednesbury"; Smith et al., *Judicial Review of Administrative Action*; Hunt, *Using Human Rights Law in English Courts*.

[631] See Nick Browne-Wilkinson, "The Infiltration of a Bill of Rights," *PL*, 1992, 397; Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?"; John Laws, "Law and Democracy," *PL*, 1995, 72; Stephen Sedley, "Human Rights: A Twenty-First Century Agenda," *PL*, 1995, 386; Tom Bingham, "The European Convention on Human Rights: Time to Incorporate," in *The Business of Judging Selected Essays and Speeches* (Oxford: OUP, 2000), 131.

[632] *R v Secretary of State for the Home Department, ex parte Leech* [1994] Q.B. 198 (CA, Civil Division, 19 May 1993); See also *R v Lord Chancellor, ex parte Witham* [1998] 2 W.L.R. 849 (HC, Queen's Bench Division, 7 March 1997).

[633] On this development, see Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework.," *PL*, 1997, 467.

Not only did the rule of law acquire a substantive content, but it also became an overarching principle of the English constitution. In 1992, Lord Browne-Wilkinson had already argued that the common law could offer a "halfway" Bill of Rights through the technique of presumptions of statutory interpretation, which resembles to the French *réserves d'interprétation*. The judge urged courts to presume that, in the absence of clear and precise statutory words, Parliament did not mean to infringe fundamental rights.[634] Lord Browne-Wilkinson himself followed this line of argument in *Pierson*, where the House of Lords announced that it would take into account fairness considerations when constructing the presumed will of Parliament.[635] In the same vein, in *Simms*, Lord Hoffmann proclaimed a general principle of legality, according to which "*general powers of decision-making conferred by statute were presumed to have been enacted as subject to fundamental civil liberties*".[636] Thus, legality was transformed, from a formal quality to a principle requiring the protection of substantive values, among which were fundamental civil liberties. A "liberal philosophy of common law constitutionalism" began to be developed in judicial opinions and in judges' extrajudicial writings and speeches, with Sir John Laws as its most important representative.[637]

Contesting parliamentary sovereignty. The above evolutions were hardly reconcilable with the traditional perception of parliamentary sovereignty as the cornerstone of the English constitution. The Diceyan account was progressively perceived as ill-adapted to capture the practice of judicial review, as a "misleadingly partial truth".[638] Dicey himself became probably the most criticised author in English legal writings. Indeed, it was difficult to explain the principles of substantive justice imposed by courts, as well as their application to authorities that did not derive their power from statute. Progressively, English lawyers became conscious of the fact that courts were *supplementing* and not simply implementing legislative intent.[639] The concept of sovereignty had to be reinvented to accommodate this newly acquired power of courts. Already in 1991, Lord Bridge referred to the sovereignty of Queen in Parliament in making the law, and to the sovereignty of Queen's courts in applying it.[640] Sovereignty thus came to be perceived as no longer unitary, "a matter of plain truth",[641] but as a power divided among different institutions. Talk of a "bi-polar

---

[634] Browne-Wilkinson, "The Infiltration of a Bill of Rights."

[635] *R v Secretary of State for the Home Department, ex parte Pierson* [1998] A.C. 539 (HL, 24 July 1997).

[636] *R v Secretary of State for the Home Department, ex parte Simms & O'Brien* [1999] 3 W.L.R. 328 (HL, 8 July 1999).

[637] See Hickman, *Public Law after the Human Rights Act*, 20; see for example Laws, "Law and Democracy"; Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?"

[638] Colin Turpin, *British Government and the Constitution: Text, Cases and Material*, 4th ed. (Cambridge: CUP, 1999), 39; cited by Matthew Gale, "The UK's Uncodified Constitution – Parliamentary Sovereignty and the Rise of Common Law Constitutionalism," November 2017, http://pennjil.com/the-uks-uncodified-constitution-parliamentary-sovereignty-and-the-rise-of-common-law-constitutionalism/, note 13; see also Hunt, *Using Human Rights Law in English Courts*; Sedley, "Human Rights: A Twenty-First Century Agenda"; Paul Craig, "Competing Models of Judicial Review," *PL*, 1999.

[639] Craig, *Administrative Law*, 2016, para 19-028.

[640] Lord Bridge in *X. v Morgan-Grampian* [1991] 1 A.C. 1 (HL, 4 April 1990), cited by Loughlin, *The British Constitution*, 99.

[641] Allison, *The English Historical Constitution*, 106.

sovereignty" of Parliament and the judiciary, to which the Government is accountable, became progressively recurrent in English legal discourse.[642]

Shocks to the Diceyan account also came from the side of EU law. Since the 1990 *Factortame* case, the House of Lords had affirmed its power to disapply an act of Parliament that was found to be in breach of EU law.[643] Ever since, it was accepted that if Parliament wants to depart from EU law, it should explicitly state so. In other words, it was accepted that Parliament could bind future Parliaments, at least by imposing formal and procedural requirements on the repeal of a particular act. Again, a "re-invention" of parliamentary sovereignty was necessary. In Lord Bridge's famous dicta, "*whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary*".[644] In this way, Parliament's sovereignty ceased to be absolute. Limitations to the principle came to be conceivable under English law. Mainstream scholars perceived this as a fundamental change in the English constitution. In Sir William Wade's terms, the constitution was "bending before the winds of change".[645]

The HRA and constitutional reform. The Human Rights Act (HRA), voted through in 1998, confirmed and accelerated these fundamental changes.[646] According to the Labour Government that drafted it, the statute's purpose was to "bring rights home" so that they are directly enforced by English courts.[647] The Act attributed legal status to most of the rights protected by the ECHR, together with their limitations and restrictions. It also provided for derogation under article 15 ECHR. Article 13, guaranteeing the right to an effective remedy before a national authority for violations of the Convention was not incorporated, since the Act itself was purported to introduce such a remedy in domestic law. Section 2 HRA requires that domestic courts and tribunals "take into account" Strasbourg case law in the application of the Convention. This means that, while this case law must be considered, it does not acquire the binding force of precedent. With the entry into force of the HRA in 2000, fundamental rights became domestic public law values. This enhanced the spread of fundamental rights language. Ever since, scholarly analyses on the matter have abounded in reviews and manuals.

The HRA concerns all public action in the scope of the ECHR. Hence, horizontal effect is attributed to Convention rights only insofar as such protection is provided for by the Convention itself. The Act also applies to the private actions of public authorities. In judicial review, Convention rights constitute a new ground of illegality for public acts and failures to act. Section 6 declares: "It is unlawful for a public authority to act in a way which is incompatible with a Convention right". The operation

642 Sedley, "Human Rights: A Twenty-First Century Agenda."

643 *R v Secretary of State for Transport, ex parte Factortame Ltd* [1991] 1 AC 603 (HL, 11 October 1990).

644 Ibid, 658.

645 William Wade, "The Basis of Legal Sovereignty," *CLJ* 13, no. 2 (November 1955): 191; cited by Allison, *The English Historical Constitution*, 112, fn. 52.

646 Craig, *Administrative Law*, 2016, para 18-012.

647 Labour White Paper, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf.

of HRA standards brings about some important changes in the common law procedure of judicial review. According to section 7, only the victims of violations of the ECHR, as defined in article 34 of the Convention, can rely on the rights defined therein. This condition is more restrictive than the sufficient interest required for judicial review applications in the common law. Section 8 gives wide discretion to courts as to the remedies for the violation of the Convention, since it allows for all remedies that the court will consider "just and appropriate".

Insofar as the review of legislation is concerned, the HRA constitutes a delicate compromise between the need to protect rights and to respect the international obligations of the UK on the one hand; and the principle of parliamentary sovereignty on the other. Section 3 HRA establishes a presumption of statutory interpretation in accordance with ECHR rights.[648] In this way, it announces an additional parliamentary intent, the will to comply with the Convention, which has to be taken into account by the court every time. If Convention-compatible interpretation is impossible, higher courts are able to declare primary legislation incompatible with the Convention under section 4. Declarations of incompatibility do not affect the validity of the statute at stake and are not binding for the parties in the proceedings. They only open the way to the fast-track amendment of Parliament acts provided for by section 10. This special procedure gives to the Minister, if she considers that there are compelling reasons, the power to issue remedial orders for amending legislation that is incompatible with Convention rights. Finally, section 19 introduces compatibility statements during the legislative process. This section requires from the competent Minister every time to state that the bill provisions that she proposes are compatible with the Convention, or that she wants the bill to be voted through, despite its incompatibility with the Convention.

The introduction of fundamental rights adjudication in the English context warranted important institutional changes from the point of view judicial independence. Such changes were mainly the object of the Constitutional Reform Act 2005 (CRA), which implemented a formal separation of powers inspired by the Continent.[649] Part III of the Act instituted the Supreme Court, to which the judicial powers of the Law Lords were transferred. The Supreme Court adopted its functions in 2009 and was composed by the Lords that were members of the Appellate Committee until then. Its members are appointed by the Queen on the advice of the Prime Minister and are not necessarily peers. Further, the CRA 2005 considerably affected the office of the Lord Chancellor, who was unvested from her judicial role. In terms of transparency, during the last decades, one can observe an institutional upgrading of the judiciary. The Supreme Court now disposes of an updated internet

[648] See Kavanagh, *Constitutional Review under the UK Human Rights Act*, 91 f.
[649] Allison, *The English Historical Constitution* Introduction.

site where press releases of its important decisions are issued.[650] Judges often express themselves in speeches that enjoy wide publicity.[651]

Proportionality has had a core role to play in the above evolutions. With the voting of the HRA, it explicitly emerged in English scholarship as a domestic constitutional principle. Before the statute entered into force, judges had already started applying proportionality whenever the text before them allowed for it. Although the matter was initially debated in certain judicial opinions, the view that prevailed was that proportionality entailed a more intensive scrutiny than the traditional *Wednesbury* test. Proportionality implies an important constitutional shift, since it renders courts and not the democratically elected branches responsible for the definition of constitutional rights (*paragraph i*). The form and function of proportionality under the HRA is that of a prong-structured test for assessing the outcomes of public decisions (*paragraph ii*). As such, proportionality implies a significant extension of judicial powers. However, English lawyers insist that the role of courts remains distinct from the one ascribed to the reviewed authorities. This distinction is ensured through the doctrine of deference (*paragraph iii*).

i. The reception of proportionality in human rights cases

The change in the role of the judiciary. The voting through of the HRA reinvigorated scholarly debates on proportionality. The transition from *Wednesbury* to proportionality was identified by English public lawyers as one among the most important changes brought about by the Act, if not *the* most important. Jeffrey Jowell, for example, foresaw that the new role of courts would be the protection of fundamental rights. They were to accomplish this mission through proportionality weighing and balancing of competing values.[652] Scholars perceived the proportionality test as more intrusive and sophisticated than the administrative law concept of irrationality, and they noticed that it was composed of distinct reasoning prongs.[653] According to Jowell, proportionality would bring about a shift in the burden of proof: whenever a *prima facie* interference with a right would be observed, the competent public authority would be required to show that the measure is justified. At the time, similar analyses presenting the principle of proportionality as a pronged structure of

[650] https://www.supremecourt.uk/index.html

[651] For example, Lord Neuberger, the former president of the Supreme Court, often writes newspaper articles and presents public speeches. See Neuberger, "The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK Experience."

[652] Jeffrey Jowell, "Beyond the Rule of Law: Towards Constitutional Judicial Review," *PL*, 2000, 678 f.

[653] Elliott, "The Human Rights Act 1998 and the Standard of Substantive Review"; Michael Fordham and Thomas de la Mare, "Identifying the Principles of Proportionality," in *Understanding Human Rights Principles*, ed. Jeffrey Jowell and Jonathan Cooper, Justice Series (Oxford; Portland, Or: Hart, 2001), 27; Hunt, *Using Human Rights Law in English Courts*.

reasoning and urging the courts to adopt it proliferated in law reviews and collective books.[654] Thus, the form and function of the English proportionality doctrine was much akin to the Alexyan theory.

Even before the entry into force of the HRA, it was obvious that there had also been a shift in the way courts perceived their role. The first time proportionality was applied by a domestic court as a constitutional law principle was in *de Freitas*, a case that did not concern English law.[655] The Civil Servants Act of Antigua and Barbuda prohibited any expression of opinion by civil servants on politically controversial matters. Mr de Freitas, an individual affected by this provision, claimed that the restriction was disproportionately infringing his freedom of expression and of peaceful assembly and association guaranteed by the Antigua and Barbuda Constitution. In response, the Government contended that the Constitution itself allowed for restrictions to civil servants' rights when they are "reasonably required for the proper performance of their functions" and when they are "reasonably justifiable in a democratic society". The case was brought before the Privy Council, a judicial body composed by senior judges of the UK and other Commonwealth countries, which acts as a supreme court of appeal for certain Commonwealth courts.

In the Privy Council, Lord Clyde, with whom the majority of the justices agreed, recalled the special position of civil servants in a democratic society. However, he continued, this position did not justify substantial interference with their rights. Instead, a "*proper balance*" had to be struck between the public interest in well-functioning public services, and those rights.[656] Examining the justification of the restrictions to civil servants' freedom of expression, the judges adopted a three-pronged proportionality test: the restriction should pursue a sufficiently important objective; it should be rationally connected to this objective; and the measures adopted should not be more than necessary for its achievement. Though the judges held the restriction to satisfy the first two criteria, its blanket character "*raised a question of proportionality*".[657] More precisely, the lack of regard to the special circumstances surrounding each case could not, according to the court, be justified in a democratic society.

Proportionality and common law standards: a continuum? In its judgment, the Privy Council cited related case law from many jurisdictions, like the ECHR, English, or Canadian courts. Concerning the proportionality test in particular, the judges referred to the way other Commonwealth courts had interpreted clauses similar to the "reasonably justifiable in a democratic society" clause of the Antigua and

[654] Browne-Wilkinson, "The Infiltration of a Bill of Rights," 229; 233-234; John Laws, "The Limitations of Human Rights," *PL*, 1998, 262, 265; Craig, "Unreasonableness and Proportionality in UK Law"; Garreth Wong, "Towards the Nutcracker Principle, Reconsidering the Objections to Proportionality," *PL*, 2000, 92; David Pannick, "Principles of Interpretation of Convention Rights under the Human Rights Act and the Discretionary Area of Judgment," *PL*, 1998, 549.

[655] *Elloy de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others* [1999] 1 A.C. 69 [Privy Council (Antigua and Barbuda), 30 June 1998].

[656] Ibid at 76.

[657] Ibid at 80.

Barbuda Constitution. The court first cited a South African case where the Supreme Court had adopted a similar test, drawing on Canadian case law. However, the South African and Canadian tests contained an additional prong: apart from legitimate, adequate and necessary, the restriction of the right in question should have "*no disproportionately severe effect on those to whom [it] applies*".[658] This criterion was absorbed by the necessity prong in two subsequent Zimbabwean cases, on which the Privy Council finally based its own application of proportionality in *de Freitas*.[659] Interestingly, thus, as Margit Cohn has observed, proportionality was first applied by English judges as a Commonwealth transfer.[660] Connection to Continental Europe was only indirect and informal, passing through the influence of the Strasbourg and German case law on the Canadian and South African case law.

Daly has attracted scholarly attention as the first application of proportionality under the HRA. However, the principle was actually applied before, in *Mahmood*, albeit not as an independent head of review.[661] In this case an illegal entrant in the UK was refused asylum by the British authorities and would be removed from the country, though he was married to a UK citizen. Mr Mahmood contested the decision as a disproportionate infringement of his right to family life. The High Court judge dismissed the application, even though at the time of the decision Mr Mahmood had two children in the UK. The judge accepted the Government's submissions that the restriction served the public interest of immigration control.

The facts of the decision took place before the entry into force of the HRA. That is why, on appeal, Laws and May LJJ did not apply the proportionality test but resolved the dispute according to the traditional *Wednesbury* principles, adjusted to the human rights context. They found that the Secretary of State's decision was reasonable. In response to the applicants claims based on the HRA and the Convention, Laws J stated that, even under the HRA, judicial decisions would "*form part of a continuum with what the common law ha[d] already said*".[662] Thus, he concluded that, even if the Convention was applied in the case before him, no violation of article 8 would be found and the Secretary of State would be entitled to reach the conclusions that he did.

---

[658] Ibid.

[659] See also *Thomas v Baptiste* [2000] 2 A.C. 1 [Privy Council (Trinidad and Tobago), 17 March 1999], concerning the due process clause of the Constitution of the country.

[660] See Margit Cohn, "Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom," *American Journal of Comparative Law* 58 (2010): 621. However, one should bear in mind that the *de Freitas* decision did not concern English law. The Judicial Committee of the Privy Council hears appeals from the Commonwealth countries having preserved this competence. Antigua and Barbuda is one of these countries. Judicial reasoning should thus be assessed having in mind the particularities of the interpreted text. Contrary to the English case, Antigua and Barbuda possesses an extensive bill of rights and a special clause governing restrictions to these rights. Moreover, although reference to a "democratic society" echoes the ECHR, Antigua and Barbuda are not signatory parties to the Convention and have received this clause via Commonwealth influence.

[661] *R v Secretary of State for the Home Department, ex parte Mahmood* [2001] 1 W.L.R. 840 (CA, Civil Division, 8 December 2000).

[662] Ibid, para 30.

The idea of a continuum between the ECHR and common law principles underlies Lord Phillips Master of the Rolls's opinion too. In contrast to the rest of the Lord Justices, Lord Phillips considered that since the Secretary of State claimed to have taken into account article 8 of the Convention, the court should review the application of the ECHR principles. That being, the Master of the Rolls' opinion did not lead to a different result from the one reached by his colleagues, the appeals were dismissed. In fact, Lord Phillips observed that, just like when common law rights were at stake, under the HRA the role of the court would remain supervisory and would only concern the reasonableness of the decision. Of course, the human rights context warranted "*anxious scrutiny*" of public decisions. Still, in contrast to the common law principles, under the HRA the court would not only confine itself to requiring a "*substantial justification*" in order to approve the decision. It would further impose a necessity test on the primary decision-maker. In Lord Phillips's words,

> [w]hen anxiously scrutinising an executive decision that interferes with human rights, the court will ask the question, applying an objective test, whether the decision-maker could reasonably have concluded that the interference was necessary to achieve one or more of the legitimate aims recognised by the Convention. When considering the test of necessity in the relevant context, the court must take into account the European jurisprudence in accordance with section 2 of the 1998 Act.[663]

After a long survey of Strasbourg case law on the matter, the judge concluded as to certain principles that he would apply to the facts of the case. In his opinion, the decision that the removal of the applicant was necessary in the interest of immigration control was one that a reasonable Secretary of State was entitled to take.[664]

From *Wednesbury* to proportionality: a constitutional shift. The issue of continuity between proportionality and *Wednesbury* was explored in more detail in *Daly*, where the application of proportionality achieved unanimity among the Law Lords.[665] The case concerned the compatibility with the HRA of a government policy requiring prisoners to be absent when their cell and their legal correspondence were searched. Lord Steyn was in disagreement with the Justices of the Court of Appeal in *Mahmood*. He observed that there is "*a material difference*" between the traditional common law conceptual tools and the proportionality test.[666] Referring to the three proportionality criteria articulated in *de Freitas*, he stressed that they are "*more precise and more sophisticated than the traditional grounds of review*".[667] Then he went on to compare the two approaches, based on academic works on the subject. He observed that, even though in many cases

---

[663] Ibid, para 40.

[664] These dicta were followed in *R v Secretary Of State for Home Department, ex parte Isiko & Another* [2000] EWCA Civ 346 (CA, Civil Division, 20 December 2000) and in *R v Secretary of State for the Home Department, ex parte Samaroo* [2000] EWHC Admin 435 (HC, Queen's Bench Division, 20 December 2000). *See R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26 (HL, 23 May 2001), para 25, *per* Lord Steyn.

[665] *Daly*, cited above.

[666] Ibid, para 26.

[667] Ibid, para 27.

proportionality and rationality may overlap and lead to the same results, in certain cases they do not. Under proportionality the intensity of review is "*somewhat greater*". Indeed, according to Lord Steyn, even the "anxious scrutiny" effectuated until then in fundamental rights cases did not entail such a thorough examination as "*the twin requirements (…) of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued*".[668]

Differences between the two approaches did not only concern the intensity of review but also its quality. In Lord Steyn's words, contrary to the traditional irrationality review, proportionality may require the court to "*assess the balance*" struck by the reviewed authority. It may also require "*attention to be directed to the relative weight accorded to interests and considerations*".[669] What *Daly* made clear then, is that the principle of proportionality does not confine judgment to whether the decision was reasonable; rather it might lead the court to substitute its own judgment concerning the substance of the case for that of the primary decision-maker. Thus, it entails an important constitutional shift. Under the HRA, apart from the interpretation of Convention terms and the scope of Convention rights, the courts also decide for themselves the question of proportionality.[670] As a consequence, under the HRA, it is the responsibility of the judiciary to determine "the essentially constitutional question, namely, whether the measure fulfils the constitutive requirements of a modern democracy".[671]

In *Daly* the House of Lords finally accepted proportionality as an autonomous principle and head of review in domestic public law.[672] This decision remains the leading authority in HRA cases. It defined proportionality as a more intense type of review than the traditional *Wednesbury* standard. Most importantly, it established proportionality as the correct test for the assessment of rights limitations under the "necessary in a democratic society" requirement.[673] Ever since, proportionality has proliferated in case law under the HRA and has inspired elaborate analyses and debates in scholarship. It is considered a crucial feature in the transformation of English public law into a fundamental rights order. The consistent and coherent way that English judges apply the principle has significantly contributed to this shift.

ii. The structure of proportionality in English judicial review

A well-defined structure. Contrary to its first applications in English administrative law, it is now generally accepted among English lawyers that

---

668 Ibid.

669 Ibid.

670 Craig, *Administrative Law*, 2016, paras 18-041 f. Kavanagh, *Constitutional Review under the UK Human Rights Act*, 239 f. See also Lord Bingham in *R v Headteacher and Governors of Denbigh High School, ex parte Begum* [2006] UKHL 15 (HL, 22 March 2006), 30.

671 Jowell, "Beyond the Rule of Law: Towards Constitutional Judicial Review," 680.

672 Hickman, *Public Law after the Human Rights Act*, 173.

673 *Regina v Shayler* [2003] 1 A.C. 247 (HL, 21 March 2002), para 33.

proportionality consists of a prong-structured test for assessing the justification of fundamental rights limitations. The analysis of some landmark cases illustrates the way proportionality is applied in English judicial review.

Just like in Strasbourg case law or in the global proportionality model, typically judicial reasoning under the HRA is two-fold. Courts engage in proportionality analysis only after ascertaining that a public authority or the legislator has interfered with human rights. If such interference has taken place, the judge will examine whether interference is justified and respects the precepts of the Convention under the framework of proportionality. Though the prongs differ among the various analyses, the dominant proportionality structure requires that any measure restricting a fundamental right should respond to a "pressing social need", and it should be suitable and necessary in order to achieve its aim.[674] This last requirement of necessary or non-excessive restrictions is also called proportionality "in the narrow sense".[675] On this point, the English proportionality model departs from the structure presented by the transnational proportionality literature, in which the last stage is the test of *stricto sensu* proportionality and implies a value-laden balancing of competing values.

The legitimate aim and rationality requirements. Influenced by Strasbourg, the typical English approach to the legitimate aim criterion requires a "pressing" necessity, aim or social need. When judges defer to the choices of the primary decision-makers, the objective of the reviewed measures is defined in general terms.[676] On the contrary, when the necessity of the measures is doubted, their objective can be very concretely defined in order to assess less restrictive alternatives. The judge will form her own view on the legitimacy of the justification provided by the primary decision-maker. In *Lambert*, for example, Lord Steyn described in a detailed way the mischief that the law sought to face:

> sophisticated drug smugglers, dealers and couriers typically secrete drugs in some container, thereby enabling the person in possession of the container to say that he was unaware of the contents. Such defences are commonplace and they pose real difficulties for the police and prosecuting authorities.[677]

Having identified this problem, Lord Steyn affirmed that there was "*objective justification for some interference with the burden of proof in prosecutions*" and with the claimant's presumption of innocence.

Since the legitimacy of the justification provided by the reviewed authorities is objectively established, the relation between the legitimate aim and the suitability test

---

[674] *De Freitas, Daly, Samaroo,* cited above; Kavanagh, *Constitutional Review under the UK Human Rights Act*, 234.

[675] Kavanagh, 235.

[676] See also *R v Attorney General and another, ex parte Countryside Alliance and others* [2007] UKHL 52 (HL, 28 November 2007), where the claimants pushed for a more precise definition of the legislative objective which was rejected by the court.

[677] *Regina v Lambert*, cited above, para 36 (*per* Lord Steyn).

is not always clear. This is very well exemplified in the famous *Belmarsh Prison* case.[678] After the terrorist attacks of September 2001, the British Parliament enacted the Anti-terrorism, Crime and Security Act 2001. Derogating from article 5 ECHR, the Act provided for the indefinite detention without trial or deportation of non-British nationals suspected of being a threat to national security. The derogation was based on article 15 ECHR and justified by a terrorist threat to the UK. The British Parliament's Joint Committee on Human Rights and other human rights institutions had expressed doubts as to the necessity of the derogation under the terms of the Convention. Their statements were invoked by the appellants who contested the proportionality of the measures. The Attorney General, in response, submitted that the international terrorists of Al Qaeda constituted "a public emergency threatening the life of the nation" as article 15 requires. He founded his submission on evidence which was partly secret.

Concerning the legitimacy of the aim that the derogation pursued, namely the existence of a threat to the life of the nation, Lord Bingham observed that the appellants had not succeeded in showing an error in law in the reviewed authorities' decision. Citing Strasbourg case law on the matter, he observed that national governments enjoyed a wide margin of appreciation in determining whether there existed a public emergency that justified derogations from the ECHR. Moreover, he stressed that the question was "*a pre-eminently political judgment*", requiring predictions about human behaviour, on which reasonable disagreement can exist.[679] A political resolution of the question would be more appropriate than the court substituting its own view for that of the Home Secretary. Lord Bingham thus accepted that the objective invoked by the Attorney General was sufficiently important to justify derogation from article 5.

Then, Lord Bingham proceeded to the examination of the proportionality of the measures. Indeed, in his view the requirement of a strict necessity for the derogation, imposed by article 15, entailed a proportionality test. The applicants contested the rationality of the restrictions: they claimed that, addressed only to non-British nationals, they were designed as measures of immigration control rather than anti-terrorist measures. Lord Bingham agreed with the claimants' arguments. He observed that the measures did not address the threat constituted by UK nationals, which, even though quantitatively less important, was not qualitatively different from the one posed by foreign nationals. Moreover, the applicants submitted that the policy of allowing suspected terrorists to depart the country was not rational if the government's purpose was to prevent a terrorist attack. The reasons provided by the executive branches did not explain "*why a terrorist, if a serious threat to the UK, ceases to be so on the French side of the English Channel or elsewhere*".[680] On the contrary, these provisions were understandable if the measures were designed for immigration control. The judge therefore concluded

[678] *A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department* [2004] UKHL 56 (HL, 16 December 2004). William Wade, *Administrative Law*, 9th ed. (Oxford; New York: OUP, 2004), 366.

[679] *A and others*, cited above, paras 28-29.

[680] Ibid, paras 30 f.

that a declaration of incompatibility for breach of proportionality would be appropriate: "*the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem*".[681] The majority of the Lords of Appeal agreed with Lord Bingham's opinion.

Lord Hoffmann also agreed with his colleagues that the measures were disproportionate. However, he dissented as to the exact prong of proportionality that was applicable in this case. In his opinion, even if the existence of a terrorist threat was accepted, without regard to the secret evidence invoked by the Attorney General, this threat would not be serious enough to constitute a threat to the life of the nation:

> Of course the government has a duty to protect the lives and property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms. There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom. (…) Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community. (…) This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda.[682]

In Lord Hoffmann's view then, derogation from article 5 did not serve a sufficiently important legitimate aim and, in judging that it did, the lower courts and tribunals had erred in law. There was no need for the court to examine the rationality of the measures, since their compatibility with the Convention was already excluded from the first prong of the proportionality analysis.

The necessity and balancing stages. In the dominant version of proportionality in English case law, the last prong of proportionality is the necessity test. Under this prong the court sanctions over-inclusive means like blanket prohibitions, when a partial one would succeed in achieving the aim. In *R v A*, for example, the defendant was accused of rape. As a defence he claimed that he had the consent of the alleged victim and he wanted to adduce evidence that he had had sexual intercourse with the victim some days before the incident. For the protection of victims of sexual crimes, a legislative provision totally excluded such evidence.[683] In examining the compatibility of the provision with the right to fair trial, Lord Slynn observed that it contained a blanket prohibition of potentially relevant evidence. In this judge's words, "*[w]hilst the statute pursued desirable goals, the methods adopted amounted to legislative overkill*".[684] Even though this could not be remedied through the common law

[681] Ibid, para 43.
[682] Ibid, para 95-96.
[683] *Regina v A (No 2)* [2002] 1 A.C. 45 (HL, 17 May 2001).
[684] Ibid, 67.

rules of statutory construction, section 3 of the HRA imposed a strong interpretative presumption. Thus, the provision should be construed in compatibility with the Convention and the principle of proportionality and it should be read as allowing *ad hoc* relevant evidence.[685]

The English structure of proportionality has generally been characterised by an ambiguity as to the balancing exercise, which is usually deemed to be engaged at the necessity stage.[686] In *Huang*, counsel for the claimant said that the *de Freitas* formulation of the test was wrong in ignoring this last prong of proportionality.[687] Considering this claim, Lord Bingham cited with approval his own dicta in *Razgar* and stated that proportionality "*must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention*". In his view, "*the severity and consequences of the interference will call for careful assessment at [the necessity] stage*".[688] However, the judge went on to state that whenever the individual is completely deprived of her right to family life, the impact of the impugned measures will be disproportionate in any case. In this way, Lord Bingham detached disproportionality from the necessity stage. Since this case, the balancing exercise has been announced in certain opinions under a fourth stage of proportionality analysis. In *Bank Mellat*, referring to the Canadian Supreme Court decision in *Oakes*, Lord Reed stated that

> there is a meaningful distinction to be drawn (…) between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right (step one), and the question whether, having determined that no less drastic means of achieving the objective are available, the impact of the rights infringement is disproportionate to the likely benefits of the impugned measure (step four).[689]

Hence, the reasoning that the balancing test implies was further refined. While it concerns the value-scale of the primary decision-maker, it is distinguished from the legitimate aim requirement, due to its *ad hoc* nature. While it entails consideration of the circumstances of the case, it is distinguished from the necessity stage, which is only concerned with outcomes, without questioning the aim of the reviewed decision. Resemblance to the Alexyan proportionality model is striking.

Nonetheless, neither in *Huang* nor in *Bank Mellat,* did the judges engage in an explicit balancing exercise.[690] In reality, the fourth stage was reduced to a prohibition

---

[685] Ibid, 68.

[686] Kavanagh, *Constitutional Review under the UK Human Rights Act*, 235–36.

[687] *Huang v Secretary of State for the Home Department; Kashmiri v Same* [2007] 2 A.C. 167 (HL, 21 March 2007).

[688] Ibid, para 19.

[689] *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 39 (SC, 19 June 2013), para 74.

[690] In *Bank Mellat*, the Supreme Court assessed the fair balance struck by the reviewed authority in view of the requirements of rationality: see *per* Lord Sumption, esp. para 20. The orthodox scholarly perception of proportionality analysis initially did not involve balancing either. See Jowell, "Beyond the Rule of Law: Towards Constitutional Judicial Review." Even though this author includes an overall impact test as the last prong of the proportionality structure, this test does not involve a balancing

to interfere with the "substance" of the right at stake, similar to that existing in the ECHR context. Other decisions invoke such a minimum content of rights as well. In *Roth*, Simon Brown LJ announced a further requirement that the interference should not impose an excessive burden on the individual. Analysing this requirement, the judge talked about "*an irreducible minimum of Convention rights*" and he specified that "*[h]owever compelling the social goal, there are limits to how far the individual's interest can legitimately be sacrificed to achieve it*".[691] Reference to the minimum content of a right implies categorical reasoning. Thus, English judges usually do not engage in balancing, in the sense of the global proportionality model: the intensity of interference with the right is not compared to the degree of advancement of the legitimate aim according to a certain scale of values.[692] While it might not have transformed the English judge to a modern day Socrates, the adoption of proportionality as an HRA head of review did bring about an important extension of judicial powers in the English context.

iii. Culling "sacred cows":[693] the distinctiveness of proportionality

An outcome-based test. How did proportionality affect pre-existing concepts and methods in English judicial review? At first glance, the first two stages of proportionality seem to provide a more sophisticated and intrusive version of already existing methods. Indeed, in many cases the legitimate aim test will correspond to the exclusion of illicit purposes, traditionally sanctioned by English judges under the head of illegality.[694] Similarly, the rationality test in many cases overlaps with the improper purposes or the relevancy test.[695] Yet, important differences exist between the traditional common law methods and these two proportionality stages. First of all, the scope of the review is much broader, since it generally applies to public actions justiciable under the ECHR. Most notably in this respect, proportionality is not addressed only to the administration but also to the legislature. Moreover, while previously the purposes were concretely determined by the relevant statute through construction or interpretation, now they consist in general and indeterminate values, such as "national security", "the protection of morals" or "the protection of the rights of others". Therefore, proportionality, through the legitimate aim requirement, in fact

---

exercise, since it does not assess the advancement of the aim in comparison with the interference with the right at stake.

[691] *International Transport Roth GmbH and others v Secretary of State for the Home Department* [2003] Q.B. 728 (CA Civil Division, 22 February 2002), paras 28-9.

[692] These observations should be nuanced after the famous *Nicklinson* case, where some of the Supreme Court judges engaged in an explicit and detailed balancing exercise, taking into account legal, moral and factual considerations. *R v Ministry of Justice, ex parte Nicklinson and another; R v The Director of Public Prosecutions, ex parte AM; R v The Director of Public Prosecutions, ex parte AM* [2014] UKSC 38 (SC, 25 June 2014). On this case see *infra*, Part II, Chapter 5(6).

[693] Reference to Lord Slynn's dicta in *Lambert*, cited above, para 6. According to this judge, the application of the HRA would require important constitutional changes in English law, "*sacred cows culled*".

[694] Since proportionality is considered a separate, additional ground of review, it is often said that it presupposes the existence of a legitimate purpose.

[695] See on the common law constraints on administrative discretion Craig, *Administrative Law*, 2016, paras 17-009 f.

imposes a procedural and substantial duty to provide (legitimate) reasons for public action and even for legislation. Such a duty did not exist before in English judicial review.[696] When no legitimate aim at all is advanced by the Government, the measure fails without need to evaluate its objective.[697]

Most importantly, and differently to traditional judicial review, the judge will substitute her own view as to the justification provided by the reviewed authorities. As we saw, this is possible through the objective evaluation of the merits of the measures at stake. More generally, what distinguishes proportionality from traditional methods is its concern with the outcomes of the reviewed decision and not the decision-making procedure. In this sense, proportionality is perceived as an objective test.[698] As Lord Bingham made clear in *Begum,* "*what matters in any case is the practical outcome, not the quality of the decision-making process that led to it*".[699] There goes a "sacred cow" of English judicial review, traditionally concerned with questions of competence and procedure.

In some cases the court has gone so far as to consider alternative measures advancing the purpose and to require evidence as to the ineffectiveness of such measures. In *Laporte*, the claimant was on a bus on her way from London to Gloucestershire, where she was to participate in a demonstration.[700] The police officers considered that certain of the passengers were "Wombles", members of a group likely to provoke breaches of peace at the demonstration. For this reason they forced all the demonstrators to return to London and they prohibited them to disembark from the buses until arrival. The claimant complained that, by preventing her to participate in the demonstration and by forcing her to remain in the bus, the police had violated her Convention rights. Lord Rodger, when examining the proportionality of the measures, observed that the chief constable had not considered less restrictive alternatives. The judge himself proposed such alternatives which "*would have materially reduced the threat of violence*" at the protest.

> One less drastic step which Mr Lambert might have taken would indeed have been to allow the coaches to go on to Fairford where the forces assembled to deal with an anticipated demonstration of up to 10,000 protesters would surely have been able to prevent any breach of the peace which the eight known Wombles were planning. Another possibility would have been to target the known Wombles on the coaches and to remove them at Lechlade. There is no evidence to show that this would

[696] *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 (HL, 24 June 1993) at 564. See also Kavanagh, *Constitutional Review under the UK Human Rights Act*, 241 f.

[697] *Ghaidan v Mendoza* [2004] 3 WLR 113 (HL, 21 June 2004), para 18.

[698] See *Begum,* cited above, *per* Lord Bingham, para 30. See also *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420 (HL, 25 April 2007), *per* Lord Hoffmann para 13; *per* Lord Mance para 44; *per* Lord Neuberger, para 88.

[699] *Begum*, cited above, para 31.

[700] *R v Chief Constable of Gloucestershire Constabulary, ex parte Laporte* [2007] 2 A.C. 105 (HL, 13 November 2006).

> not have been practicable, given the forces and facilities available to the police there.[701]

Even though the judges generally acknowledged "*the danger of hindsight*" and the respect due to the "*judgment of the officer on the spot, in the exigency of the moment*",[702] they considered that the restrictions to the rights of the claimants had been disproportionate. Consideration of alternative measures can take place even in the review of the legislature.[703]

In contrast to the common French perception of proportionality as a "narrowly tailored" test, in English public law proportionality not only concerns the scope of the contested measures, but also their real impacts. This is why judicial enquiry under proportionality is always concerned with the concrete facts of the case. *Shayler* concerned the disclosure of information by a former member of the security service.[704] Such a disclosure was banned by an act of Parliament. The House of Lords found that *in abstracto* the impugned Act was compatible with the Convention, since procedures were available to individuals for exemption from the duty of confidentiality in case a public interest required so. Refusal of authorisation to disclose information was justiciable under judicial review procedures and would be submitted to anxious scrutiny. Moreover, according to the court, in case of malpractices within the security service, the public interest could be protected through internal procedures.

However, the Lords stressed the importance of the fact-sensitive application of proportionality. The above legally established procedures satisfied the requirements of the Convention, "*if properly applied*", that is, given that "*the power to withhold authorisation was not abused and that proper disclosures were not stifled*".[705] In other words, while in the abstract the ban and the possibility to authorise disclosure did not violate article 10 ECHR, the *concrete* proportionality of the relevant provisions would depend on their application by the competent authorities in each case.[706] In the case at hand, no disproportionate administrative conduct was at stake, since Shayler had not requested any authorisation in the first place.

Enhancing judicial fact-finding tools. The impact-based nature of the proportionality enquiry is more apparent in appeal instances, where the judge examines *de novo* the facts of the case. *Huang*, for example, concerned immigration authorities' refusals to grant entry or residence permissions to foreign nationals. Until 2005, jurisdiction to hear appeals in such matters belonged to the Immigration Appellate Authority (IAA), an independent judicial body. In his opinion in *Huang*, Lord Bingham

---

[701] Ibid, para 89. See also *per* Lord Carswel.

[702] Ibid, para 55; see also paras 90 and 106.

[703] See for example *Lambert*; cited above, para 37 f. (*per* Lord Steyn). On the judicial consideration of alternative measures more generally, see Jowell, "Beyond the Rule of Law: Towards Constitutional Judicial Review," 679–80.

[704] *Regina v Shayler*, cited above.

[705] Ibid.

[706] See also *R v Director of Public Prosecutions, ex parte Kebeline and Others* [2000] 2 A.C. 326 (HL, 28 October 1999), *per* Lord Hope.

defined the function of this body under the HRA, which, in his view, "*is not a secondary, reviewing, function* (…). *The appellate immigration authority must decide for itself whether the impugned decision is lawful and, if not, but only if not, reverse it*".[707] The appellate authorities are better placed than the competent immigration officer to assess the facts of the case. Thus, facts are *de novo* established before the judge, even if they have changed since the administrative decision was issued.[708] Similar observations apply to the First-tier Tribunal, which, since 2010, has assumed the IAA's and other appellate authorities' function.

In judicial review cases, in contrast, the function of the court is by definition secondary. Nevertheless, the court will still require evidence in order to accept the allegations advanced by the parties and especially by the reviewed public authorities. In this respect, the *Bank Mellat* decision by the Supreme Court is exemplary.[709] Bank Mellat is a large Iranian commercial bank owned by private persons. In 2009, the Treasury issued an order prohibiting financial transactions or business relationships between the bank and companies operating in the UK financial sector. Bank Mellat challenged the order. Among other arguments, it claimed that this order disproportionately interfered with its property rights, protected by article 1 of the First Additional Protocol. In order to justify the restriction, the Treasury argued that Bank Mellat was financing Iran's nuclear weapons projects which endangered the UK's national interests. To support its argument, the authority relied upon confidential information. The lower courts had rejected the bank's challenges, considering that the Treasury "*reasonably believed that the development or production of nuclear weapons in Iran posed a significant risk to the national interests of the United Kingdom*".[710]

The *Bank Mellat* decision concerns national security and the UK's international relations, domains where the judiciary traditionally refrains from scrutinising policy choices. Indeed, the court admitted that "*a large margin of judgment*" should be accorded to the Treasury in such a case.[711] However, this did not prevent the majority of judges from requiring substantial evidence of the alleged threat to the UK interests. For the first time, the Supreme Court decided that it can hear such evidence in a closed session. In the majority's view, the proof provided by the Treasury was insufficient to justify the singling out of Bank Mellat among various Iranian banks. Lord Sumption contended that, "*once it is found that the problem is not specific to Bank Mellat but an inherent risk of banking, the risk posed by Bank Mellat's access to those markets is no different from that posed by the access which comparable banks continued to enjoy*".[712] Due to its discriminatory nature, the measure was ineffective and "*incapable of objective justification*" with regard to its aim.[713] Therefore, contrary to the traditional remitting of the facts to the primary

[707] *Huang,* cited above, para 11.

[708] See also Craig, *Administrative Law*, 2016, paras 18-042 f.

[709] *Bank Mellat v Her Majesty's Treasury (No. 2)* (SC, 19 June 2013), cited above.

[710] *Bank Mellat v Her Majesty's Treasury (No 2)* [2011] EWCA Civ 1 (CA, Civil Division, 13 January 2011).

[711] See the Supreme Court's decision, cited above, para 21.

[712] Ibid, para 27.

[713] Ibid, para 25.

decision-makers, courts under the HRA will sometimes be led to evaluate the supporting evidence, even when it concerns sensitive political matters.

Moreover, in order to understand the mischief that a contested legislative provision is purported to address, courts may be led to consider matters stated in Parliament.[714] There goes another "sacred cow" of the English legal culture. Long since the Magna Carta, judges have been prohibited from referring to the *Hansard*, since such reference was deemed to violate the principle of parliamentary sovereignty. Indeed, it entails the danger of the courts scrutinising the seriousness of parliamentary debates and of attributing to the whole legislature the will of a single MP or Minister.[715] However, in the context of proportionality analysis, having regard to the decision-making process does not mean that members of Parliament should themselves reason in proportionality terms. Instead, reference to the *Hansard* by the court is allowed only if it serves the court's understanding of the measures at stake. As Lord Nicholls put it in *Wilson*,

> the proportionality of legislation is not to be judged by the quality of the reasons advanced in support of it in the course of parliamentary debate, or by the subjective state of mind of individual ministers or other members.[716]

Proportionality thus remains an impact-based test. Contrary to the traditional judicial review principles, it is the *current* effect of the legislation that is considered and not the factual situation that existed when the decision was taken.[717]

Proportionality and deference. Despite the intensive outcome-based scrutiny that proportionality entails, English lawyers insist that under proportionality the roles of the judiciary and the reviewed authority remain distinct. In *Daly*, Lord Steyn stressed that proportionality did not involve a shift to merits review. Monitoring the necessity of a right's restriction in a democratic society differs from expressing an opinion on the general desirability of the measure in socio-political terms.[718] This difference is fundamental for English scholars.[719] The judicial role under proportionality thus remains supervisory and courts are not entitled to take the decision according to what they think appropriate in the abstract. The definition of the public interest belongs to the legislator and to authorities accountable to the people. As Lord Hoffmann neatly put it in *Alconbury*, "*The Human Rights Act 1998 was no doubt intended to strengthen the rule of law but not to inaugurate the rule of lawyers*".[720] Judicial opinions are expressed in legal

[714] *Wilson v First County Trust Ltd* [2003] UKHL 40 (HL, 10 July 2003).

[715] See Aileen Kavanagh, "Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory," *Oxford Journal of Legal Studies* 34, no. 3 (2014): 443.

[716] *Wilson*, cited above, para 67.

[717] Ibid, para 62; *Begum*, cited above, para 30.

[718] *Daly*, cited above, para 28.

[719] Hickman, *Public Law after the Human Rights Act*, 177.

[720] *R v Secretary of State for the Environment, Transport and the Regions, ex parte Alconbury Developments Ltd and Others* [2001] UKHL 23 (HL, 9 May 2001), para 121.

terms and are based exclusively on legal standards. Proportionality does not impose a general "correctness" requirement.[721]

The difference between the role of the judiciary and that of the reviewed branches of government is ensured by the doctrine of deference. Following this doctrine, the intensity of the proportionality scrutiny varies as a function of the weight accorded to the opinions of the reviewed authority. Influenced by the European concept of the margin of appreciation, this idea first appeared in one of the earliest HRA cases, *Kebeline*, where Lord Hope stated that when striking a balance among the Convention principles sometimes "*it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention*".[722] Other terms have also been used to express this cautious approach: "margin of discretion", "discretionary area of judgment". When searching for the appropriate intensity of review, courts take into account various factors. In *Roth,* Laws LJ identified four rationales for deferring to the reviewed authority: democratic legitimacy, definition of the right as qualified in the Convention, constitutional responsibility, and institutional expertise.[723] Scholars have since produced extended analyses of these rationales, have added more, and often attempt to categorise the various cases under which matters of deference might arise.[724] Once again, the English developments on this point are much akin to the transnational proportionality literature.

There is general consensus that deference does not imply abdication of judgment or injusticiability. Even when significant weight is accorded to the primary decision, judges should still sanction disproportionate violations of fundamental rights. In certain cases of social policy, deference will lead courts to apply a vague concept of proportionality and to only ascertain that the balance has been struck by the competent authority without engaging the rest of proportionality's prongs.[725] Generally however, a categorical subject-matter based approach to deference has been rejected. Even in areas traditionally left to Parliament, like housing, judges will apply a structured proportionality test.[726] In such cases, deference is taken into account *within* the proportionality framework.[727] The weight accorded to the reviewed decision may differ

---

[721] Kavanagh, *Constitutional Review under the UK Human Rights Act*, 239 f.; Craig, "Unreasonableness and Proportionality in UK Law," 100 f.

[722] See *Kebeline*, cited above, 380, *per* Lord Hope.

[723] *Roth*, cited above, at 765 f.

[724] Alan Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge: CUP, 2012); Julian Rivers, "Proportionality and Variable Intensity of Review," *CLJ* 65, no. 1 (2006): 174; Craig, *Administrative Law*, 2016, paras 18-033 f. Kavanagh, *Constitutional Review under the UK Human Rights Act*, 181 f. and 211 f.; Hickman, *Public Law after the Human Rights Act*, 128 f.; Murray Hunt, "Sovereignty's Blight: Why Contemporary. Public Law Needs the Concept of 'Due Deference,'" in *Public Law in a Multi-Layered Constitution*, ed. Nicholas Bamforth and Peter Leyland (Oxford; Portland, Or: Hart, 2003), 337.

[725] *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2002] Q.B. 48 (CA, Civil Division, 27 April 2001). See also *Countryside Alliance*, *per* Lord Hope, concerning the right to property.

[726] Craig, *Administrative Law*, 2016 at 18-044. In case law, see *Ghaidan v Mendoza*, cited above.

[727] Hunt, "Sovereignty's Blight: Why Contemporary. Public Law Needs the Concept of 'Due Deference,'" 349 f.; in case law, see for example *Begum*, cited above; *R v Secretary of State for Health, ex parte Sinclair Collis* [2012] QB 394 (CA, Civil Division, 17 June 2011).

according to the various issues arising under the various prongs.[728] When faced with sensible subject-matter, like the fight against terrorism, or with matters where the decision-making authority has special expertise, the courts will tend to avoid complex value judgments and will often emphasise procedural requirements of reasoned justification and substantial evidence.[729]

***

After a long period of rejection, proportionality is now flourishing in English public law discourse and has led to an impressive evolution of domestic judicial review. Contrary to Lord Greene's concern only with the irrationality of the primary decision-maker, proportionality is a test for assessing the balance struck by the reviewed authorities. Far from being self-evident, it leads the courts to extensive argumentation concerning the legitimacy of rights restrictions and the intensity of judicial review. While it does not always involve a value-laden balancing of competing rights or principles, it does involve the consideration of the outcomes of legislation by reference to Convention rights and it obliges public authorities to justify restrictions to those rights. The content of proportionality in English law is akin to the one described in the proportionality theory. It is not doubted today that the reception of proportionality in HRA cases has led to a better protection of fundamental rights. Contrary to their French colleagues, English judges proceed to an intrusive review of the aims of the primary decision-maker, even when this is Parliament. Once more in contrast with the other side of the English Channel, the English application of proportionality has led the courts to assiduously review the facts of the case before them and to consider less restrictive alternative measures.

Proportionality has provoked extensive debates in English public law, both in scholarship and in the courtroom. The question of whether its application is in continuity with or represents a change of the conceptual apparatus of domestic judicial review has always been at the core of discussion. The clear conceptual distinction of proportionality from irrationality long constrained its function in legal practice, since its application presupposed the judicial recognition of an additional ground of review – something that parliamentary sovereignty excluded. Therefore, whenever proportionality was rejected by courts as a head of judicial review, English public lawyers have sought its continuity with existing domestic concepts and distinctions, sometimes at a cost to its conceptual neatness. However, it is through its establishment as *distinct* from pre-existing heads that proportionality has flourished in English public law. It is precisely this distinction that liberated its application from the structural

[728] *Countryside Alliance*, cited above, *per* Lord Hope, paras 84 f.; Hunt, 368 f.; Craig, *Administrative Law*, 2016, para 18-036.

[729] See Craig, *Administrative Law*, 2016, para 18-049; Hunt, "Sovereignty's Blight: Why Contemporary. Public Law Needs the Concept of 'Due Deference,'" 349 f.; Richard Clayton, "Proportionality and the HRA 1998: Implications for Substantive Review," *JR*, 2002, 124. In case law, *Sinclair Collis*, cited above, *per* Lord Neuberger.

constraints that traditionally marked the application of the *Wednesbury* test. This is very different from the thirst for continuity observed in the French perception of proportionality, and is connected to the analytical English public law tradition.

The evolution of proportionality in English public law has primarily been the work of judges, incited to adopt this direction by lawyers. Scholars have followed rather than guided evolution in the courtroom. Compared to the French *doctrine*, the English perception of proportionality has been much more loyal to the actual reasoning patterns of courts. This is because rather than some kind of idea, knowledge or common-sense shared by lawyers, proportionality represents a tool, a head of review, a new ground for lawyerly and judicial argumentation. Even though Part II will show that English public law is undergoing radical transformation that nuances the above conclusions, this instrumental, pragmatic perception of proportionality has underpinned its spread in this context. Interestingly, this perception stands in stark contrast with the one underlying the spread of proportionality in the Greek context, where proportionality is perceived as a value in itself.

CHAPTER 3

The spread of proportionality in Greek public law

η θριαμβευτική πορεία[730]

Situating the study. The spread of proportionality in Greece would please every proportionality enthusiast. Proportionality emerged in Greek legal discourse earlier than in France or England and has been applied by domestic courts for more than 40 years. Greece is one of the rare legal systems where, since 2001, proportionality explicitly enjoys constitutional status. The generous formulation of article 25(1) of the Constitution states:

> The rights of the human being as an individual and as a member of society and the principle of the welfare state rule of law are guaranteed by the State. All agents of the State shall be obliged to ensure the unhindered and effective exercise thereof. These rights also apply to the relations between individuals to which they are appropriate. Restrictions of any kind which, according to the Constitution, may be imposed upon these rights, should be provided either directly by the Constitution or by statute, should a reservation exist in the latter's favour, and should respect the principle of proportionality.[731]

The spectacular spread of proportionality in the Greek public law raises questions as to how this language has affected the discursive context in which it was inserted.

Research on the use of proportionality in Greece meets difficulties similar to those observed in the French case. Greek public lawyers believe proportionality to designate much more than its explicit use in judicial decisions or in official legal sources. Proportionality is understood as a universal idea, a value akin to justice, which is inherent in judicial review, despite it being systematised as a concrete method of review abroad. Greek public lawyers, be they scholars, judges or practitioners, generally agree on the conceptual content of proportionality, which eclectically recovers doctrinal developments in other jurisdictions and at home. However, when it comes to judicial practice, local judicial review structures seem to constrain the use of proportionality language, whose content hardly corresponds to the idea described outside courtroom. The above features are neatly expressed in George Gerapetritis' thesis on

[730] This phrase is taken by Konstantinos Gogos, "Πτυχές του ελέγχου αναλογικότητας στη νομολογία του Συμβουλίου της Επικρατείας [Aspects of Proportionality Review in the Case Law of the Council of State]," *ΔτΑΤΕΣ III*, 2005, 299. It means "the triumphant march".

[731] Source of translation: http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf.

proportionality, which, albeit written in English, has been very influential in the Greek context.[732] The study consists of an erudite comparative analysis of the application of proportionality in French, English, Greek and European administrative law. In this work, proportionality is perceived as a method of review or an ideal which is rarely applied as such by domestic courts, but rather finds expression through other heads of review, techniques and concepts.

In the Greek context, additional difficulties exist. Since Aristotle, "proportion" (*αναλογία*) has been used as a legal concept and involves moral-legal evaluations. It means at the same time "analogy" and "proportion". Proportionality corresponds to a different term (*αναλογικότητα*), which did not exist in Greek before. However, in the early uses of proportionality language, Greek lawyers have employed the term "proportion" instead. In order to identify these exceptional uses of proportionality language and to distinguish them from the almost homonymous language of analogy, other indices were taken into account: reasoning in prongs, reference to Germany, to European case law, or to fundamental rights. Further, a major challenge for this study has been access to Greek legal sources, which is much more difficult than in the other systems studied. Only few academic writings are accessible online and Greek legal databases are much less reliable and manageable than French or English ones.

Here, like in the French context, legal discourse is studied only insofar as proportionality language is used. My purpose is not to show that the ideas designated by proportionality did not exist before its emergence as a particular discourse, nor to expose as inexact or incorrect doctrinal analyses on the ideal of proportionality. More modestly, I study how Greek lawyers started to speak in proportionality terms and what content they attached to this particular way of speaking. When did proportionality emerge in this context? What has its function been in the discourse of legal actors? How has proportionality interacted with existing categories, concepts, and distinctions? Who uses proportionality and why? While proportionality existed both in theory and practice under the 1975 Constitution, local features seem to have constrained its function and dynamic (**Section 1**). The 2001 reform and the constitutional entrenchment of the principle gave new impetus to its use, both in scholarship and in case law (**Section 2**).

1. Proportionality under the 1975/1986 Constitution

The foundations of Greek constitutionalism. Enlightenment and liberalism are the ideological foundations of the Modern Greek state. Inspired by the American and especially the French Revolution, the Greek nationalist movement connected from the beginning the legal recognition of natural rights to national independence. All revolutionary constitutional texts proclaimed certain human rights, albeit providing for

[732] George Gerapetritis, *Proportionality in Administrative Law: Judicial Review in France, Greece, England and in the European Community* (Athens: Σάκκουλα, 1997).

quite limited protection. Rights provisions were more detailed in the 1832 Constitution and in the 20th century texts, with the exception of the 1952 Constitution, written just after the civil war and expressing the distrust and polarisation that was dominant in the Greek society.

The Constitution guarantees political freedom and national independence and has long been attributed supreme normative power in Greek case law. Judicial review of legislation is a secular practice, even older than its first constitutional entrenchment in 1927.[733] As a corollary of 19th century constitutionalism, it has never subsequently been contested. It is deeply rooted in the minds of Greek lawyers and society, as a guarantee against the centralised exercise of power.[734] This is also why, contrary to France and England, the normative force of constitutional rights has long been accepted by Greek public lawyers and courts. The observation of constitutional norms has been traditionally considered a duty of Greek courts, who exercise it in the name of the principle of legality (*αρχή της νομιμότητας*), the domestic traditional version of the rule of law and the antecedent of the Greek principle of "a state ruled by law" (*κράτος δικαίου*).[735]

The positivist tradition. Despite its commitment to rights, Greek public law has been dominated by the positivist tradition, developed under the influence of French and German scholarship.[736] Since the 1950s, in reaction to the oppressive 1952 regime, Greek liberal constitutionalism has been combined with the dominance of a Kelsenian vision of law as completely detached from morality and ideology. In this polarised socio-political context, the effort to constrain public authorities in a neutral concretisation of formal constitutional precepts was inspired by distrust towards those who possessed normative power. This scholarly tendency was theorised in the works of Aristovoulos Manessis, one of the most influential post-war Greek public lawyers.[737] However, ambitious constitutional texts and the constitutional theories surrounding

---

[733] Article 93(4) Constitution. The first Constitution which provided for judicial review of legislation was the constitution of 1927. However, judicial review of legislation was exercised already since 1897 by *Areios Pagos*.

[734] Constantinos Yannakopoulos, *Η επίδραση του δικαίου της Ευρωπαϊκής Ένωσης στον δικαστικό έλεγχο της συνταγματικότητας των νόμων [The Influence of EU Law on Judicial Review of the Constitutionality of Legislation]* (Athens; Thessaloniki: Σάκκουλα, 2013), 44 f.

[735] See more generally Antonis Manitakis, "Ιστορικά γνωρίσματα και λογικά προαπαιτούμενα του δικαστικού ελέγχου της συνταγματικότητας των νόμων στην Ελλάδα [Historical Traits and Logical Assumptions of Judicial Review of the Constitutionality of Legislation in Greece]," in *Τιμητικός τόμος Του Κ. Μπέη* (Athens: Αντ. Σάκκουλας, 2003), 52 f.; Antonis Manitakis, "Fondement et légitimité du contrôle juridictionnel des lois en Grèce," *RIDC* 40, no. 1 (1988): 39; Phédon Vegleris, "La Constitution, la loi et les tribunaux en Grèce," in *Annales de la Faculté de Droit de Liège*, (Liège: Faculté de droit, 1967), 437.

[736] Antonis Manitakis, "Ο δικαστής υπηρέτης του νόμου ή εγγυητής των συνταγματικών δικαιωμάτων και μεσολαβητής διαφορών [The Judge, Servant of the Law or Guarantor of Constitutional Rights and Mediator in Legal Disputes]," *NoB* 47, no. 2 (1999): 177 f.; 182 f.

[737] See Aristovoulos Manessis, *Αι εγγυήσεις τηρήσεως του Συντάγματος [The Normative Guarantees of the Constitution]*, vol. I (Thessaloniki: Το νομικόν, 1956); Yannis Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]* (Athens; Komotini: Αντ. Ν. Σάκκουλας, 1996), 307 f.; Konstantinos Stamatis, "Το νόημα του Κράτους Δικαίου στην Ελλάδα, 1952-1967 [The Meaning of the Ideal of a State Ruled by Law in Greece, 1952-1967]," in *Όψεις του Κράτους Δικαίου*, ed. Konstantinos Stamatis and Antonis Manitakis (Thessaloniki: Σάκκουλα, 1990), 109.

them have usually been an illusory representation of the Greek reality. In its short but turbulent history, the country met wars, dependence on external powers, authoritarian regimes and dictatorships, with the last and still lively in local memory being the military regime of 1967.[738]

The context surrounding the 1975 Constitution. The fall of the *junta* in 1974 and the 1975 Constitution inaugurated a new era in Greek constitutional politics, called *Metapolitefsi* ("change of regime", *Μεταπολίτευση*). The 1975 Constitution was the fruit of the rejection of authoritarian regimes of the past and a tool for the establishment of democracy anew. Thus, it is impregnated by a vivid commitment to liberalism. It contains an extensive bill of "Individual and Social Rights",[739] which follows the part concerning the fundamental provisions on the Greek polity. Until recently, the 1975 text, to a large extent still formally valid, has been considered a "constitutional success",[740] as it organised political life in Greece more effectively than any other Constitution. For more than three decades its application consolidated democracy, the rule of law and human rights. Domestic constitutional lawyers have long been proud of the system of constitutional democracy established in 1975, as when it was enacted it was considered one of the most progressive not only at a European, but also international level.[741]

Under the 1975 Constitution, the dominant legal positivism was translated into an omnipotence of Parliament similar to the one observed in the French context.[742] Since the main aim of the Constitution was to establish a democratic regime, the democratically elected body has enjoyed strong legitimacy in the exercise of its powers. Scholars have talked about a "presumption of constitutionality" (*τεκμήριο συνταγματικότητας*) of legal statutes.[743] This doctrine concerns the intensity of judicial review and means that legal statutes are only exceptionally declared unconstitutional. The judge is allowed to intervene only to sanction cases of manifest incompatibility of domestic legislation with constitutional precepts. Judicial review of legislation thus leaves considerable freedom to Parliament in the exercise of legislative competence.

A mixed system of judicial review. The Greek system of judicial review is mixed, corresponding to the US model but also applying a separation of jurisdictions

---

738 See Nicos Alivizatos, *Les institutions politiques de la Grèce à travers les crises: 1922-1974* (Paris: LGDJ, 1979).

739 Part B', articles 4-25 of the Constitution.

740 Nicos Alivizatos, *Ο αβέβαιος εκσυγχρονισμός και η θολή συνταγματική αναθεώρηση [Uncertain Modernization and Vague Constitutional Reform]* (Athens: Πόλις, 2001), 185: «συνταγματική επιτυχία».

741 Aristovoulos Manessis, "Οι κύριες συνιστώσες του συστήματος θεμελιωδών δικαιωμάτων του Συντάγματος του 1975 [The Main Components of the Fundamental Rights System in the Constitution of 1975]," in *Συνταγματική θεωρία και πράξη*, vol. II (Athens: Σάκκουλα, 2007), 529.

742 Ifigeneia Kamtsidou, *Η επιφύλαξη υπέρ του νόμου [The Clause of Legislative Competence]* (Athens: Σάκκουλα, 2001).

743 Antonis Manitakis, "Οι (αυτο)δεσμεύσεις του δικαστή από τον παρεμπίπτοντα έλεγχο της (αντι)συνταγματικότητας των νόμων [Judicial (Self-)Restraint Resulting from the Incidental System of Judicial Review of the (Un)constitutionality of Legislation]," *ΤοΣ*, no. 2 (2006): 403; Antonis Manitakis, *Ελληνικό Συνταγματικό Δίκαιο [Greek Constitutional Law]*, vol. I (Thessaloniki: Σάκκουλα, 2004), 409; *Contra*, Constantinos Yannakopoulos, "Ο αυτεπάγγελτος έλεγχος (αντι)συνταγματικότητας των νόμων [The Ex Officio Judicial Review of the (Un)constitutionality of Legislation]," *ΔτΑ* 16 (2002): 1175.

à la française.[744] This complicated combination leads to a system that comprises three supreme courts, *Areios Pagos* (*Άρειος Πάγος,* civil and criminal jurisdiction), the Council of State (*Συμβούλιο της Επικρατείας*, administrative jurisdiction) and the Court of Audit (*Ελεγκτικό Συνέδριο*). Judicial review is incidental, namely, it arises in the application of legislation to a particular case. Therefore, it is concrete, exercised in the context of the particular factual and normative circumstances. It is diffused to all courts, though in practice centralised to the supreme courts.[745] It is practiced *ex officio*, even though the arguments of the parties in practice play an important role.[746] Judgments of unconstitutionality have a declarative effect, namely, they lead to the non-application of the statute to the case at hand, without entailing its *erga omnes* abrogation.[747] Complex and sometimes ineffective as it may be, the Greek system of judicial review is one of the rare Greek particularities of which domestic constitutionalists have been proud. Propositions for the adoption of the centralised European model have always met strong resistance in Greek scholarship, even though they have always been recurrent.[748]

The diffused character of judicial review has been attenuated by article 100 of the Constitution, which provides for a Supreme Special Court. This *ad hoc* court has the competence to resolve eventual conflicts between supreme courts' decisions concerning the unconstitutionality of legal statutes. Supreme Special Court decisions enjoy an *erga omnes* effect.

---

[744] See Akritas Kaidatzis, "Ο έλεγχος της συνταγματικότητας των νόμων στην Ελλάδα, ενόψει της διάκρισης σε συστήματα ισχυρού και ασθενούς τύπου [Judicial Review of the Constitutionality of Legislation in Greece, in View of the Distinction between Strong and Weak Systems]," *Constitutionalism.gr* (blog), September 4, 2013, http://constitutionalism.gr/site/wp-content/mgdata/pdf/m01kaidatzisjudicialreview.pdf. The author uses Mark Tushnet's distinction to analyse the Greek system of judicial review.

[745] Even though the decisions of supreme courts are not binding, they exercise an important directive influence on the subsequent case law of inferior courts. See Kaidatzis, 17 f.

[746] See for example StE (Pl.) 1528/2003, *NoB* 2003, 1346, concerning the construction of "The Mall", a commercial center, in violation of certain environmental and urban-planning rules. Antonis Manitakis argues that this *ex officio* character is attenuated by the incidental character of judicial review, which inevitably binds the court to the arguments of the parties. See Manitakis, "Οι (αυτο)δεσμεύσεις του δικαστή από τον παρεμπίπτοντα έλεγχο της (αντι)συνταγματικότητας των νόμων [Judicial (Self)Restraint Resulting from the Incidental System of Judicial Review of the (Un)constitutionality of Legislation]."

[747] For a general description of the history and the essential traits of the Greek system of judicial review in English, see Epaminondas Spiliotopoulos, "Judicial Review of Legislation Acts in Greece," *Temple Law Quarterly* 56 (1983): 463.

[748] On the initial phases of this debate see Manitakis, "Ιστορικά γνωρίσματα και λογικά προαπαιτούμενα του δικαστικού ελέγχου της συνταγματικότητας των νόμων στην Ελλάδα [Historical Traits and Logical Assumptions of Judicial Review of the Constitutionality of Legislation in Greece]," 42. The debate was reanimated in the mid-2000s, during the public debate on the constitutional reform of 2008. See Kostas Chryssogonos and Evaggelos Venizelos, *Το πρόβλημα της συνταγματικής δικαιοσύνης στην Ελλάδα [The Problem of Constitutional Justice in Greece]* (Athens; Komotini: Σάκκουλα, 2006); Antonis Manitakis, *Το συνταγματικό δικαστήριο σε ένα σύστημα παρεμπίπτοντος ελέγχου της συνταγματικότητας των νόμων [The Constitutional Court in a System of Incidental Judicial Review of the Constitutionality of Legislation]* (Athens; Thessaloniki: Σάκκουλα, 2008). The need for a constitutional court is still at the core of academic debates, mainly due to the initially diffident stance of Greek courts in the context of the economic crisis. See Kaidatzis, "Ο έλεγχος της συνταγματικότητας των νόμων στην Ελλάδα, ενόψει της διάκρισης σε συστήματα ισχυρού και ασθενούς τύπου [Judicial Review of the Constitutionality of Legislation in Greece, in View of the Distinction between Strong and Weak Systems]," 23 f.

The crucial role of the Council of State. The Council of State, which is the judge of legality of administrative action, has been more important in checking the political branches of government. Since its institution in 1929, the Council has had the power to annul administrative acts after direct recourse by individuals. The annulment decisions of the supreme administrative court have an *erga omnes* effect. This entails a certain degree of centralisation of judicial review of legislation, since in practice general administrative acts like decrees and regulations are often necessary for the application of legal statutes. Scholars consider the Council of State to be "the constitutional court *par excellence*" in the Greek system of judicial review, since its constitutionally relevant case law is richer than that of the other supreme courts.[749] The Council of State's role enjoys constitutional protection. With the creation of general administrative tribunals in 1983, the Council kept a last resort jurisdiction to decide on the legality of lower courts' decisions.

The system of judicial review of the administrative action is very similar to the French one, which has inspired Greek institution-makers.[750] Judicial review of the administration aims to preserve objective legality and the distribution of competences between Parliament and the executive. However, in Greece the principle of legality has a much stricter content than in France, which brings it closer to the traditional Diceyan understanding of legality. Indeed, the Constitution contains no general competence clause for the executive, whose action must be empowered by statute. Article 95 declares that administrative acts can be attacked as *ultra vires* or for violation of the law. These "grounds of annulment" (*λόγοι ακύρωσης*) have been further specified in legislation. The scrutiny of the "external" legality of administrative acts consists in the review of the competence of the authority that issued them, or of the violation of substantial formal and procedural requirements, such as the absence of justification or of previous hearing of aggrieved citizens. Scrutiny of the "internal" legality consists in the review of the compatibility of administrative action with its legal basis. An act that, while apparently conforming to the principle of legality, pursues a goal manifestly different from the purpose of enabling legislation, can be annulled under the head of abuse of power.

Here too the distinction between legality (*νομιμότητα*) and expediency (*σκοπιμότητα*) is crucial. Domestic lawyers have traditionally schematised this distinction as follows: while the court examines the "*if*" (*εάν*) and the "*what*" (*τι*) of public power or discretion, it has no say as to the "*how*" (*πώς*) of its exercise.[751] Hence, the distinction between grounds and content of public decisions, observed in the French system, applies in the

[749] Kaidatzis, "Ο έλεγχος της συνταγματικότητας των νόμων στην Ελλάδα, ενόψει της διάκρισης σε συστήματα ισχυρού και ασθενούς τύπου [Judicial Review of the Constitutionality of Legislation in Greece, in View of the Distinction between Strong and Weak Systems]," 20; see also Evaggelos Venizelos, "Η θέση του ΣτΕ στο σύστημα δικαστικού ελέγχου της συνταγματικότητας των νόμων [The Role of the Council of State in the System of Judicial Review of the Constitutionality of Legislation]," *Δίκαιο&Πολιτική*, no. 6 (1983): 9.

[750] For a systematic presentation, see Epaminondas Spiliotopoulos, *Droit administratif hellénique*, 2nd ed. (Athènes; Bruxelles: Sakkoula; Bruylant, 2004), esp. 286 f.; 325 f.

[751] See for example Prodromos Dagtoglou, *Γενικό Διοικητικό Δίκαιο [General Administrative Law]*, 4th ed. (Athens; Komotini: Αντ. Σάκκουλας, 2004), 191.

Greek context as well. So too does the distinction between administrative discretion and "bound" competence. While in cases of "bound" competence (*δέσμια αρμοδιότητα*), courts can substitute their own view for that of the primary decision-maker concerning the legality of the reviewed act, in the field of administrative discretion (*διακριτική ευχέρεια*) they normally abstain from substantive appreciations. Thus, as to the conditions for the exercise of administrative competence, courts only sanction substantial factual errors (similar to the French material existence of facts) and the erroneous legal characterisation of the facts mentioned in the administrative file. As to the content of the reviewed decision, courts only sanction the "trespassing of the extreme limits" of administrative discretion (*υπέρβαση άκρων ορίων*), that is, its "bad exercise" (*κακή άσκηση*).[752]

A system of weak judicial review. While legalist positivism did not prevent certain European constitutional courts from acquiring important political powers, in Greece its combination with domestic institutional particularities did. Greek judges have never enjoyed the political legitimacy of their Western colleagues. Judicial decisions have not always been taken into account during parliamentary debates[753] and have sometimes not been executed by the administration either.[754] Greek courts have showed "diffidence" when monitoring important government policies.[755] The only known instance of consistent judicial policy in opposition to the will of Parliament is found in environmental case law during the '90s. However, this case law was interpreted by mainstream scholars as an instance of judicial "activism", even when its "strict methodological rigour" was affirmed.[756] Mainstream scholarship has justified or even promoted judicial restraint through the importation from the United States of the theory of "judicial self-restraint".[757] This is also related to the traditional suspicion of

---

[752] Michail Stassinopoulos, *Δίκαιον των διοικητικών πράξεων [Law of Administrative Acts]* ([χ.ε.], 1951), 235 f.

[753] See Law n. 3207/2003, conferring legal status upon an administrative decision, which had been annulled as unconstitutional by the Council of State in its decision 1528/2003.

[754] ECtHR, *Hornsby vs. Greece*, 19 March 1997, no. 18357/91.

[755] Kaidatzis, "Ο έλεγχος της συνταγματικότητας των νόμων στην Ελλάδα, ενόψει της διάκρισης σε συστήματα ισχυρού και ασθενούς τύπου [Judicial Review of the Constitutionality of Legislation in Greece, in View of the Distinction between Strong and Weak Systems]," 29; see also Akritas Kaidatzis, "Δικαστικός έλεγχος των μέτρων οικονομικής πολιτικής. νομολογιακές τάσεις και προσαρμογές στο μεταβαλλόμενο οικονομικο-πολιτικό περιβάλλον [Judicial Review of Economic Policy Measures. Jurisprudential Tendencies and Adaptations to the Changing Economic-Political Circumstances]," *Constitutionalism.gr* (blog), October 6, 2010, http://www.constitutionalism.gr/site/1616-dikastikos-eleghos-twn-metrwn-oikonomikis-politiki/; Akritas Kaidatzis, "'«Μεγάλη πολιτική» και ασθενής δικαστικός έλεγχος. Ένα σχόλιο για τις στρατηγικές τήρησης του Συντάγματος στην εποχή του «Μνημονίου» ['Big Policy' and Weak Judicial Review. A Comment on the Strategies for Observing the Constitution in the Age of the 'Memorandum']," *Constitutionalism.gr* (blog), March 21, 2011, http://www.constitutionalism.gr/site/1964-megali-politiki-kai-astenis-dikastikos-eleghos-ena/.

[756] Alivizatos, *Ο αβέβαιος εκσυγχρονισμός και η θολή συνταγματική αναθεώρηση [Uncertain Modernization and Vague Constitutional Reform]*, 52.

[757] Yannakopoulos, *Η επίδραση του δικαίου της Ευρωπαϊκής Ένωσης στον δικαστικό έλεγχο της συνταγματικότητας των νόμων [The Influence of EU Law on Judicial Review of the Constitutionality of Legislation]*, 188 f.; Manitakis, "Οι (αυτο)δεσμεύσεις του δικαστή από τον παρεμπίπτοντα έλεγχο της (αντι)συνταγματικότητας των νόμων [Judicial (Self-)Restraint Resulting from the Incidental System of Judicial Review of the (Un)constitutionality of Legislation]"; Nicos Alivizatos, "Μεταξύ ακτιβισμού και αυτοσυγκράτησης [Between Activism and Self-Restraint]," *ΔτΑ* 19 (2003): 697.

Greek public lawyers towards the judiciary.[758]

Greece is typically classified among the systems of mixed judicial review, but Kaidatzis observes that judicial review in this context is much weaker than in the US.[759] On the one hand, the diffused system of judicial review leaves little possibility for a coherent judicial or jurisprudential policy. On the other hand, the lack of a *stare decisis* rule confines the judges to their purely judicial role, bound to the examination of concrete cases. Judicial reasoning is traditionally confined to the mechanical subsumption of cases to a general legal rule.[760] Here, like in France, judgements traditionally consist of a syllogism composed of long phrases. The opinions of dissenting judges on the various steps of the judicial syllogism are published but this does not undermine the formal style of judicial reasoning. Fidelity to formal legal sources is an asset of judicial reasoning and a major criterion for the validity of judicial arguments. Greek judges are traditionally deemed to be disconnected from socio-political circumstances and mainly concerned with the law, for which they have the particular expertise and competence. Like in France, they have the image of an elite expert group, selected through meritocratic competitions and subject to the review of their colleagues for the development of their life-long career. Differently from France, this is the case not only for civil law judges but also for the members of the administrative courts.

The role of foreign influence in the Greek context. Generally, similarity with the French judicial review structures is striking. This feature is closely intertwined with the openness of Greek public law discourse abroad. Since the beginnings of the Greek state, domestic scholars have accorded great importance to comparative law. Still today, the vast majority of Greek scholars speak foreign languages, have studied abroad and are very well aware of foreign doctrinal developments. It is indicative that one of the most important reviews on human rights includes summaries in foreign languages of all the articles published therein.[761] External influence is not limited to scholarship, but encompasses positive law and legal practice. Since the beginnings of its existence, the Modern Greek state has been constructed in the light of foreign models. The Greek Constitution of 1832 followed its Belgian and French counterparts at the time,[762] and the Greek Council of State was instituted under the French model of the *Conseil d'Etat*.[763] This Council, like its model, is charged with the elaboration of presidential

[758] Nikolaos Androulakis, "Το «κράτος των δικαστών» - ένα ανύπαρκτο σκιάχτρο; [The 'government of Judges' - An Inexistent Scarecrow?]," *NoB* 33 (1985): 1505.

[759] Kaidatzis, "Δικαστικός έλεγχος των μέτρων οικονομικής πολιτικής. νομολογιακές τάσεις και προσαρμογές στο μεταβαλλόμενο οικονομικο-πολιτικό περιβάλλον [Judicial Review of Economic Policy Measures. Jurisprudential Tendencies and Adaptations to the Changing Economic-Political Circumstances]," 16 f.; 24 f.

[760] Manitakis, "Ο δικαστής υπηρέτης του νόμου ή εγγυητής των συνταγματικών δικαιωμάτων και μεσολαβητής διαφορών [The Judge, Servant of the Law or Guarantor of Constitutional Rights and Mediator in Legal Disputes]," 182 f.

[761] Review *Δικαιώματα του Ανθρώπου [Human Rights],* published by Sakkoulas.

[762] Aristovoulos Manessis, *Deux États nés en 1830: ressemblances et dissemblances constitutionnelles entre la Belgique et la Grèce* (Bruxelles: Maison Ferdinand Larcier, 1959).

[763] For example, see Yves Gaudemet, "Les nouvelles méthodes du juge administratif français," in *État-loi-administration. Mélanges en l'honneur de Epaminondas Spiliotopoulos*, ed. Petros Pararas (Athènes;

decrees. Foreign influence is also easy to detect in judicial decisions. Domestic judges often follow the reasoning structures or substantive solutions adopted by foreign courts. Lately, Greek judges do not hesitate to explicitly consider foreign legal solutions,[764] cite foreign decisions[765] and even employ foreign legal terms.[766]

To the informal influence of foreign jurisdictions, one should add the formal legal influence of European law. After the fall of the dictatorship, Greece again became a member of the Council of Europe and, some years later in 1981, of the EC. In 1985 the country recognised the right of individual petition before the Strasbourg court. Article 28 of the Constitution expresses the openness of the domestic legal order to supranational law. According to this provision, the generally accepted rules of international law, as well as ratified international conventions "shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law". Since very early, prominent domestic scholars have studied the relationship between European rights and the Constitution.[767] Greek courts have monitored the compatibility of domestic statutes and administrative acts with the provisions of the ECHR and the EU Treaties, in the same incidental and diffused way that they review the compatibility with the Constitution. Initially, the formalism that pervades in Greek public law thought affected the effective application of European rights in the domestic sphere. Giving full effect to those rights required an important shift of powers towards the judiciary, contrary to traditional distinctions and to the commonly shared perception of the role of the judge. Progressively, however, review of compatibility of public action with supranational or international legal precepts became more intrusive and started influencing core features of domestic judicial review.[768]

Strikingly, the emergence and spread of proportionality in Greek legal discourse seems quite disconnected from these contextual evolutions. The relevant terminology first appeared in the context of the early *Metapolitefsi*. Since the mid-'70s proportionality was sparsely used in scholarly writings and judicial decisions (*paragraph i*). Defying the legislation-centred formalism dominant in Greek legal discourse, the use of proportionality spread during the '80s. In 1984, the Council of State enunciated it as a general constitutional principle. While proportionality was purported to bring about major structural changes in domestic judicial review, its application was soon limited to a manifest error test (*paragraph ii*). Proportionality was not part of the "activist"

Bruxelles: Αντ. Ν. Σάκκουλας; Bruylant, 1998), 147.

[764] StE 2110/2003 *Ε⊥⊥⊥* 2004, 89, para 6

[765] StE (Pl.) 460/2013 *Ε⊥⊥⊥* 2013, 121, 445, paras 12 and 14.

[766] For example, in decision StE (Pl.) 668/2012 *NoB* 2012, 384, some members of the Council of State refer to the German concept of "Existenzminimum" in their opinion (para 36).

[767] Phédon Vegleris, *Η Σύμβαση των Δικαιωμάτων του Ανθρώπου και το Σύνταγμα [The European Convention on Human Rights and the Constitution]* (Athens: Σάκκουλας, 1977).

[768] Yannakopoulos, *Η επίδραση του δικαίου της Ευρωπαϊκής Ένωσης στον δικαστικό έλεγχο της συνταγματικότητας των νόμων [The Influence of EU Law on Judicial Review of the Constitutionality of Legislation]* conerning EU law;; Ibrahim Özden Kaboğlu and Stylianos-Ioannis Koutnatzis, "The Reception Process in Greece and Turkey," in *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, ed. Helen Keller and Alec Stone Sweet (Oxford: OUP, 2008), 451 f. concerning the ECHR.

judicial trend in the field of environmental protection. Until the late '90s, insofar as domestic judicial review was concerned, its function was mainly the intensification of procedural requirements in administrative law (*paragraph iii*). Neither was proportionality terminology a key feature of Greek public law's turn to the ECHR. The domain in which the principle acquired particular force was the application of EC Treaties. In this field, Greek judges acted as "translators" of the ECJ case law and sometimes exercised intrusive review of the legislator (*paragraph iv*).

i. The neglected cases of the '70s

The emergence of proportionality in Greek public law. First it was criminal law scholars who, since the beginning of the '70s, used the metaphor of proportion to describe legal reasoning. Procedural requirements and standards taken into account during criminal prosecution and trial were deemed to express more general principles and ideals, such as "the principle of necessary proportion".[769] In 1975, Nikolaos Androulakis talked about the requirements of appropriateness, necessity and "necessary balance" resulting from certain provisions of the code of criminal procedure.[770] These principles were generally connected to the requirement of moderation and non-excess of public officials in this context. However, these ideas for a long time did not find concrete expression in case law. Besides, some authors argued that the eventual application of the principle of proportionality in criminal law would add nothing to the already entrenched necessity requirement.[771]

As far as general public law is concerned,[772] proportionality emerged during the year that followed the enactment of the 1975 Constitution, at first in expropriation law. In the '70s, like today, the administrative procedure of expropriation was replete with technicalities. First, at the stage of urban planning, the administration committed a specific site to public use in service of a public utility purpose. This entailed the prohibition of some kinds of uses of the land, most notably construction. At a second stage, the administration acquired the land, usually through expropriation. While the urban plan, as a general administrative act, was generally subject to the principle of legality, expropriation in particular should be provided for by law and was subject to stricter legal constraints, like the requirement of a just compensation or the obligation for the administration to examine less onerous solutions for the affected individuals.[773]

In a decision in 1975, monitoring the act of expropriation for the erection of a cultural centre in Xanthi, the Council of State applied a strict separation between the

---

[769] Nikolaos Androulakis, *Θεμελιώδεις έννοιαι της ποινικής δίκης [Fundamental Notions of Criminal Procedure]*, vol. A (Athens: Σάκκουλα, 1972).

[770] Nikolaos Androulakis, "Τα όρια της ανακριτικής δράσεως και η «αρχή της αναγκαιότητας» [The Limits of Inquisitory Action and The 'principle of Necessity']," 1975, 1.

[771] On this point, see Giorgos Triantafyllou, "Η αρχή της αναλογικότητας στην ποινική δίκη [The Principle of Proportionality in the Criminal Process]," *Ελλ⊐νη* 31 (1990): 301, fn. 5, 19 and 20.

[772] Criminal law is part of public law in Greece, albeit the most "isolated" part.

[773] StE (Pl.) 300/36 *TNIL⊐ΣA*.

two procedures. In doing so, it reversed its previous case law, in which the legality of the administrative action was considered as a whole. According to this new decision, at the stage of urban planning the administration should be guided only by public interest considerations. Individual property rights and other particular legal requirements were to be taken into account only after the urban plan was concluded, during the expropriation procedure.[774] The clarity of this solution came at the cost of the coherence of administrative action and sometimes had absurd consequences. For example, a town plan sought to constrain the use of private lands, while at the same time the expropriation of these lands was legally prohibited. This prohibition could result from the availability of an adjacent public property that could serve the public utility of the expropriation, for instance.

Beginning his career at the Council of State, Petros Pararas pointed out the "legal absurdum" to which the new case law led.[775] He argued that a way out of this deadlock was to take as a starting point the cohesiveness of administrative action, which in his view underpinned the Council's previous case law. The administrative procedure for erecting public buildings was "*substantively* one and only", involving two preliminary stages. At both of these stages, administrative authorities should examine on the one hand the legitimate urban planning reasons connected to the public interest, and on the other hand the legal conditions of expropriation, guaranteeing the property rights of individuals. Yet the young judge's reasoning was more far-reaching. He went on to state that the individual derives from his right to property,

> a claim against the administration not to deprive him from his land, unless in application of the *principle of proportionality (Prinzip der Verhlätnismäßigkeit)*, and more generally of *Übermaßverbot*, which prohibits the administration from taking a measure if the general harm that it causes overshoot the expected advantages.[776]

Pararas continued by arguing that if in a concrete situation the urban planning criteria were in conflict with the legality requirements of expropriation, among which was the principle of proportionality, the administration was in principle obliged to favour the protection of the right to property. In support of this argument, the judge stressed the status of proportionality as a general constitutional principle and the individualist ideals that underpinned the Greek Constitution. Pararas contended that the interpretation that he proposed, adopted by the Council itself in some previous cases, was "more successful".[777]

---

[774] StE (Pl.) 2952/1975 *ToΣ* 1976, 345.

[775] Petros Pararas, "Παρατηρήσεις υπο την ΣτΕ (Ολ.) 2952/1975 [Comment on StE (Pl.) 2952/1975]," *ToΣ*, 1976, 350.

[776] Pararas, 350, emphasis in the original, citations omitted (citing contemporaneous German scholarship).

[777] Pararas, 350.

The application of proportionality by a dissenting judge. Less than a year later, the principle of proportionality was explicitly mentioned in a judicial opinion.[778] Two foreign joint-stock companies contested the legality of an act of expropriation on the basis of article 107 of the Constitution. In combination with a law dating from 1953, this constitutional provision prohibits the expropriation of foreign properties. Responding to the applicants' claim, the Council stated that while the prohibition was expressed in absolute terms, it should nevertheless be interpreted within the limits set out by competing constitutional provisions. More specifically, article 17 introduces a social conception of property, prohibiting its exercise to the detriment of the public interest. Further, article 106 provides for the possibility of nationalisation of enterprises that have the character of a monopoly and are of vital importance for the exploitation of national wealth, or for the provision of public services. According to the court, the combined interpretation of these provisions excluded certain expropriations from the prohibition of article 107. This was the case when the related public works "*have, from their nature, a more general importance for society or are connected to compelling national interests*".[779] In the court's view, the expropriations in question entered this exception and thus were not prohibited, since they served the construction of a highway connecting Athens and Thessaloniki, the two biggest cities of the country.

Thus, in this decision, the Council operated a reconciliation of competing constitutional provisions which was akin to judicial balancing. Yet, it did not refer to proportionality. Instead, it was in a dissenting opinion of one judge that the principle was invoked. The judge argued for a more contextual solution from the one to which the majority had concluded. In his view, even in cases of important public works, expropriation should only be possible if it was the only way to serve a compelling public interest. According to the judge, if alternative solutions were available the administration should weigh *in concreto* the economic loss incurred by individuals and the public in the various alternative situations. Most importantly, the executive authorities should proceed to this weighing, "*in application of the principle of relativity and the principle of proportion of the means for the achievement of state aims, principles resulting from the notion of the contemporary democratic and social state*".[780] In the instance at hand, the judge concluded as to the illegality of the administrative decision, because the administration had not proceeded to such a reasoning.[781]

The importance of the dissenting opinion did not escape the attention of Greek public lawyers. In his commentary Giorgos Kassimatis saw in the reasoning of the dissenting judge the invocation of a general constitutional principle, "the principle of relativity or proportionality (*Verhlätnismäßigkeits-prinzip*)".[782] According to this author, the principle was composed of three more specific ones: the principle of relativity; the

[778] StE (Pl.) 58/1977 *EEN* 1977, 580. The publication of the names of dissenting members of courts started only later, with Law n. 2172/1993.

[779] StE (Pl.) 58/1977, cited above.

[780] StE (Pl.) 58/1977, cited above

[781] Ibid.

[782] Giorgos Kassimatis, "Παρατηρήσεις στην ΣτΕ (Ολ.) 58/1977 [Comment on StE (Pl.) 58/1977]," *ΤοΣ*, 1977, 628.

principle of proportion of the means; and the principle of the choice of the less restrictive means.[783] Inherent in the ideal of a "State ruled by Law", relativity was founded on the fundamental principles of equality and freedom and had always functioned as a means for the protection of individual rights against state intervention.

However, Kassimatis pointed out that the dissenting judge had committed "a dangerous error" by expanding the scope of the principle so as to concern the exercise of individual rights and not only of public power.[784] The author argued that judicial principles do not operate *in abstracto* according to rational rules, but rather within a certain historical, political, and social context. Therefore, relativity should not be directly applied whenever competing interests were to be weighed. Only Parliament could transpose the principle to situations other than public intervention, as it had already done through certain civil code provisions. Kassimatis gave the example of legitimate defence, or of the state of emergency, which excluded the strict application of tort law rules and the abusive exercise of tort rights, as manifestations of the principle.

The application of proportionality against the right to strike. Kassimatis' fears were realised when proportionality found its first judicial application in an interim measures procedure before a civil law court. Assessing the legality of a strike organised by bank employees, the judge Chrysikos, President of the Athens Court of First Instance, identified the constitutional basis of collective labour rights. Article 23 of the Constitution explicitly guarantees the freedom to form and participate in trade unions, as well as the right to strike. The judge interpreted this constitutional provision to protect strike only as an *ultimum refugium* for claiming better working conditions. Generally, added the judge, labour rights, like all rights, are subject to limitations, among which the prohibition of abuse, explicitly entrenched in article 25(3) of the Constitution and guaranteed by article 281 of the civil code. Chrysikos concluded that the employees' right to strike was "*manifestly relative and the legality of its exercise [was] subject to judicial review according to (…) the Constitution*".[785] In the case at hand, the judge concluded that there was a manifest disproportionality between the means used by the employees and their ends. Thus, he held the strikes to be abusive, among other reasons, according to "*the constitutional principle of proportion between means and ends*". Proportionality was thus applied against a group of individuals exercising their collective rights. The illegal character of the employees' strike founded the order for interim measures. More importantly, it also founded the banks' claim for due compensation and for abstention from illegal strikes in the future, as well as their right to terminate the individual working contracts of the employees involved.[786]

The progressively open recognition of proportionality in the Council of State case law. A timid but progressively open recognition of proportionality was also taking place in the Council of State case law. In decision 1303/1977, the Minister of

[783] Kassimatis, 628.
[784] Kassimatis, 628.
[785] MPrAth 10517/1979 *NOMOS* (Athens Court of First Instance, interlocutory injunction).
[786] Ibid.

Public Works had annulled a prefectural decision on land regularisation. While stressing the broad discretion of the prefect on the matter, the Minister had specified that it should be "prudently exercised",[787] so as not to excessively favour one of the properties to the detriment of another. The Council of State confirmed the ministerial decision. It started by restating the broad discretionary powers enjoyed by the administration in the land regularisation procedure. Indeed, the scrutiny of substantive technical appreciations as to the most appropriate means generally exceeded the competence of the "*judge of legality*" of administrative action. However, this applied only insofar as the administration had not exceeded "*the extreme limits of its discretion*". Most notably, these limits were trespassed,

> whenever, without any reason, a property is excessively burdened in favour of an adjacent property, [because] in such a case the administration appears to have valued only the interest of one of the neighbouring owners. In principle this is precisely the case whenever (…) [the administration acts] in violation of the principle of proportion of the means to the legitimate aim pursued by the administrative authority (see CS 58/1977).[788]

In this way, the court translated in legal terms and validated the Minister's decision. The influence of Pararas, Advocate General in this decision, is obvious.

Conceptual confusion. Principle of relativity, proportionality or proportion? On what occasions was proportionality applicable and under what form? Confusion was dominant not only as far as terms were concerned, but also as to the structure and function of this new public law concept. In some cases, proportionality was used as a unitary standard prohibiting excess, in others as a reasoning method for balancing costs and benefits. In some cases it was addressed to public authorities, in others to individuals in the exercise of their rights. Sometimes proportionality was referred to as an individual claim resulting from the legal protection of property rights, other times as an objective standard of reasonableness of administrative action. Sometimes it acquired the meaning of a pronged reasoning process effectuated by the primary decision maker, other times its prongs were deemed to compose "substantively one principle".[789]

At first, not many features seemed to unite the various instances of proportionality language. Still, Pararas' and Kassimatis' reference to the same German doctrinal construction shows that they were actually *referring to the same thing*. Decision 1303/1977 even cited the previous 58/1977 as an application of the same principle. Looking more closely at how proportionality language was used, one observes that in all these cases, proportionality's function was to attenuate excessive legal formality. Appeal to proportionality seemed to add a minimum substantive content to legal decision

[787] StE (Pl.) 1303/1977 *ΤΝΠΛΣΑ*: «*μετά φειδούς*».
[788] Ibid.
[789] Kassimatis, "Παρατηρήσεις στην ΣτΕ (Ολ.) 58/1977 [Comment on StE (Pl.) 58/1977]," 628.

making. Thus, the question of legality ceased to be seen as an absolute, all-or-nothing question but as a matter depending on the factual circumstances of each case. This is why "relativity" was used as a term in parallel to "proportion" or "proportionality". Like equity, proportionality had different manifestations. It could vest in various forms and could accomplish different missions in legal reasoning. Soon, from this conceptual noise a more concrete perception of proportionality emerged as dominant.

ii. One transfer for another

Proportionality as a principle developed in German law. In the 1978 edition of his handbook, Aristovoulos Manessis pointed out the relativity of the protection of individual rights and mentioned the limitations imposed by case law on their legislative restrictions. According to this prominent scholar, restrictions on the exercise of rights should have an objective and impersonal character and should be justified by a compelling public interest. They should be necessary and appropriate to achieve their objective, which should not be achievable by less onerous means. Finally, restrictions should be proportionate to the legislative goals and should not infringe the substance of the rights at stake. Though Manessis did not use the term "principle of proportionality", the influence of the German proportionality doctrine is obvious.[790] A few years later, in an article published in 1983, Apostolos Gerontas presented elaborate research on the German proportionality theory, especially in constitutional rights and professional freedom cases. He stressed that proportionality involved an *in concreto* balancing that enhanced convincing judicial argumentation. Thus, he called for the application of the principle in domestic constitutional case law as well. To this end, Gerontas adjusted the principle to domestic constitutional structures, reinterpreting articles of the 1975 Constitution as implying the application of proportionality.[791] Greek public lawyers' fine understanding of the German doctrine is striking.

The solemn enunciation of proportionality in case law. The transfer of proportionality in the Council of State case law soon arrived. In decision 2112/1984, a statute dating from 1981 deprived painters who did not possess a degree in Arts from the right to receive public commissions. This was an important restriction on the exercise of their profession, particularly because the Orthodox Church, which is a public person in Greece, is the most important client of painters specialising in hagiography. In order to acquire the right to receive public commissions anew, painters had to become members of the Chamber of Artists, which involved a long and complicated procedure with an uncertain outcome. The Union of Hagiographers,

---

[790] Aristovoulos Manessis, *Συνταγματικά Δικαιώματα [Constitutional Rights]*, vol. A (Thessaloniki: Σάκκουλα, 1978), 37 f; 50 f; Aristovoulos Manessis, *Συνταγματικά Δικαιώματα [Constitutional Rights]*, 2nd ed., vol. A (Thessaloniki: Σάκκουλα, 1982), 77 f.

[791] Apostolos Gerontas, "Η αρχή της αναλογικότητας στο γερμανικό δημόσιο δίκαιο [The Principle of Proportionality in German Public Law]," *ΤοΣ*, 1983, 20.

together with individual artists, introduced an action for the annulment of the implementing administrative act before the Council of State.

The fourth section of the Council unanimously declared the statute unconstitutional.[792] In doing so, it followed the observations of its Advocate General (*εισηγητής*) Pararas. The court applied previous case law on the matter and located the constitutional basis for the protection of professional freedom in article 5(1) of the Constitution, protecting the right to freely develop one's personality and to participate in the social, economic and political life of the country. The judges defined the scope of this protection broadly, comprising the freedom to choose and to exercise any profession. However, they also declared that Parliament has the power to place limitations on this freedom by imposing positive obligations, restrictions or prohibitions on its beneficiaries. The constitutional provision itself declares that the right in question should not be exercised to the detriment of the rights of others, in violation of the Constitution or in violation of the "good usages" (*χρηστά ήθη*), that is, the moral imperatives that are dominant in society each time.

With a precision reminiscent of constitutional law handbooks,[793] and departing from its traditional laconic style of justification, the Council of State stated that restrictions on professional freedom are constitutional only when they are generally and objectively defined, and justified by sufficiently important reasons of general or public interest. The court announced that the legislative criteria would be considered to be objective only insofar as the conditions and restrictions set for the exercise of a certain profession complied with "*the constitutional principle of proportionality (αρχήν της αναλογικότητος), resulting from the ideal of a State ruled by Law*".[794] The judges went on to specify the content of the principle:

> Restrictions imposed by the legislator and the Administration on the exercise of individual rights should only be those necessary and relevant to the aim pursued by the law. More specifically, they should be directly related not only to this aim, but also to already acquired qualifications of the candidates for the exercise of a certain profession (artistic or scientific knowledge), certified by law or de facto, as well as to the object and the nature of the profession itself.[795]

Proportionality was thus announced as a requirement of necessity and relevance imposed on legislative interference with individual freedoms. As such, it was not a self-standing standard but was applied in combination with the individual right invoked.

---

[792] StE (Pl.) 2112/1984 *ΤοΣ* 1985, 63, commented by Anastasios Tachos, "Παρατηρήσεις στην ΣτΕ (Ολ.) 2112/1984 [Comment on StE (Pl.) 2112/1984]," *Αρμ*, 1984, 907.

[793] Sarantis Orfanoudakis, *Η αρχή της αναλογικότητας στην ελληνική έννομη τάξη: από τη νομολογιακή εφαρμογή της στη συνταγματική της καθιέρωση [The Principle of Proportionality in the Greek Legal Order: From Its Judicial Application to Its Constitutional Consecration]* (Thessaloniki: Σάκκουλα, 2003), 79.

[794] StE (Pl.) 2112/1984, cited above.

[795] Ibid.

In this case, the proportionality scrutiny entailed a close examination of the impacts of the public decision on the professional freedom of the plaintiffs. The court observed that the aggrieved individuals were "*substantially*" obliged to stop exercising their profession and that no transitional measures were provided for by the law. Further, the procedure they would have to follow in order to qualify as hagiographers was particularly burdensome and long, and the law did not define any objective criteria for attributing this qualification. While the Council did not structure its reasoning according to the proportionality prongs, it did proceed to a searching scrutiny of the outcomes of the reviewed legislation, taking into account the facts and not only its scope. Thus, the function of proportionality was not very different to the one it accomplishes in the global model. The court declared the "*strict provisions*" in question unconstitutional, holding that they "*were not dictated by reasons of general public interest*".[796] By introducing an impact-based evaluation of the legislative purpose, proportionality blurred the traditional distinction in Greek judicial review between the "*if*" and the "*how*". Vassilios Voutsakis noticed the important implications that the application of the principle had for the traditionally formalist judicial methods.[797]

The perception of proportionality in theory. This did not seem to trouble mainstream scholars, who celebrated the 1984 decision as the consecration of proportionality in Greek public law.[798] The solemn announcement of proportionality provoked an explosion of scholarly interest in the matter.[799] Proportionality became part of mainstream public law handbooks,[800] while it was also incorporated in legislative and administrative texts.[801] As to the concrete form of review that it implied, scholars unanimously saw in the Council of State's dicta the introduction of a prong-structured method of reasoning like the one applied by foreign, and especially German courts.[802] As such, proportionality was to serve the reconciliation of conflicting

---

[796] Ibid.

[797] Vassilios Voutsakis, "Η αρχή της αναλογικότητας: από την ερμηνεία στη διάπλαση του δικαίου [The Principle of Proportionality: From Legal Interpretation to Legal Formation]," in *Όψεις του Κράτους Δικαίου*, ed. Konstantinos Stamatis and Antonis Manitakis (Thessaloniki: Σάκκουλα, 1990), 205.

[798] Dimitra Kontogiorga-Theocharopoulou, *Η αρχή της αναλογικότητας στο εσωτερικό δημόσιο δίκαιο [The Principle of Proportionality in Domestic Public Law]* (Thessaloniki: Σάκκουλα, 1989), 9; Antonis Manitakis, "Πρόλογος [Preface]," in *Όψεις του Κράτους Δικαίου*, ed. Konstantinos Stamatis and Antonis Manitakis (Thessaloniki: Σάκκουλα, 1990), 5 f.; Voutsakis, "Η αρχή της αναλογικότητας: από την ερμηνεία στη διάπλαση του δικαίου [The Principle of Proportionality: From Legal Interpretation to Legal Formation]," 205 f.

[799] Tachos, "Παρατηρήσεις στην ΣτΕ (Ολ.) 2112/1984 [Comment on StE (Pl.) 2112/1984]"; Vassilios Skouris, "Η συνταγματική αρχή της αναλογικότητας και οι νομοθετικοί περιορισμοί της επαγγελματικής ελευθερίας [The Constitutional Principle of Proportionality and Legislative Restrictions of Professional Freedom]," *Ελλ∆νη* 28 (1987): 773; Kontogiorga-Theocharopoulou, *Η αρχή της αναλογικότητας στο εσωτερικό δημόσιο δίκαιο [The Principle of Proportionality in Domestic Public Law]*; Voutsakis, "Η αρχή της αναλογικότητας: από την ερμηνεία στη διάπλαση του δικαίου [The Principle of Proportionality: From Legal Interpretation to Legal Formation]."

[800] Dimitrios Tsatsos, *Συνταγματικό ∆ίκαιο [Constitutional Law]*, vol. Γ', Θεμελιώδη Δικαιώματα [Fundamental Rights] (Athens: Αντ. Ν. Σάκκουλας, 1988), 245 f;; Dagtoglou, *Γενικό ∆ιοικητικό ∆ίκαιο [General Administrative Law]*, 135 f;; Prodromos Dagtoglou, *Ευρωπαϊκό Κοινοτικό ∆ίκαιο [European Community Law]*, 2nd ed. (Athens: Αντ. Σάκκουλας, 1985), 160 f.

[801] See for example, article 3(5) Law n. 1867/1989 on imprisonment for debt.

[802] Skouris, "Η συνταγματική αρχή της αναλογικότητας και οι νομοθετικοί περιορισμοί της επαγγελματικής ελευθερίας [The Constitutional Principle of Proportionality and Legislative Restrictions of Professional Freedom]"; Voutsakis, "Η αρχή της αναλογικότητας: από την ερμηνεία στη διάπλαση του

constitutional values, in particular of individual rights with the public interest. Its application was general and not limited to the field of professional freedom. Proportionality implied a scrutiny of public decisions from the point of view of their appropriateness, necessity and *stricto sensu* proportionality (or rather disproportionality). It ensured the reasonableness of public decisions as means to the ends of public action, what Greek scholars called their "relevance" (*συνάφεια*).[803] Scholars pointed out that the principle was subject to variable application, fluctuating between a negative standard of disproportionality or of a positive standard of proportionality.[804]

The perception of proportionality was akin to the Alexyan model. Similarity can be observed not only at the level of the proportionality structure, but also at a substantive level. Scholars expected the transfer of proportionality to lead to more intrusive judicial review from the point of view of constitutional rights. During the '80s and '90s proportionality terminology progressively spread in Council of State and of Court of Audit decisions.[805] However, its perception in the minds of Greek public lawyers was considerably detached from the way it was *actually applied* in subsequent case law. Four years later, the Council of State plenum defined more clearly the function of proportionality in judicial review.[806]

Proportionality as manifest error: constrained in traditional distinctions. A statute dating from 1985 prohibited the use of the terms "Medical Centre" or "Health Centre" in the naming of private clinics. The goal was to avoid the confusion that these terms could provoke, due to the fact that similar denominations were used by public centres providing health services. In application of the law, the prefect of East Attica ordered a private clinic to remove such terms from its name. The order was to be executed within a short deadline, or else the clinic would be faced with licence withdrawal. The clinic contested the prefect's decision by arguing that both the decision and its legislative basis were contrary to the principle of proportionality and to article 5 of the Constitution. The Council of State rejected the claims based on article 5, stating that this article allowed for restrictions of economic freedom for public interest purposes. The court held that the contested measures did not violate proportionality either. In its view, proportionality can lead to a declaration of unconstitutionality,

---

δικαίου [The Principle of Proportionality: From Legal Interpretation to Legal Formation]," 215; Dimitra Kontogiorga-Theocharopoulou, "Σημεία εργασίας επί της αρχής της αναλογικότητος [Elements of Study on the Principle of Proportionality]," in *Σύμμεικτα προς τιμήν Γεωργίου Μ. Παπαχατζή* (Athens: Σάκκουλα, 1989), 889.

803 Antonis Manitakis, "Η πολυσήμαντη επιστροφή του Κράτους Δικαίου [The Multifaceted Return of the Ideal of a State Ruled by Law]," in *Όψεις του Κράτους Δικαίου*, ed. Konstantinos Stamatis and Antonis Manitakis (Thessaloniki: Σάκκουλα, 1990), 61; Voutsakis, "Η αρχή της αναλογικότητας: από την ερμηνεία στη διάπλαση του δικαίου [The Principle of Proportionality: From Legal Interpretation to Legal Formation]," 215.

804 Kontogiorga-Theocharopoulou, *Η αρχή της αναλογικότητας στο εσωτερικό δημόσιο δίκαιο [The Principle of Proportionality in Domestic Public Law]*, 51.

805 StE 2261/1984 *ΘΕ ΣΤΕ* 110/1984, paras 107, 179-180; StE 3682/1986 *ΘΕ ΣΤΕ* 1986, paras 292 f.; StE 1426/1989 *APM* 1989, 810; StE 4050-1/1990 *ΔΔΙΚΗ* 1991, 566; StE 1540/1994 *ΤΝΠΔΣΑ*; ES (Pl.) 737/1989 *ΔΔΙΚΗ* 1990, 1458 (Court of Audit).

806 StE 1149/1988 *ΤοΣ* 1988, 324.

> only if it is manifest that the measure is by nature inappropriate [to obtain] the purpose pursued by the law, or when [the measure] equally manifestly overshoots this purpose, and not when simply the expediency of the measure can be contested.[807]

The Council considerably restricted the scope and function of proportionality. The difference from the reasoning of the judge in decision 2112 is obvious. Proportionality no longer concerned the constitutional protection of economic freedom but was applied as a self-standing manifest error test, as an exception to the omnipotence of Parliament when it unreasonably exercised its powers. Indeed, once the legitimacy of the legislative aim was ascertained in principle, proportionality was almost a given. While it still concerned the content of legislation, it was not concerned with its impact on constitutional rights. In this sense, the Greek version of proportionality, like the French manifest error test, were not very different from *Wednesbury* unreasonableness. The Greek court refused to examine claims concerning the availability of less restrictive measures for obtaining the same legislative purpose.[808] The appraisal of the necessity of legislative restrictions, as well as the balancing of competing constitutional values, remained an exclusively political project.

Through a minimal review of the content of legislation (what Greek lawyers call "marginal review" – *οριακός έλεγχος*), proportionality actually served in the scrutiny of the "*if*" of public action, of its grounds. In this way, it was contained by the traditional distinction between "*if*" and "*how*". Still, proportionality did bring about a major structural change in Greek judicial practice: the introduction of the manifest error as a test concerning the legislative means-ends. Indeed, before 1988 the term manifest (*πρόδηλο, κατάδηλο*) had rarely been used in the judicial review of Parliament. It had mostly been invoked in the construction of the normative content of constitutional provisions. After the spread of proportionality in domestic legal discourse however, its use became frequent in the evaluation of the content of legislation.[809] In other words, what Greek public lawyers have interpreted as the transfer of the proportionality test is (in terms of discursive structures) the transfer of the manifest error test! The structural change that proportionality engineered in domestic constitutional review has largely been neglected by Greek scholars. This is probably because the manifest error test fit well the traditional perception of the role of the judge in the "marginal" scrutiny of the legislator and the doctrine of the "presumption of constitutionality" of legal statutes.[810]

The deferent application of proportionality in constitutional law. Decision 1149/1988 became a reference point for the application of proportionality in the

---

[807] Ibid.

[808] Ibid.

[809] Based on the results of the research by keywords in the legal databases NOMOS and Isokratis on the 30 September 2017.

[810] Venizelos talks about proportionality as a method for "marginal" constitutional review in Evaggelos Venizelos, *Το γενικό συμφέρον και οι περιορισμοί των συνταγματικών δικαιωμάτων [The General Interest and the Limitations on Constitutional Rights]* (Thessaloniki: Παρατηρητής, 1990), 220 f.

judicial review of legislation, and was often cited together with decision 2112/1984, despite the different content that proportionality had in these decisions. Before proceeding to the proportionality test, the Council of State typically examined the legitimacy of the legislative aim. In this respect, it required "*general, objective and appropriate criteria*".[811] Further, usually it required that restrictions be defined in a general and impersonal way. Review of the legislative criteria sometimes led to an intrusive scrutiny of legislative provisions.[812] However, once the legitimacy of legislative intent was ascertained in principle, disproportionality constituted an exception to the constitutionality of legislation. Sometimes courts required a "*reasonable relationship*" between state intervention and its objective, but they subsequently still sanctioned manifest errors in this respect.[813]

Judicial restraint in the application of proportionality considerably limited its function in constitutional law. This did not impede scholarly theories on proportionality from following their own brilliant trajectories. While in legal theory proportionality was understood as a guarantee of constitutional rights, in practice it was a free-standing principle. Whereas in theory it was perceived as a three-pronged requirement of necessity, appropriateness, and relevance, in practice, it long corresponded to a standard of manifest inappropriateness and manifest overshooting. For a long time, the principle was rarely used in the scrutiny of legislation. Writing in 1997, George Gerapetritis observed that at the time only one statute had been declared unconstitutional under proportionality (the author referred to the 2112/1984 decision). The technical implications of proportionality were much more important in administrative law, where the concept inspired scholarly analyses with a more concrete, technical content. In this field, proportionality had a completely different form and function to the one it had in the judicial review of legislation.

iii. Proportionality and institutional competence in administrative law

The limited role of proportionality in constitutional rights protection. Proportionality did not participate much in the "activist" judicial movement in the field of environmental protection. Its relatively modest function in this field is exemplified in decision 3682/1986. In this case, legislation had forbidden fencing private properties that were situated less than 500 meters from the shore and did not belong to an urban zone. The reason for this prohibition was that such constructions were obstructing public access to the beach. A subsequent administrative decision instituted a procedure for the demolition of such constructions, even when they had existed prior to the law in question, insofar as this was necessary to provide public access to the beach. The decision for the demolition was to be taken by the administration if certain conditions, defined in detail in a general administrative act, were fulfilled. Individuals affected by

[811] See for example ES 737/1989, cited above, and StE (Pl.) 413/1993 ⊿/*NH* 1993, 443.
[812] StE (Pl.) 413/1993, cited above.
[813] StE 2153/1989 *APM* 1990, 382; StE 392/1993 *To*Σ 1994, 150, para 14.

this procedure brought an action before the Council of State, contesting the compatibility of legislation, as well as of the administrative act of implementation, with their property rights.

The Council started by carefully examining the scope of the law. The affected properties were situated outside the limits of urban zones, where construction was generally forbidden. The conditions for the demolition of the concerned constructions were defined objectively and in detail, so as to ensure that demolition would take place only insofar as it was necessary. Finally, their fulfilment was "*certified each time by the Administration through an individual act, due to the nature of the measure and in application of the constitutional principle of proportionality*".[814] The court went on to identify the aim of the legislation in question. In its view, the provisions "*served a general social interest, that is, the possibility for every individual to access the sea, which is a common good that everyone should enjoy without disturbance*". The Council said that this right resulted from article 24(1) of the Constitution, which defines the protection of the environment as a primary obligation of the state. Following these normative considerations, the court found that the contested measures did "*not violate the constitutional right to property but constitute[d] a legitimate restriction to the use and enjoyment of part of [the claimants'] land*".[815]

Protection of the environment in the Council of State case law proceeded through an extensive interpretation of the relevant constitutional provisions, sometimes to the detriment of other constitutional rights and principles. Though the Council often engaged in value-laden argumentation, it did not employ proportionality language at this point in judicial reasoning. In fact, proportionality designated a principle addressed to the *administration* rather than to Parliament. Greek public lawyers perceived it as a value of equity or reasonableness, a requirement for the administration to consider the impacts of its decision on individual rights. Proportionality was to be applied *in concreto*, after consideration of the particular circumstances of each case. Hence, its application raised questions of institutional competence and balance. Indeed, given that concrete factual considerations were primarily the competence of expert administrative authorities, the Council typically deferred to the substantive appreciations of the administration in judicial review. Besides, even in the inquisitorial system of fact-finding that is dominant in Greek judicial review, the administration enjoys an undeniable advantage in obtaining documents and evidence.[816]

The formal application of proportionality. In this context, proportionality reasoning thus acquired a particularly formal tone. Proportionality's function was to set procedural requirements for the exercise of administrative discretion, and thus to ensure that public authorities took into account sufficiently the circumstances of the case and the interests of the claimants. Most importantly, in the legality review of onerous administrative acts proportionality implied a more intrusive scrutiny of the

[814] Ibid.

[815] StE 3682/1986, cited above.

[816] George Gerapetritis, "Στο δρόμο για την θεσμικά ισόρροπη παρέμβαση του δικαστή [Towards an Institutionally Balanced Judicial Intervention]," *ΔτΑ* 25 (2005): 198.

justification of public decisions.[817] In the field of administrative sanctions in particular, where its application was more frequent, proportionality preserved its content of equity or relativity. Greek judges generally accepted that proportionality required administrative authorities to consider the seriousness of the offence committed, as well as the conditions under which it was committed.[818] But even in the field of individual rights, where proportionality was analysed as a requirement of reasonableness and necessity, it was only the justification of the primary decision that was examined.

In case 1540/1994, for instance, the claimants contested the legality of an expropriation. During the procedure preceding the impugned act, the administration had failed to respond to their contention that a smaller parcel of land would sufficiently serve the aim of the expropriation. Had the administration expropriated only this piece of land, construction would still be possible on the claimants' property. On the contrary, the land remaining from the contested expropriation was not big enough to fulfil the urban planning criteria for granting a construction licence. The Council of State annulled the reviewed decision under the ground of non-respect of a formal requirement. According to the court, the administration had not answered a claim that was substantial for deciding in this case,

> since expropriation extincts the right to property [which is] generally protected by the Constitution (article 17). As a consequence, also in application of the constitutional principle of proportionality (CoS 2112/84), [the administration] is not allowed to seize a land that is bigger than what is considered necessary and sufficient for pursuing the (…) public utility aim.[819]

Applied in combination with the right to property, proportionality corresponded to a "less onerous means" requirement, imposed on the administration. Thus, it obligated the competent authority to take into account individual claims as to the existence of less restrictive alternatives. The judges sanctioned this requirement through a formal review of the justification provided by the primary decision-maker. Had justification of the contested acts been complete, the judges would have refused to contest the solution to which the competent authority had concluded.[820]

Proportionality as a standard of justification. Given that proportionality mainly entailed additional justification requirements, there was no place for its application when no justification was required for the reviewed act whatsoever. Insofar

---

[817] StE 1129/2003 *Ελλ.Δνη* 2004, 1202. On this decision, see Gerapetritis, *Proportionality in Administrative Law*, 113 f.; Gerapetritis, "Στο δρόμο για την θεσμικά ισόρροπη παρέμβαση του δικαστή [Towards an Institutionally Balanced Judicial Intervention]."

[818] StE 257/1987 *ΘΕ ΣΤΕ* 16/1987, paras 10 f.

[819] StE 1540/1994, cited above, para 9 (opinion by Pararas).

[820] See for example StE 2173/1988 *ΘΕ ΣΤΕ* 11/1988, paras 3-4, and 16 f. In this case the administration had justified its decision not only by mentioning the public interest reason, but also by concretely justifying the choice of the particular piece of land. The court rejected the proportionality claims of the plaintiffs and stated that the existence of alternative choices was not reviewable by the judge of legality because it would encroach upon the substantive evaluations of the administration.

as individual onerous acts were concerned, this was generally the case in the presence of "bound competence" (*δεσμία αρμοδιότητα*). For example, in decision 3705/1992, a student saw her qualification for the next academic year refused by the school authorities, due to her too-frequent absence from classes. The school had acted in application of the law, which established a threshold of 50 unjustified absences, exceeding which students were not qualified, no matter the circumstances. The student contested the proportionality of the school's refusal. The Council rejected her arguments without examining the concrete facts of the case. The judges stated that proportionality was not even at stake, since the competence of the administration was bound by law and no discretion was left to the application authorities. The court thus confined itself to affirming *in abstracto* the reasonable character of the legal limit of 50 absences, which constituted the basis for the contested act.[821]

The same applied for general administrative acts and decrees, which traditionally were not subject to any justification requirement. In these cases, proportionality functioned only as a check that the public authority did not exceed the limits of the competence delegated by Parliament. Decision 1821/1995 is illustrative to this respect.[822] Zante is an Ionian island where the *caretta caretta* sea turtle breeds. This is a rare species, the protection of which is mandated by national and international texts. Following legislative delegation, a presidential decree enacted important restrictions on the use of property on part of the island, aiming to preserve the *caretta caretta* birthplaces. This impeded the plaintiff company from constructing a hotel complex. The company claimed that the decree did not respect the limits set by its legislative basis, nor by the principle of proportionality. The Council of State held these claims unfounded. Recalling the lack of any justification requirement concerning general administrative acts, the Council stated that their substantive review was confined to a check of "*their conformity with the conditions set by the [legislative] delegation and of the eventual trespassing of its limits*".[823]

In the case at hand the court held that the administration had been empowered by Parliament to adopt the contested measures. As for the principle of proportionality, the court rejected the plaintiffs' arguments by stating that the restrictions

> aim[ed] to protect the *caretta caretta* sea turtle (…) but also to upgrade and develop the region (…), and were considered appropriate and necessary for obtaining these purposes, following an evaluation of all the relevant factual and scientific data.[824]

Hence, once the legal basis and the public interest aim of the reviewed act were established, no place was left for proportionality review. The court did not even apply the manifest error test concerning the means-ends of the reviewed decision, as it did

[821] StE 3705/1992 *ΤΝΠ⊥ΣΑ*; StE 4335/1996 *ΤΝΠ⊥ΣΑ*, para 9, concerning a disciplinary sanction imposed by the prefect on a mayor.

[822] StE (Pl.) 1821/1995 *ΤοΣ* 1996, 263.

[823] Ibid.

[824] Ibid.

in the review of legislation. Its scrutiny ended in the affirmation that the competent authorities had proceeded to the proportionality assessments themselves. The judicial scrutiny was very weak, since the court usually constructed the public interest purpose of the reviewed decisions itself, and it did so in broad and indeterminate terms.[825]

Thus, in the review of general administrative acts the principle of proportionality has traditionally been reduced to a requirement of "proportion, or at least plausibility".[826] This was expressed in the cases where the court ascertained under proportionality that the restriction "*cannot be deemed to exceed the reasonable limits, according to common experience, in view of the pursued aim*".[827] In such cases, proportionality corresponded to a minimal substantive review of unreasonableness akin to the English *Wednesbury* test. Its function was to eliminate abuses of public power. Hence, it was often invoked together with the principle of good administration or with the prohibition of abuse of power.

Proportionality as equity in substantive adjudication. Proportionality was much more important in substantive administrative law, where institutional concerns were not so significant. In certain cases involving personal freedom restrictions, the Council of State affirmed the power of the judiciary to review *de novo* the facts of the relevant administrative decisions.[828] Thus, imprisonment for debt became the most glorious field of application for proportionality. This measure was imposed as a means of enforcement on the debtors of public persons when their behaviour betrayed bad faith and they had no means for reimbursing their debts. The aim of imprisonment for debt was to put pressure on the debtor and on her family and friends in order to find a way to reimburse the public. In this field, proportionality progressively developed from a prohibition of unreasonableness and abuse, to a requirement of proof of the appropriateness and necessity of imprisonment from administrative authorities.[829] Judicial policy on the matter was followed by a legislative reform that imposed a proportionality requirement on the application of the measure.[830] This made

---

[825] Yannakopoulos talks about a presumption that laws and administrative regulations pursue the public interest, in *Η επίδραση του δικαίου της Ευρωπαϊκής Ένωσης στον δικαστικό έλεγχο της συνταγματικότητας των νόμων [The Influence of EU Law on Judicial Review of the Constitutionality of Legislation]*, 173 f.

[826] See Kassiani Manolakoglou, "Η αρχή της αναλογικότητας ως τεχνική του δικαστικού ελέγχου πράξεων διακριτικής ευχέρειας της διοίκησης [The Principle of Proportionality as a Technique for the Judicial Scrutiny of Discretionary Administrative Acts]," *Constitutionalism.gr* (blog), April 22, 2011, 10, http://constitutionalism.gr/site/wp-content/mgdata/pdf/kassianianalogikotita21042011.pdf; see also Gogos, "Πτυχές του ελέγχου αναλογικότητας στη νομολογία του Συμβουλίου της Επικρατείας [Aspects of Proportionality Review in the Case Law of the Council of State]."

[827] StE (Pl.) 4027/1998 *ΔΦΟΡΝΟΜΟΘ* 1999, 931, para 9.

[828] StE 2775/1989 *APXN* 1990, 281.

[829] DPrAth 6056/1987 *ΕΔΙΚΑ* 1988, 58 (Athens Administrative Court of First Instance); DEfAth 3057/1988 *ΕΔΙΚΑ* 1988, 728 (Athens Administrative Court of Appeal); DEfAth 2313/1989 *ΔΦΟΡΝΟΜΟΘ* 1989, 914 (Athens Administrative Court of Appeal); DPrThes 18/1989 *ΕΔΙΚΑ* 2000, 44 (Thessaloniki Administrative Court of First Instance); DPrAth 5/1993 *ΔΔΙΚΗ* 1993, 447 (Athens Administrative Court of First Instance); DEfAth 1/2000 *ΔΦΟΡΝΟΜΟΘ* 2000, 707 (Athens Administrative Court of Appeal). Whenever the applicant contested the necessity of the imprisonment, the question of the burden of proof was raised. Indeed, it is difficult for the administration to prove that the claimant does not possess sufficient property to fulfil her pecuniary obligations.

[830] See Law n. 1867/1989 is the most well-known piece of legislation. The statute was soon abrogated due to the difficulties of establishing evidence. However, in its decision DPrAth 5/1992

imprisonment for debt much more difficult, since it charged the administration with adducing evidence of the debtor's bad faith, as well as of the effectiveness of imprisonment in each particular case.

Proportionality terminology spread in certain private law cases as well. Having the content of relativity or equity, the principle served the teleological interpretation of "indeterminate legal notions" (*αόριστες νομικές έννοιες*) contained in civil code provisions, like the prohibition of abuse in article 281. In labour law, for example, the principle preserved its function as a criterion for identifying abusive strikes.[831] In some rare cases proportionality had a protective function for labour rights. Its application imposed limits on the employer's right to dismiss an employee, when less restrictive measures were available.[832] Proportionality was also used in competition law and contract law.[833] In its version as *proportionnalité des peines*, it spread in criminal case law too.[834] While during the late '90s *Areios Pagos* accepted that proportionality applied in private law, the court usually refused to review lower courts case law in this respect, since it understood proportionality to imply appreciations of a factual nature.[835]

Instead of being the object of study in constitutional law, proportionality attracted more scholarly attention as an administrative, criminal or private law principle.[836] While Greek lawyers never forgot to mention its foreign origins, its theoretical content and its protective function for rights, proportionality was re-contextualised in the various technical fields of the Greek legal discourse in which it was inserted. Its concrete implications for the interpretation and application of substantive and procedural rules were studied fragmentally. This did not affect the unitary perception of proportionality in theory. The principle began to be described as having two "aspects". As a

---

ΔΔΙΚΗ 1993, 194, the Athens Administrative Court of First Instance declared the abrogation of the statute unconstitutional, contrary to the constitutional principle of proportionality.

831 See EfAth 1/92 *ΕΕΔ* 1992, 840 (Athens Court of Appeal).

832 See MPrAth 458/1991 *Ελλάνη* 1991, 628 (Athens Court of First Instance); MPrAth 3308/1992 *ΔΕΝ* 1993, 594 (Athens Court of First Instance); MPrAth 3646/1992 *ΑΡΜ* 1994, 561 (Athens Court of First Instance).

833 See EfAth 5025/1990 *Δ/ΝΗ* 1992, 193 (Athens Court of Appeal), where the court affirmed that the refusal by a bank to reconsider the loan of one of its clients (a ship owner) in the middle of a shipping crisis was contrary to proportionality and thus to good usages. See also DEfAth 1440/1990 *ΔΔΙΚΗ* 1990, 1352 (Athens Administrative Court of Appeal), in which the court applies proportionality in public contracts. See also the use of the principle in company law, where the debt adjustment agreement by the majority creditors must conform to proportionality and must meet "*the golden rule of optimal public utility*". Similarly, EfAth 5846/1998 *Δ/ΝΗ* 1999, 1372 (Athens Court of Appeal); EfAth 7029/1998, *ΔΕΕ* 1999, 75 (Athens Court of Appeal).

834 DStrThess 772/1989 *ΑΡΜ* 1989, 1254 (Administrative Military Court of Thessaloniki); Anakr Tripoli 12/1991 *ΠΟΙΝΧΡ* 1991, 932 (Tripoli instruction judge); SymbPlim Mesolongi 2/1992 *ΥΠΕΡΑΣΠΙΣΗ* 1992, 140 (Mesolongi Correctional Court in Council).

835 AP 451/1999 *NOMOS*; AP 445/1999 *ΕΕΝ* 2000, 534; On this point, see Dionysis Giakoumis, "Οι αόριστες έννοιες, η διακριτική ευχέρεια του δικαστή ως αόριστη νομική έννοια, η εξειδίκευσή της και η δυνατότητα αναιρετικού ελέγχου υπό το πρίσμα της αρχής της αναλογικότητας [Indeterminate Notions, Judicial Discretion as an Indeterminate Legal Notion, Its Concretisation, and the Possibility of Cassation under the Framework of the Principle of Proportionality]," *Δτκ* 36 (2005): 48.

836 For some examples, see Triantafyllou, "Η αρχή της αναλογικότητας στην ποινική δίκη [The Principle of Proportionality in the Criminal Process]"; Theocharis Dalakouras, *Η αρχή της αναλογικότητας και τα μέτρα δικονομικού καταναγκασμού [The Principle of Proportionality and Coercive Measures in Criminal Proceedings]* (Thessaloniki: Σάκκουλα, 1993); Konstantinos Simantiras, *Γενικές αρχές αστικού δικαίου [General Principles of Civil Law]*, 4th ed. (Athens: Αντ. Σάκκουλας, 1990), para 472.

substantive value, it represented a requirement of equity, reasonableness or moderation. From a technical point of view, it served as a tool for the judge in the interpretation and application of legal rules and its content was concretised according to the circumstances of each case.[837] In the meantime, yet another form and function for proportionality emerged in the field of EC law.

iv. Proportionality as a European law principle

The initial formalist stance of Greek courts. From the mid-'80s, Greek public lawyers started mentioning proportionality as an EC law principle in handbooks.[838] By the end of the decade, the EC law aspect of proportionality began to be invoked in courtrooms too. Yet until the mid-'90s, proportionality was mainly understood and applied as a *domestic* public law principle, transferred from German law. Its application was not perceived as a supranational obligation, since the EC Treaties were understood as imposing substantive legal norms rather than any particular scrutiny method. Thus, the question of compatibility with EC law freedoms was understood as a question of discrimination on the basis of nationality and not as a requirement for eliminating any *de facto* obstacles to trade.[839] Similarly, the ECHR did not much influence judicial practice on proportionality. For some time, when the Convention was invoked it was the relevant *domestic* constitutional right or principle that applied. This was combined with a literal interpretation of Convention rights by Greek judges, who did not follow Strasbourg case law on the matter.[840]

The first preliminary references to the ECJ on proportionality. One has to wait until the mid-'90s for the first judicial applications of proportionality in European law. The movement started in lower administrative courts.[841] Among the supreme courts, it was *Areios Pagos* that first sent a preliminary reference to the ECJ on proportionality in 1996. A statute dating from 1987 instituted expulsion from Greek territory as an additional penalty for foreigners in possession of illegal drugs. The accused could object to the measure only if important reasons, especially connected to family life, justified her remaining in the country. Otherwise, expulsion was imposed for life, while the Minister of Justice had the power to reconsider the decision three years after the conviction. Greek citizens having committed the same misdemeanour were faced only with additional residence restrictions. In the case at hand, Italian citizens contested their conviction for illegal drug use in cassation. They contested the

[837] Manitakis, "Πρόλογος [Preface]," 5 f.; Antonis Manitakis, *Κράτος δικαίου και δικαστικός έλεγχος της συνταγματικότητας [The Ideal of a State Ruled by Law and Judicial Review of Constitutionality]* (Thessaloniki: Σάκκουλα, 1994), 209–10.

[838] Most prominently Dagtoglou, *Ευρωπαϊκό Κοινοτικό Δίκαιο [European Community Law]*.

[839] StE 2153/1989 *APM* 1990, 382.

[840] On this point, see *infra*, Part III, Chapter 7(4).

[841] DPrThess 921/1995 *ΔΔΙΚΗ* 1995, 730 (Thessaloniki Administrative Court of First Instance).

decision only insofar as it obligated them to leave the country. Among other arguments, they invoked EC law and the freedom of movement.[842]

In its decision, *Areios Pagos* referred extensively to the EC Treaties and Luxembourg case law. It observed that the freedom of movement was a fundamental EC law principle, derogations from which should be interpreted strictly. In cases where restrictions had been imposed as a criminal penalty, the ECJ required that they not be disproportionate to the nature of the committed offence.[843] *Areios Pagos* understood this as a requirement "*that the (general) principle of proportionality not be violated*".[844] The Greek judges referred to the *Rutili* case to underscore that the ECJ individual freedoms case law had been inspired by the ECHR. They understood the ECHR "necessary in a democratic society" requirement to be "*synonymous*" with the principle of proportionality in EU law.[845] In this case, *Areios Pagos* decided that a preliminary reference to the ECJ was necessary in order to assess the compatibility of the domestic measures with proportionality.[846] Hence, the supreme civil court established proportionality as the criterion for the compatibility of domestic legislation with EC Treaty freedoms. The discriminatory nature of the measures was to be taken into account in the relevant assessment but it was no longer determinant for the compatibility of domestic law with European law. Furthermore, the appraisal of proportionality was left to the ECJ, even though the principle was understood as synonymous with the domestic general principle of proportionality and with the ECHR requirement of necessity in a democratic society.

During the same period, in decision 5116/1996, proportionality was applied as an EC law principle by the Council of State plenum as well. The case concerned a Council Regulation in the field of tobacco. The Regulation had brought about important changes in the subsidies regime for tobacco producers, with the goal of adjusting production to market conditions.[847] More precisely, replacing the previous collective responsibility regime, the Regulation had defined individual production quotas for a four-year period of time and had limited Community subsidies only to the amount of tobacco that did not exceed these quotas. The quotas were to be allocated according to tobacco production during the years preceding the enactment of the Regulation. A ministerial decision had implemented the Community Regulation and had individually defined the quotas for tobacco producers. The plaintiffs, newly established tobacco producers, were excluded from subsidies under this new system and impugned the Regulation, together with the implementing administrative act, for violation of their legitimate expectations and of the principle of proportionality. They alleged that Community policy on the matter had encouraged them to invest important sums in tobacco production. However, they contended, the policy changes introduced with the

[842] AP 1067/1996 *NOB* 1997, 480.
[843] Ibid.
[844] Ibid.
[845] Ibid.
[846] Ibid.
[847] Council Regulation (EEC) 2075/92.

Regulation excluded them from subsidies and thus made it impossible for them to obtain a satisfactory income.

Examining the proportionality of the measures, the Council of State followed ECJ case law on Community policy measures closely. In the domestic court's view, European case law was sufficiently clear and rendered a preliminary reference to Luxembourg unnecessary. The Council held that,

> according to the consistent case law of the Court of the European Communities, the principle of proportionality is among the general principles of European Community law, and accordingly, the measures chosen for obtaining the objectives of a regulation must be suitable and necessary. Every time that it is possible to choose among various appropriate measures, the less onerous must be chosen, while the onerous consequences of the measure must not be disproportionate to the objective pursued. However, in view of the large discretion of the community legislator in the domain of common agricultural policy, judicial review (…) is limited to the examination of whether the measure is manifestly inappropriate for obtaining the objective pursued (cf. the above-mentioned decisions *CEC Crispoltoni II*, case C-133, 300, 362/93, and *Germany v Council*, case C-280/93).[848]

The Council found that, in the case at hand, it could not be said that the establishment of individual quotas was manifestly inappropriate for the stabilisation of the tobacco market, given that the system of collective responsibility in the allocation of quotas had been unsuccessful in this respect.

The application of proportionality by means of translation of the ECJ case law. The domestic court thus employed proportionality in the same way that Luxembourg judges do.[849] Just like the ECJ, the Council announced proportionality as a general principle of EC law. Following Luxembourg case law, it attributed a large margin of appreciation to the Community legislator. Thus, while proportionality was announced as a three-pronged requirement imposed on public interference with market freedoms, it was only the manifest inappropriateness of the Community measures that was subsequently investigated. In this case, Greek judges acted as "translators" of ECJ case law. The application of proportionality "by means of translation" was subsequently extended to other fields. In 1999, the supreme administrative court stated that in intra-communitarian trade cases, proportionality as an EC law principle conditions the validity of domestic legislation even in areas not subject to EC law harmonisation, like customs law. This was the case, "*independently of the matter of discrimination*" that traditionally triggered the application of EC law.[850] In

[848] StE (Pl.) 5116/1996 ΔΔ*IKH* 1998, 252, para 14.
[849] On this point, see *infra*, Part III Chapter 8(1).
[850] StE 2245/1999 ΔΔ*IKH* 2000, 458.

some cases, proportionality led to an intrusive review of legislation, in defiance of traditional structures and distinctions of judicial review.

In decision 1918/1998, the Council of State applied the ECJ case law on sex equality in the field of access to profession and professional education. Domestic legislation had set quotas that limited women's access to special training for policemen. Examining the compatibility of the legislation with EC law, the court stressed that exceptions to the principle of sex equality are legitimate only as far as they are provided for by a specific law. The wording of the law or the relevant debates in Parliament should indicate the "*concrete and appropriate criteria*", according to which such exceptions are introduced. This will allow "*the affected citizens and the courts to check, in every concrete case, if the exception (…) is justified by sufficient reasons and is necessary and appropriate for obtaining the aim pursued.*"[851] In the case at hand, derogation from sex equality was not justified by the mission of the Hellenic Police, since this mission is very general and comprises competences for the exercise of which "*the gender factor does not play any role, or exercises an insignificant influence.*"[852] Proportionality thus allowed the scrutiny of the criteria set by the law, not only in order to ascertain the sincerity of the legislator, but also its necessity in the concrete case. It implied judicial interference with the *how* of the exercise of administrative discretion. In this way, the Council ensured the effective application of the EC law principle of sex equality.

By the end of the '90s the meaning of proportionality as an EC law principle and method of review had been consolidated. The domestic judiciary remained loyal to the application of proportionality by the ECJ in its various domains of case law, despite its complexity in certain areas.[853] Proportionality of the restricted measures acquired the content of an exception, "*interpreted restrictively*",[854] thus always engaging judicial scrutiny and ensuring that EC principles remain the rule. Domestic courts, and especially lower ones, assumed the mission of ensuring the effective application of EC law in the Greek legal order, through domestic procedures and heads of review. Cast with this new EC law content, proportionality was extensively studied by various scholars and practitioners, among them a prominent member of the supreme civil court.[855]

The marginal role of proportionality in Greek public law's turn to Strasbourg. The proliferation of proportionality in EC law cases during the '90s stands in contrast to its limited importance in the application of the ECHR. Of course, proportionality benefitted from the Greek legal order's timid turn to Strasbourg. In the field of personal freedom restrictions, under the influence of Strasbourg case law,

---

[851] StE (Pl.) 1918/1998 *NOMOS*, para 5.

[852] Ibid, para 8.

[853] DPrHer 367/1999 *ΔΕΕ* 2000, 217 (Herakleion Administrative Court of First Instance); StE 2245/1999 *ΔΔΙΚΗ* 2000, 458; DPrAth 7287/2001 *ΔΔΙΚΗ* 2002, 736 (Athens Administrative Court of First Instance).

[854] NSK 385/2001 *NOMOS* (opinion by the Legal Council of the State).

[855] Evaggelos Kroustallakis, "Ελληνική πολιτική δικονομία και κοινοτικό δίκαιο: άμεσες και έμμεσες επιδράσεις [Greek Civil Procedure and Community Law: Direct and Indirect Influences]," *Δ/Νη*, 1999, 1457; Evaggelia Prevedourou, "Η αρχή της αναλογικότητας στη νομολογία του ΔΕΚ [The Principle of Proportionality in the ECJ Case Law]," *ΕΕΕυρΔ*, 1997, 1, 297.

the principle acquired the form of a strict necessity test. As such, it spread in the adjudication of domestic constitutional rights, particularly in the field of temporary custody and imprisonment for debt. Further, proportionality was progressively perceived as an ECHR principle and reference to Strasbourg jurisprudence became part of the ritual of every proportionality study.[856] However, the principle was not understood as a key element of the process of "Europeanisation" of Greek public law. Domestic lawyers interpreted Convention law to pose substantive requirements of protection rather than methods of reasoning. Proportionality was hardly mentioned in studies on the operation of the ECHR in the domestic sphere.[857] It was not until its explicit entrenchment in the 2001 constitutional text that proportionality became hegemonic as a method of reasoning.

2. The hegemony of proportionality after the 2001 reform

The 2001 reform and its context. The progressive spread of European rights in the domestic sphere and the rise of fundamental rights discourse during the '80s and the '90s led to a "diffusion" of the Constitution in everyday life.[858] This was combined with a timid interpretative turn in Greek scholarship,[859] and with the quest for historically and socially situated constitutional interpretation.[860] However, rather than bolstering the normativity of the Constitution, "diffusion" led to its vulgarisation and provoked suspicion as to its political instrumentalisation. Already in 1981, Phédon Vegleris observed that the invocation of the Constitution often expressed "the consoling idea that, whatever cannot be obtained through law, is obtained against it, through the Constitution".[861] Rather than institutional faith, scholars observed the distrust that traditionally underpins the formal style of constitutional interpretation.[862] Rather than faith in the possibility of consensus on the meaning of constitutional provisions and on the values underpinning them, scholars accused the Council of State

---

[856] See Orfanoudakis, *Η αρχή της αναλογικότητας στην ελληνική έννομη τάξη : από τη νομολογιακή εφαρμογή της στη συνταγματική της καθιέρωση [The Principle of Proportionality in the Greek Legal Order: From Its Judicial Application to Its Constitutional Consecration]*; Charalampos Anthopoulos, "Όψεις της συνταγματικής δημοκρατίας στο παράδειγμα του άρθρου 25 παρ. 1 του Συντάγματος [Aspects of Constitutional Democracy in the Example of Article 25 Par. 1 of the Constitution]," in *Το νέο Σύνταγμα*, ed. Dimitrios Tsatsos, Evaggelos Venizelos, and Xenophon Contiades (Athens; Komotini: Αντ. Ν. Σάκκουλας, 2001), 153.

[857] On this point, see *infra*, Part III, Chapter 7(4).

[858] Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]*, 493 f.

[859] See most notably Manitakis, *Κράτος δικαίου και δικαστικός έλεγχος της συνταγματικότητας [The Ideal of a State Ruled by Law and Judicial Review of Constitutionality]*.

[860] See most notably Dimitrios Tsatsos, *Συνταγματικό Δίκαιο [Constitutional Law]*, 4th ed., vol. A', Θεωρητικό Θεμέλιο [Theoretical Undepinnings] (Athens: Αντ. Ν. Σάκκουλας, 1994); discussed by Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]*, 568 f.

[861] Phédon Vegleris, "Τα όρια του ελέγχου της συνταγματικότητας [The Limits on the Review of Constitutionality]," *ΤοΣ*, 1981, 455; cited by Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]*, 500.

[862] On this point, see Constantinos Yannakopoulos, "Τα δικαιώματα στη νομολογία του Συμβουλίου της Επικρατείας [Rights in the Council of State Case Law]," in *Τα δικαιώματα στην Ελλάδα 1953-2003*, ed. Michalis Tsapogas and Dimitris Christopoulos (Athens: Καστανιώτης, 2004), 439.

of "hermeneutic relativism".[863] The institutional impotence of the Greek judiciary made scholars diagnose a "rule of law deficit" in the Greek polity.[864]

The 2001 constitutional reform aspired to change this. Its "latent strategy" was claimed to be the establishment of "new constitutionalism", characterised by institutional faith and belief in consensual and reasonable constitutional interpretation.[865] Presented as a process of institutional and constitutional modernisation, the amendment changed the formulation of almost half of the 120 constitutional articles. The 2001 reform had an important impact on the domestic constitutional rights regime: among the 22 articles of the Constitution dedicated to rights, 14 were amended and new articles were added. However, despite its extent, the reform had only symbolic value and did not radically change the polity established in 1975. Hence, it has been perceived by domestic scholars as an instance of "solemn jabber" that undermines the normative power of the Constitution.[866]

Notwithstanding its declared goal of promoting institutional faith, mainstream scholars and judges saw in the 2001 reform an act of institutional war against the judiciary.[867] The amendment certainly sought to limit the possibilities for future judicial "activism" akin the one manifested in environmental case law. In a show of power against the Council of State sections, the constitutional assembly declared appreciations relating to the protection of the environment, as "technical" and following "the rules of science", thus impeding the intervention of the judge of legality in relevant matters.[868] Judicial allegiance to the political branches was further ensured by increasing governments' say in the supreme courts' composition.[869] Limitation of judicial activism was also pursued through the centralisation of constitutional review. Most notably, article 100(5) of the Constitution delegates the determination of judgments of unconstitutionality exclusively to the plenary sessions of the supreme courts. Centralisation was recently furthered with the institution of the "pilot procedure" (*πιλοτική δίκη*) in 2010. This procedure allows administrative courts to refer cases of general importance affecting a broad circle of persons to the Council of State. The supreme administrative court decides on the referred cases and thus defines a jurisprudential line that must be followed by lower courts in future disputes. In fact,

---

[863] Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]*, 593; esp. 599.

[864] Kostas Beis, *Το ελληνικό έλλειμμα κράτους δικαίου [The Greek Rule of Law Deficit]* (Athens: Eunomia, 1998).

[865] Xenophon Contiades, *Ο νέος συνταγματισμός και τα θεμελιώδη δικαιώματα μετά την αναθεώρηση του 2001 [The New Constitutionalism and Fundamental Rights after the 2001 Reform]* (Athens; Komotini: Αντ. Ν. Σάκκουλας, 2002).

[866] Prodromos Dagtoglou, *Συνταγματικό Δίκαιο. Ατομικά Δικαιώματα [Constitutional Law. Individual Rights]*, 4th ed., vol. A' (Athens; Komotini: Αντ. Ν. Σάκκουλας, 2012), para 214; Constantinos Yannakopoulos, "Η μετάλλαξη του υποκειμένου των συνταγματικών δικαιωμάτων [The Transformation of the Subject of Constitutional Rights]," *ΕφΔΔ* 2 (2012): 147.

[867] Alivizatos, *Ο αβέβαιος εκσυγχρονισμός και η θολή συνταγματική αναθεώρηση [Uncertain Modernization and Vague Constitutional Reform]*, 95 f.; On the relevant political debates preceding the reform, cf. Ioannis Tassopoulos, "Η συνταγματική θέση της δικαιοσύνης στο πολιτικό μας σύστημα [The Constitutional Role of Justice in Our Political System]," in *Το νέο Σύνταγμα*, ed. Dimitrios Tsatsos, Evaggelos Venizelos, and Xenophon Contiades (Athens: Αντ. Ν. Σάκκουλας, 2001), 357.

[868] Article 24(1).

[869] Article 88(1) explicitly entrenched the nomination of supreme courts' presidents by the executive.

many of the cases of general importance referred to the Council concern the constitutionality of legal statutes.[870]

Blurring domestic constitutional limits under the influence of EU law. However, with the progressive development of EU law, constitutional limits do not concern only the exercise of government power. Perhaps most importantly, constitutional adjudication has to face and delimit the operation of supranational provisions in the domestic sphere.[871] Since the mid-'90s, scholars have seen in article 28 a process of "departure" of the Constitution, to give its place to EU law.[872] This provision allows for the concession of constitutional competences to supra-legal entities through international agreements, "when this serves an important national interest and promotes cooperation with other States". It also allows for limitations on the exercise of national sovereignty, "insofar as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity".[873] Scholars have perceived article 28 as having a "tacit constitutional reform function", which can be engaged with the signing of international agreements or amendments of EU Treaties.[874] The interpretative clause added to article 28 in 2001 by providing that article 28 "constitutes the foundation for the participation of the Country in the European integration process", enhanced the tendency towards "constitutional recession".

The pervasive force of EU law in the domestic sphere was revealed with the advent of the Eurozone crisis. Since 2010, governmental policy has been determined in considerable detail by Memoranda of Understanding (MoUs), concluded in the context of economic adjustment programmes that Greek governments agree with their creditors, the ECB, the Commission and the IMF,[875] as a quid pro quo for receiving financial assistance. These *sui generis* emergency legal instruments, affecting all aspects of governmental policy and considerably undermining the possibility for constitutional rights protection, have been implemented through emergency acts and procedures at

---

[870] Fili Arnaoutoglou, *Η πρότυπη ή πιλοτική δίκη ενώπιον του Συμβουλίου της Επικρατείας [The Pilot Procedure before the Council of State]* (Athens: Νομική Βιβλιοθήκη, 2012); Kaidatzis, "Ο έλεγχος της συνταγματικότητας των νόμων στην Ελλάδα, ενόψει της διάκρισης σε συστήματα ισχυρού και ασθενούς τύπου [Judicial Review of the Constitutionality of Legislation in Greece, in View of the Distinction between Strong and Weak Systems]," 19 f.

[871] Constantinos Yannakopoulos, "Το ελληνικό Σύνταγμα και η επιφύλαξη του εφικτού της προστασίας των κοινωνικών δικαιωμάτων [The Greek Constitution and the Feasibility Clause of Social Rights Protection]," *Εφ⊥⊥* 4 (2015): 417.

[872] Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]*, 646 f.

[873] 28(2) and 28(3) respectively.

[874] See on this matter, Lina Papadopoulou, "Η συνταγματική οικοδόμηση της Ευρώπης από τη σκοπιά του ελληνικού Συντάγματος [The Constitutional Construction of Europe from the Point of View of the Greek Constitution]," in *Η προοπτική ενός Συντάγματος για την Ευρώπη*, ed. Lina Papadopoulou and Antonis Manitakis (Athens: Σάκκουλα, 2003), 176; citing Julia Iliopoulou-Stragga, *Ελληνικό συνταγματικό δίκαιο και ευρωπαϊκή ενοποίηση [Greek Constitutional Law and European Integration]* (Athens: Αντ. Ν. Σάκκουλας, 1996), 37.

[875] Note that, in the context of the First Economic Adjustment Programme, the Commission acted on behalf of the MS that had provided financial assistance to Greece. In the Second and the Third Economic Adjustment Programmes, the Commission has acted on behalf of the EFSF and the ESM respectively.

the margin of constitutional provisions. Their implementation has been perceived and often justified in the domestic sphere as an obligation resulting from EU law. The policies described in the MoUs are subsequently adopted in Council Decisions, after recommendation of the Commission, under the excessive deficit procedure of article 126 TFEU. The way the MoUs have operated within the Greek constitutional order has the characteristic of institutional diversion. Yannis Drossos, a moderate constitutional scholar, has talked about "a turning point" in the functioning of the Greek polity,[876] while others have repeatedly denounced the violation of the Constitution in its most fundamental principles.[877]

In apparent contradiction to the suspicion that the constitutional reform expressed towards the judiciary, proportionality was conferred constitutional status in 2001. Its entrenchment at the highest level of the legal order has rendered it hegemonic in Greek legal discourse as a method for the adjudication of fundamental rights. This has been especially so in the context of economic crisis (*paragraph i*). Consensus as to the content of proportionality in Greek public law did not lead to its consistent application in case law. Despite the commonly shared perception of proportionality as a fundamental rights principle, proportionality in judicial review at most corresponds to a test of efficiency and rationalisation (*paragraph ii*).

i. All things in proportion, especially in times of economic crisis

The spread of proportionality in the discourse of domestic courts. In the years preceding the 2001 reform, one observes an explosion of proportionality language in the decisions of Greek supreme courts. During the period 1990-1994 reference to proportionality was found almost exclusively in the Council of State case law.[878] The supreme administrative court used the term less than twice per year on average. Between 1995 and 1998 it used proportionality in an average of five decisions per year, while *Areios Pagos* referred to the principle twice in total, albeit without applying it. In 1999, *Areios Pagos* explicitly referred to proportionality in five cases, as many as the Council of State. In 2000, proportionality terminology was employed in

[876] Yannis Drossos, "Το "Μνημόνιο" ως σημείο στροφής του πολιτεύματος [The 'Memorandum' as a Turning Point of the Regime]," *The Book's Journal* 6 (2011): 42.

[877] See, for example, Kostas Chryssogonos, "Η χαμένη τιμή της Ελληνικής Δημοκρατίας. Ο μηχανισμός «στήριξης της ελληνικής οικονομίας» από την οπτική της εθνικής κυριαρχίας και της δημοκρατικής αρχής [The Lost Honour of the Hellenic Republic. The 'rescue' Mechanism of the Greek Economy from the Point of View of National Sovereignty and of the Principle of Democracy]," *NoB* 6 (2010): 58; Giorgos Katrougkalos, "Memoranda sunt Servanda? Η συνταγματικότητα του Ν. 3845/2010 και του Μνημονίου για τα μέτρα εφαρμογής των συμφωνιών με το ΔΝΤ, την ΕΕ και την ΕΚΤ [Memoranda Sunt Servanda? The Constitutionality of Law 3845/2010 and of the Memorandum for the Implementation of the Agreements with the IMF, the EU and the ECB]," *Εφ∟∟* 2 (2010): 151.

[878] This data is based on the results of the research by keywords in the legal database NOMOS on the 26 November 2015. Apart from the Council of State case law, one decision by the Supreme Special Court was found and two by the Court of Audit.

22 cases by all three supreme courts.[879] The spread of proportionality in the supreme courts' language was due to the wider recognition of the legal scope and function of the principle. After a period of resistance, for the first time in 2000, *Areios Pagos* explicitly recognised the application of proportionality as a matter of law that could be raised by the claimants during cassation and, in some cases, even proceeded itself to the examination of the proportionality requirements.[880]

The endorsement of the global model by domestic scholarship. This evolution paralleled a renewal of scholarly interest in the principle. During the late '90s one finds elaborate theoretical studies of proportionality in Greek scholarship. These studies share the perception of proportionality as a method for constitutional value-balancing that is very akin to the global model. In 1998 Georges Xynopoulos talked about a "more comprehensive model of proportionality" that did not simply oppose public interests to individual rights, but also imposed a "weighing of values" for the resolution of constitutional conflicts.[881] Yet, he observed that at the time this perception of proportionality had not been transposed in the Greek context. One year later, in an influential contribution, Kostas Beis adapted the Alexyan constitutional rights theory in the domestic context. This author contended that proportionality was a method for fundamental rights adjudication that involved weighing competing constitutional values. Echoing German constitutional theory, in Beis' study, the Constitution was presented as an "objective value-order" that could provide rational criteria for balancing.[882] Proportionality thus, as opposed to "subsumptive automatism", was promoted as a method for constitutional reasoning that would open up the constitutional order to practical reasoning.[883] This aspect of proportionality balancing was extensively analysed by Kostas Stratilatis, who reconstructed a famous *Areios Pagos* freedom of speech decision as an instance of proportionality analysis.[884] Scholars insisted on the *ad hoc* character of the constitutional value-scale and rejected an *a priori* hierarchy of constitutional values. This rendered the application of the three-pronged proportionality structure very important: according to this new scholarly trend, correct application of proportionality as a method would lead to correct adjudication of constitutional rights and to transparent judicial reasoning. The Alexyan proportionality theory became mainstream in Greek constitutional law.

---

[879] The decisions where proportionality was applied were issued by *Areios Pagos* (3), the Council of State (17) and the Court of Audit (2).

[880] AP 1597/2000 and 254/2000, cited above. See also AP 1215/2000 *ΕΕΜΠΔ* 2002, 369 (in private relations). In decision AP (Pl.) 17/1999 *ΔΙΝΗ* 1999, 1288, the plenum of *Areios Pagos* defined proportionality as a criterion for the validity in the domestic sphere of penalty clauses included in foreign contracts.

[881] See Georges Xynopoulos, "Réflexions sur le contrôle de proportionnalité," in *État-loi-administration. Mélanges en l'honneur de Epaminondas Spiliotopoulos*, ed. Petros Pararas (Athènes; Bruxelles: Ant. N. Sakkoulas; Bruylant, 1998), 461. The author refers to a « *modèle plus large de proportionnalité* » : 523, and a « *pondération normative* » : 535.

[882] Kostas Beis, "Η αρχή της αναλογικότητας [The Principle of Proportionality]," *ΔΙΤΑ* 30, no. Δ (1999): 488 f.

[883] Beis, 481.

[884] Kostas Stratilatis, "Η συγκεκριμένη στάθμιση των συνταγματικών αξιών κατά τη δικαστική ερμηνεία του συντάγματος [The in Concreto Balancing of Constitutional Values in the Judicial Interpretation of the Constitution]," *ΤοΣ*, no. 3 (2001): 495.

The explicit constitutional entrenchment of proportionality. This perception of proportionality became dominant with the constitutional reform of 2001. The explicit entrenchment of the principle as an aspect of the "welfare state ruled by law" (*κοινωνικό κράτος δικαίου*) seemed in continuity with its increasing use and importance in the discourse of domestic actors. In contrast with the suspicion generated by the 2001 reform, the amendment of article 25 met with consensus among legal scholars. Proportionality in particular seemed to transcend traditional political cleavages. Giorgos Katrougkalos ranged it among the principles of social justice entrenched with the constitutional reform and argued that these principles "form together a minimum core of overlapping consensus".[885] Indeed, almost everyone agreed on the validity, or rather correctness, of proportionality in Greek constitutional law. Vassilios Voutsakis even argued that proportionality was not entrenched but "discovered".[886] Critiques remained quite marginal and did not concern the validity of the principle itself but rather structural features of its application, most notably its status as an autonomous head of judicial review.[887]

In the field of constitutional rights, the 2001 reform confirmed pre-existing legal theory and scholars have often stressed its symbolic function. Symbols should be taken seriously, especially when contained in the hierarchically superior text of a legal order. The constitutionalisation of proportionality not only met consensus among mainstream constitutional scholars, but it also *established* consensus on its validity among legal actors more generally.[888] It therefore gave a new impetus to the use of proportionality in judicial practice. It is only after 2001 that *Areios Pagos* engaged itself in an explicit proportionality review of legislation, and it did so by explicitly referring to the reformed article 25(1) of the Constitution.[889] Since the entry into force of the new constitutional text, all Greek courts abandoned their previously reticent stance and proportionality language became a recurrent mode of judicial argumentation. The constitutional establishment of proportionality as a correct judicial method provoked

---

[885] Giorgos Katrougkalos, "Νομική και πολιτική σημασία της αναθεώρησης του άρθρου 25 του Συντάγματος [Legal and Political Significance of the Reform of Article 25 of the Constitution]," *ΔτΑ* 10 (2001): 470–71.

[886] Vassilios Voutsakis, "Η αρχή του Κράτους Δικαίου και οι νέες διατάξεις περί ατομικών και κοινωνικών δικαιωμάτων [The Principle of a State Ruled by Law and the New Provisions on Individual and Social Rights]," *NoB*, no. 1 (2002): 11.

[887] Mitsopoulos criticises the detachment of proportionality from teleological interpretation, in Georgios Mitsopoulos, "«Τριτενέργεια» και «αναλογικότητα» ως διατάξεις του αναθεωρηθέντος Συντάγματος ['Third Party Effect' and 'Proportionality' as Provisions of the Amended Constitution]," *ΔτΑ* 15 (2002): 641. In the same vein, Chryssogonos criticises its detachment from the scope of rights, in Kostas Chryssogonos, "Η προστασία των θεμελιωδών δικαιωμάτων στην Ελλάδα πριν και μετά την αναθεώρηση του 2001 [The Protection of Fundamental Rights in Greece before and after the 2001 Reform]," *ΔτΑ* 10 (2001): 529.

[888] In this sense, it had a "stabilising effect"; see Vassilios Skouris, "Συνολική αποτίμηση του αναθεωρητικού εγχειρήματος [Overall Evaluation of the Reform]," in *Το νέο Σύνταγμα*, ed. Dimitrios Tsatsos, Evaggelos Venizelos, and Xenophon Contiades (Athens; Komotini: Αντ. Ν. Σάκκουλας, 2001), 462.

[889] AP (Pl.) 14/2001 *ΠΟΙΝΔ/ΝΗ* 2001, 832; AP (Pl.) 15/2001 *ΠΟΙΝΧΡ* 2001, 798; AP (Pl.) 16/2001 *NOB* 2002, 411, on article 20(1) of the Constitution, concerning the right to judicial protection.

reactions from certain scholars, who interpreted it as a usurpation by the constitutional legislator of a power that belongs to scholarship or to judges.[890]

Proportionality as an "overarching" principle for the adjudication of fundamental rights. More than an administrative or criminal law principle, more than a substantive requirement of necessity in imprisonment for debt litigation, more than a method for constitutional adjudication, proportionality is an "overarching principle" in Greek law.[891] The fragmented technical studies on its implications in various legal fields have been replaced by general studies on its content and structure. Proportionality is considered to bind all state authorities in the exercise of legislative, administrative and judicial power. As a norm of constitutional rank, it is deemed "diffused" in the legal system, influencing norm-production and adjudication in all the fields of law.[892] Scholars saw in the constitutional reform the entrenchment of the fundamental rights paradigm and the advent of the Alexyan proportionality model, which, in the words of Xenophon Contiades, is "inherent in the texture of fundamental rights as principles (Prinzipien)".[893] Reference to the welfare state in the constitutional text enhanced the perception of constitutional rights as socially bound values. Greek lawyers perceive proportionality as the ultimate criterion of the constitutionality of rights infringement.[894] The proliferation of proportionality has been combined with an accentuation of the importance of its structure, which has since been perceived as unitary in all fields. Proportionality is deemed to "insert the balancing of constitutional values into a systematic and rational argumentative framework".[895] Scholars have

---

[890] See most notably Mitsopoulos, "«Τριτενέργεια» και «αναλογικότητα» ως διατάξεις του αναθεωρηθέντος Συντάγματος ['Third Party Effect' and 'Proportionality' as Provisions of the Amended Constitution]."

[891] Apostolos Gerontas, "Η αρχή της αναλογικότητας και η τριτενέργεια των θεμελιωδών δικαιωμάτων μετά την αναθεώρηση του 2001 [The Principle of Proportionality and the Third Party Effect of Fundamental Rights after the 2001 Reform]," in *Πέντε χρόνια μετά τη συνταγματική αναθεώρηση του 2001*, ed. Xenophon Contiades, vol. A (Athens; Komotini: Αντ. N. Σάκκουλας, 2006), 470.

[892] Giakoumis, "Οι αόριστες έννοιες, η διακριτική ευχέρεια του δικαστή ως αόριστη νομική έννοια, η εξειδίκευσή της και η δυνατότητα αναιρετικού ελέγχου υπό το πρίσμα της αρχής της αναλογικότητας [Indeterminate Notions, Judicial Discretion as an Indeterminate Legal Notion, Its Concretisation, and the Possibility of Cassation under the Framework of the Principle of Proportionality]"; Filippos Doris, "Η αρχή της αναλογικότητας στο πεδίο ρύθμισης των ιδιωτικού δικαίου σχέσεων και ιδιαίτερα στο αστικό δίκαιο [The Principle of Proportionality in the Field of Private Law Relations and Especially in Civil Law]," in *Τόμος τιμητικός του Συμβουλίου της Επικρατείας - 75 χρόνια* (Thessaloniki: Σάκκουλα, 2004), 229.

[893] Contiades, *Ο νέος συνταγματισμός και τα θεμελιώδη δικαιώματα μετά την αναθεώρηση του 2001 [The New Constitutionalism and Fundamental Rights after the 2001 Reform]*, 235; see also Christina Akrivopoulou, "Ο πολιτικός δικαστής αντιμέτωπος με την αναλογικότητα κατά τον αναιρετικό έλεγχο της εύλογης χρηματικής αποζημίωσης [Civil Law Courts Faced with Proportionality in the Review of the Legality of Reasonable Indemnity]," in *Τόμος τιμητικός Πέτρου Ι. Παραρά* (Athens: Αντ. N. Σάκκουλας, 2012), 29; Athanasios Raikos, *Συνταγματικό Δίκαιο. Θεμελιώδη Δικαιώματα [Constitutional Law. Fundamental Rights]*, 3rd ed., vol. 2 (Athens: Αντ. N. Σάκκουλας, 2008), 242 f.; Voutsakis, "Η αρχή του Κράτους Δικαίου και οι νέες διατάξεις περί ατομικών και κοινωνικών δικαιωμάτων [The Principle of a State Ruled by Law and the New Provisions on Individual and Social Rights]," 10 f.

[894] Orfanoudakis, *Η αρχή της αναλογικότητας στην ελληνική έννομη τάξη : από τη νομολογιακή εφαρμογή της στη συνταγματική της καθιέρωση [The Principle of Proportionality in the Greek Legal Order: From Its Judicial Application to Its Constitutional Consecration]*, 21 f.; esp. 24-25.

[895] Anthopoulos, "Όψεις της συνταγματικής δημοκρατίας στο παράδειγμα του άρθρου 25 παρ. 1 του Συντάγματος [Aspects of Constitutional Democracy in the Example of Article 25 Par. 1 of the Constitution]," 174.

pressured for its consistent and intrusive application by courts.[896]

The perception of proportionality as a fundamental rights principle is also pervasive the supreme courts' case law. In this respect, *Areios Pagos* has assumed a pioneer role. After some initial hesitation, the supreme civil court considerably altered its reasoning style to adapt it to proportionality and its fundamental rights baggage. *Areios Pagos* often engages in structured proportionality analysis, which, in its view "*tends to rationalise onerous State interferences with the individual and social rights of the human and of the citizen*".[897] Proportionality analysis typically follows extensive normative considerations concerning the scope of the constitutional rights at stake and the intensity of the court's scrutiny. According to well-established case law, restrictions of individual rights should be objectively defined and justified by reasons of public interest. Proportionality requires that these restrictions be "*restricted on the basis of the conceptual elements of the appropriateness and necessity of the measure and of its proportion to the goal pursued*".[898] The three-pronged structure of proportionality has since been applied by the Council of State and the Court of Audit, albeit not with the same consistency and rigour that one finds in the *Areios Pagos* case law.[899]

The pervasive dynamic of proportionality. Decision 43/2005 by *Areios Pagos* is illustrative of proportionality's pervasive dynamic both as a principle and as a standardised method of reasoning. In this case, the court examined the constitutionality of a provision of the code of civil procedure, which declared that improperly stamped documents are not admissible as elements of proof in judicial proceedings. The purpose of this provision was the effective collection of stamp duties. However, its application in the concrete case impeded a bank from enforcing the payment of a 300,000 euro debt, despite the fact that in reality stamp duties had been paid. *Areios Pagos* started with the enunciation of the principle of proportionality as an overarching principle in the Greek legal order:

> the principle of proportionality, as a general principle of law, has been consistently recognised by case law as resulting from the provisions of article 5§1 and 25§1 of the 1975 Constitution, as well as of articles 6§1, 8§2, 9§2 and 10§2 of the ECHR, even before its explicit entrenchment as a constitutional concept with the [2001 reform], transpires the whole of public action and binds the legislator, the judge and the administration.

In the supreme civil court's dicta, proportionality is depicted as part of a "total" constitutional theory. It transcends the separation between private and public, the

[896] Voutsakis, "Η αρχή του Κράτους Δικαίου και οι νέες διατάξεις περί ατομικών και κοινωνικών δικαιωμάτων [The Principle of a State Ruled by Law and the New Provisions on Individual and Social Rights]," 24.

[897] AP (Pl.) 5/2013 *ΤΝΠΔΣΑ*.

[898] AP (Pl.) 10/2003 *Ελλ∠νη* 2003, 406, para III.

[899] StE 1249/2010 *NoB* 2010, 390; StE (Pl.) 3177/2007 *∠ΦΟΡΝΟΜΟΘ* 2008, 1214; ES 1376/2002 *ΑΡΧΝ* 2003, 593 (Court of Audit).

various branches of law and even the written Constitution itself. In the following lines, *Areios Pagos* went on to address the content of proportionality:

> All the means of exercise of public power, laws, judicial decisions and administrative acts, must fulfill its three criteria, that is, they must be a) suitable, that is, appropriate for the realisation of the pursued goal, b) necessary, that is, to produce the least possible constraint on the private person or the public, and finally, c) proportionate in the strict sense, namely, to be substantively coherent with the pursued goal, so that the expected benefit is not inferior to the harm caused by them.

The court applied the proportionality prongs itself and did not refer the case back to the lower court. Following a detailed analysis of the circumstances, it concluded that the application of the code of civil procedure provision in this case was unconstitutional.

Proportionality as legal science. Proportionality is more than law, even more than constitutional law. Its validity is axiomatic and uncontested. Its solemn affirmation quiets the critiques of the 2001 reform.[900] As a structure, a framework of argumentation, it serves the interpreter of the Constitution, "like the microscope the biologist or the telescope the astrologist", in her search for the correct constitutional solution.[901] Its application relativizes the scope of the most concrete and detailed provisions, even at a constitutional level.[902] Proportionality is presumed to be inherent in the indeterminate concepts of Greek legal codes and can lead to the censuring of legislative omissions.[903] It tends to replace virtually every method of legal reasoning.[904]

---

[900] In the words of Venizelos, "the new article 25 by itself would suffice to give right to the constitutional reform, as it lays down the principles for the interpretation and application of all constitutional rights", in Evaggelos Venizelos, "Η νομικοπολιτική σημασία της αναθεώρησης του Συντάγματος [The Legal-Political Significance of the Constitutional Reform]," 2004, https://www.evenizelos.gr/parliament/constitutionalreview2001/694-2009-04-18-18-39-52.html.

[901] Orfanoudakis, *Η αρχή της αναλογικότητας στην ελληνική έννομη τάξη : από τη νομολογιακή εφαρμογή της στη συνταγματική της καθιέρωση [The Principle of Proportionality in the Greek Legal Order: From Its Judicial Application to Its Constitutional Consecration]*, 58–59.

[902] StE (Pl.) 3470/2011 *E⊿⊥⊥* 2012, 585. On the *Michaniki* litigation, concerning article 14(9) of the Greek Constitution, see *infra,* Part II, Chapter 6(4) and (5).

[903] StE (Pl.) 3470/2011, cited above, see the majority opinion.

[904] In case law, see decision StE (Pl.) 613/2002 *NoB* 2002, 1972, in which proportionality replaced the principle of sustainable growth concerning the protection of the environment. On this tendency in academic analyses, see the study on proportionality by the former President of *Areios Pagos,* Stefanos Matthias, "Το πεδίο λειτουργίας της αρχής της αναλογικότητας [The Scope of the Principle of Proportionality]," *Ελλ⊿ηνη* 47, no. 1 (2006): 1; Giakoumis, "Οι αόριστες έννοιες, η διακριτική ευχέρεια του δικαστή ως αόριστη νομική έννοια, η εξειδίκευσή της και η δυνατότητα αναιρετικού ελέγχου υπό το πρίσμα της αρχής της αναλογικότητας [Indeterminate Notions, Judicial Discretion as an Indeterminate Legal Notion, Its Concretisation, and the Possibility of Cassation under the Framework of the Principle of Proportionality]"; Giorgos Vassilakakis, "Η αρχή της αναλογικότητας. Ο αναιρετικός έλεγχος της εφαρμογής της από τον Άρειο Πάγο επί χρηματικής ικανοποιήσεως λόγω ηθικής βλάβης [The Principle of Proportionality. The Review of Its Application in Cassation by Areios Pagos in the Field of Indemnity for Moral Damage]," *Νομικά Χρονικά* 50 (2008), http://www.nomikaxronika.gr/article.aspx?issue=50. The tendency to replace pre-existing methods with proportionality raises problems in judicial practice, most notably in the appellate review of lower courts. See AP 132/2006 *NoB* 2006, 825; AP 6/2009 *NoB* 2009, 1162, see the minority opinion.

It became a common framework used by the legislator and the administration.[905] Domestic scholars perceive it as "an indispensable methodological tool for contemporary legal science".[906] The place of proportionality in Greek legal discourse is now hegemonic.

This becomes even more obvious in the context of the ongoing crisis. The current state of economic emergency establishes fiscal consolidation as a major aim of domestic public law and eliminates the possibility for constitutional theory detached from the circumstances. In this context, proportionality seems to offer *the only possible method* for applying constitutional provisions. Courts have used proportionality language in virtually all the decisions that concerned the constitutionality of austerity measures under the economic adjustment programmes.[907] In a recent article published in *ICON* and translated in a domestic human rights journal, Xenophon Contiades and Alkmene Fotiadou argued that

> [i]nsisting on defining a minimum core content as a prerequisite for the justiciability of social rights is an updated aspiration, which risks the very enforceability of these rights amidst global economic crisis, at the very hour when they are needed the most. Proportionality not only creates the context for litigation, enhancing the justiciability of social rights, but also renders their content concrete by promoting a dialogue between the judge and the lawmaker which enhances their content and upgrades them to a shared narrative with civil and political rights, that of the proportionality idiolect.[908]

The local perception of proportionality in Greece seems to coincide perfectly with the transnational proportionality theory. However, the hegemony of proportionality as a fundamental rights principle in domestic legal discourse is translated into a principle of efficiency and rationality in judicial review.

ii. Proportionality, efficiency and rationalisation in judicial review

Proportionality as an efficiency test. The constitutional entrenchment of proportionality has transformed the practice of courts considerably. While traditionally, through a "marginal" review of the impacts of public decisions, proportionality actually served to criticise public authorities' intentions, the new

---

[905] APD 147/2001 *ΠΟΙΝΔ/ΝΗ* 2002, 37 (decision by the Data Protection Authority); EPA 193/2001 *ΔΕΕ* 2001, 995 (decision by Competition Commission); NSK 357/2001 *NOMOS* (opinion by the Legal Council of the State).

[906] Beis, "Η αρχή της αναλογικότητας [The Principle of Proportionality]," 498.

[907] See StE (Pl.) 668/2012, cited above; StE (Pl.) 4741/2014 *ΕΔΔΔ* 2015, 170; StE (Pl.) 2192/2014 *ΤΝΠΔΣΑ*; ES (Pl.) 4327/2014 *APM* 2015, 1194; StE (Pl.) 2287/2015 *APM* 2015, 1371. For a more thorough analysis of the crisis litigation, see *infra,* Part III, Chapter 8(4) and Chapter 9(3).

[908] Xenophon Contiades and Alkmene Fotiadou, "Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation," *International Journal of Constitutional Law*, no. 10 (2012): 660. The quotation is taken from the abstract.

version of proportionality is an outcome-based test. Charalampos Anthopoulos explained that "[t]he principle of proportionality refers to the "*how*" of a restriction. The "*if*" of a restriction is determined by the principle of the general interest, which defines which goal is constitutionally justified, or at least tolerable".[909] However, contrary to Greek public lawyers' perception of proportionality as a fundamental rights principle, the outcome-based scrutiny that it entails has come at a cost for its value-laden content. The legitimate interest stage is external to proportionality analysis.[910] Far from being a balancing structure for the adjudication of constitutional rights, the application of the principle by Greek courts sometimes entails an expulsion of values from constitutional adjudication.

The expulsion of values from proportionality analysis is observed even in fields where the traditional version of proportionality had found glorious application, most notably in imprisonment for debt cases. In 2008, the plenary Session of the Council of State was called to judge upon the constitutionality of the code of administrative procedure articles that provided for imprisonment for debt.[911] The supreme judges censured the measure but explicitly refused to apply proportionality. According to the court, the Constitution defines the respect and protection of human dignity as "*a primary obligation of the State*"[912]. The same goes for personal freedom, which "*lies in the core*" of human dignity.[913] The judges stressed that the Constitution tolerates the deprivation of personal freedom, only under the condition that it is "*rationally necessary*" for the protection of the public interest.[914] Public interest reasons have led to the adoption of criminal incarceration in certain instances, among which is the non-fulfillment of debt obligations to the public as a criminal offense. However, the judges considered the issue of imprisonment as an administrative sanction, to be "*totally different.*" In their words,

> [f]ramed in this way, the matter does not even concern the application of the principle of proportionality, because this principle presupposes that the goal, as well as the means used for its achievement are in principle legitimate. However, the measure of imprisonment for debt is by itself contrary to the Constitution (…)[915]

---

[909] Anthopoulos, "Όψεις της συνταγματικής δημοκρατίας στο παράδειγμα του άρθρου 25 παρ. 1 του Συντάγματος [Aspects of Constitutional Democracy in the Example of Article 25 Par. 1 of the Constitution]," 173.

[910] See for example Anthopoulos, 172; Voutsakis, "Η αρχή του Κράτους Δικαίου και οι νέες διατάξεις περί ατομικών και κοινωνικών δικαιωμάτων [The Principle of a State Ruled by Law and the New Provisions on Individual and Social Rights]," 24; Gerontas, "Η αρχή της αναλογικότητας και η τριτενέργεια των θεμελιωδών δικαιωμάτων μετά την αναθεώρηση του 2001 [The Principle of Proportionality and the Third Party Effect of Fundamental Rights after the 2001 Reform]," 472 f.

[911] StE (Pl.) 250/2008 *Ε⊥⊥⊥* 2008, 407, para 5. Contrast decision StE 1624/2002 *Ε⊥ΚΑ* 2002, 343.

[912] StE (Pl.) 250/2008, cited above.

[913] Ibid.

[914] Ibid.

[915] StE 2820/2004 *⊥⊥ΙΚΗ* 2005, 229, para 9.

Hence, the application of proportionality only concerned the efficiency of the reviewed decision. Value-laden considerations of legitimacy were excluded from its content.

Proportionality and requirements of justification. As an efficiency test, proportionality has sometimes set considerable justification requirements for public authorities. This has been manifested in particular in the review of the legislator. Traditionally Greek constitutionalists recognised the absence of any justification requirement for legal statutes. The litigation concerning pharmacy licenses before the Council of State is an illustrative example of the change that proportionality has brought about in this respect. A legal statute dating from 1991 had imposed strict population criteria for providing a pharmacy license, according to which, one pharmacy should correspond to 3,000 residents in each municipality or community. The introductory report to the law stated that the population quota were justified by the need to promote public health, and more precisely the need to ensure the sustainability of pharmacies.[916] In 1998, aggrieved individuals contested the constitutionality of the measures. The Council of State, both in section and in plenum, declared the relevant legislation as unconstitutional.[917]

Responding to the arguments of the plaintiffs, the court followed its consistent case law in the field of professional freedom: legislative restrictions of the choice and exercise of a certain profession should be generally and objectively defined and justified by sufficient reasons of public or social interest. Further, they should be related to the object of the law and to the character of the profession under consideration and should not be aimed solely at the protection of certain persons already exercising a profession, to the detriment of new candidates for this profession.[918] Following these general normative considerations, the judges announced the principle of proportionality as a three-pronged requirement. Legislative restrictions should be "*suitable and necessary for obtaining the public or social interest aim pursued by the legislator and should not be disproportionate to this aim*".[919]

The judges went on to specify the way these normative considerations were to be applied in the case at hand. They stressed that, when the restriction concerns not only the exercise but also the access to a profession, the principle of proportionality requires that the necessity of "*such an exceptional restriction*" in pursuit of the legislative aim be "*apparent and clearly identifiable.*"[920] The supreme administrative court thus applies a variable standard of proportionality review, as a function of the seriousness of the legislative interference with the right at stake. As we will see, the Council's reasoning is reminiscent of Strasbourg case law.[921] In the case at hand, the measures were "*equivalent to the establishment of a closed number of pharmacies, thus leading to the exclusion of the*

[916] StE (Pl.) 3665/2005 *E⊥IKA* 2006, 59, para 4.
[917] Ibid; see also StE 2110/2003, cited above.
[918] See decision StE (Pl.) 3665/2005, cited above para 4.
[919] Ibid.
[920] Ibid.
[921] See *infra*, Part III, Chapter 7(1).

possibility to open a pharmacy for entrants in the profession".[922] Hence, judicial scrutiny was not limited to a manifest error test, only concerning the reasonableness the measures in question. Instead, the judges applied a more intensive proportionality standard and found the contested statute to be disproportionate.

Interestingly, the scrutiny of the legislator proceeded through the scrutiny of the justification of the contested measures. The Council was divided as to the concrete arguments of unconstitutionality. The first opinion of the majority argued that the law promoted the goal of public health in a quite irrational and indirect manner, since the measures enacted were "*not apparently connected*" to this goal. Indeed, in their view, the legislative goal would be more rationally promoted if the legislator enacted guarantees and requirements for the exercise of professions related to public health and not by preserving the sustainability of existing pharmacies.[923] The justification of the second majority opinion was quite similar. In the judges' view, while one could accept the sustainability of pharmacies as an objective for the promotion of public health, access to the profession of pharmacist should be restricted according to criteria connected to public health and not according to whether a pharmacy already exists or not.[924] A few Councilors of the majority went even further and adopted the reasoning of the section decision that had referred the case to the plenum. More precisely, they argued that, according to the introductory report to the law, "*increase in the number of pharmacies and the correlated increase of their proportion to the population, has in principle as a consequence the reduction, albeit significant, of the revenue and profits of pharmacies, but does not necessarily result in putting at stake their sustainability*". The judges thus concluded that, even if the appropriateness of the measures for obtaining their goal was accepted, their necessity was "*not evidenced*".[925]

Proportionality, facts and rationalisation. All the concrete opinions of the majority reveal the judges' effort to rationalise the legislative means-ends. The majority is not convinced as to the efficiency of the measures in achieving their goal. Even more, the third opinion goes so far as to contest *the concrete factual appreciations of the law-makers* concerning the mischief that Parliament aims to confront. This is despite the complex character of these assessments, containing economic and statistical data and prognoses. The judges require facts, "*data*" and "*evidence*" as to the causal relationships established by the legislator when choosing the concrete measures at stake. This is also observed in other Council of State decisions concerned with restrictions to professional freedom.[926] Proportionality creates high expectations of objective fact determination, even in the inquisitorial system that applies in administrative law adjudication. Greek public lawyers believe that its application enhances the participation of citizens in the administrative decision-making process and encourages

[922] Ibid.
[923] Ibid, see the first opinion.
[924] Ibid, see the second opinion.
[925] Ibid, para 4; see also StE 2110/2003, cited above.
[926] StE (Pl.) 1621/2012 *E⊥⊥⊥* 2012, 2143, para 7.

the aggrieved individuals to seek alternative solutions.[927]

The rationalising, fact-oriented application of proportionality has sometimes led to a more efficient division of labour between Parliament and the administration. This is exemplified by decision 1910/2001.[928] In this case, legislation dating from 1994 had annulled the extension of leasing contracts for public premises when this extension had been concluded during the last months of the year 1993. The introductory report to the law justified the onerous measure by arguing that the concerned extension contracts had been agreed upon during electoral campaign and served micro-political interests to the detriment of the public financial interest. This resulted in the closure of the night club "Neraida" (meaning fairy in Greek), which contested the constitutionality of the 1994 law, in particular its compatibility with economic freedom.

The Council of State accepted the arguments advanced by the owners of the nightclub. They were of the opinion that the criterion set by the legislator for the application of the law, related to the time of conclusion of the relevant agreements, was not "*appropriate and sufficient*" to justify the automatic annulment of the concerned contracts. According to the judges, whether the individual contracts were contrary to the public interest, among other reason because the agreed rent was disproportionate to what is generally agreed in similar contracts, was a matter that required "*investigation of the factual circumstances in each concrete case*" and, as such, it entered into the competence of the administration. The court thus declared that the "*automatic*" annulment of public contracts is contrary to article 5(1) of the Constitution.[929]

The inconsistent application of proportionality in judicial practice. While proportionality in Greek constitutional law is perceived as a fundamental rights principle, it corresponds to an efficiency test in judicial review. Value-choices are excluded from this test, which is only concerned with facts and evidence. To this, one should add the inconsistent way in which proportionality is applied, which contrasts with its status as an "overarching principle". Traditional versions of proportionality have persisted in domestic judicial review and operate in concurrence with the new rationalising version. In many cases involving constitutional rights, proportionality is applied as a manifest error test[930] or not applied at all.[931] In administrative law proportionality still applies as a standard of equity or reasonableness.[932] In other cases,

---

[927] Gerontas, "Η αρχή της αναλογικότητας και η τριτενέργεια των θεμελιωδών δικαιωμάτων μετά την αναθεώρηση του 2001 [The Principle of Proportionality and the Third Party Effect of Fundamental Rights after the 2001 Reform]," 479; Gerapetritis, "Στο δρόμο για την θεσμικά ισόρροπη παρέμβαση του δικαστή [Towards an Institutionally Balanced Judicial Intervention]."

[928] StE (Pl.) 1910/2001 *APXN*/2001, 690.

[929] Ibid, para 10.

[930] See for example StE 956/2009 *TNΠΔΣA*, para 6; StE 4182/2005 *ΔΔIKH* 2005, 970, para 7.

[931] StE (Pl.) 2281/2001 *ΔΔIKH* 2001, 959, concerning the inscription of religion on ID cards. StE (Pl.) 1685/2013 *EΔΔΔ* 2013, 391, concerning an exceptional levy imposed on certain properties.

[932] See Manolakoglou, "Η αρχή της αναλογικότητας ως τεχνική του δικαστικού ελέγχου πράξεων διακριτικής ευχέρειας της διοίκησης [The Principle of Proportionality as a Technique for the Judicial Scrutiny of Discretionary Administrative Acts]" and the cited case law: StE 796/2009 *TNΠΔΣA*, para 6; StE 398/2003 *TNΠΔΣA* (on bound competence); StE 1501/2008 *EΔKA* 2009, 60.

it is applied by means of translation of the ECJ or the ECHR relevant case law.[933] The various "faces" and "guises" of proportionality provoke distrust among domestic public lawyers.[934] While the constitutional entrenchment of proportionality has led to the spill-over of proportionality language upon Greek law and to a "scientific" consensus as to its validity, it has not led to a consistent application of the three-pronged proportionality structure.

***

The spread of proportionality in Greek public law has been impressive. The principle has been employed in judicial review since the '70s and was announced as a constitutional principle from 1984. For nearly 40 years, the principle has been used in the judicial review of both Parliament and the administration. Contrary to English and French public law, proportionality met no major resistance in Greek public law discourse. The principle was even explicitly entrenched with the constitutional reform of 2001. However, the "triumphant march" of proportionality in Greek public law seems detached from the role that the principle has had in practice. The use of proportionality by courts is characterised by constant conceptual ambiguity and tension. While it was announced as a requirement of necessity and relevance imposed on legislative restrictions of rights, in subsequent Council of State practice it was reduced to a manifest error review of the legislative means-ends. At the same time, in administrative law, proportionality preserved its ambiguous content of equity or relativity that it had since the first uses of the term during the '70s. As an EC law principle, it was applied "by means of translation" of Luxembourg case law and sometimes led to an intrusive scrutiny of public decisions during the '90s.

The fragmented content of proportionality in positive law has stood in contrast to its unitary and relatively stable perception in Greek legal theory. Indeed, since 1984 and even before, scholars saw in proportionality a three-pronged requirement of appropriateness, necessity and *stricto sensu* proportionality, applied in German and European law. Similar to the French *doctrine*, Greek academic writings on proportionality have been detached from the structures of judicial reasoning. However, in contrast to France, proportionality in Greece has not so much served the analysis or systematisation of domestic case law either. At best, it has led to a re-interpretation of concrete rules in administrative, criminal and private law. Greek proportionality scholars have rather been concerned with affirming the theoretical content of the principle, sometimes without even defining its relationship with pre-existing concepts and distinctions in domestic judicial review. It seems that, despite its fragmented and incoherent application in practice, the use of proportionality language has a value in

[933] AP (Pl.) 26/2003 *Ελλ⊥νη* 2003, 1263, in which the supreme civil court follows closely the ECHR reasoning in property rights.

[934] George Gerapetritis, "Πρόσωπα και προσωπεία του ελέγχου της αναλογικότητας [Faces and Guises of Proportionality Review]," *⊿τΑΤΕΣ IV*, 2006, 269.

itself for Greek public lawyers, it is part of "a style that highlights, magnifies, overflows".[935]

Unsurprisingly, the most solemn affirmation that can be, the constitutional entrenchment of proportionality, met consensus in Greek public law and established proportionality analysis as a correct scientific method in domestic legal reasoning. Proportionality's hegemony in the Greek legal order is not comparable to its limited role in French constitutional law. However, when it comes to judicial practice, the application of proportionality is inconsistent. Traditional versions have persisted and compete with a new, fact-oriented and rationalising version of proportionality as a test of efficiency and rationalisation. The application of proportionality in Greece differs from the practice of French courts, due to its intrusiveness and fact-oriented nature in some cases. However, it lacks the clarity, the consistency and the attention to values that characterises its application by English judges.

[935] Nikolaos I. Saripolos, *Πραγματεία του Συνταγματικού Δικαίου [Treatise of Constitutional Law]*, 1st ed. (Athens, 1851), 47; cited by Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]*, 129.

Comparative conclusions
Detecting the expressive function of proportionality

A survey of the use of proportionality language by French, English and Greek lawyers confirms the "doctrinal imperialism" of proportionality. Since its emergence in France, proportionality has been perceived as conspicuous, and especially since the 2000s, it proliferates in case law. In England, proportionality spreads as a human rights head and culls the "sacred cows" of common law review. In Greece, it is a hegemonic method of legal reasoning and it replaces pre-existing categories and standards. However, what seems to be an irresistible spread of proportionality is not so much connected to its systematic application in practice. In fact, proportionality's content has been very different across space and time. Contrary to the claims of certain proportionality enthusiasts, proportionality has not always functioned as a pronged test for the optimal realisation of fundamental rights. Very often, structural features of the Alexyan proportionality theory, like balancing or reasoning in prongs, are absent from judicial reasoning. In certain cases, it is even more fundamental features of proportionality that are missing, like its connection to rights, and in yet others proportionality is not even a judicial test at all. Proportionality is reconstructed "from scratch" by its host environments, which inscribe their proper rationality in its use.[936] Convergence at the level of legal language is only superficial. Proportionality as a transnational idiom reaffirms the boundaries of the discourses that have embraced it.

Despite divergence in the application of proportionality, in the following lines I will attempt to schematise certain common features in its use that transcend national borders and provide what Legrand calls a "dialogical interface" for pushing the comparison further. These features may seem common-sensical to the reader, since they are part of European lawyers' common understanding of the term. However, they are worth mentioning, since they have guided my search for the expressive function of proportionality and they structure the rest of the presentation of this thesis.

First, in all the contexts studied, proportionality has been promoted as a transfer from abroad. Dreyfus and Braibant in 1978 argued for the explicit recognition of the principle of proportionality, which would be imported from other European countries or international jurisdictions. In *GCHQ*, Lord Diplock talked about the transfer of the principle of proportionality, recognised in the administrative law of Continental European states. In his study of the German principle of proportionality in 1983, Apostolos Gerontas called for its application in domestic constitutional law. The perception of proportionality as a transfer is connected to the fact that certain personalities made a significant contribution to its spread in each domestic context. Guy Braibant, Jeffrey Jowell and Petros Pararas are only some of these personalities,

[936] Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 1998), 12, http://papers.ssrn.com/abstract=876950.

who often, in addition to being influential in scholarship, have an active role in legal and judicial practice. The perception of proportionality as a transfer has persisted in all the systems studied: today, in the minds of domestic public lawyers in France, England and Greece, proportionality represents a pronged structure for legal reasoning coming from German law.

Second, in all the contexts studied, the transfer of proportionality discourse has proceeded through the application of European law and has been connected to the adjudication of supranational rights and freedoms. In France, it is only after courts recognised the full effect of EU Treaties and the ECHR in the domestic sphere that proportionality actually spread in judicial reasoning. In England, the ECA and the HRA have provided "gateways" for the application of proportionality in domestic judicial review. And Greek judges apply proportionality as an EU law principle "by translation" of Luxembourg case law. As for the ECHR, while for some time proportionality was not perceived to be a major factor in its application in the Greek context, the turn of the domestic constitutional order to Strasbourg has definitely enhanced the spread of proportionality discourse in domestic judicial review. In all these cases, supranational law has imposed its own norms and priorities on domestic public authorities and proportionality has served their enforcement by the judge.

Third, the spread or promotion of proportionality has been at some point connected to fundamental rights and has taken a form quite similar to the one described by the Alexyan legacy. In France, the transfer of the prong-structured proportionality test in constitutional law has been explicitly connected to the German version of the principle. Despite its inconsistent application by courts, proportionality is now perceived as a fundamental rights principle both in scholarship and in case law. In England, fundamental rights language has rapidly expanded under the HRA and proportionality is deemed a crucial feature of this shift. Both the application and the scholarly perception of proportionality roughly correspond to its description in the proportionality theory. In Greece, since its emergence proportionality has been connected to the German three-pronged structure for judicial reasoning, defying its deferent and formalist application in judicial practice. Since 2001 the mainstream perception of proportionality in Greek scholarship is very akin to the Alexyan model. However, this perception contrasts with the inconsistent application of proportionality in judicial practice and the exclusion of value-laden reasoning from its scope.

Fourth, the perception of proportionality and of its evolution in all domestic contexts has not always depended on the conceptual content assigned to proportionality by courts. Indeed, sometimes domestic public lawyers' perception even defies important structural features of its use in judicial reasoning, such as its form and function. The perception of proportionality in each discursive context thus seems to express more general tendencies in the way domestic public lawyers perceive law and legal language itself. Defying the absence of its recognition in domestic practice, French public lawyers have perceived proportionality as an idea that is omnipresent in domestic law and guides its evolution. Appeal to proportionality has served scholars

in establishing coherence between the fragmented concepts and methods of French judicial review. In this way, the use of proportionality in French public law expresses the more general perception of this field as a coherent knowledge system. In contrast, English lawyers have been more attentive to judicial reasoning patterns and to the structural features of proportionality in practice. Proportionality in English public law is perceived as an additional ground for contesting a public act and thus for lawyerly argumentation, which is different from the traditional heads of review. As such it expresses the instrumentalist perception of legal structures that is typical of the common law. Differently to both England and France, the spread of proportionality in Greece has not been connected to its function in judicial practice and has been of little service to the analysis or systematisation of domestic case law or legislation. Expressing the formalism of Greek legal language, in the sense of its disinterest in social practices, even when they are shared by the members of the legal profession, proportionality is perceived as correct, no matter its application in practice.

It is not my purpose at this point to make general conclusions about the perception and characteristics of law as a social practice or cultural system in the different domestic contexts. These observations are too abstract and subject to the "culture as a thought-stopper" critique. Besides, culture is not static and in every system different tendencies and different perceptions of law coexist and compete. So too does the *legal* culture, and even the *public law* culture that defines the semantic horizons of the concepts among which proportionality operates. Any similarities and differences observed at this stage can only be but a transitional state of knowledge. The expressive function of proportionality should be sought in its more concrete manifestations. The common features observed above offer a starting point, since they constitute a minimum content in the use of proportionality language by legal actors across the different systems studied. The concretisations of this content each time express domestic perceptions of the law, rights and public authorities, society, and European integration. They also express the way these features may change over time.

PART II

GREAT EXPECTATIONS

The performative effect of proportionality theory. The analysis in Part I has shown that despite divergence in the use of proportionality across legal systems, the narrative of the success of proportionality does not completely lack factual basis. Proportionality has indeed spread in domestic legal discourses, and even though its judicial application seldom follows *exactly* the proportionality model described by Alexy and his followers, it is sometimes very akin to it. In the various contexts studied, proportionality has eventually been connected to rights and is increasingly used by judges as a pronged structure. In this sense, Robert Alexy and his followers are right. Besides, one should not neglect the influence that the Alexyan theory itself has had on the spread of proportionality in the various contexts studied. Local legal actors increasingly perceive the Alexyan proportionality model as the correct way to "speak" proportionality and press for its adoption by other actors, especially judges. The proportionality model thus becomes performative. Not only it does it *describe* local forms of legal reasoning, but it also *constitutes* them. Performativity means success for the proportionality theory, which, like every interpretative theory, offers a self-consciously normative account of legal reasoning.

The rational human rights paradigm. Scholars usually attribute proportionality's success to its inherent qualities as a reasoning structure. This is connected to the particular perception of rights that underpins the relevant studies, which Mattias Kumm has called the "Rational Human Rights Paradigm".[937] Based on a reconstruction of judicial practice in modern liberal constitutional democracies, proportionality theorists contend that rights are not rules but principles, that is, abstract "ideal-ought" statements.[938] Principles are only *prima facie* commands; they become definite only after they are balanced against other competing principles, in the set of facts of each case.[939] Thus, they empower the applying authority to realise them to a lesser degree, when their realisation is not possible. In the rational paradigm, rights consist in optimisation requirements, they command the decision-maker to realise them to the greatest extent possible, according to the factual and legal possibilities of each case. As we saw, proportionality serves as a methodological framework for accomplishing this task.

The advocates of proportionality opt for a wide definition of the scope of rights. "Definitional generosity" includes trivial, or even illegal actions in the scope of

---

[937] Mattias Kumm, "Democracy Is Not Enough: Rights, Proportionality and the Point of Judicial Review," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, March 11, 2009), http://papers.ssrn.com/abstract=1356793.

[938] Robert Alexy, *A Theory of Constitutional Rights*, trans. Julian Rivers (Oxford; New York: OUP, 2002), 86 f.; Mattias Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. A Review Essay on *A Theory of Constitutional Rights*," *International Journal of Constitutional Law* 2, no. 3 (2004): 578. The distinction between rules and principles was first introduced by Ronald Dworkin, in "The Model of Rules," *University of Chigago Law Review* 35, no. 1 (1967): Article 3.

[939] Kai Möller contests Robert Alexy's rules/principles distinction but still accepts that the application of some important constitutional rights entails balancing. See "Balancing and the Structure of Constitutional Rights," *International Journal of Constitutional Law* 5, no. 3 (2007): 453.

constitutional protection.[940] The model of rights presented in proportionality scholarship is then typically opposed to the traditional approach adopted by the US Supreme Court, which attributes the status of constitutional rights only to private interests deemed to be fundamental.[941] The expansive conception of rights is often complemented by the recognition of a general right to liberty and to equality,[942] or of an all-encompassing right to autonomy.[943] The consequence of the broad conception of constitutional rights is that almost every action or omission of public authorities can be submitted to a process of justification, according to which its legal validity is assessed. That is because almost every action or omission of public authorities will affect the realisation of a constitutional right. Thus, the domain of constitutional justice becomes "prima facie coextensive with the domain of political justice generally".[944]

Rights serve as guidance for virtually every act of the legislative and administrative authorities. Apart from negative obligations of state non-intervention, they are considered to create positive obligations of protection on the part of public authorities, through the establishment of institutions and procedures or through material acts. Rights to positive state action are attributed the same normative status as negative ones. Nevertheless, certain specificities in their structure explain the wider discretion that public authorities enjoy in their protection.[945] Rights radiate in the legal system and affect the interpretation of abstract legal notions and sub-constitutional norms. They have a horizontal effect in private relationships. Social and economic rights guarantee the minimum conditions for a decent life, the "existential minimum", which is a prerequisite for the realisation of liberties.[946] Departing from classical liberal distinctions between private and public law or between state and society, in proportionality theory the constitution's reach constantly expands to cover not only the whole of public action, but also the whole of society. Mattias Kumm talks about the "total constitution".[947]

Democracy, rights and justification: criticism and what proportionality's defenders expect. Alec Stone Sweet and Jud Mathews observe that proportionality "has provided an important doctrinal underpinning for the rights-based expansion of judicial authority across the globe".[948] Thus, critics of the Alexyan theory have argued

---

[940] Alexy, *A Theory of Constitutional Rights*, 210 f.; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge Studies in Constitutional Law (Cambridge: CUP, 2012), 17 f.; esp. 42 f.; Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford: OUP, 2012), 45 f.

[941] Kumm, "Constitutional Rights as Principles," 582 f.

[942] See Alexy, *A Theory of Constitutional Rights*, 223 f.; 260 f.

[943] Kai Möller, *The Global Model of Constitutional Rights*, Oxford Constitutional Theory (Oxford: OUP, 2012), 73 f.

[944] Kumm, "Constitutional Rights as Principles," 587.

[945] Klatt and Meister, *The Constitutional Structure of Proportionality*, 85 f.; Alexy, *A Theory of Constitutional Rights*, 344 f.

[946] Alexy, *A Theory of Constitutional Rights*, 288 f.; 349 f.; Kumm, "Constitutional Rights as Principles," 582 f.

[947] Mattias Kumm, "Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law," *German Law Journal* 7, no. 4 (2006): 341.

[948] Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism," *Columbia Journal of Transnational Law* 47 (2008): 86–87.

that it turns the constitution in a "juridical genome" and that it leaves no discretion to Parliament.[949] The defenders of proportionality however, respond that democracy not only requires majoritarian decision-making, but also the participation of individuals in the political process. With the spread of proportionality and fundamental rights, the courts become a forum for the contestation of political decisions.[950] Critics of judicial review object that this renders policy reasoning excessively legal-technical and leaves no place for reasonable disagreement on the relative importance of constitutional values.[951] Proportionality scholars however, argue that legislative discretion remains unaffected, since the role of the judiciary is not to find the correct answer, but rather to "to *police the boundaries of the reasonable*".[952] The judiciary assumes a mission of "Socratic contestation",[953] for which it is particularly well-suited given the procedural and institutional rules guaranteeing judicial independence and impartiality, as well as the obligation to justify judicial decisions. Courts' analytical and reactive role in the policy-making process reduces necessities for access to fact and institutional expertise.[954] Hence, following David Beatty, proportionality "is able to reconcile both democracy and rights in a way that optimizes each".[955]

The conceptualisation of rights as principles does not guarantee their priority over other values nor does it entail their absolute, categorical protection. Rights represent neither "trumps",[956] nor "firewalls",[957] nor "side constraints",[958] nor any other kind of anti-utilitarian considerations that protect the individual from the pursuit of the

---

[949] Ernst Forsthoff, *Der Staat der Industriegesellschaft: dargestellt am Beispiel der Bundesrepublik Deutschland*, 2nd ed. (München: Beck, 1971); cited by Robert Alexy in the Postscript of his *A Theory of Constitutional Rights*, 388. See also Ernst Wolfgang Böckenförde, "Grundrechte Als Grundsatznormen. Zur Gegenwärtigen Lage Der Grundrechtsdogmatik," in *Staat, Verfassung, Demokratie : Studien Zur Verfassungstheorie Und Zum Verfassungsrecht* (Frankfurt am Main: Suhrkamp, 1991), 185; cited by Alexy, *A Theory of Constitutional Rights*, 388 f.; Paul Kahn, "The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell," *Yale Law Journal* 97 (1987): 9. Tsakyrakis also makes this observation in his criticism on proportionality, in "Proportionality: An Assault on Human Rights?," New York School Jean Monnet Working Paper Series, no. Paper 9 (2008): 6 f., www.JeanMonnetProgram.org. For a more complete presentation of the debate, see Klatt and Meister, *The Constitutional Structure of Proportionality*, 75 f.

[950] Kumm, "Democracy Is Not Enough," 28 f.; "Alexy's Theory of Constitutional Rights and the Problem of Judicial Review," in *Institutionalized Reason: The Jurisprudence of Robert Alexy*, by Matthias Klatt (Oxford; New York: OUP, 2012), 201; Robert Alexy, "Balancing, Constitutional Review, and Representation," *International Journal of Constitutional Law* 3, no. 4 (2005): 572.

[951] See especially Jeremy Waldron, "The Core of the Case Against Judicial Review," *Yale Law Journal* 115 (June 2005): 1346. See also Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge; New York: CUP, 2009).

[952] See also Kumm, "Democracy Is Not Enough," 35 f.

[953] Mattias Kumm, "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review," *Law and Ethics of Human Rights* 41, no. 2 (2010): 141. Other scholars submit to this idea: see, for example, Barak, *Proportionality*, 472 f.; Möller, *The Global Model of Constitutional Rights*, 108.

[954] Kumm, "Democracy Is Not Enough," 31 f.; "Constitutional Rights as Principles," 595; Möller, *The Global Model of Constitutional Rights*, 126 f.

[955] David Beatty, *The Ultimate Rule of Law* (Oxford; New York: OUP, 2004).

[956] Ronald Dworkin, *Taking Rights Seriously*, New impression, with a reply to critics (London: Duckworth, 1978), 193.

[957] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Studies in Contemporary German Social Thought (Cambridge, MA: MIT Press, 1996), 259.

[958] Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974), 30 f.

common interest under any set of circumstances. The *prima facie* scope of a right is subject to limitations, justified by considerations of public interest or by the need to protect the rights of others, and thus is distinguished from the scope of its actual protection. The limitation of constitutional rights can be constitutionally valid, even when it consists of very serious restrictions, since the Alexyan proportionality theory does not recognise any categorically defined content to constitutional rights. In the end, the validity of rights limitations only depends on whether they respect the principle of proportionality.[959] Proportionality theory thus promotes a socially situated perception of rights and of the individual. In Aharon Barak's terms, proportionality "represents the notion that the individual lives within a society and is a part thereof; that the very existence of that society—its needs, as well as its tradition—may provide a justification to the limitation of human rights through laws that are proportional".[960]

The defenders of proportionality are aware that the rational human rights paradigm is at odds with liberal philosophical accounts of rights, which recognise a small number of strong rights. Jürgen Habermas has famously criticised the balancing approach to the adjudication of constitutional rights. In his view, balancing deprives rights of the "strict priority" that they enjoy as legal norms over other policy interests.[961] In the same vein, Stavros Tsakyrakis criticises proportionality scholars' commitment to consequentialism, which in his view neglects the importance of rights as values and endangers the protection of minorities.[962] Grégoire Webber objects to the ubiquity of proportionality balancing, arguing that "by their very nature, rights aspire to be absolute".[963] Proportionality enthusiasts retort however, that giving strict precedence to rights over the public interest is not practicable. In their view, the proportionality structure can accommodate moral considerations based on liberal conceptions of rights. For example, the legitimate aim prong can serve to exclude paternalistic commands as to how individuals should conduct their lives from the notion of public interest. Further, rights can be assigned different weights in the balancing process, according to the substantive theory of justice that one adopts.[964] Frederick Schauer has argued for an alternative conception of rights as "shields",

---

[959] Kumm, "Alexy's Theory of Constitutional Rights and the Problem of Judicial Review," 192 f; Barak, *Proportionality*, 27 f; 493 f; Klatt and Meister, *The Constitutional Structure of Proportionality*, 17 f; 66 f.

[960] Barak, *Proportionality*, 165.

[961] Habermas, *Between Facts and Norms*, 256.

[962] Tsakyrakis, "Proportionality: An Assault on Human Rights?," 6 f.

[963] Grégoire Webber, "Proportionality and Absolute Rights," in *Proportionality: New Frontiers, New Challenges*, ed. Vicki Jackson and Mark Tushnet (Cambridge; New York: CUP, 2017), 74.

[964] Kumm, "Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement," in *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy*, by George Pavlakos (Oxford: Hart, 2007), 141 f.; see also "What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement," New York University Public Law and Legal Theory Working Papers, no. Paper 46 (2006), http://lsr.nellco.org/nyu_plltwp/46. For a more detailed analysis of this issue concerning the complex relation of balancing and human dignity, see Mattias Kumm and Alec Walen, "Human Dignity and Proportionality: Deontic Pluralism in Balancing," in *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, ed. Grant Huscroft, Bradley Miller, and Grégoire Webber (New York: CUP, 2014), 67.

enjoying lexical priority in the balancing process.[965] In this way, adopting proportionality does not necessarily compromise rights protection.

Even though rights in the rational paradigm do not enjoy absolute protection, they can be "formidable weapons", since they oblige public authorities to justify their infringement.[966] Proportionality allows structured argumentation based on the factual and legal possibilities of each case. Critics have contested the existence of rational criteria for arbitrating among competing values.[967] However, proportionality scholars do not consider balancing to be irrational but simply more open-ended than subsumption.[968] For Robert Alexy, the constitution can provide a common point of reference that renders competing rights commensurable.[969] Furthermore, the concrete and fact-oriented character of the balancing process under proportionality makes it more transparent and rational than weighing constitutional principles such as freedom of speech and privacy at a high level of abstraction.[970] Proportionality responds both to equity considerations connected to the particularity of each case and to general requirements of objectivity and predictability imposed on judicial decisions.[971] Thus, it is believed to bring with it a whole institutional-political culture, in which every coercive act of the state results from a "*collective judgment of reason* about what justice and good policy requires".[972] Mattias Kumm observes that,

> [i]n institutional terms these features of human rights practice require a recharacterization of what courts do when they assess whether public authorities have violated rights. Courts are not simply engaged in applying rules or interpreting principles. They assess justifications. Call this *the turn from interpretation to justification.*[973]

Proportionality theorists contend that criticism as to the substantive outcomes of proportionality's application should not be addressed to the structural model *per se*, which does not predetermine the outcomes of judicial decisions. Everything depends

---

[965] Frederick Schauer, "A Comment on the Structure of Rights," *Ga. L. Rev.* 27 (1992): 415; see, more recently, Frederick Schauer, "Proportionality and the Question of Weight," in *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, ed. Grant Huscroft, Bradley Miller, and Grégoire Webber (New York: CUP, 2014), 173.

[966] Kumm, "What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement," 11.

[967] On the objection of irrationality see Habermas, *Between Facts and Norms*, 254 f. On the issue of commensurability, see Frederick Schauer, "Commensurability and Its Constitutional Consequences," *Hastings Law Journal* 45 (1994): 785. See also Francisco Javier Urbina Molfino, *A Critique of Proportionality and Balancing* (Cambridge; New York: CUP, 2017).

[968] Robert Alexy, "Constitutional Rights, Balancing and Rationality," *Ratio Juris* 16, no. 2 (2003): 139; *A Theory of Constitutional Rights*, 401; Robert Alexy, "On Balancing and Subsumption. A Structural Comparison," *Ratio Juris* 16, no. 4 (2003): 433–49.

[969] Alexy, "On Balancing and Subsumption. A Structural Comparison," 442. Scholars have further developed this point by adducing insights from philosophy and practical reason. See Klatt and Meister, *The Constitutional Structure of Proportionality*, 58 f.

[970] Alexy, *A Theory of Constitutional Rights*, 105 and 369 f.; Barak, *Proportionality*, 357.

[971] Vlad Perju, "Proportionality and freedom—An Essay on Method in Constitutional Law," *Global Constitutionalism* 1, no. 2 (2012): 334.

[972] Kumm, "Democracy Is Not Enough," 21.

[973] Kumm, 6.

on the substantive moral theory that will complement the model and on in its actual application by courts.[974] Proportionality, when correctly applied, simply renders this theory public and open to criticism. Thus, it leads to the "rational optimization of the common good", no matter how different societies perceive it.[975] Proportionality and the rational human rights paradigm seem abstract enough to accommodate local visions of rights and democracy in constitutional democracies around the globe. They are promoted as a "global model" of rights-based adjudication.[976] In David Beatty's words, "[a]pplied impartially, proportionality is a formal principle that is capable of being used anywhere in the world. On a shrinking planet, it is appropriately multicultural".[977] The occasional use of the transplant metaphor in the relevant literature does not imply defiance of the context that surrounds proportionality's use but rather a claim that it can and even should be accommodated and reframed within the proportionality structure.[978]

The German origins of proportionality. Still, the source of proportionality *is* local. Alexy's theory was initially purported to offer a reconstructive account of the case law of the German Federal Constitutional Court (GFCC). It is only since the 2000s that proportionality and the rational human rights paradigm acquired a universal range.[979] Even after the detachment of proportionality from Karlsruhe, scholarship has often used German constitutional case law as an example of the success of proportionality and of the rational human rights paradigm. The conditions for the felicity of proportionality theory should thus be sought in the particular discursive context in which proportionality emerged as a method of judicial review.

Moshe Cohen-Eliya and Iddo Porat observe that the success of proportionality is rooted in a communitarian conception of the state expressed in the German notion of *Rechtsstaat*.[980] In German post-war constitutionalism, the Fundamental Law, as Germans like to call their Constitution, incorporates the core features of the political morality shared by society.[981] It establishes an "*objective order of values*" (*objektive*

---

[974] "Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement," 141 f.; see also "What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement."

[975] Julian Rivers, "Proportionality and Variable Intensity of Review," *CLJ* 65, no. 1 (2006): 181.

[976] Möller, *The Global Model of Constitutional Rights*.

[977] Beatty, *The Ultimate Rule of Law*, 168.

[978] See Mattias Kumm, "Is the Structure of Human Rights Practice Defensible? Three Puzzles and Their Resolution," in *Proportionality: New Frontiers, New Challenges*, ed. Vicki Jackson and Mark Tushnet (Cambridge; New York: CUP, 2017), 30 f., on "the problem of variance"; see also Perju, "Proportionality and freedom—An Essay on Method in Constitutional Law." Vlad Perju accepts that the pronged framework might have to adapt itself to local needs. Thus, he proposes a fifth prong of proportionality for its successful transplant to the US. See Vlad Perju, "Proportionality and Stare Decisis: Proposal for a New Structure," in *Proportionality: New Frontiers, New Challenges*, ed. Vicki Jackson and Mark Tushnet (Cambridge; New York: CUP, 2017), 75.

[979] Kumm, "Constitutional Rights as Principles," 575.

[980] Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture*, Cambridge Studies in Constitutional Law (Cambridge: CUP, 2013), chap. 3.

[981] Cohen-Eliya and Porat, 46; 122 f.; Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed, revised and expanded (Durham, NC: Duke University Press, 2012), 356 f. See also as an example the value discourse in the *Abortion I* (1975), 39 BVerfGE 1, cited and translated by Kommers, 374 f.

Wertordnung) on which social integration is based.[982] In this sense, "the Basic Law was designed not only to create a system of governance but also to foster a secured and preferred *way of life*".[983] Jacco Bomhoff stresses that the GFCC jurisprudence expresses "a faith in law of such fervour and ambition that nonbelievers may find difficult to take seriously."[984] Faith in law is combined with faith in state organs and especially the GFCC itself, which was attributed the mission of substantiating the objective order of values that the Basic Law incorporates in individual cases.[985] As Bomhoff explains, while in the US judicial balancing has been connected to the illegitimate pursuance of political outcomes, in Germany it is combined with a belief in juridical autonomy and purports to offer a refined method of legal reasoning which would lead to better *legal* outcomes. Proportionality balancing, in continuity with the movements of *Interessenjurisprudenz* and Rudolf von Jhering's teleology, expresses a rational, scientific methodology for the entrenchment of the values expressed in the Constitution in every case.[986] German lawyers' perception of legal knowledge as a rational and scientific enterprise, what Cohen-Eliyah and Porat call "epistemological optimism",[987] is also manifest in formalist doctrines that accompany proportionality, like the "theory of personal spheres" in the conflict between freedom of speech and right to privacy,[988] the "gradation theory" (*Stufentheorie*) in cases concerning professional freedom[989] or the identification of "scales of scrutiny" in cases of epistemic uncertainties.[990]

Proportionality expressing local culture. Integration through law, institutional faith and epistemological optimism are cultural features that seem to favour the correct and consistent application of proportionality. However, they are not universal characteristics of legal culture. They can vary, even in liberal constitutional democracies, even in Europe. Divergence in the use of proportionality observed in Part I indicates that local cultural features affect the way proportionality is understood

---

[982] *Lüth* (1958), 7 BVerfGE 198.

[983] Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 47. My underlining.

[984] Jacco Bomhoff, "Balancing Constitutional Rights: Introduction," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, November 13, 2013), 8, http://papers.ssrn.com/abstract=2343536.

[985] Cohen-Eliya and Porat, *Proportionality and Constitutional Culture*, 47 f. See also Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 46 f.

[986] Jacco Bomhoff, "Genealogies of Balancing as Discourse," *Law & Ethics of Human Rights*, no. 4 (April 2010): 108.

[987] Cohen-Eliya and Porat, *Proportionality and Constitutional Culture*, 90. See generally p. 82 f.

[988] *Lebach* (1973), 35 BVerfGE 202, in Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 484.

[989] *Pharmacy* (1958), 7 BVerfGE 377, cited by Kommers, 666 f.

[990] *Codetermination* (1979), 50 BVerfGE 290. See also Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence," *University of Toronto Law Journal* 57, no. 2 (2007): 391. On this point, see Bomhoff, "Balancing Constitutional Rights," 9. According to the author this belief is revealed by "the tropes surrounding the vocabulary of balancing in Germany. There, a list of dominant terms would have to include words like *dialektisch* (dialectical), *prinzipiell* (principled), *durchtheoretisiert* (fully theorized), *Einheitsbildung* (fostering of unity), *'logisch-teleologisch'* (logicalteleological), *Optimierung* (optimization), and *Synthese* (synthesis)". The perception of proportionality as a rational reasoning method also informs the criticism of concrete GFCC's decisions, which often takes the form of a "friendly advice" to the Court in the application of proportionality (Ibid, 134 f.).

in different contexts. Divergence also points to local sources of resistance to the application of proportionality as a pronged fundamental rights structure.

Of course, proportionality itself can be a *source* of cultural change. Cohen-Eliya and Porat suggest that the spread of proportionality in different systems sets a global reference point for adjudication and could generate a "race to the top" in the field of fundamental rights protection. This means that judges would tend to compete with each other as to which legal system protects fundamental rights better.[991] These authors also point out that the migration of a methodological tool like proportionality can bring with it "cultural baggage" from Germany.[992] Drawing on the example of Canadian and Israeli case law, they observe that the spread of proportionality can bring with it an organic perception of the state and openness of law to value-laden reasoning and to foreign ideas. Part I has described the way proportionality has been inserted to pre-existing discursive structures in the different contexts studied and the way it has affected these structures. It has shown that the influence of German constitutionalism and of fundamental rights language has certainly enhanced the spread of proportionality. That being said, proportionality has not always been connected to Germany and fundamental rights. What is more, even in cases where proportionality is used as a fundamental rights principle, it does not always lead judges to transparent value-laden reasoning. This indicates that things might be more complicated than the proportionality literature assumes.

In this Part, my purpose is to make sense of the three stories on the spread of proportionality presented in Part I. I do not only purport to observe the effects that proportionality has had on French, English and Greek legal cultures but also the way these cultures have affected proportionality. Part I has shown that in all the contexts studied, proportionality has been perceived as a transfer from another context and has purported to change domestic law in a certain way. This shows that legal actors perceive their local discourse and the source context to be similar in a certain way. But expectations of proportionality considerably vary across space and time, according to the local stakes attached to legal argumentation. The goals of legal actors are set, and even thought of, within a certain culture, without which they would not even exist as such. The source context of proportionality is not always Karlsruhe or the rational human rights paradigm. Other influences, coming from other legal systems or even from other disciplines like economics, mathematics and philosophy, might be present and might affect the content of proportionality language according to local criteria for the evaluation of legal arguments. In the cultural study of law, metaphors like migration or transplantation can only be a *starting point* for legal comparison. The meaning of proportionality and the goals that it is expected to accomplish largely depend on local imagination. Local meanings of proportionality enhance and constrain its use. They make sense of its evolution and of its success or failure in different settings.

[991] Cohen-Eliya and Porat, *Proportionality and Constitutional Culture*, 134 f., citing David Law.
[992] Cohen-Eliya and Porat, 134 and 136 f.

The purpose of this Part is to identify the particular domestic meaning of proportionality in France, England and Greece. Why do legal actors use proportionality language and not pre-existing concepts, methods and heads? What does proportionality add to legal argumentation? How is it expected to change local legal reasoning and argumentation? Does it succeed or fail to meet the great expectations invested in it and why? From the point of view of comparative law, what do the different proportionality stories tell us about differences in domestic legal cultures? Or more precisely, what do the different ways in which domestic proportionalities differ from the Alexyan model tell us about the way domestic legal cultures differ from each other? I will argue that objectivity and pretension to scientific exactness are the major assets of proportionality language in France. Proportionality is used by local lawyers as a theory, part of a legal science that justifies the expansion of the reach of law and of judicial powers (**Chapter 4**). Quite differently, it is a function of myth-making that is attributed to proportionality in English public law. Proportionality is mobilised by local lawyers as a rationalist principle that, referring to substantive values, can establish coherence among sparse common law precedents (**Chapter 5**). The expectations of proportionality are greater in Greece, where it is perceived as a legal transplant. As such, proportionality is expected to produce not only legal but also socio-political transformation (**Chapter 6**).

CHAPTER 4
Searching for a legal science

Proportionality and the myths of French public law thought. How to make sense of proportionality in French public law? While the influence of the transnational fundamental rights language is present, it seems that peculiarly local characteristics have constrained the use of proportionality and affected its spread in this context.

Proportionality in France is very different from the transplant described by the defenders of proportionality. While it emerged as a transfer from abroad, in the minds of domestic lawyers it has represented a value of law-making, a general principle that pre-existed the emergence of the term in judicial decisions and that has persisted even in the absence of proportionality language in judicial practice. Though the German proportionality model has been mentioned in certain academic analyses, scholars have usually not argued for its adoption as such. Rather, this model has served the reconstruction of already pre-existing domestic case law. Even the relatively recent reception of the pronged structure of proportionality has not been interpreted by French public lawyers as a radical change in already existing methods of judicial reasoning. This is why mainstream scholarship has accorded minor importance to the structural integrity of proportionality and is not much bothered by its inconsistent application. Few are those who have studied the analytical features of proportionality case law, and even fewer those who pressure for the application of proportionality as an argumentative framework.[993] In particular in private law, the adoption of proportionality to the detriment of the traditional syllogistic model meets important resistance.[994]

Most importantly, the spread of proportionality in France has not been a question of rights optimisation, as the Alexyan theory envisages. Indeed, with some very rare exceptions, the defenders of proportionality have not combined it with a clearly articulated theory of fundamental rights as principles.[995] This is simply because

[993] For some exceptions, see Rhita Bousta, "Contrôle constitutionnel de proportionnalité: la « spécificité » française à l'épreuve des évolutions récentes," *RFDC*, 2011, 913; Christophe Jamin, "Juger et motiver. Introduction comparative à la question du contrôle de proportionnalité en matière de droits fondamentaux," March 30, 2015, https://www.courdecassation.fr/cour_cassation_1/reforme_cour_7109/juger_motiver._31563.html.

[994] See the relevant discussion in « Regards d'universitaires sur la réforme de la Cour de cassation - conférence débat 24 novembre 2015 », published in the special number of *La Semaine Juridique*, supplément au no 1-2, 11 January 2016.

[995] One could say that Xynopoulos promotes a vision of fundamental rights as principles, in *Le contrôle de proportionnalité dans le contentieux de la constitutionnalité et de la légalité en France, en Allemagne et en Angleterre* (Paris: LGDJ, 1995); "Réflexions sur le controle de proportionnalité en Europe continentale et en Grèce," in *État-loi-administration. Mélanges en l'honneur de Epaminondas Spiliotopoulos*, ed. Petros J. Pararas (Athènes; Bruxelles: Ant. N. Sakkoulas; Bruylant, 1998), 461. A similar perception of rights seems to be emerging in some private law analyses: see for example Frédéric Zenati-Castaing, "La juridictionnalisation de la Cour de cassation," *RTD Civ.*, 2016, 511; Jamin, "Juger et motiver."

subjective rights are difficult to conceive in French public law. As Michel Troper neatly observed, "the idea of the state as a public entity, separate from society, endowed with legal personality, eager to oppress citizens and limit their liberty, is completely foreign to the French Revolution".[996] The modern French legal tradition is dominated by the allegory of the social contract, mainly owing to the work of Jean-Jacques Rousseau and transcribed in the *DDHC*. According to this narration, Men form societies and concede their freedom to the Sovereign in order to preserve their natural and imprescriptible rights. These rights are defined by statutes, so that their exercise by every member of society can be assured. This means that, traditionally, rights cannot be conceived in the absence of legal statutes. Typically, freedoms have been organised in detail by such statutes, like the laws of 30 June 1881 and 28 March 1907 concerning the freedom of assembly, or the law of 9 December 1905 on the freedom of conscience and the free exercise of religion.[997]

The laws of the Sovereign express the general will. Law is thus sacred and infallible; it cannot be put into question. French public law is permeated by a voluntarist perception of the state and of legal norm-production. Legislation is imagined as a sovereign will, emanating from a mythical entity, the Legislator, executed by the administration and pronounced by the judicial "mouth", in the concrete and formal terms of judicial decisions. One cannot help but notice the mythopoeic characteristics of French legal thought, which stand in stark contrast to the "rational" human rights paradigm underlying the Alexyan proportionality theory. The establishment of a republican regime, in which sovereignty belongs to the people, has entailed the supplementing of the myth of the general will with another, intermediary one: the myth of representation. In other words, because the Parliament is composed of the elected representatives of the people, its will expresses the sovereign will of the people through legal statutes.[998] In other words, in the foundations of the traditional French public law *légicentrisme* lies a confusion between represented and representatives.[999]

Since law expresses a will, legal norm-production consists of choosing the norms on which life in society is based. It is the sovereign will that evaluates social reality and, on this basis, decides policy goals as well as the measures to obtain them. It is the sovereign will that, from evaluating a certain situation in the *être*, will conclude to a certain *devoir être*. And, because law is infallible, the will expressed in legal statutes is external to judicial review. So are the goals of administrative action, whose function is traditionally limited to the execution of the legislative will. French judicial review is

---

[996] See Michel Troper, "Who Needs a Third Party Effect Doctrine?," in *The Constitution in Private Relations. Expanding Constitutionalism*, by Sajó András and Uitz Renáta (Utrecht: Eleven International Publishing, 2005), 121.

[997] Nevertheless, the idea of subjective public rights is not totally absent from administrative law in the XIX and XX century, see on this Norbert Foulquier, *Les droits publics subjectifs des administrés: émergence d'un concept en droit administratif français du XIXe au XXe siècle* (Paris: Dalloz, 2003).

[998] Pierre Brunet, *Vouloir pour la nation: le concept de représentation dans la théorie de l'état* (Rouen: Publications de l'Université de Rouen, 2004); Pierre Brunet, "Que reste-t-il de la volonté générale? Sur les nouvelles fictions du droit constitutionnel français," *Pouvoirs*, no. 114 (2005): 5.

[999] See also Dominique Rousseau, "La démocratie continue," *Le Débat*, no. 96 (1997): 73.

characterised by a fusion of substance and form. Legal statutes incorporate substantive value choices that the judge "discovers" and applies in concrete cases. Hence, the formality of French legal discourse can be described as a species of "dogmatism". French judges affirm the value-choices of Parliament as if they were positive facts.

Judicial decision-making is perceived as a mechanical process of application of the law. It consists in a syllogism with a *majeure*, a *mineure* and a *conclusion*. Balancing of competing interests is excluded from this process. Initially, application of the law was purported to exclude even the process of interpretation itself. Revolutionary laws entrusted statutory interpretation only to the Minister, through the procedure of the *référé législatif*.[1000] Consciousness of the inevitable nature of interpretation did not change the presentation of the content of legal norms in judicial decisions as pre-established and untouchable. The truth of judicial solutions is presumed absolute, transcendental. It cannot be contested, nor can it be the result of considerations of private interest. This is why the procedure before public law courts, mainly concerned with the legality of public action, is traditionally inquisitorial.

Antoine Garapon observes that, "[i]n France, law is assimilated to something transcendent whereas in the world of common law, it is best described as the rules of the game".[1001] Indeed, French lawyers often use the term "consecration" to designate the recognition of new legal rules or principles. The quasi-sacred nature of law makes sense of the mystery and the secrecy surrounding judicial decision-making. The institutional structure of the judiciary as a collective body is concealed behind the laconic and monolithic appearance of judicial justifications. The negotiations taking place in judicial deliberations are not accessible to the addressees of justice. The trust of the latter is not ensured through transparency, as the Alexyan theory would presuppose, nor through procedural justice in its Rawlsian sense. Rather, it is precisely the insulation of the judges and councillors composing ordinary courts, their education in elite institutions and their affiliation in *corps*, which is deemed to endow them with expertise and independence from external interests. Mitchel Lasser characterises this type of legitimacy as republican. In his words, "it is the state as a whole and unitary entity, complete with its representative institutions, that carries the imprimatur of republican legitimacy".[1002] This author shows that, in contrast to its caricatured description and criticism by common lawyers, this kind of meritocratic and formalist system has its own merits.

The limited potential for a legal science. The predominance of the norm-producing will undermines the potential for law as objective, scientific knowledge. While science is perceived as based on objective evaluations of fact and causation, facts

[1000] Décret du 16-24 août 1790, sur l'organisation judiciaire. On the idea of interpretation as being unnecessary in the civil law tradition, see Chaïm Perelman, "Droit, logique et épistémologie," in *Ethique et droit* (Bruxelles: éditions de l'Université de Bruxelles, 1990), esp. p. 623.

[1001] Antoine Garapon, "French Legal Culture and the Shock of 'Globalization,'" *Social and Legal Studies* 4, no. Special issue on Legal culture, Diversity and Globalization (1995): 499.

[1002] Mitchel Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (Oxford; New York: OUP, 2009), 53.

are deemed external to the inquiry as to the content of legal norms. Hume's axiomatic separation between Is and Ought is fundamental in French public law. This makes sense of French lawyers' traditional suspicion towards historical, sociological, Marxist and other critical approaches to law, classically rejected as non-legal. It is indicative that reference to *ad hoc* legal norm-production is very rare, almost inexistent in legal writings. This renders the function of proportionality as an *ad hoc* instance of balancing difficult to seize in this context. French public law discourse is distinctively formal, based on binary, all-or-nothing distinctions. This is neatly expressed in the traditional plan in *deux parties-deux sous-parties* that has been followed since the '40s in theses and university writings.[1003]

The problem with applying the law according to the factual circumstances of each case is that it inevitably implies *subjective* -and thus potentially arbitrary- value-judgments by the authorities of application, conditioned by considerations of morality, ideology or, even worse, interest. Domestic lawyers typically use the term "abstract" as synonymous to "objective" and "concrete" as synonymous with "subjective".[1004] This is connected to the fact that French legal thought, permeated by the dominance of positivism, is pessimistic about the possibility of objective value-judgements, and suspiciously levels the accusation of *jusnaturalisme* towards those who appeal to such judgments.[1005] One of the most important attributes of French legal science is (pretension to) axiological neutrality.[1006] It is indicative that *the* most important reference point in French legal thought during the last century has been Hans Kelsen and his "pure" theory of law. This feature has impeded the development of theories of inclusive positivism such as the ones developed in common law systems. Similarly, the Alexyan concept of law as including elements of morality is hardly conceivable within the fundamental assumptions of modern French legal thought.

Rationalisation efforts. These traditional characteristics have been – just as traditionally – criticised in the French context. French public lawyers have always sought to impose constraints on the norm-making will of state authorities, either by appealing to the "natural, imprescriptible and sacred rights" of the *DDHC*,[1007] or by importing methods from the *sciences dures* and the *sciences sociales*.[1008] Contestation of the

---

[1003] On this plan, see Frédéric Audren and Jean-Louis Halpérin, *La culture juridique française: entre mythes et réalités: XIXe-XXe siècles* (Paris: CNRS, 2013), 223 f.

[1004] See par exemple, Françoise Dreyfus, "Les limitations du pouvoir discrétionnaire par l'application du principe de proportionnalité: à propos de trois jugements du Tribunal Administratif de l'O.I.T," *RDP*, 1974, 700. For this author, the proportionality of penalties "repose sur des appréciations qui *ne sauraient être strictement objectives parce que la faute elle-même doit être considérée par rapport aux circonstances particulières* dans lesquelles elle s'est produite et que la peine n'aura pas le même impact quels que soient les cas dans lesquels elle est prononcée" (emphasis added).

[1005] For this tendency of French legal thought, see Olivier Jouanjan, "De la vocation de notre temps pour la science du droit : modèles scientifiques et preuve de la validité des énoncés juridiques," *Revue européenne des sciences sociales*, no. XLI-128 (2003): 134 f.

[1006] Véronique Champeil-Desplats, *Méthodologies du droit et des sciences du droit* (Paris: Dalloz, 2016), 107 f.; 111 f.

[1007] Phrase taken from the preamble of the 1789 Declaration of the Rights of Man and of the Citizen. See, for example, the other famous *Doyen* of French public law, Maurice Hauriou, *Précis élémentaire de droit constitutionnel*, 2nd ed. (Paris: Sirey, 1930), 306 f.

[1008] Champeil-Desplats, *Méthodologies du droit et des sciences du droit*, 42 f.; 145 f.

traditional voluntarist common-sense in French public law has been constantly present in the writings of scholars and of *commissaires de gouvernement*, calling for judicial pragmatism.[1009] The Council of State has not been indifferent to these tendencies. It was the desire for rationalisation that led the court to increasingly monitor the facts grounding administrative action. It was the will to impose equity constraints on legal norm-production that, since the '40s, inspired the creation of the normative category of general principles of law, which the administrative judge has sometimes anchored to the preamble of the Constitution.[1010]

Still, legal formality remained decisive in case law and preserved the mystery surrounding legal norm-production. It has been expressed in a pervasive "dogmatism" in French judicial reasoning, in the sense of exclusion of legislative value-choices from judicial review. A prominent example of this "dogmatism" is the theory of the *loi écran*, which has survived until today and "spontaneously evokes the alleged golden era of a Revolution full of graces".[1011] Furthermore, even when the judge made recourse to general principles, these principles were presented as an objective reconstruction of a presumed legislative will.[1012] Excision of values from judicial reasoning underlies the allegedly "manifest" character of the factual errors sanctioned by the judge, the taboo that surrounds the *détournement de pouvoir*, and even the fundamental distinction between *légalité* and *opportunité*, which has guided the evolution of French judicial review. In contrast to the impact-oriented notion of merits in UK public law, *opportunité* excludes the scrutiny of the *intent* of the reviewed authorities.

The mystery and the myth surrounding norm-production also persisted in scholarship. The normative will of law-making authorities constantly escapes rational determination through legal scientific knowledge. In French legal thought one observes a strict separation between Is and Ought. This allows to make sense of the distinction between science and *doctrine* that is a recurrent theme in this context. On the one hand, science in the sense of establishment of objective and exact knowledge is traditionally doomed never to participate in legal norm-production, since it can only be established in situations of fact. On the other hand, *doctrine* in the sense of normative system-building is doomed to be non-scientific.[1013] The exclusion of the norm-making will from legal scientific knowledge is apparent in Kelsenian transcendental-logical hypothesis of the *Grundnorm* as well. Recourse to a hypothetical norm that founds the autonomy of the legal system stands in contrast to the Alexyan proportionality model,

---

[1009] See especially the *Commissaire du gouvernement* Bernard Chenot, criticizing the « *faiseurs de systèmes* », in his *conclusions sur* CE 10 février 1950, *Sieur Gicquel,* Rec. 100. See also the answer by Jean Rivero, "Apologie pour les « faiseurs de systèmes »," *Recueil Dalloz*, 1951, 99.

[1010] CE, 26 June 1959, *Syndicat général des ingénieurs conseils*, no. 92099, ECLI:FR:CESJS:1959:92099.19590626; CE, 12 February 1960, *Société Eky*, nos. 46922 and 46923, ECLI:FR:CESJS:1960: 46922.19600212.

[1011] Brunet, "Que reste-t-il de la volonté générale? Sur les nouvelles fictions du droit constitutionnel français," 5.

[1012] Marceau Long et al., *Les grands arrêts de la jurisprudence administrative*, 21st ed. (Paris: Dalloz, 2017), 388.

[1013] See Jacques Chevallier, "Doctrine juridique et science juridique," *Droit et société*, no. 50 (2002): 103.

which, faithful to the rationality of legal norm-production, replaces legal reasoning with a structure for practical argumentation.

Rationalisation and constitutional review. The rationalisation of Parliament was the quest of the reform movement of the end of the Third Republic, composed of notable scholars and political personalities. This movement influenced considerably the drafting of the 1958 Constitution, which instituted for the first time the Constitutional Council.[1014] However, the introduction of constitutional review did not radically change the voluntarist perception of legal norm-production. Jean Carbonnier observes that the Fifth Republic is "*ambitieuse et dominatrice*": voted for under the "authority of a charismatic chief, a happy soldier" (meaning Charles De Gaulle), it imposes itself by means of "written orders, (…) acts of an authoritarian will".[1015] The constitutional judge long refused to review the value-choices of Parliament. The legislator was deemed to be sovereign in pursuit of the public interest, a notion that "escaped constitutional mechanics and constitutional engineering".[1016]

This feature did not change with the recognition of the normative value of the constitutional preamble either, even though this text -and especially the *DDHC* to which it refers- have served as a catalogue of substantive rights in judicial review. Constitutional rights, or rather public freedoms (*libertés publiques*) are objective requirements of abstention in the French context. Hence, they concern the normative content of legislation and not the intentions of Parliament. They do not impose optimisation requirements, they do not constitute a separate normative category of fundamental rights. Rather, their function is to set objective *limits* on public action. As such, they belong to categories like the general principles of law or the "fundamental principles recognised by republican legislation" (what French lawyers call the *PFRLR*), which contain other objective principles, such as the independence of administrative court or the competence of the judiciary concerning property rights.[1017] The application of public freedoms consists in an abstract confrontation between the content of different legal norms, following the syllogistic model. It traditionally acquires a distinctively formal or procedural style, even in the most significant Constitutional Council decisions. Among the requirements that public freedoms imply, one most notably finds the preclusion of a preliminary license or the role of the judiciary as protector of individual freedom, announced in article 66 of the Constitution.

Certainly, the "juridicisation" of the Constitutional Council and the development of constitutional reasoning methods ended with the establishment of Parliament as a constituted institution and introduced a certain distance between the people and the law. According to perhaps the most famous Constitutional Council formula, "*legislation*

[1014] Alec Stone Sweet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (New York: OUP, 1992), 31–45.

[1015] Jean Carbonnier, *Droit et passion du droit sous la Ve République* (Paris: LGDJ, 2008), 26, 28 resp.

[1016] François Saint Bonnet, "L'intérêt général dans l'ancien droit constitutionnel," in *L'intérêt général, norme constitutionnelle*, ed. Bertrand Mathieu and Michel Verpeaux (Paris: LGDJ, 2007), before fn. 5.

[1017] Dominique Rousseau, *Droit du contentieux constitutionnel*, 11th ed. (Paris: Montchrestien, 2016), 264 f.

(…) *only expresses the general will insofar as it respects the Constitution*".[1018] Law-making began to be represented as a process of reconciliation between competing constitutional values and the Council started to censure manifest errors and manifest disproportionalities in its scrutiny of legislative bills.

Still, immunity of legislative goals has persisted in constitutional case law. Following a *considérant* that became consistent in the Council's decisions, "*it is the competence of the legislator to proceed to the necessary reconciliation between the respect of freedoms and the preservation of public order, without which the exercise of freedoms cannot be ensured*".[1019] This reconciliation was not (or at least not explicitly) reviewed by the judge through judicial balancing. It seems that reference to reconciliation corresponded to a *ritual*, which served to reconstruct legislative intentions in a constitutionally legitimate way. Immunity of legislative intent has also underpinned certain constitutional methods. For example, the technique of the *réserve d'interprétation* allows the judge to "speak" the words of the legislator according to a legislative will *presumed* to be legitimate. Moreover, sanctioning an abuse of power is unthinkable in French constitutional law.[1020] Idealisation of Parliament and the legislative process transpires in judicial decisions. The Legislator is constantly personified. It is his unitary will (invariably, Parliament is represented as a man) that is sought in the *travaux parlementaires* or presumed in the *réserves d'interprétation* that the Council enounces.

Demystification and new mythopoeia. At the same time, French public lawyers do not always believe in their myths and often even denounce them as such. This has been the case for the "myth of the general will" and the "myth of representation", which are often deconstructed and even ridiculed in contemporary French legal writings.[1021] In the context of "*crise de la loi*"[1022] and under the increasing influence of European law in the domestic sphere, during the recent decades the French *doctrine* has appeared much more sceptical as to the possibility of objective knowledge concerning the meaning of legal prescriptions. This has led to a progressive abandonment of the traditional positivism, to the advantage of hermeneutic or realist theories, or -more often- of an "*amorphe*" description and systematisation of case law.[1023] The normative force of judicial decisions is increasingly affirmed in legal *doctrine* and science.

[1018] Decision no. 85-197 DC, 23 August 1985, *Loi sur l'évolution de la Nouvelle Calédonie*, ECLI:FR:CC:1985:85.197.DC, cons. 27.

[1019] Décision no. 85-187 DC, 25 January 1985, *Loi relative à l'état d'urgence en Nouvelle-Calédonie et dépendances*, ECLI:FR:CC:1985:85.187.DC, cons.3.

[1020] See Valérie Goesel-Le Bihan, "Le contrôle exercé par le Conseil constitutionnel : défense et illustration d'une théorie générale," *RFDC*, 2001, 67.

[1021] See already Raymond Carré de Malberg, *La loi, expression de la volonté générale : étude sur le concept de la loi dans la constitution de 1875* (Paris: Sirey, 1931), 222, who talks about a "fiction"; see also Brunet, "Que reste-t-il de la volonté générale?," Rousseau, "La démocratie continue."

[1022] Pierre Mazeaud, "Voeux du président du Conseil constitutionnel au président de la République" (Vœux du Conseil constitutionnel au Président de la République, Palais de l'Elysée, January 3, 2005), https://www.cairn.info/revue-francaise-de-droit-constitutionnel-2005-4-p-879.htm.

[1023] Jouanjan, "De la vocation de notre temps pour la science du droit," 142.

Boas observed that "mythological worlds seem to have been built up, only to be shattered again, and that new worlds were built from the fragments".[1024] Indeed, demystification of Parliament has been accompanied by an idealisation of the judiciary. Often personified in legal writings, the Judge fascinates French public lawyers. He is perceived as a protector of freedoms that are now called fundamental.[1025] This perception has been expressed in positive law as well, with the instauration of preliminary judicial procedures explicitly reserved to the adjudication of freedoms, the *référé libertés* and the *QPC*. Mainstream *doctrine* often develops complex doctrinal constructions to make sense of case law and to guide the judge in rights adjudication. However, in the contemporary context of decline of fundamental rights, one observes a general tendency towards institutional suspicion in French legal, and especially constitutional discourse. This tendency is expressed in the recurrent reflection and criticism of the Constitutional Council's institutional structure and political composition.[1026] It is also apparent in the importance of realist approaches to legal interpretation, which often present the judge as inspired by illegitimate, or at least extra-legal motives.

The meaning of proportionality in French public law. The evolution of judicial review in the French context can be understood as a continuous effort to demystify the norm-producing will. The use of proportionality by French lawyers makes sense in this particular discursive context. In this chapter I argue that rather than echoing a perception of fundamental rights as principles, and of law as practical reasoning, the force of proportionality language in French public law lies in its aura of value-proof objectivity and scientific correctness. The spread of proportionality thus expresses the mystery surrounding political-moral choices in French public law thought. At the same time, it expresses domestic lawyers' search for a legal science, which, exempt from subjective moral or ideological evaluations, could rationalise such choices. Proportionality in French public law has not served so much as a tool for legal change, as the transplant account of its spread would suggest, but rather as a conceptual tool in the hands of the *doctrine* for systematising and justifying evolutions in domestic judicial review.

The stakes attached to the introduction of proportionality language in French public law become clearer when one examines the judicial methods that domestic

---

[1024] Franz Boas, "Introduction," in *Traditions of the Thompson River Indians of British Columbia*, by James Alexander Teit, Memoirs of the American Folklore Society (Houghton, Mifflin: Boston : New York, 1898), 18; cited by Claude Lévi-Strauss, *The Savage Mind* (Chicago: University of Chicago Press, 1966), 31.

[1025] Georges Vedel, "Le Conseil constitutionnel, gardien du droit positif ou défenseur de la transcendance des droits de l'homme," *Pouvoirs* 45 (1988): 149. See for example Louis Favoreu, *Droit des libertés fondamentales*, 2e éd, Précis (Paris: Dalloz, 2001), 143; Jean-Marc Sauvé, "Le juge administratif, protecteur des libertés" (Colloque organisé pour les dix ans de l'Association française pour la recherche en droit administratif, Université d'Auvergne, juin 2016), http://www.conseil-etat.fr/Actualites/Discours-Interventions/Le-juge-administratif-protecteur-des-libertes.

[1026] See already Georges Vedel, "Réflexions sur les singularités de la procédure devant le Conseil constitutionnel," in *Nouveaux juges, nouveaux pouvoirs ?: Mélanges en l'honneur de Roger Perrot* (Dalloz, 1995), 537; see also Dominique Rousseau, *Droit du contentieux constitutionnel*, 9th ed. (Paris: Montchrestien, 2010), 59 f.

scholars categorise under this term. Most notably, these have been the review of the necessity of police powers and the *bilan*. That is, two instances of extension of judicial powers (**Section 1**). Proportionality, could bestow an appearance of objectivity on evaluations that were traditionally seen as subjective. This is because it represented both a moral-legal ideal imported from other jurisdictions, and a mathematical equation imported from positive sciences (**Section 2**). In scholarly studies proportionality was developed as a theory of administrative science, implying the rational adaptation of the means of public action to its ends. In this sense, it even found application in the famous *Entreprise de presse* decision (**Section 3**). While the function of proportionality as a positive law concept has been constrained by the traditional structures of judicial review, as a theoretical concept it has succeeded in justifying important changes in the domestic perception of the manifest error test. Still, the common perception of proportionality as synonymous with the manifest error has come at a cost for its scientific rigour (**Section 4**). In certain cases, the application of proportionality leaves no place for alternative worldviews and expresses the republican tradition that has long dominated French public law. In the current context of decline of fundamental rights, proportionality provokes scholarly scepticism (**Section 5**).

1. The stakes attached to the transfer of proportionality: an extension of judicial powers

The emergence of necessity review. According to the mainstream proportionality narrative in French law, the principle appeared during the '30s in the Council of State's case law. In 1930 Mr Benjamin, a writer well-known for his extreme right-wing ideas, was invited to a literature conference in Nevers. This provoked strong reactions from political opponents and a counter-protest was announced by schoolteacher trade-unions. The mayor of Nevers finally decided to prohibit the event for reasons of public peace. Mr Benjamin attacked the mayor's decision before the Council of State, which annulled it some years later as *ultra vires*.[1027] The Council considered that, while the mayor had the power to take the appropriate measures in order to maintain public order, "*he [shoud] reconcile the exercise of his powers with the respect to the freedom of assembly*", guaranteed by the law. However, the risks of a public order disturbance provoked by Mr Benjamin's conference were not serious enough to legally justify its prohibition. In the Council's words,

> it does not result from the inquiry that the risk of disturbances alleged by the mayor of Nevers, was so serious that he could not maintain public order by using his police powers, without prohibiting the conference.[1028]

Hence, the court imposed a strict necessity requirement on restrictions of the freedom of assembly. The prohibition of a conference is within the power of the mayor *only* when no alternative, less restrictive measures are available for maintaining public order.

[1027] CE, 19 May 1933, *Benjamin,* nos. 17413 17520, ECLI:FR:CEORD:1933:17413.19330519.
[1028] Ibid.

The case remained famous for establishing the axiom "freedom is the rule, restriction is the exception" as an enforceable rule in French public law and never lost its place in the *Grands arrêts*. Pierre-Henri Prélot observes that the relevant commentary in the collection of administrative case law remained almost identical since 1956.[1029]

However, Prélot also points out that the substantive solution applied in *Benjamin* brings about nothing new compared to previous case law. As this author observes, in terms of substance, the axiom "freedom is the rule, restriction is the exception" comes "directly from 1789" and was already enforced in French judicial review.[1030] Further, the Council had already affirmed its power to review police measures in order to protect public freedoms, like the freedom to protest. What then, was so original about the *Benjamin* decision?

Prélot shows that the novelty of the 1933 case lay in the establishment of the *administrative judge* as the protector of public freedoms, a role that until then belonged to Parliament. Indeed, at the time freedom of assembly was well organised by Third Republic legislation and no legal provision empowered the mayor to prohibit a literary conference for public order reasons, as he had done in the case at hand. However, the Council of State did not annul the mayor's decision under the head of incompetence. This is because, according to the *Commissaire du gouvernement*, while the law did not provide for restrictions of the freedom of assembly for the protection of the public order, "the legislator of 1881 (…) certainly did not want to allow this freedom to generate serious [public order] troubles". Therefore, the Council allowed the prohibition of an assembly for public order reasons by introducing an *exception* to the principle of legality. This unsettled Achille Mestre who, commenting on the decision at the time, pointed out a regressive interference with the liberal principle of legality.[1031] In compensation, the administrative judge affirmed to herself the power to protect public freedoms by exercising a necessity review of police restrictions.

The *bilan* as an irritant. A similar extension of judicial powers to the detriment of liberal legality can be observed in the *bilan* case law. After the first wave of enthusiasm for what was perceived as a refinement of judicial methods, the question of the insertion of judicial balancing into the traditional distinctions of French public law arose. The promoters of judicial balancing had tried to play down the shift that this method brought about. Concerning the discretionary powers of the administration, Michel Morisot observed that the scrutiny that he proposed was "situated in the borders of the appreciation of expediency".[1032] Similar expressions are found in Guy Braibant's observations in the *Ville Nouvelle Est* case.[1033] Using spatial

[1029] Pierre-Henri Prélot, "L'actualité de l'arrêt *Benjamin*," *RFDA*, no. 5 (2013): 1020, après fn. 3.

[1030] Ibid. The origin of the expression is the dicta of the *Commissaire du gouvernement* Louis Corneille in his *conclusions* sous l'arrêt CE, 10 August 1917, *Baldy*, Rec. 638.

[1031] "Note sous CE, 19 mai 1933, *Benjamin*," *Rec. Sirey* 3 (1934): 1.

[1032] Michel Morisot, "Conclusions sur CE Ass., 20 octobre 1972, *Société Sainte-Marie-de-l'Assomption*," *RDP*, 1973, 847.

[1033] Dreyfus, "Les limitations du pouvoir discrétionnaire par l'application du principe de proportionnalité: à propos de trois jugements du Tribunal Administratif de l'O.I.T," 696; Guy Braibant, "Conclusions sur CE Ass., 28 mai 1971, *Ville Nouvelle Est*," *Rev.Adm.*, no. 142 (1971): 427; Guy Braibant,

metaphors, both *Commissaires du gouvernement* affirmed that the traditional limits of judicial competence were not trespassed.

However, André de Laubadère and other administrative law experts considered these affirmations simple instances of "euphemism".[1034] The *bilan* as a judicial technique irritated the traditional perception of public authorities' discretionary powers as a clearly defined area of decision-making. It implied the review of the *choice* of administrative means, of the *exercise* of administrative discretion. Thus, it inevitably led to a review of *opportunité* of administrative acts and involved an important extension of judicial powers to the detriment of those of the administration.[1035] Morisot actually admitted that the balancing method that he proposed would substitute the judicial appreciation of the public interest for that of the administration.[1036] The only instance where the judge proceeded to a full appreciation of the exercise of administrative discretion was the necessity review of police measures, established in *Benjamin*. This gives us an important hint as to the stakes attached to the use of proportionality in French public law. This similarity between the types of scrutiny exercised in *Ville Nouvelle Est* and in *Benjamin* allowed to designate both under the label of proportionality.

A possible justification for the judge to intrude into the exercise of administrative discretion could be a legal norm that prescribed it. In some exceptional cases, the judge had herself created or "discovered" legal requirements imposed on administrative discretion.[1037] But such requirements were deemed to result from the sufficiently clear objectives or intentions of the legislator. [1038] Nonetheless, scholars observed that no superior legal norm could justify balancing the overall advantages and disadvantages of an administrative decision. Such balancing implied a review of the expediency of the decision, its adaptation to its socio-political goals. Jean Waline observed that the only way to justify judicial balancing was to admit that the *opportunité* of expropriation was a legal requirement.[1039] In French public law tradition this constituted a contradiction in terms.

Necessity and the *bilan* as instances of proportionality. The use of proportionality terminology eased these doctrinal problems in a mysterious way.

"Le principe de proportionnalité," in *Mélanges offerts à Marcel Waline: le juge et le droit public*, vol. II (Paris: LGDJ, 1974), 304 f.

[1034] André de Laubadère, "Le contrôle juridictionnel du pouvoir discrétionnaire dans la jurisprudence récente du Conseil d'État français," in *Mélanges offerts à Marcel Waline : le juge et le droit public* (Paris: LGDJ, 1974), 541; see also Jean Waline, "Le rôle du juge administratif dans la détermination de l'utilité publique justifiant l'expropriation," in *Mélanges offerts à Marcel Waline : le juge et le droit public* (Paris: LGDJ, 1974), 821, who criticises the bilan case law.

[1035] de Laubadère, "Le contrôle juridictionnel du pouvoir discrétionnaire dans la jurisprudence récente du Conseil d'État français," 531.

[1036] Morisot, "Conclusions sur CE Ass., 20 octobre 1972, *Société Sainte-Marie-de-l'Assomption*," 848.

[1037] de Laubadère, "Le contrôle juridictionnel du pouvoir discrétionnaire dans la jurisprudence récente du Conseil d'État français," 535.

[1038] See for example CE, 9 juillet 1943, *Tabouret et Laroche*, Rec. 182.

[1039] Waline, "Le rôle du juge administratif dans la détermination de l'utilité publique justifiant l'expropriation," 824.

According to its promoters, proportionality required a relationship of "fair proportion" between three elements: the factual situation; the administrative decision; and its goal.[1040] In other words, it implied a legal requirement of adequacy of administrative action, which was to be appraised according to the particular factual circumstances, the *motifs de fait* that justified the decision. Adequacy to the factual circumstances is very close to… expediency. What the principle of proportionality discretely translated was a substantive legal requirement of *opportunité* of administrative decisions. Hence, the entrenchment of a general principle of proportionality was purported to provide the judge with a superior norm for the extension of judicial review in the content of public decisions, at least in certain fields.[1041]

Despite their similarities in terms of type of judicial review, a fundamental difference existed between the necessity and the *bilan*. In the 1933 decision freedoms remained central in judicial review. The promoters of proportionality seemed to perceive individual rights' protection as a crucial moral-legal justification for entrenching the principle.[1042] In the words of Braibant, the rule of proportionality requires that "insofar as the Administration enjoys powers that allow it to impair citizen's rights and freedoms, it must not use them, except if it is necessary".[1043] Nonetheless, connection to public freedoms was not apparent in the *bilan* case law. Even more, in certain cases judicial balancing seemed to take a direction that could "pervert" the method[1044] and even menace the liberal foundations of administrative law. Indeed, in some cases judicial balancing seemed to represent a new perception of the public interest as plural and polyvalent, no longer confronted with private interests, but rather including them in its scope. This not only undermined the objectivity of the assessment of the public interest, but it also blurred the liberal distinction between public and private altogether.

The radical function of balancing was latent in a *considérant* that was first enounced in *Société civile Sainte-Marie-de-l'Assomption* and reproduced in posterior case law:

> the public utility of an operation cannot be legally declared, except if the impairment of private property, the financial cost and the eventual disadvantages of a social nature or the impairment of other public interests that it causes are not excessive compared to the interest that it presents.[1045]

French public lawyers noticed that, by adding "*other public interests*" in the appraisal of public utility, the Council effected a fragmentation of the notion of public interest

[1040] Braibant, "Le principe de proportionnalité," 298; see also Dreyfus, "Les limitations du pouvoir discrétionnaire par l'application du principe de proportionnalité: à propos de trois jugements du Tribunal Administratif de l'O.I.T," 695–96.

[1041] Dreyfus and Braibant referred most notably to the fields of expropriation, administrative sanctions and economic intervention.

[1042] Dreyfus, "Les limitations du pouvoir discrétionnaire par l'application du principe de proportionnalité: à propos de trois jugements du Tribunal Administratif de l'O.I.T," 705.

[1043] Braibant, "Le principe de proportionnalité," 298.

[1044] Jeanne Lemasurier, "Vers un nouveau principe général du droit ? Le principe « bilan-coût-avantages »," in *Mélanges offerts à Marcel Waline: le juge et le droit public*, vol. II (Paris: LGDJ, 1974), 561.

[1045] See for example CE, 28 January 1976, no. 95507, ECLI:FR:CESSR:1993:95507.19930219.

itself. By recognising a plurality of competing public interests, judges inevitably arbitrated between them and thus acted as administrators. Public utility became a matter to be decided on a case by case basis.[1046] This provoked the criticism of the *bilan* case law in scholarship. Judicial balancing was increasingly perceived as a danger for the administered.

The quest for a theory of judicial balancing. The irritation of traditional public law structures and distinctions that the *bilan* provoked could be eased if "the theory of balancing of interests" acted as "a force of simplification and generalisation".[1047] In French public law, the deconstruction of legal structures can be compensated for by the construction of theories. Even though, in such a case, concrete legal solutions are no longer *a priori* determined by precise legal rules, theory still allows for the separation of the structure from the event, for the separation of the legal necessity from the contingency of the subjective interests at stake. Judicial techniques that involve the application of law according to factual circumstances are typically framed as parts of a more general theory: *théorie des circonstances exceptionnelles*, *théorie de l'erreur manifeste, théorie du changement de circonstances*… Judicial balancing did not escape the frenzy of theorisation and the term "*théorie du bilan*" is still often used to describe the method introduced in *Ville Nouvelle Est*.

This tendency towards theorisation might explain French public lawyers' attention to the different *methods* of judicial reasoning, in contrast to common lawyers' attention to reasoning structures, patterns and heads.[1048] Methods are ways of thinking, techniques of proceeding, according to an underlying theory or structure. Focus on methods has provided domestic public law with coherence. Véronique Champeil-Desplats points out the crucial role that inductive methodology has played in the construction of a knowledge specific to French administrative law. French public lawyers, through observation and commentary on the Council of State case law, have constructed general principles and reasoning models, which are used to reproduce or even predict the reasoning and the solutions advanced by the administrative judge.[1049] The role of *faiseurs de systèmes* has consisted, in the words of Jean Rivero, in inducing "from the concrete to the abstract, passing from the multiple to one".[1050] The search for a "theory" of judicial balancing should thus be read in the context of the general tendency towards doctrinal reconstruction of the administrative judge's pragmatist

[1046] Waline, "Le rôle du juge administratif dans la détermination de l'utilité publique justifiant l'expropriation," 814; 828.

[1047] de Laubadère, "Le contrôle juridictionnel du pouvoir discrétionnaire dans la jurisprudence récente du Conseil d'État français," 546.

[1048] See for example Yves Gaudemet, "Méthodes du juge," ed. Denis Alland and Stéphane Rials, Dictionnaire de la culture juridique (Paris: PUF, 2003); Jean-Michel Blanquer, *Les méthodes du juge constitutionnel* (Paris: LGDJ, 2000); Champeil-Desplats, *Méthodologies du droit et des sciences du droit*.

[1049] Champeil-Desplats, 94 f.

[1050] Rivero, "Apologie pour les « faiseurs de systèmes »" 100–101.

case law. Jacco Bomhoff has identified this tendency as an instance of "perfectionism" in law.[1051]

Still, most commentators at the time of the *Ville Nouvelle Est* case observed that there was no actual structure that could guide the comparison of advantages and disadvantages of an administrative operation by the judge.[1052] Indeed, not only did balancing lack a general theory, but it contested fundamental conceptual structures and distinctions of French administrative law. This restrained the potential of the *bilan* in French public law considerably.

Judicial balancing constrained by traditional structures. Judicial balancing was not the only method that allowed for review of discretionary powers. By definition the manifest error was also applied in cases of administrative discretion. But, while in the application of the manifest error the formality of judicial review was preserved precisely by the *manifest*, and thus exceptional, character of judicial intervention, it did not necessarily go the same way for balancing. André de Laubadère pointed out the danger of an overly-intrusive application of the *bilan* and suggested its use only "as an exceptional remedy for certain gaps of the traditional review of discretionary power".[1053] Hence, despite the audacious announcement of balancing in the Council of State *considérants* many authors interpreted it as sanctioning only manifest errors or disproportionalities.[1054] This meant that "under the guise of comparison and balancing, what the judge censure[d] [was] very simply the measures that are *excessive in themselves*".[1055] In fact, in the minds of mainstream French scholars at the time of its emergence, and contrary to what its name indicates, the *bilan* implied no actual balancing. For Jean Waline, this rendered it not only dangerous, but also redundant. In the same vein, in 1977 the *Commissaire du gouvernement* Kahn lamented: "we could have spared the so-called "theory of balancing", where I see no balancing nor theory…"[1056] The function of the balancing announced in the official judicial decisions was deemed to be mostly "preventive" or "pedagogic" for the administrative authorities who would perform it in the first place.[1057]

[1051] Jacco Bomhoff, "Perfectionism in European Law," in *Cambridge Yearbook of European Legal Studies, Vol. 14, 2011-2012*, ed. Catherine Barnard, Markus Gehring, and Iyiola Solanke (Oxford: Hart, 2012), 75.

[1052] de Laubadère, "Le contrôle juridictionnel du pouvoir discrétionnaire dans la jurisprudence récente du Conseil d'État français," 546–47; Waline, "Le rôle du juge administratif dans la détermination de l'utilité publique justifiant l'expropriation," 818.

[1053] de Laubadère, "Le contrôle juridictionnel du pouvoir discrétionnaire dans la jurisprudence récente du Conseil d'État français," 547.

[1054] See Alain Bockel, "Contribution à l'étude du pouvoir discrétionnaire de l'administration," *AJDA*, 1978, 368.

[1055] de Laubadère, "Le contrôle juridictionnel du pouvoir discrétionnaire dans la jurisprudence récente du Conseil d'État français," 547.

[1056] Jean Kahn, "Le pouvoir discrétionnaire du juge administratif," in *Le Pouvoir discrétionnaire et le juge administratif*, ed. IFSA (Paris: Cujas, 1978), 16; Michel Guibal, "De la proportionnalité," *AJDA*, 1978, 486.

[1057] See Guibal, "De la proportionnalité," 486 f. See also the commentary on the official website of the French Council of State on the *Ville Nouvelle Est* decision http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Les-decisions-les-plus-importantes-du-Conseil-d-Etat/28-mai-1971-Ville-Nouvelle-Est.

This idea seemed to be shared by practitioners. In *Ville Nouvelle Est*, Braibant had urged his colleagues to apply the new method with "*tact et mesure*", sanctioning only acts that "trespassed a certain threshold".[1058] Commenting on the relevant case law, two Council of State members foresaw that the court would not let itself linger in "a territory marked by subjectivity and expediency".[1059] This deferent judicial attitude had been confirmed in the first decisions of the early '70s. In its first years of application, the *Ville Nouvelle Est* case law had rarely led to the invalidation of administrative declarations of public utility. However, in later cases, the Council adopted a more aggressive stance, censuring acts even when they did not manifestly contradict the public interest. This again provoked scholarly criticism.[1060]

In the absence of a theory that could frame it, the spread of judicial balancing as a method of review that would be distinct from the manifest error was criticised in French *doctrine* in the same instrumentalist terms as it was praised.[1061] Concerns of institutional expertise, combined with the traditional French suspicion towards the judiciary, rendered untenable any margin for judicial subjectivity and policy-making.[1062] In Michel Rougevin-Baville's words, the *bilan* only "add[ed] to the arbitrariness of the Administration an arbitrariness *a posteriori* of the judge, who moreover decide[d] based on the administrative file and a long time after the decision [in question]".[1063]

The stakes attached to the transfer of proportionality. "We have not developed a theory of the principle of proportionality -maybe because until relatively recently we did not need one".[1064] This is how Braibant, paraphrasing Lord Reid from the House of Lords, concluded his study on proportionality. Proportionality appeared in French *doctrine* as a response to the need to justify an advance of judicial review, without compromising the coherence and objectivity of the French legal order. In a magic way, it encompassed both the manifest error and the *bilan* in its scope and was thus able to preserve the unity of judicial methods, while admitting their variable application according to the circumstances. Proportionality was a "theory", a doctrinal construction that could constrain the subjectivity of pragmatist judicial solutions, and that could bring about the "simplification and generalisation" of administrative case law that French public lawyers sought. The systematising function of proportionality

[1058] Braibant, "Conclusions sur CE Ass., 28 mai 1971, *Ville Nouvelle Est*," 427.

[1059] Daniel Labetoulle and Pierre Cabanes, "Note sous CE Ass., 28 mai 1971, *Ville Nouvelle Est*," *AJDA*, 1971, 404.

[1060] See Waline, "Le rôle du juge administratif dans la détermination de l'utilité publique justifiant l'expropriation," 825; Lemasurier, "Vers un nouveau principe général du droit ? Le principe « bilan-coût-avantages »," esp. 557; de Laubadère, "Le contrôle juridictionnel du pouvoir discrétionnaire dans la jurisprudence récente du Conseil d'État français," 548.

[1061] de Laubadère, "Le contrôle juridictionnel du pouvoir discrétionnaire dans la jurisprudence récente du Conseil d'État français," 545; Waline, "Le rôle du juge administratif dans la détermination de l'utilité publique justifiant l'expropriation," 821 f.; Lemasurier, "Vers un nouveau principe général du droit ? Le principe « bilan-coût-avantages »," 560 f.

[1062] Marcel Waline, "Note sous CE Ass., 28 mai 1971, *Ville Nouvelle Est*'," *RDP*, 1972, 454. See also Jean Kahn, "Note sous CE Ass., 26 octobre 1973, *Grassin*," *AJDA*, 1973, 586.

[1063] "*Conclusions* sur CE Ass., 18 juillet 1973, *Ville de Limoges*," Rec. 572. The proposition of the *Commissaire de gouvernement* was not followed. The Council Plenum applied the *bilan* theory in *Ville de Limoges*, no 86275, ECLI:FR:CEASS:1973:86275.19730718.

[1064] Braibant, "Le principe de proportionnalité," 306.

has persisted in later writings. It is inherent in the perception of the *contrôle de proportionnalité* as a method used by public law judges. Besides, systematisation or reconstruction is also a major asset of the Alexyan proportionality theory, which is inspired by interpretative approaches to law. However, it is not clear how proportionality could accomplish its systematising mission.

2. Searching for objectivity: proportionality between fact and law

Objective but not manifest. The early uses of proportionality language in French public law are permeated by epistemological optimism, that is, a belief in the possibility of objective factual evaluations. Albeit not being manifest, proportionality preserved the objectivity of judicial review. Sometimes, this provoked confusion as to the intensity of review that it implied. Guy Braibant, for example, regarded both the *bilan* and the *erreur manifeste* as applications of the principle. However, at the same time he perceived the *bilan* as a method for more intensive scrutiny, through which the judge "accurately weighs the proportions between the facts, the goal and the reviewed act".[1065] In the same vein, while Françoise Dreyfus proposed sanctioning *manifest* disproportionalities, she talked about a "detailed examination" of the administrative file, which contradicted the manifest character of the review.[1066] Similarly, Alain Bockel underscored that the *bilan* entailed a decision based on *all the elements* of the administrative file, while at the same time he suggested that only "manifest disproportionalities" could be censured under this new method.[1067]

The ambiguity was already latent in Braibant's famous observations in the *Ville Nouvelle Est* case. The *Commissaire du gouvernement* had proposed the employment of the *bilan* only to censure administrative decisions that were "arbitrary, unreasonable or poorly studied".[1068] Though the terms "arbitrary" and "unreasonable" implied the moral criticism of the intentions of the primary decision-maker, the sanctioning of "poorly studied" decisions was different. These decisions need not necessarily contain any *manifest* error, and in their scrutiny the real motives of the primary decision-maker would be in principle irrelevant. Braibant's dicta appeared to contradict with the observation of Braibant himself from more than a decade earlier that "discretionary power implies the right to err".[1069] What then, rendered administrative decisions *so* poorly studied or *so* erred that judicial intervention through balancing or proportionality was justified?

This question brings to the surface another paradox in the argumentation on the *bilan*. Despite Braibant's reference to the study and planning of administrative

[1065] Braibant, 302.

[1066] Dreyfus, "Les limitations du pouvoir discrétionnaire par l'application du principe de proportionnalité: à propos de trois jugements du Tribunal Administratif de l'O.I.T," 698.

[1067] Bockel, "Contribution à l'étude du pouvoir discrétionnaire de l'administration," 368.

[1068] Braibant, "Conclusions sur CE Ass., 28 mai 1971, *Ville Nouvelle Est*," 427.

[1069] Guy Braibant, "Conclusions sur CE, 18 February 1958, *Société des éditions de la terre de feu*," Rec. 114.

decisions, the application of the *bilan* was not a matter of *procedural* guarantees.[1070] Indeed, in his observations in *Ville Nouvelle Est* Braibant had argued for the disapplication of the preliminary administrative procedure of expropriation. In the view of the *Commissaire du gouvernement,* though the legal text defining the procedure was "simple and clear", it had the disadvantage of rendering expropriation too time consuming and in most cases impossible to apply.[1071] Thus, the *bilan* review did not have as a goal to ensure the consistency and completeness of the administrative file on which the contested decision was based. Braibant considered this objective as obtainable only through a legislative reform of the expropriation procedure, which would adapt it to the reality of administrative action.[1072]

Therefore, the objective character of administrative errors that the *bilan* was to sanction did not result from the non-respect of legal forms and procedures. Rather, it resulted from the judicial assessment of administrative action in substance. This made Jean Waline conclude that the *Ville Nouvelle Est* case law was "an act of faith in the omniscience of the administrative judge".[1073] Proportionality as well, as synonymous with adequacy, enhanced the shift of focus in judicial scrutiny from the procedure to the substance of administrative decisions. According to Braibant, it was an application of the rules of "common-sense".[1074] Clearly, however, as the reactions to the *bilan* case law express, the common-sensical knowledge to which Braibant appealed did not correspond to the *legal* common-sense shared among French public lawyers. The objectivity of judicial review under proportionality balancing did not result from legal formality but rather from the opening of law *to an extra-legal knowledge* that was perceived as objective. What then, was the nature of the "common-sense" that could allow for judicial balancing? In this respect, previous uses of proportionality language in French public law prove insightful.

The financial "genes" of proportionality in French public law. Michel Morisot's opinion was not the first time that the term "proportion" was employed in judicial reasoning. As Braibant pointed out in his article, the term was used before, especially in the field of public finances.[1075] For example, according to well-established case law, the fees fixed for the provision of a public service must be connected to its real cost. Thus, in some cases the Council of State had affirmed to itself the power to check whether the defined fees were out of proportion with the real cost of the service provided to the users.[1076] Moreover, according to an administrative law provision dating from 1959, a public service should be financed by its users through a fee, which

[1070] Waline, "Le rôle du juge administratif dans la détermination de l'utilité publique justifiant l'expropriation," 819 f.

[1071] Braibant, "Conclusions sur CE Ass., 28 mai 1971, *Ville Nouvelle Est*," 423.

[1072] Braibant, 424.

[1073] Waline, "Le rôle du juge administratif dans la détermination de l'utilité publique justifiant l'expropriation," 822.

[1074] See for example Braibant, "Le principe de proportionnalité," 298; Bockel, "Contribution à l'étude du pouvoir discrétionnaire de l'administration," 366.

[1075] Braibant, "Le principe de proportionnalité," 297; esp. 300.

[1076] CE, 16 November 1962, *Syndicat intercommunal d'électricité de la Nièvre et autres*, nos. 42202 and 44595, Rec. 612.

should be "a direct and proportionate" quid pro quo for the provision of the service.[1077] Similar terminology was employed in some decisions dating from the late '40s, concerning property taxation for the execution of public works.

In all the above cases proportion represented a purely factual or mathematical element, implying no legal evaluation of the situation. However, as Braibant stressed, "the role of the judge is more important when it concerns the validity of an administrative act than the correctness of a financial equation".[1078] This is precisely what Morisot's opinion added to the use of proportionality terminology: for the first time, proportionality was connected to judicial balancing in French legal discourse. Although proportion was still used as a synonym for non-excess, it now required a *legal* -and not purely mathematical- evaluation of the factual situation before the judge. Both Dreyfus and Braibant accentuated the moral-legal character of proportionality evaluations by referring to its aspects of morality and justice, mostly coming from its uses in foreign jurisdictions. Still, as well as being a transfer from other legal systems, proportionality was a transfer from other disciplines. Hence, it claimed an accuracy and objectivity that one only finds in the *sciences exactes*.

Interestingly, "proportion" or "proportionality" did not lose its connotations of mathematical exactness in case law. Thus, in certain areas the administrative judge had explicitly refused to apply a legal requirement of proportionality, precisely due to its overly-stringent character. For example, concerning representation of trade unions in joint technical committees, the Council of State had judged that the competent Minister "*was not particularly required to proportionate the size of each organisation to the number of seats attributed to it*".[1079] The mathematical connotations of proportionality persisted in the early writings on the principle too. Thus, while Braibant identified the review of disciplinary sanctions exercised by the ILO court, or the scrutiny of exceptional circumstances exercised by the Council of State as applications of proportionality, he also argued for the spread of proportionality in the scrutiny of purely factual evaluations, like the "relation between the regulated selling price and the real price [of a product], or the amount of the tax and its object".[1080]

A careful analysis of the *bilan* case law confirms the financial "genes" of proportionality. As we saw, the *Grassin* decision was the first use of proportionality as a judicial balancing standard. Interestingly, a reading of this case in the light of previous Council of State decisions reveals much about the nature of the review exercised by the court when using this term. Since the '60s, the term "proportion" had been sporadically employed in the field of urban planning as a consequence of the applied legal norms. For example, the national regulation of town planning allowed for the refusal of an individual construction license in certain cases where, due to particular

[1077] See CE, 21 October 1988, nos. 72862, 72863, and 73062, ECLI:FR:CESSR:1988:72862.19881021.

[1078] Braibant, "Le principe de proportionnalité," 301.

[1079] CE, 15 February 1974, *Fédération nationale des syndicats de fonctionnaires de l'agriculture*, nos. 80772 and 80814, ECLI:FR:CESJS:1974:80772.19740215. See on this Braibant, 302–3.

[1080] Braibant, 305.

circumstances, the construction at stake imposed the realisation of new public works on the municipality, "out of proportion with its actual resources". Administrative courts had affirmed their power to evaluate whether the expenses required by the municipality were indeed disproportionate themselves – usually confirming the administrative refusal.[1081] Moreover, in "*Le Moulin Bellanger*" the Council of State had imposed obligations to inform where construction licenses were refused for this reason, in order for the administrative courts to be able to proceed to this evaluation.[1082]

The *Néel* case had expanded this case law in the field of expropriation, even though no legal text referred to proportionality or proportion. In this case, the Council had decided that the administrative file concerning the declaration of public utility should contain sufficient information as to the financial cost of the correlated expropriations. Otherwise, the file was considered incomplete, thus tainting the whole administrative procedure with irregularity. The *Commissaire du gouvernement* Baudouin had justified the imposition of requirements to provide information on the administration by asserting that it offers "one of the most concrete and the most profound anchors for evaluating [its] character of public utility".[1083] In other words, the *Commissaire du gouvernement* connected the check of the financial cost of an expropriation, in which the court typically used proportionality language, with the appraisal of its public utility. One year later, when arguing for the first application of the *bilan*, Braibant also included the financial cost of an operation in the appreciation of public utility.[1084] While he did not use proportionality language, his *conclusions* contained many references to economics, the most characteristic being the use of the term "cost-benefit analysis" (*bilan coût-avantages*) to designate the review that he was proposing.

Therefore, by employing proportionality terminology in the evaluation of the public utility of the Peyratte airport, the judges of *Grassin* did nothing but draw out the consequences of previous case law. In the words of the Council,

> the cost of the operation at stake, which entails the fragmentation of many agricultural exploitations, is evaluated at 700,000 F, an amount out of proportion with the financial resources of the municipality, counting no more than around 1,100 residents. Further, it does not follow from the elements of the administrative file that the municipality benefitted from external financial aid.

The proportionality reasoning of the court was not very far from a simple financial equation, like the one it typically applied in the field of construction licences. While

[1081] See also Braibant, 301.

[1082] CE, 18 July 1973, no 83745, ECLI:FR:CESSR:1973:83745.19730718**;** see also CE, 23 June 1976, no 96285, ECLI:FR:CESSR:1976:96285.19760623**.**

[1083] "Conclusions sur CE Ass., 23 January 1970, *Epoux Neel*," Rec. 44, cited by Waline, "Le rôle du juge administratif dans la détermination de l'utilité publique justifiant l'expropriation," 819.

[1084] Braibant, "Conclusions sur CE Ass., 28 mai 1971, *Ville Nouvelle Est*," 426.

the judges proceeded to a detailed examination of the facts of the case, proportionality involved a mathematical rather than a legal evaluation. The term was generally used in this way in the *bilan* case law,[1085] while in cases where no financial equation was at stake the court did not necessarily use proportionality language.[1086]

Based on these evolutions, the early proportionality scholars described the whole process of judicial balancing in proportionality terms. In this way, they enhanced an important conceptual shift. While until then the proportionality of the financial cost of an operation to the resources of a municipality was only *part* of the legal evaluation of the public utility of an operation, proportionality came to designate *the whole* of the legal evaluation of public utility. This conceptual shift, which literary analysts call a synecdoche, attributed the objective connotation of proportionality appreciations to the evaluation of public utility as a whole. This is what enabled proportionality language to preserve the objectivity of judicial review in the *bilan* case law. Commenting the application of the *bilan* during the '70s, a public law professor referred to as *Mademoiselle* Lemasurier observed that the Council of State "tended to raise into a general legal principle a rule that until then was implicit and diffused in its proper case law, but practiced explicitly and rationally by certain administrative authorities in the context of rationalisation of budgetary choices".[1087]

***Bilan* and Alexyan proportionality.** Objective but not manifest, common-sensical but escaping legal formality, the use of proportionality language reveals French public lawyers' general tendency to attribute the characteristics of economic rationality to moral-legal argumentation. Reference to cost-benefit analysis echoes Jeremy Bentham's conception of utility, exempt from natural law considerations and based on an algebraic evaluation and calculation of advantages and disadvantages of legal decision-making.[1088] Olivier Jouanjan and Véronique Champeil-Desplats point out that modern French legal thought has often borrowed models and methods from mathematics and the *sciences dures* in order to ground the scientificity of doctrinal legal constructions.[1089] Besides, as we have seen, belief in the commensurability of values and the possibility of their rational comparative evaluation also characterises the Alexyan theory of proportionality. Indeed, the *bilan* is the closest one gets to the transnational proportionality theory in French public law at the level of judicial methods. However, the epistemological optimism of French public lawyers remains very different from the one that animates proportionality scholars due to its focus on *facts*.

[1085] See for example CE, 6 July 1977, no. 00267, ECLI:FR:CESSR:1977:00267.19770706; CE, 28 January 1976, no. 95507, ECLI:FR:CESSR:1976:95507.19760128.

[1086] See for example CE (Pl.), 22 February 1974, *Adam*, nos. 91848 and 93520, ECLI:FR:CEASS:1974:91848.19740222.

[1087] Lemasurier, "Vers un nouveau principe général du droit ? Le principe « bilan-coût-avantages »," 554.

[1088] Champeil-Desplats, *Méthodologies du droit et des sciences du droit*, 63 f.

[1089] Champeil-Desplats, 58 f.; see also Jouanjan, "De la vocation de notre temps pour la science du droit."

In contrast to the Alexyan proportionality, the *bilan* does not presuppose the attribution of an *ad hoc* normative power to the judge. Rather, it concerns the *in concreto* evaluation of the public utility of an administrative operation, that is, the process of the legal characterisation of the facts of the case. The *bilan* case law is not rights-oriented and thus leaves to the reviewed authorities the fundamental value-choices that orient public action. This is also why this kind of reasoning did not spill over into other fields. Rather than implying a paradigmatic transformation of the legal order into a "total constitution" of fundamental rights, proportionality, as it is employed in the *bilan* case law, simply embodies the "*hypertrophie du fait*" that more generally characterises standards in French public law.[1090] Rather than the myth of the judge as protector of fundamental rights, proportionality represents a prosaic and technical rationality of legal decision-making.

The rejection of proportionality in positive law. Of course, sceptics were not convinced by the double nature of proportionality, between fact and law, which contested the French positivist common-sense.[1091] For some time, the mythical ambiguity of the concept did not capture the imagination of French public law judges either. By their upbringing and experience, the members of the Council of State and of the *Conseil constitutionnel* are immersed in the reality of public action and are disenchanted with the decision-making process that it implies. Hence, as we have seen in case law proportionality long continued to designate a purely factual assessment, an arithmetic equation, and was deprived of a particular legal content. While part of a commonly accepted anti-formalist legal discourse, proportionality did not itself become an *official* source of law, nor did it contest the traditional methods of official legal decision-making. Mitchel Lasser has neatly shown the shift between anti-formalist *doctrine* and the formalist official discourse as a more general characteristic of French legal culture.[1092] While the technical judicial review theories elaborated by the French *faiseurs des systèmes* are certainly among the "formants" of French legal knowledge, they are not always explicitly recognised in official legal sources. Thus, they cannot always provide an explicitly acknowledged basis for judicial decisions. According to Lasser, this shift expresses an institutional compromise between judges and the political branches of government which is fundamental for the French legal system. In this sense then, proportionality language followed the general tendencies and respected the "binding arrangements" of the discourse into which it was inserted.

Proportionality and the double discourse of the constitutional judge. The arithmetic connotations of proportionality have persisted, even after the affirmation of its constitutional status. When employed in the sense of *proportionnalité des peines et des sanctions*, proportionality designates a relation between two quantifiable elements,

---

[1090] Stéphane Rials, *Le juge administratif français et la technique du standard (essai sur le traitement juridictionnel de l'idée de normalité)* (Paris: LGDJ, 1980), 235.

[1091] Bockel, "Contribution à l'étude du pouvoir discrétionnaire de l'administration," 370; Jean-Marie Auby, "Le contrôle judictionnel du degré de gravité d'une sanction disciplinaire, note sous CE, 9 juin 1978, *Lebon*," *RDP*, 1979, 238.

[1092] Mitchel Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford Studies in European Law (Oxford; New York: OUP, 2004).

the imputed offence and the incurred penalty. As such, it concerns the *quantum* of the sanctions defined by law, most notably pecuniary ones. Its arithmetic nature was particularly present in the *Conseil supérieur de l'audiovisuel* case, where the principle was first explicitly announced.[1093] In the area of sanctions, then, proportionality represents a relation between two numbers and is not applied by reference to constitutional rights. The comparison to which it leads the judges is dyadic, and does not comprise the use of a right or a value as a yardstick.[1094] Proportionality is a *factual* matter, to be appreciated by the administration or the first instance judge.

This is why, while the explicit recognition of proportionality in constitutional case law bolstered scholarly hopes for a coherent adjudication of fundamental rights, it did not lead to any radical change in judicial practice. In fact, proportionality perfectly fit what Georges Vedel called the "double discourse" grounding the legitimacy of the constitutional judge. On the one hand, addressed to the agents of the political game, it designated a neutral mathematical relation that did not contest the value choices of the legislator and thus implied no radical redistribution of powers between the judiciary and Parliament. On the other hand, due to its function in the fundamental rights case law of other courts, proportionality acquired a particular value-laden content and participated in the mythopoeia surrounding the constitutional judge. Hence, addressed to the believers in the transcendence of fundamental rights, the use of proportionality language alluded to some eternal, natural values underpinning formalist judicial reasoning, whose protection the Council had assumed.[1095]

The ambiguity of proportionality, between an arithmetic assessment and a moral-legal requirement, between fact and law, is deeply rooted in French public law and has been reproduced in different contexts and throughout the various conceptual mutations of proportionality. We could even go further and say that it is the loss of precisely this pretension to neutrality that is at the source of scholarly scepticism and suspicion towards its diffusion as a fundamental rights principle. In any case, the scientific aesthetics of proportionality have allowed for its conceptual development independent of judicial practice, and even for its application as a theory in French constitutional law.

3. Proportionality and the administrativisation of constitutional law: deconstructing Entreprises de presse

Proportionality as a technocratic goal of public action. Not only has proportionality attributed the scientific tone of economic rationality to legal reasoning,

[1093] See Decision no. 88-248 DC, 17 January 1989, *Loi modifiant la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication*, ECLI:FR:CC:1989:88.248.DC, esp. cons. 30.

[1094] On the dyadic and triadic structure of proportionality analysis, see Bernhard Schlink, "Proportionality," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: OUP, 2012), 719–20.

[1095] Vedel, "Le Conseil constitutionnel, gardien du droit positif ou défenseur de la transcendance des droits de l'homme."

it has also expressed an entirely different view of administrative decision-making as rational and efficient, functional to the needs of modern society and functioning according to the objective rules of science. In some cases, proportionality is presented as a goal of public action itself. This departs from the traditional vision of the administration as executing the policy goals set by Parliament. The scientific connotation of proportionality, the fact that it is deemed exempt of subjective moral evaluations, sometimes allows public law to intrude on the intentions of public authorities.

The shift that proportionality entailed in French legal thought was plainly expressed in Michel Guibal's analysis on the concept in 1978. Guibal contends that "the notion of proportionality is by itself simple, evident, permanent and … normal. (…) one can think that it goes without saying".[1096] Applied in administrative decision-making, it constitutes an end of public action and corresponds to the adaptation of legal means to legal ends. For Guibal, proportionality considerations "mingle the elements of legality and expediency, technique and law, numbers and will".[1097] While the author rejects a purely mathematical perception of proportionality, he argues that it can be rationally appreciated through comparative assessment of the costs and benefits of public action. Thus, he argues that proportionality is "a key notion of administrative law and administrative science"[1098] and that it can constitute "the over-all justification of administrative action",[1099] replacing previous ideas of public utility, public service or public power.[1100] There go the long debates between the *Écoles* of Toulouse and Bordeaux on the fundament of administrative law.[1101] There goes ideology in French public law.

In Guibal's analysis, the possibility for rational assessment of the relation between cost and benefit attributed to proportionality a *critical* function that it did not have in previous writings. The concept of proportionality transcends formal legal sources. In the author's words, it cannot be "reduced to a stereotyped formula and even less to a simple element of judicial review".[1102] In this way, Guibal established the shift between the scholarly perception of proportionality and its application in practice. Proportionality designates an extra-legal value by reference to which legal scholarship should evaluate domestic case law, independently of whether courts actually used proportionality language or not. In Guibal's view, the only effective proportionality

[1096] Guibal, "De la proportionnalité," 477.

[1097] Guibal, 480.

[1098] Guibal, 477.

[1099] Guibal, 479.

[1100] For a similar use of the term though much less ambitious, see Jean-Jacques Bienvenu, *L'interprétation juridictionnelle des actes administratifs et des lois: sa nature et sa fonction dans l'élaboration du droit administratif*, vol. II (Paris II: thèse, 1979), 112. In this author's analysis, proportionality (between individual sacrifices and the needs of public service) is an objective sought in the conclusion of public contracts.

[1101] I refer here to the big *querelle* in French administrative *doctrine* during the 20th century. The School of Toulouse and its *Doyen* Maurice Hauriou advanced the notion of *puissance publique* as the foundation of administrative law, while the *Doyen* of Bordeaux, Léon Duguit, provided a theory of the state and of the administration based on the notion of *service public*.

[1102] Guibal, "De la proportionnalité," 478.

scrutiny involves the quest for a "strict correspondence" between the costs and the advantages of an administrative decision. On this basis, Guibal described the review exercised by the Council of State as "virtual and fictitious, at best embryonic".[1103] He called for the judges to set aside legal formalities that impeded the realisation of proportionality. The refusal to exercise proportionality review could have no valid justification. Instances of judicial restraint were pointed to by the author as political choices, not resulting from the distribution of competences in a coherent legal order.

While he admittedly failed to influence judicial practice, Guibal significantly influenced the content of proportionality in French public law. As we have seen, the detachment of the scholarly perception of proportionality from judicial practice was consolidated in the work of Xavier Philippe, where the concept of *contrôle de proportionnalité* was employed to describe the instances where the judge pursued proportionality in the sense of an equilibrium. This author also accentuated the mathematical and philosophical origins of proportionality and seemed to believe in its objective nature. By affirming the pursuit of proportionality as a method of review, Philippe purported to affirm the possibility of objective extra-legal considerations in judicial reasoning. Thus, while proportionality was ascribed a major function in the adjudication of substantive rights, it simultaneously expressed an excision of moral choices from legal reasoning. In Philippe's words, "if we want to avoid the most important risks of subjectivity (…) we should depart from a moral perception of proportionality that would be similar to reasonable, as close to just".[1104] Philippe's analysis was less radical than Guibal's: he did not seek in proportionality the fundament of administrative law. Still, by using proportionality language he too sought an attenuation of legal formality in the name of the simplicity and the accessibility of law. In Philippe's work, proportionality is akin to a requirement of "good legislation", similar to that of "good administration" and implies the coherence, efficiency and rationality of public action.

Rejection of formalism; excision of ideology and of moral choices from legal reasoning; and efficiency and rationality as major aims of public action. More than attributing a scientific tone to moral-legal evaluations, the use of proportionality language revealed a technocratic shift in French public law *doctrine*. It revealed French public lawyers' growing belief in the determination of correct legal solutions by allegedly neutral, or even scientific considerations of fact. This tendency transpires in Jacques Chevallier and Danièle Lochak's interdisciplinary quest for an "administrative science",[1105] and meets more general theoretical movements, like André Tunc's idea of modernisation developed since the '60s. Writing in 1977, Christian Atias and Didier Linotte vigorously criticised what they perceived as a trend of legal determinism, which they called the "myth of the adaptation of the law to fact".[1106] Interestingly, it is in this

[1103] Guibal, 485.

[1104] Xavier Philippe, *Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative françaises* (Paris: Économica, 1990), 8.

[1105] Jacques Chevallier and Danièle Loschak, *Science administrative* (Paris: LGDJ, 1978).

[1106] Christian Atias and Didier Linotte, "Le mythe de l'adaptation du droit au fait," *Recueil Dalloz*, chronique XXXIV (1977): 251.

technocratic sense that the theory of proportionality found application in constitutional law. This in one of the most famous decisions by the Constitutional Council: *Entreprises de presse*.[1107]

The reasoning in *Entreprises de presse*. *Entreprises de presse* is known for the unequivocal terms in which the Council enforced the freedom of expression. The bill brought before the Council set maximum limits on the concentration of press enterprises at a national and local level. It defined percentage thresholds limiting the diffusion of newspapers of the same nature. The measures particularly affected the interests of a major press group, owned by Hersant, who was politically opposed to the Government. This is what motivated the *saisine* by the opposition MPs and gave much media attention to the case. In its decision, the Constitutional Council started by announcing the constitutional status both of the freedom of expression and of press pluralism.[1108] Then it went on to examine the scope of the legislation in question. The court stressed that the thresholds also applied in cases where concentration of press enterprises was a result of the market itself and of the preferences of the public. The judges held that this rendered the legislative provisions "*evidently unconstitutional*" and "*directly contrary to article 11 of the 1789 Declaration*".[1109] Thus, they enounced a *réserve d'interprétation*, excluding the application of the law in such cases.

However, this neutralising interpretation was not enough to save the bill from a declaration of unconstitutionality. The legislative restrictions affected the existing status of enterprises that until then had functioned under a more favourable legislative regime. The court affirmed in principle the power of Parliament to render legislation more restrictive in the future. However, it declared that when legislative measures interfered with a legitimate status quo relating to the exercise of a public freedom, this interference should be "*really necessary for ensuring the realisation of the constitutional objective pursued*".[1110] The strict necessity requirement was not fulfilled in the case at hand. In the words of the constitutional judges,

> concerning national newspapers, in view of their number, the variety of their traits and tendencies, or the conditions of their diffusion, it cannot be validly argued that pluralism is actually undermined in such a serious way that it would be necessary to challenge existing situations to restore it, especially by proceeding to transfers or suppression of newspapers, eventually against the will of their readers.[1111]

The Council exercised a full necessity review of the contested measures. In this process, it took into account varying factual elements, like the number, the traits and tendencies, and the conditions of diffusion of the existing newspapers.

[1107] Decision no. 84-181 DC, 11 October 1984, *Loi visant à limiter la concentration et à assurer la transparence financière et le pluralisme des entreprises de presse*, ECLI:FR:CC:1984:84.181.DC.

[1108] See the decision, cons. 35 f.

[1109] Ibid, cons. 41.

[1110] Ibid, cons. 47.

[1111] Ibid, cons. 49.

Some scholars perceive the decision as implicitly sanctioning a legislative abuse of power.[1112] Indeed, even though by referring to the *real* necessity of the contested measures, the court might appear to criticise the impact of legislation on constitutional rights, the legislative ends played an important role in the judicial reasoning. The court questioned the legislative appreciation of the relevant circumstances as constituting a real risk for press pluralism. In other words, it was the *plausibility* of the legislative justification that was challenged. In the words of the court, "*it cannot be validly argued*" that the circumstances necessitated legislative intervention. The recently published deliberations of the Constitutional Council reveal that the judges indeed presumed that the contested legislation aimed to limit the influence of Hersant.[1113]

Still, criticism of legislative intent did pass through an evaluation of the impact of legislation, as their quite detailed consideration in the decision indicates. Mainstream scholars at the time of the decision saw in the Council's dicta a whole "general theory of constitutional freedoms", in which the freedom of press enjoyed a particular type of constitutional protection, called *effet cliquet*.[1114] This would mean that in the field of the press freedom, Parliament can affect legally established advantages only when this is necessary for the protection of another constitutional value. Otherwise, it can only intervene in order to render more effective the protection of the freedom of press.[1115] According to this purportedly fundamental rights "architecture", other "first range freedoms" would enjoy reinforced constitutional protection, like for example the freedom of association. Enforced guarantees would imply, most notably, the prohibition of a regime of preliminary licence for the exercise of these freedoms. However, scholarly expectations were once again frustrated by subsequent case law. The *effet cliquet* protection of constitutional freedoms was very rarely used after the 1984 decision and the Council never referred to a theory of fundamental rights. What then, was the reasoning that the Council followed in *Entreprises de presse*?

***Entreprises de presse* as an application of proportionality.** Close attention to the reasoning in *Entreprises de presse* shows that the Council criticised the whole means-ends relationship established by Parliament, the adequacy of legislation. Presenting his report on the case during the deliberations, the *Doyen* Vedel compared the review exercised by the Constitutional Council to that exercised by the Council of State. In the view of the *Rapporteur*, "in the domain of public freedoms, the legislator is not more free than the administration".[1116] Vedel continued:

[1112] See on this Georges Vedel, "Excès de pouvoir législatif et excès de pouvoir administratif," *Cahiers du Conseil constitutionnel*, no. 1–2 (1996/1997): para 40.

[1113] Xavier Philippe et al., "Les délibérations du Conseil constitutionnel - Année 1984," *Cahiers du Conseil constitutionnel*, no. 32 (2011): after note 39. See the deliberation on the 10-11 October 1984, 12, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/decisions/PV/pv1984-10-10-11.pdf.

[1114] Louis Favoreu, "Note sous Décision no. 84-181 DC," *RDP*, 1986, 493; Philippe, *Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative françaises*, 185.

[1115] Louis Favoreu et al., *Les grandes décisions du Conseil constitutionnel*, 18th ed. (Paris: Dalloz, 2016), no. 31.

[1116] Deliberation, 10-11 October 1984, cited above, 10.

> By ensuring the adequacy of the means chosen by the legislative power to the ends pursued in the area of pubic freedoms, the Constitutional Council does nothing but fully exercise its competences and does not indulge itself to a scrutiny of expediency, as one could -mistakenly- think.[1117]

Review of the legislative means-ends had the advantage of avoiding any judicial involvement with the legislative ends themselves, which could be criticised as subjective or too audacious. As is typical in French public law, it was the application of a particular "theory" that preserved the objectivity of judicial scrutiny in this respect. Indeed, Vedel mentioned that his reasoning followed such a "theory", even though this was not explicitly mentioned in the official justification of the decision.[1118]

By referring to the Council of State methods, to the adequacy of the means to the pursued ends, to public freedoms and to the implicit application of a "theory", Vedel certainly appealed to the perception of proportionality common at the time in French public law. This was confirmed by Vedel himself in subsequent analyses. In another deliberation, the judge referred to *Entreprises de presse* to explain the judicial reasoning that the court had followed. In his words,

> the Constitutional Council evaluated the situation of the press at a given moment and estimated that it was not necessary, within this situation, to render retroactive the provisions examined at the time. Thus, (…) the Council did not apply a theory of legitimately established rights in the field of public freedoms, but, more simply, a theory of the proportionality of the employed means to the pursued ends.[1119]

Contrary to mainstream scholarly readings of the case then, which saw an implicit application of the *détournement de pouvoir* or of the *effet cliquet*, it was another administrative law "theory" that guided judicial reasoning in the decision! Proportionality, implying an objective appreciation of the legislative means-ends, had the advantage of allowing the court to stay away from a moral evaluation of the legislative goal. Despite the intrusive review that it entailed, it still did not involve the risk of subjectivity that finding an abuse of power involves.

Confirming the immunity of legislative value-choices. *Entreprises de presse* thus confirmed the immunity of legislative goals from judicial review. The characterisation of the legislative goal of pluralism as an *objectif de valeur constitutionnelle* reinforces this conclusion.[1120] This category had been first used in a 1982 decision, again concerning article 11 *DDHC,* and had served to justify limitations on the freedom of communication, even though the relevant constitutional provisions did not provide

---

[1117] Ibid, p. 10

[1118] Ibid.

[1119] Deliberation, 29 July 1986, 11, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/decisions/PV/pv1986-07-29.pdf; this reading is confirmed in Vedel, "Excès de pouvoir législatif et excès de pouvoir administratif," para 40.

[1120] See Decision no. 84-181 DC, cited above, cons. 38.

for any such limitations.[1121] At the level of appearances, the identification of constitutional objectives allows the court to intrude into the forbidden sphere of legislative intent. However, in practice this normative category has mainly served to *legitimise* the legislative goals by translating them into constitutional terms.[1122] In subsequent case law, other such categories have been mobilised by the Council in order to accommodate legislative goals, like the principles that are particularly necessary in our times (*principes particulièrement nécessaires à notre temps*) or the principles and requirements enjoying constitutional status (*principes et exigences de valeur constitutionnelle*). Among the rare cases where constitutional objectives have actually imposed constraints on legislative decision-making, the requirement of accessibility and intelligibility of the law figures prominently. The scrutiny that this requirement implies is all about formal, linguistic features of legislation and not about its substantive, value-laden content. In other words, the category of *objectifs de valeur constitutionnelle*, rather than entailing judicial review of the policy goals of Parliament, expresses the Council's deference to legislative value-choices.

The novelty of the *Entreprises de presse* decision lay in the searching scrutiny of *facts* to which the constitutional judges proceeded. It is by concretising and "factualising" the legislative intent that the Council arrived at the censure of the legislative measures. Generally speaking, we can say that the reasoning of the constitutional court was akin to the way that proportionality has been applied by Greek courts since its constitutional entrenchment: focus on facts, efficiency and rationalisation. Hence, far from entrenching an underlying theory of constitutional rights or any other value-laden constitutional content, the application of proportionality in *Entreprises de presse* expressed what Vedel famously called the "administrativisation" of constitutional law.[1123] As we have seen, the transposition of administrative law theories and methods into constitutional law was one of the major assets of Philippe's thesis on proportionality.

The technocratic connotations of proportionality. The technocratic connotations of proportionality persisted even after its establishment as a fundamental rights principle in constitutional case law. Concern with the simplification, efficiency and rationality of legislation persists in the uses of proportionality language even today. It is expressed in the "*proportionnalité à la française*" applied by the Constitutional Council, which rarely questions the legitimacy of the legislative choices in principle. It transpires in the generally shared perception of the "narrowly tailored" review

[1121] Decision no. 82-141 DC, 27 July 1982, *Loi sur la communication audiovisuelle*, ECLI:FR:CC:1982:82.141.DC, cons. 5.

[1122] In 2001, Rousseau raised the question whether the category of *objectives of constitutional value* could actually constitute a source of unconstitutionality: in Dominique Rousseau, *Droit du contentieux constitutionnel*, 6th ed. (Paris: Montchrestien, 2001), 110. Interestingly, this question does not appear in later versions of this author's handbook. See, however, Decision no. 86-210 DC, 29 July 1986, *Loi portant réforme du régime juridique de la presse*, ECLI:FR:CC:1986:86.210.DC. In this case, the Council exceptionally imposed limits on legislative power by invoking the objective of pluralism, while it applied a manifest error test concerning the objective of transparency.

[1123] Georges Vedel, "Introduction," in *L'unité du droit: mélanges en hommage à Roland Drago* (Paris: Economica, 1996).

exercised by French courts as an instance of proportionality. In the Warsmann report "on the quality and simplification of legislation", proportionality is mentioned as a principle of "good legislation".[1124] According to this report, the legislator should "proportionate" the measures enacted to impact studies and other factual information resulting from the procedure that precedes legislation. Similarly, scholars studying proportionality perceive it as a requirement of minimal effectiveness of legislation that is objectively appraised according to factual considerations. In their analyses, metaphors borrowed from mechanics are considered more appropriate to describe the review exercised by the Council on legislative choices. The role of the constitutional court is understood as similar to that of a mechanic: it checks the effectiveness of the legislative "machine" in the cases that are brought before it, the adequacy of the law to obtain its objective.[1125]

It is thus not surprising that, despite scholarly hopes for coherent fundamental rights case law, the spread of proportionality in constitutional law did not much change the taboo surrounding the value-choices expressed in legislation. The exclusive competence of Parliament in the reconciliation of competing constitutional objectives has been repeatedly affirmed.[1126] It is Parliament that, "*in view of the state of science and technology*",[1127] defines the scope of constitutional values such as human dignity, or of constitutional obligations such as decent housing.[1128] Similarly, the Council is not willing to participate in "*moral, scientific, and, ultimately, political debates*" on the existence of differences between homosexual and heterosexual couples that would justify their distinct treatment by law.[1129] Further, it considers that "*the appreciation moral and social considerations only belongs [to Parliament]*".[1130] More generally, when it comes to "*questions de société*",[1131] the court defers to the legislative considerations. Thus, while proportionality has undoubtedly increased judicial powers, its application has not established the judge as a fundamental rights protector in French public law.[1132]

[1124] Jean-Luc Warsmann, "Rapport sur la qualité et la simplification du droit," Décembre 2008, http://www.uquebec.ca/observgo/fichiers/88022_Droit.pdf.

[1125] Jean-Baptiste Duclerq, *Les mutations du contrôle de proportionnalité dans la jurisprudence du Conseil constitutionnel* (Paris: LGDJ, 2015).

[1126] See for example Decision no. 94-352 DC, 18 January 1995, *Loi d'orientation et de programmation relative à la sécurité*, ECLI:FR:CC:1995:94.352.DC, cons. 3. This is also the typical reasoning followed in the state of emergency case law. See for example Decision no. 2016-536 QPC, 19 February 2016, *Ligue des droits de l'homme [Perquisitions et saisies administratives dans le cadre de l'état d'urgence]*, ECLI:FR:CC:2016:2016.536.QPC, cons. 5.

[1127] Decision no. 94-343/344 DC, 27 July 1994, *Loi relative au respect du corps humain et loi relative au don et à l'utilisation des éléments et produits du corps humain, à l'assistance médicale à la procréation et au diagnostic prénatal*, ECLI:FR:CC:1994:94.343.DC, cons. 10. See also Decision no. 2010-2 QPC, 11 June 2010, *Loi dite "anti-Perruche"*, ECLI:FR:CC:2010:2010.2.QPC, cons. 4.

[1128] Decision no. 94-359 DC, 19 January 1995, *Loi relative à la diversité de l'habitat*, ECLI:FR:CC:1995:94.359.DC.

[1129] Decision no. 2010-39 QPC, 6 October 2010, *Isabelle D. et Isabelle B.*, ECLI:FR:CC:2010:2010.39.QPC; no. 2010-92 QPC, 28 January 2011, *Mme Corinne C. et autre*, ECLI:FR:CC:2011:2010.92.QPC. See the *commentaire aux cahiers* of the first decision, 10, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/201039QPCccc_39qpc.pdf.

[1130] Decision no. 2010-2 QPC, *Loi dite "anti-Perruche"*, cited above, cons. 15.

[1131] See the *commentaire* mentioned above, p. 10.

[1132] Véronique Champeil-Desplats, "Le Conseil constitutionnel a-t-il une conception des libertés

As a theory, proportionality has the asset of representing a new paradigm of public action as modern, efficient and rational, exempt from moral-legal considerations. At the same time, it establishes coherence between traditional methods of review. Hence, in a subtle way, since its emergence in domestic public law proportionality has assumed a function of rationalising French public law and of demystifying traditional "ghosts" of judicial review. Along with these "ghosts", the doctrinal distinctions that they used to sustain are deconstructed. In reality, the spread of proportionality language in French public law has enhanced important transformations in *other* judicial methods, long before the enunciation of proportionality itself as a constitutional principle. In order to understand the extent of the transformation that proportionality has enhanced in French public law, we must go back to *Ville Nouvelle Est* and its doctrinal impacts.

4. Forgotten distinctions: proportionality and manifest error

Displacing the debate on the scope of application of the manifest error test. Balancing the advantages and disadvantages of administrative decisions was not at all a given before *Ville Nouvelle Est*, not even in its manifest error version. Before the emergence of judicial balancing and proportionality, many scholars and *commissaires du gouvernement* had argued for an extension of the scope of the manifest error test, from the review of the *grounds* to the review of the *content* of administrative discretion. Braibant himself had proposed a manifest error review in his first opinion on *Ville Nouvelle Est* before the Council of State sub-sections.[1133] However, the Council had consistently refused this solution: the manifest error concerned solely the *factual grounds* of administrative decisions. Only if it was limited in the area of fact, and exempt from considerations of expediency could this test still fit the fundamental structures of judicial review. On the contrary, due to its factual nature, its application in the review of the content of public decisions would bring considerations of *opportunité* into the game again. The manifest error would lead the judge to substitute her own assessments as to the adequacy of the reviewed decision, and this was perceived as a prohibited trespassing of the limits of judicial competence.

Analyses contemporary to *Ville Nouvelle Est* maintained the strict conception of the manifest error review. In certain handbooks the *bilan* was clearly distinguished from the manifest error: while the *bilan* implied a review of the content of administrative decisions, the manifest error concerned their factual grounds, that is, the appreciation by the administration of the facts that conditioned the exercise of its competence.[1134]

---

publiques ?," *Jus Politicum*, no. 7 (2012); Valérie Goesel-Le Bihan, "Le contrôle de proportionnalité exercé par le Conseil constitutionnel, technique de protection des libertés publiques ?," *Jus Politicum* 7 (2012).

[1133] Labetoulle and Cabanes, "Note sous CE Ass., 28 mai 1971, *Ville Nouvelle Est*," 404; cited by Waline, "Le rôle du juge administratif dans la détermination de l'utilité publique justifiant l'expropriation," 823.

[1134] See for example Bockel, "Contribution à l'étude du pouvoir discrétionnaire de l'administration," 365. The author talks about "case law that is not born yet". See the decision *Federation nationale des syndicats des fonctionnaires de l'agriculture et autres*, 15 February 1974, cited above.

Nonetheless, *Ville Nouvelle Est* seemed to have totally displaced the debate. Since the judge had affirmed her power to balance the advantages and the disadvantages of administrative decisions, scholars progressively accepted *ad minus* the possibility for an objective scrutiny of the content of administrative decisions under a manifest error test. Some argued that the only possible interpretation of judicial balancing that could preserve the "logic" and the "identity" of the French system of judicial review was to see it as an extension of the manifest error to the content of decisions.[1135] In this way, scholarly focus on the doctrinal problems of judicial balancing led them to neglect a major conceptual transformation of the manifest error test.

Blurring the grounds/content distinction. The promotion of a general legal principle of proportionality further enhanced this evolution. Indeed, both Dreyfus and Braibant perceived the manifest error as an application of the general principle proportionality, which governs "all aspects of discretionary power", independently of traditional doctrinal distinctions.[1136] Interestingly, the promoters of proportionality nuanced the distinction between content and grounds of administrative decisions, which they perceived as "fragile".[1137] Often substantive legality requirements imposed on the content of a decision could be seen as conditions for the exercise of administrative competence and vice versa.[1138] This was the case of the necessity review of police restrictions, for example, where it was not clear whether necessity was part of the grounds of the restrictions or whether it was a substantive legal requirement imposed on the exercise of police powers. By imposing a legal requirement of adequacy of a public decision to its grounds and to the goal of administrative action, the recognition of a general principle of proportionality would put an end to what was perceived as an outdated distinction.[1139]

Scholarly calls to abandon the distinction between grounds and content had found expression in judicial practice too. Indeed, since the mid '70s the Council of State had started blurring the distinction between grounds and content of administrative decisions.[1140] In the famous *Lebon* case, it applied a manifest error test in the review of the content of disciplinary sanctions.[1141] Hence, even though the defenders of

---

[1135] de Laubadère, "Le contrôle juridictionnel du pouvoir discrétionnaire dans la jurisprudence récente du Conseil d'État français," 547, 549.

[1136] Bockel, "Contribution à l'étude du pouvoir discrétionnaire de l'administration," 370.

[1137] Dreyfus, "Les limitations du pouvoir discrétionnaire par l'application du principe de proportionnalité: à propos de trois jugements du Tribunal Administratif de l'O.I.T," 703. Maxime Letourneur himself had played down the importance of the distinction in a contribution on the application of the manifest error by the Council of State in 1972: Maxime Letourneur, "Le contrôle de l'erreur manifeste d'appréciation dans la jurisprudence du Conseil d'État," in *Mélanges Ganshof van Der Meersch*, vol. III (Paris: LGDJ, 1972), 563.

[1138] Auby, "Le contrôle judictionnel du degré de gravité d'une sanction disciplinaire, note sous CE, 9 juin 1978, *Lebon*," 236.

[1139] Dreyfus, "Les limitations du pouvoir discrétionnaire par l'application du principe de proportionnalité: à propos de trois jugements du Tribunal Administratif de l'O.I.T," 695, 700; Braibant, "Le principe de proportionnalité," 298.

[1140] See for example CE (Pl.), 5 May 1976, *Bernette*, nos. 98647 and 98820, ECLI:FR:CEASS:1976:98647.19760505. Guibal, "De la proportionnalité," 486.

[1141] CE, 9 June 1978, *Sieur Lebon*, no. 05911, ECLI:FR:CESJS:1978:05911.19780609. In doing so, the Council abandoned its previous refusal to review the "proportionality" of these sanctions. See for

proportionality did not obtain the change that they called for in the form of an *official* enunciation of the general principle of proportionality, they did obtain some of the core advances in judicial review that proportionality was expected to bring about. The review of the content of discretionary public decisions was generalised. *Plus c'est la même chose, plus ça change*.[1142] This is why public lawyers reconstructed the disciplinary sanctions case law as an application of proportionality, which followed the example of international courts.[1143]

After some early scepticism concerning the abandonment of traditional structures and distinctions,[1144] the justificatory force of proportionality soon concealed the transformation of the manifest error test. In the earlier editions of their handbook, for example, Georges Vedel and Pierre Delvolvé contested the possibility to exercise proportionality review through the manifest error.[1145] However, the question of the scope of the manifest error was totally neglected in later scholarly analyses on proportionality.[1146] French public lawyers seem to have forgotten the structural features that until the '70s had constrained the spread of the manifest error test. Progressively, this test was understood as an aspect of the *contrôle* of proportionality. The transformation was further enhanced with the transfer of the manifest error in constitutional law, where, due to the abstract character of constitutional requirements, the distinction grounds/content was more difficult to make. In *Sécurité et Liberté*, for example, the Council applied the manifest error as a method for the review of the necessity of penalties.[1147]

A distinction that persisted in constitutional case law. Still, at least for a while, proportionality and manifest error *were* distinguished in the Constitutional Council's reasoning. This can be illustrated by an analysis of *Loi sur l'évolution de la Nouvelle-Calédonie*, which concerned a bill organising the election of the New Caledonian *Congrès*. In this case, Parliament had delimited the circumscriptions on a geographic rather than a demographic basis and introduced important inequalities in the representation of the local population in the legislative assembly. In its scrutiny under the principle of voting equality, the Council clearly distinguished the constitutional requirement for elections on a demographic basis from a strict requirement of proportionality between the populations of the various circumscriptions. The court affirmed that "*other general interest necessities*" could compromise demographic representation. However, it stated

instance CE, 13 October 1967, no. 71629, ECLI:FR:CEORD:1967:71629.19671013.

[1142] Michele Graziadei, "Comparative Law as the Study of Transplants and Receptions," in *Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford: OUP, 2006), 462 observes this on legal transplants more generally.

[1143] Auby, "Le contrôle judictionnel du degré de gravité d'une sanction disciplinaire, note sous CE, 9 juin 1978, *Lebon*", 237 f.

[1144] See Auby, ibid, who describes this transformation and identifies its reasons.

[1145] Philippe, *Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative françaises*, 171 note 70.

[1146] See for example the study by Jean-Paul Costa, "Le principe de proportionnalité dans la jurisprudence du Conseil d'État," *AJDA*, 1988, 434.

[1147] Decision no. 80-127 DC, 20 January 1981, *Loi renforçant la sécurité et protégeant la liberté des personnes*, ECLI:FR:CC:1981:80.127.DC.

that this was constitutionally acceptable "*only to limited degree*".[1148] The court found that this limit had been "*manifestly trespassed in the case at hand*" and declared the reviewed provisions as unconstitutional.[1149]

Though refusing to impose a strict proportionality rule on the legislator, the Council did impose limits on the possibility of derogating from this rule in the name of demographic representation. And it sanctioned these limits by application of the manifest error test. A few days later however, in the second New Caledonia case, the Council seemed to have changed its mind.[1150] While on the 8th of August the court concluded that one representative for 4,728 residents constituted a manifest error, on the 23rd of August it decided that one representative for 4,052 residents did not constitute such an error. French public lawyers have criticised what they have perceived to be a contradictory application of the manifest error test. In their view, the disproportion was equally flagrant in the second decision, but the Council still deferred to the legislative choice. Mainstream scholarship has thus contested the objectivity of the manifest error review, or has ironically sought for a *particular* proportion, the trespassing of which would have led the judge to sanction the legislative choice.[1151]

Scholarly criticism of the New Caledonia cases has neglected the difference *in kind* of the evaluations that proportionality and the manifest error implied. Indeed, scholars understood the manifest error to involve an objective factual test, generally valid and not depending on the context of legislative decision-making, just like calculations of proportionality. However, things were different in the Council's reasoning: while proportionality (as a mathematical equation) was an *extra-legal quality* of legislative choices, the manifest error defined the *legal-constitutional limits*, the trespassing of which allowed for judicial intervention. In other words, application of the manifest error preserved a moral-legal burden that proportionality lacked. While proportionality functioned as a criterion for the appraisal of legislative outcomes according to the rules of logic and science, the manifest error test concerned the evaluation of the legislative grounds according to the Constitution, the *value-laden justification* of legislative action. In practice, the manifest error functioned as a substitute for a legislative abuse of power. It was concerned with the state of mind of the primary decision-maker and its application depended on the particular context of each case.

The moral-legal evaluation that the manifest error test implied was difficult to grasp for French public lawyers, due to the taboo that surrounds the value-laden choices of Parliament. However, it is precisely the value-laden character of manifest error review that renders its seemingly contradictory application in the New Caledonia cases intelligible. Despite the approximation of the reviewed bills in terms of impacts, a crucial difference separated the two. While in the first case constitutional limits had

---

[1148] Decision no. 85-196 DC, 8 August 1985, *Loi sur l'évolution de la Nouvelle-Calédonie*, ECLI:FR:CC:1985:85.196.DC, cons. 16.

[1149] Ibid.

[1150] Decision no. 85-197 DC, 23 August 1985, *Loi sur l'évolution de la Nouvelle Calédonie*, ECLI:FR:CC:1985:85.197.DC, cons. 35.

[1151] Favoreu et al., *Les grandes décisions du Conseil constitutionnel* n. 43.23.

been trespassed, in the second case the Parliament had taken into account the Constitutional Council's decision on the matter and had amended the unconstitutional provisions, in an effort to conform to the judicial precepts. Judicial intervention to sanction the parliamentary choices could thus be perceived as imposing an overly-inflexible objective requirement of proportionality on the legislator, where the Constitution provides for none. During the relevant deliberation, Georges Vedel had pointed out that the Council's methods did "not present the "Pascalian" or "Euclidian" rigour".[1152] The manifest error only prohibited the legislator from doing "*n'importe quoi*".[1153] Thus, it was concerned rather with the state of mind of the primary decision-maker.

In subsequent case law, the Council used distinct standards to criticise the outcomes of legislation on the one hand and its justification on the other. Concerning the election of the Marseille city council, for example, the court underscored that,

> [e]ven if the legislator did not consider it expedient, for two of the hundred seats, to strictly apply the rule of proportionality to the highest average, the disparity of representation between the [city] sectors with regard to the respective importance of their population (…) is not manifestly unjustifiable nor disproportionate in an excessive manner.[1154]

The distinction between the "manifestly unjustifiable" and "disproportionate in an excessive manner" standards indicates that while the manifest error partook in the Council's methods of *legal-constitutional* reasoning, the identification of excessive disproportionalities proceeded through a mere *factual* appreciation.

This is confirmed by the recently published judicial deliberation on the matter, which reveal that the use of one single standard of manifest disproportionality had been proposed by a member of the Council. In response, the secretary general observed that such a formulation would exempt legislative value-choices from judicial review. It would imply "that the legislator is the only judge of the general interest grounds that he invokes", thus leaving open the risk of arbitrary legislation.[1155] Georges Vedel agreed and added:

> A baker can sell [a piece of] bread [claiming that it weighs] 450 grams, while it weighs less: it can be measured. On the contrary, to what extent can we say that there is venial or capital sin? It is not an error but an appreciation of expediency [that is at stake]. There should be a formulation

---

[1152] Deliberation, 23 August 1985, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/decisions/PV/pv1985-08-23.pdf, 4.

[1153] Ibid, 24.

[1154] See for example Decision no. 87-227 DC, 7 July 1987, *Loi modifiant l'organisation administrative et le régime électoral de la ville de Marseille*, ECLI:FR:CC:1987:87.227.DC, cons. 6. Similarly, Decision no. 86-218 DC, 18 November 1986, *Loi relative à la délimitation des circonscriptions pour l'élection des députés*, ECLI:FR:CC:1986:86.218.DC, cons. 8.

[1155] Deliberation, 7 July 1987, 43, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/decisions/PV/pv1987-07-07.pdf.

> of the manifest error that combines the quantum and the grounds of choice.[1156]

A similar distinction between manifest error and proportionality language was typical of the Council of State's reasoning too. The administrative judge typically used expressions like "*disproportion marquée*", diligently avoiding the employment of a manifest disproportionality standard.[1157]

Proportionality and the factualisation of the manifest error test. However, the French *doctrine* perceived the manifest error as synonymous with manifest disproportionality and this synonymy was soon performed in judicial practice. We saw that, some months following the *Nouvelle-Calédonie* case law, in 1986, the Council abandoned the meticulous distinction between proportionality language and manifest error.[1158] This enhanced the transformation of the manifest error into an outcome-based test, concerned with facts and efficiency rather than with the moral-legal choices of the legislator. This is neatly exemplified in the emergence and spread of the "manifest inappropriateness" standard. This standard emerged in 1990, possibly under the influence of the ECJ *Fedesa* case law.[1159] It is commonly perceived as an instance of *contrôle de proportionnalité* and is used "an objective substitute for the abuse of power review".[1160] Its spread expresses a more general tendency towards factualisation and rationalisation of moral-legal evaluations in the Council's reasoning. The "manifest inappropriateness" standard expresses the replacement of moral-legal constitutional limits with factual ones.

The diffusion of proportionality. Inversely, the proximity between manifest error and manifest disproportion came at a cost for proportionality's arithmetic rigour. In *Loi portant amnistie*, for example, the manifest disproportionality standard was employed as a "*belle marquise*". Addressed to trade unions, it expressed in simple and understandable terms that Parliament had reasonably exercised its competence.[1161] The less rigorous perception of proportionality has allowed for its diffusion in French law. We saw that since the early '90s, under the influence of European law, domestic courts use proportionality in rights adjudication. Taking impulsion from the transnational proportionality and fundamental rights language, the disproportionate standard was transferred in constitutional case law too. Since 2008, proportionality proliferates in

---

[1156] Ibid.

[1157] See for example CE, 6 February 1981, no. 16660, ECLI:FR:CESSR:1981:16660.19810206. Only two examples of combination of manifest error and proportionality in the Council of State case law until 1986: CE, 23 October 1986, no. 64900, ECLI:FR:CESSR:1985:64900.19851023, and CE, 7 May 1982, no. 17713, ECLI:FR:CESSR:1982:17713.19820507. Still, in these cases proportionality represents an arithmetic relation.

[1158] Decision no. 86-215 DC, 3 September 1986, L*oi relative à la lutte contre la criminalité et la délinquance*, ECLI:FR:CC:1986:86.215.DC. See on this point *supra*, Part I, Chapter 1.1.iii.

[1159] Decision no. 90-280 DC, 6 December 1990, *Loi organisant la concomitance des renouvellements des conseils généraux et des conseils régionaux*, ECLI:FR:CC:1990:90.280.DC. On *Fedesa*, see *infra*, Part III, Introduction.

[1160] Valérie Goesel-Le Bihan, "Réflexion iconoclaste sur le contrôle de proportionnalité exercé par le Conseil constitutionnel," *RFDC*, 1997, 237.

[1161] Deliberation, 20 July 1988, 24 f., esp. 28, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/decisions/PV/pv1988-07-20.pdf.

French law and has acquired a pervasive dynamic. While the function of fundamental rights protection that proportionality assumes in this context seems akin to the one it has in the Alexyan model, its form is very different.

5. Proportionality as a fundamental rights principle: social integration as assimilation

Proportionality and the idealisation of the judiciary. Undoubtedly, proportionality as a fundamental rights principle has contributed to the mythopoeia surrounding the judiciary and its function as a protector of citizens' rights. It is not by chance that the study of proportionality increasingly excites judges themselves, and especially the presidents of the supreme courts.[1162] In the new representation of the legal system as a fundamental rights order, legal reasoning is perceived as an instance of reconciliation of competing values, and the judge as an institution that is well-qualified to perform it.[1163] In the words of Xavier Philippe, for example, "the *contrôle de proportionnalité* leads the judge to "veritable Salomon judgements. In reality", the author continues, "we can ask ourselves whether, through the variable intensity of the review, the judge does not pertain to a general quest of coherence that proportionality allows him to obtain."[1164] Idealisation of the judiciary is a feature of mainstream proportionality scholarship too, where, as we saw, the judge is presented as Socrates and the judicial process as an instance of maieutic dialogue. In French public law, like in the Alexyan theory, proportionality as a fundamental rights principle has expressed a belief in the possibility of rational resolution of axiological conflicts.

This is even more remarkable in constitutional discourse, where proportionality has certainly benefitted from a quasi-religious belief shared by some French lawyers in "the transcendence of human rights".[1165] The relevant studies, until recently rare, mainly produced by Valérie Goesel-Le Bihan, have been characterised by an impressive faith in a court mainly composed by political personalities. Despite the lack of transparency in its use, optimistic scholars have perceived proportionality as a method for weighing constitutional rights. They have contended that its variable application reveals the pragmatism of the constitutional judge and have provided complex reconstructions of constitutional case law under the proportionality

[1162] Jean-Marc Sauvé, "Le principe de proportionnalité, protecteur des libertés" (Intervention à l'Institut Portalis, Aix-en-Provence, 2017), http://www.conseil-etat.fr/Actualites/Discours-Interventions/Le-principe-de-proportionnalite-protecteur-des-libertes; Bertrand Louvel, "Réflexions à la Cour de cassation : Contribution à la refondation de la justice," *La Semaine Juridique*, Regards d'universitaires sur la réforme de la Cour de cassation – conférence débat 24 novembre 2015, supplément au no 1-2 (2016): 1.

[1163] Philippe, *Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative françaises*, 421 f.

[1164] Philippe, 347.

[1165] Vedel, "Le Conseil constitutionnel, gardien du droit positif ou défenseur de la transcendance des droits de l'homme," 159, para 20.

prongs.[1166] In these writings, the Council is often presented as a young apprentice.[1167] Commenting on the proportionality case law of the Constitutional Council in 2007, Goesel-Le Bihan characterised it as "a work of maturity", which proves the court's "permeability to changing political contingencies".[1168] Even more optimistic judges have seen in the Council's application of proportionality the "beauty and harmony" that one finds in Chinese gardens, despite the "disorder" that it provokes in French public lawyers' "Cartesian spirits".[1169]

Proportionality as republican inculcation: the *Burqa* affair. However, in practice proportionality is inconsistently applied, usually leading to a self-evident affirmation of the legitimacy of fundamental rights restrictions. It is used interchangeably with other standards such as "excessive interference" with the rights at stake. The absence of justification observed in the application of proportionality is a more general characteristic of French case law and is connected to the republican legitimation of public authorities, and especially of the judiciary. As Mitchel Lasser observes, in French law "[t]he pedagogical process [is] one of proper republican *inculcation*, not one of mutual *explanation*".[1170]

This can be illustrated in the *Burqa* affair. The case arose in the context of *a priori* review and concerned the constitutionality of a statute forbidding the full-face coverage in public spaces.[1171] The statute was voted through after extensive discussion of the subject in the media and, in spite of its neutral formulation, had as a goal to prohibit the well-known religious and cultural practice of certain Muslim women to entirely cover their face when in public. During the parliamentary discussion of the statute, this practice was characterised "intolerable",[1172] as a symbol of the position of women in the Islamic tradition that undermines fundamental republican values.[1173] Prohibition of the *burqa* obtained strong consensus between the Left and the Right. Only one member in each chamber of Parliament voted against the bill. The bill was referred to the Council by the Presidents of the two chambers of Parliament -the first occurrence of such a referral since 1959- without any arguments against its constitutionality. This "*saisine blanche*" could be seen as a plea for a "certificate of

[1166] Goesel-Le Bihan, "Réflexion iconoclaste sur le contrôle de proportionnalité exercé par le Conseil constitutionnel"; "Le contrôle de proportionnalité dans la jurisprudence du Conseil constitutionnel : figures récentes," *RFDC*, 2007, 269.

[1167] Goesel-Le Bihan even talks to the Council in "Le contrôle exercé par le Conseil constitutionnel : défense et illustration d'une théorie générale."

[1168] Goesel-Le Bihan, "Le contrôle de proportionnalité dans la jurisprudence du Conseil constitutionnel," 295.

[1169] Régis Fraisse, "Le Conseil constitutionnel exerce un contrôle conditionné, diversifié et modulé de la proportionnalité," *Les Petites Affiches*, no. 46 (2009): after fn. 2.

[1170] Lasser, *Judicial Transformations*, 141.

[1171] Decision no. 2010-613 DC, 7 October 2010, *Loi interdisant la dissimulation du visage dans l'espace public*, ECLI:FR:CC:2010:2010.613.DC.

[1172] See the report of the *Délégation aux droits des femmes et à l'égalité des chances entre les hommes et les femmes* of the National Assembly : http://www.assemblee-nationale.fr/13/rap-info/i2646.asp.

[1173] See the *résolution* voted by the National Assembly the 11th of May 2010, on the commitment to the respect of republican values against the development of radical practices undermining it, http://www.assemblee-nationale.fr/13/dossiers/ppr_34-1_valeurs_rep.asp.

constitutionality" that would impede future contestations of the statute via the *QPC* procedure.

In a surprisingly short decision, the Council validated the reviewed measures. The constitutional judges started by identifying the legislative goal. Despite the bill's neutral formulation, they considered that it was a response to, "*until recently exceptional, practices of concealing the face in public spaces*". The Council followed its typical stance and did not contest the legitimacy of the legislative objective. It contented itself with mentioning that "*the legislator estimated that such practices can constitute a danger for public security and disregard the minimum requirements of living in society*".[1174] Having ascertained, or rather certified, the legitimacy of the legislative goal, the judges went on to exercise proportionality review on the reconciliation of competing values by Parliament. In their words,

> having regard to the objectives that the legislator set, and given the nature of the penalty instituted for the case of infringement of the rule fixed by him, he adopted provisions that ensure a not manifestly disproportionate reconciliation between the preservation of public order and the guarantee of constitutionally protected rights.[1175]

It seems that proportionality was employed in its version of a fundamental rights principle, concerned with the reconciliation between public order and constitutional rights. Interestingly, however, the judgment does not mention which constitutional rights were in question. Religious freedom was invoked, but only in a *réserve d'interprétation* that excluded the application of the contested provisions in places of worship.[1176] The use of the manifestly disproportionate standard indicates that it was rather the principle of proportionality of penalties that was applied by the Council. This interpretation is reinforced by the explicit reference to the trivial character of the legislative sanctions. However, proportionality of penalties is not really a constitutional right, and arguably, many such rights could have been invoked against the legislative provisions. Nor does proportionality concern the means-ends relationship of legislation. The judges do not specify with respect to what they evaluated the proportionality of the reconciliation that the Parliament had ensured.

Reinventing proportionality and fundamental rights. The disproportionate standard did not imply any scrutiny of the legislative value-choices nor of the effectiveness of the reviewed measures. It was used as an axiomatic affirmation that the legislative choices were reasonable and legitimate. Once again, the Council left the definition of the value-laden content of the Constitution to the majority in Parliament. However, the *Burqa* case is even more interesting because, in order to do so, the court engaged in a kind of reasoning that is quite rare in constitutional case law. Apart from the reference to proportionality, the decision echoes fundamental rights language in its

[1174] See the *Burqa* decision, cons. 4.
[1175] Ibid, cons. 5.
[1176] Ibid.

reference to freedom and equality. When discussing the legislative objective, the judges stressed that "*the legislator estimated that the women concealing their face in public spaces, either voluntarily or not, are placed in a situation of exclusion and inferiority that is manifestly incompatible with the constitutional principles of freedom and equality*".[1177] The Council took this feature into account when it validated the legislative reconciliation between public order and constitutional rights. Strikingly however, freedom and equality were not qualified as rights themselves. They were mentioned as constitutional principles, and as such, were part of the legislative objective of maintaining public order. Traditionally, public order did not encompass the protection of moral-political values.[1178] Since the '90s, however, it has progressively included the protection of fundamental rights.[1179]

Commentators impugned the incoherent reasoning in the Constitutional Council's *Burqa* decision as an "abdication of constitutional review".[1180] The point of view of Muslim women was not considered at all by the Council. Its laconic affirmations, presented as self-evident and not subject to any institutional contestation, reveal the minimalist character of the adversarial procedure, if there can be said to be any such procedure. The *Burqa* case exemplifies the way French public law reinvents proportionality and its fundamental rights baggage according to local discursive needs and to local criteria for the evaluation of legal arguments. In this context, rights do not function as optimisation requirements, but rather represent *objective* values. Consent to their infringement is inoperative. The definition of their scope is exclusively left to the Parliament. Rights-based adjudication consists in an axiomatic affirmation that the only possible way for minorities to socially integrate is to conform to the majoritarian worldview. In the republican French context, notions like the general interest, and more recently, public order, are surrounded by a "mythic halo" and are deemed to be the ultimate goal of public action.[1181] They represent a "reflex of republican union" which is not opposed to constitutional rights, since it presupposes and comprises their reconciliation.[1182] In this way French public law avoids the creation of a "fundamentalism of rights" or a "*conception jusqu'au-boutiste des droits subjectifs*".[1183] From this perspective, individual fundamental rights claims are perceived as nothing but partisan interests, and as Mitchel Lasser observes, "partisan interests are just that:

[1177] Ibid, cons. 4.

[1178] See, however, CE, 18 December 1959, *Films Lutétia*, nos. 36385 and 36428, ECLI:FR:CESJS:1959:36385.19591218.

[1179] CE (Pl.), 27 October 1995, *Commune de Morsang-sur-Orge*, no. 136727, ECLI:FR:CEASS:1995:136727.19951027. More generally on the accomodation of fundamental rights by the French public law tradition, see *infra*, Part III, Chapter 7(2).

[1180] Marthe Fatin-Rouge Stéfanini and Xavier Philippe, "Jurisprudence du Conseil constitutionnel Octobre 2010-mars 2011," *RFDC*, 2011, 549.

[1181] Guillaume Merland, "L'intérêt général dans la jurisprudence du Conseil constitutionnel," in *L'intérêt général, norme constitutionnelle*, ed. Bertrand Mathieu and Michel Verpeaux (Paris: Dalloz, 2007).

[1182] Pierre Mazeaud, "Voeux du président du Conseil constitutionnel au président de la République" (Palais de l'Elysée, January 3, 2006), *Cahiers du Conseil constitutionnel*, no. 20 (2006).

[1183] Pierre Mazeaud, "2, rue de Montpensier : un bilan," *Cahiers du Conseil constitutionnel*, no. 25 (2008): 27.

partisan and interested. They have neither the democratic pedigree nor the republican legitimacy to play a dominant role in the resolution of social conflicts".[1184]

Dissonances between domestic case law and Strasbourg. Four years later, called to judge upon the *burqa* ban in *SAS v France*, the ECtHR did not exactly share the Constitutional Council's opinion.[1185] First of all, the public security argument invoked by the Government was rejected. The Strasbourg court questioned the sincerity of the argument itself. In the court's words, "*[h]aving regard to the case file, it may admittedly be wondered whether the Law's drafters attached much weight to such concerns*".[1186] Still, the judges went on to examine whether the security objective could in fact justify the blanket ban of the *burqa* as necessary in a democratic society. They observed that the women concerned by the ban were "*obliged to give up completely an element of their identity that they consider important*".[1187] Such an interference with individual rights could only be justified "*in a context where there is a general threat to public safety*", something that the Government had not shown.[1188] Quite at the opposite, in its decision, the Constitutional Council had admitted that this practice, until recently, was of an exceptional nature. The Strasbourg court further underlined that an obligation for the concerned women to show their faces whenever stopped by the police would sufficiently address any risk for public security that the *burqa* might entail.

The court continued by examining the second legitimate objective provided for by article 8(2) ECHR, that is, the protection of the rights of others. In this respect, the French Government invoked the principle of sex equality, the respect to human dignity and "the respect for the minimum requirements of life in society". The ECtHR rejected the objectivised understanding of fundamental rights and declared that it was "*not convinced*" by the argument based on the principle of equality. Rights' holders cannot be protected from the exercise of their own rights.[1189] Nor did the human dignity argument work out. Although the court observed that "*the clothing in question is perceived as strange by many of those who observe it,*" it pointed out, "*however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy*".[1190] Instead, the only goal that the Strasbourg court accepted as legitimate was "*the respect for the minimum requirements of life in society*". The judges stated that they were "*able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier*".[1191] Still, due to the vagueness of the notion, the court declared that it would carefully monitor the necessity of the contested legislation.

The judges proceeded to a long and thorough impact-based examination of the blanket ban on the *burqa* in public spaces. They stressed that, even though a very small

[1184] Lasser, *Judicial Transformations*, 48.
[1185] ECtHR, *SAS v France* 1 July 2014, no. 43835/11.
[1186] Ibid, para 115.
[1187] Ibid, para 139.
[1188] Ibid, para 139.
[1189] Ibid, para 118.
[1190] Ibid, para 120.
[1191] Ibid, paras 121-122.

proportion of the French population is affected by the ban, the impacts on the women in question are very significant. The ban has the effect of "*isolating them and restricting their autonomy, as well as impairing the exercise of their freedom to manifest their beliefs and their right to respect for their private life*".[1192] Even more, the court pointed out that it was "*understandable that the women concerned may perceive the ban as a threat to their identity*".[1193] Still, according to the court, despite the fact that the blanket prohibition of the *burqa* in public spaces affects pluralism, it is "*a choice of society*".[1194] It is concerned with what domestic authorities perceive as the most fundamental values on which socialisation is based. Hence, the European judges showed restraint in their review of the solution adopted by the domestic authorities, in the absence of common ground among Convention parties on the issue. The judges finally concluded that the *burqa* ban "*can be regarded*" as proportionate and necessary in a democratic society.[1195]

The intrusive scrutiny exercised by the ECtHR stands in stark contrast with domestic case law. Where domestic courts had unwarily accepted the legitimacy of the goals invoked by Parliament, the European court proved much more suspicious and searching. Where domestic courts had categorically affirmed the proportionate character of the ban and its compatibility with the Convention, the European court only reluctantly accepted the legitimacy of domestic measures, through the application of the margin of appreciation doctrine. The Strasbourg judges did not affirm the proportionality of the measures *per se*, but only the *plausibility* of domestic authorities' claim that the ban was proportionate and necessary. No doubt, the European court could not be more hostile to the domestic legislation in an era of terrorism and disintegration. The judgement attracted the attention of the media and has been generally perceived as a decision based on "political prudence" rather than on European human rights.[1196] A future condemnation of the French attitude on the matter looked very probable. The "stateless" court based in Strasbourg (according to the vice-president of the French Council of State) would not prove any more sensible to domestic republican values, no matter how fundamental they are considered by French officials.[1197]

The application of proportionality as an instance of republican inculcation, provokes scepticism in the domestic sphere as well. Even the scholars who were most faithful to proportionality and to the Constitutional Council seem to have lost faith in the principle's protective function.[1198] Besides, French public lawyers' short and sweet belief in the existence of objective value-choices now seems to be fading away.

[1192] Ibid, para 146.

[1193] Ibid, paras 145.

[1194] Ibid, para 153.

[1195] Ibid, para 157.

[1196] Franck Johannès, "Voile islamique : la CEDH ne condamne pas la France mais émet des réserves," *Le Monde*, 1 July 2014.

[1197] "*cette cour apatride*": this phrase was pronounced by Jean-Marc Sauvé, Vice president of the Council of State at the time, in a speech delivered in May 2010 during a student visit at the Council of State.

[1198] Goesel-Le Bihan, "Le contrôle de proportionnalité exercé par le Conseil constitutionnel, technique de protection des libertés publiques ?"

Proportionality review is increasingly criticised for its subjectivity and for the confusion that it provokes in the traditional distribution of competences between the judge, the administration and the legislator.[1199] The accusation of *jusnaturalisme* resurfaces and is readily addressed to proportionality and fundamental rights enthusiasts.[1200] This is combined with a turn towards security in French constitutional politics, and with increasing institutional suspicion towards the constitutional judge and state authorities. The two-year long state of emergency and the extensive police powers provided by normal legislation exemplify these tendencies. Mireille Delmas-Marty observes that the normalisation of the state of emergency marks "an anthropological rupture", that is, the transition "from a society of responsibility to a society of suspicion".[1201]

***

Proportionality in French public law has provoked more significant changes as a theory than as a positive law concept. At least in its early uses in this context, proportionality was perceived as a transfer from other disciplines rather than a legal transplant from Germany. As such, proportionality has expressed and enhanced domestic lawyers' belief in the possibility of objective determination of the content of legal and constitutional provisions. It has expressed and enhanced domestic lawyers' perception of legal decision-making as a rational enterprise following the rules of logic. In short, proportionality in French public law has expressed and enhanced domestic lawyers' belief in the possibility of law being a science exempt from considerations of morality or ideology. Only this kind of scientific knowledge could allow the judge to intrude on the norm-producing will of primary decision makers.

In a moment of optimism for fundamental rights, and under the influence of fundamental rights language, proportionality traded off its scientific rigour for a value-laden content in constitutional adjudication. However, its application in this context, far from involving an exchange of practical arguments coming from competing worldviews, resembles an instance of republican inculcation that state institutions impose on deviant minorities. Proportionality and its fundamental rights baggage have been reinvented by French public lawyers. Their dynamic was contained within the discursive structures of domestic public law. The decline of proportionality in this context is itself corollary to French public lawyers' disenchantment with fundamental rights and to their loss of faith in the possibility for objective or scientific value-choices. More generally, the use of proportionality language has followed and furthered the long-existing quest for demystification that inspires the evolution of French public law. The use of proportionality resonates French public lawyers' view of the relationship

[1199] Pierre Delvolvé, "Droits subjectifs contre interdit législatif," *RFDA*, 2016, 754; Louis Dutheillet de Lamothe and Guillaume Odinet, "Contrôle de conventionnalité : in concreto veritas ?," *AJDA*, 2016, 1398.

[1200] Denys de Béchillon, "Observations sur le contrôle de proportionnalité," *La Semaine Juridique*, Regards d'universitaires sur la réforme de la Cour de cassation – conférence débat 24 novembre 2015, supplément au no 1-2 (2016): 29.

[1201] Mireille Delmas-Marty, "De l'état d'urgence au despotisme doux," *Libération*, 16 July 2017.

between objective factual knowledge and legal technique. It expresses a belief in, and simultaneously a continuous effort to transcend, a distinction that is fundamental for French "Cartesian spirits": the distinction between *science* and *doctrine*, between descriptive and prescriptive legal reasoning, between *être* and *devoir être*.

CHAPTER 5
Searching for an English public law

Proportionality and the fundamental rights shift. Diametrically opposed to the French lawyerly obsession with scientific knowledge, it is said that once an English judge thanked God that the law of England was not a science.[1202] We will see that the traditional English aversion to science has been a factor both for the initial rejection and for the subsequent success of proportionality in this context.

The spread of proportionality in English public law fits quite well with the descriptions in the Alexyan legacy. Proportionality, long rejected by the formalist and insular Diceyan orthodoxy, has now been adopted under the HRA and has acquired a pervasive dynamic. As a prong-structured head of judicial reasoning, it engineers important constitutional transformations. Most importantly, its application is combined with the importation of a fundamental rights baggage. Indeed, the HRA cannot be seen as a simple "gateway" to the application of Convention rights and proportionality in the domestic sphere. Ten years after its adoption, the relevant litigation represented almost half of the cases brought before the supreme English jurisdictions,[1203] a number that is likely to have increased since. The Act affects the whole of English public law, from procedural issues of evidence to the perception of the constitutional role of courts and parliamentary sovereignty. Mainstream scholars have used constitutional language to describe the Act and its application in English law. For example, there is consensus in scholarship that the HRA constitutes a bill of rights.[1204] Paul Craig observes that through section 3 the HRA "encapsulates a "softer" form of constitutional review".[1205] Aileen Kavanagh stresses the "constitutional" powers that the statute confers to courts and goes further to suggest that, even though the HRA is not formally entrenched, it constitutes higher-order law, since its amendment or repeal is legally and politically difficult.[1206] Jeffrey Jowell too talks about the HRA as a "higher-order framework",[1207] while others talk about the "constitutionalisation" of administrative law.[1208]

[1202] Morris Cohen, "Law and Scientific Method," in *Jurisprudence in Action: A Pleader's Anthology* (London: Sweet & Maxwell, 1953), 115, cited by Patrick Atiyah, *Pragmatism and Theory in English Law* (London: Sweet & Maxwell, 1987), 4, note 7.

[1203] Thomas Poole and Sangeeta Shah, "The Impact of the Human Rights Act on the House of Lords," *PL*, 2009, 347.

[1204] See Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: CUP, 2009), 307 f. See also Murray Hunt, "The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession," *Journal of Law and Society* 26, no. 1 (1999): 86.

[1205] See Paul Craig, *Administrative Law*, 8th ed. (London: Sweet & Maxwell, 2016), 18–004 f.

[1206] Kavanagh, *Constitutional Review under the UK Human Rights Act*, 271 f.

[1207] Jeffrey Jowell, "Judicial Deference and Human Rights: A Question of Competence," in *Law and Administration in Europe: Essays in Honour of Carol Harlow*, ed. Paul Craig and Richard Rawlings (Oxford; New York: OUP, 2003), 68.

[1208] David Dyzenhaus, Murray Hunt, and Michael Taggart, "The Principle of Legality in

The use of constitutional language is connected to the paradigmatic change that the HRA brought about. Domestic lawyers talk about the "reinvention" of administrative law as a rights-based system.[1209] Section 2 HRA requires courts to take into account Strasbourg jurisprudence. Thus, English courts have accepted the dynamic interpretation of the Convention's provisions and shown themselves generous when applying Convention rights. In the context of article 8, for example, and contrary to the traditional analytical formalism that animates the common law, they state that "*[p]rivate and family life is a flexible and elastic concept incapable of precise definition*".[1210] The expansion of rights means an increasing number of cases are formulated in rights terms. Contrary to the traditionally restricted grounds of review, through the expanding scope of fundamental rights large domains of public action become justiciable under section 6. Justiciability of administrative action ceases to depend on the available remedies and non-justiciability becomes the exception. English public law scholars suggest the jettisoning of doctrinal barriers in judicial review.[1211] Even more, they advocate the establishment of a general requirement of reason giving and of a culture of justification.[1212]

In the fundamental rights legal order, the reach of law expands. This is the case not only with respect to public authorities, but with respect to society too. Domains until recently left to the private realm are subject to legal ordinances. Courts as public authorities, ought to respect Convention rights when interpreting private legal norms.[1213] Hence, rights are accepted to have an "indirect horizontal effect".[1214] This blurs liberal categories and the traditional primacy of private ordering.[1215] Civil liberties cease to be perceived as independent of law. Thus, a significant shift in the foundations of the legitimacy of the English constitution is observed. Traditionally, the constitution enjoyed legitimacy because it was deemed to be created by society. Inversely, now the "total" constitution acquires a legitimacy of its own and the power to *regulate* society. New concepts, such as privacy, emerge in English private law. Old ones are seen as "empty vessels", in which ECHR principles are "poured".[1216]

Administrative Law: Internationalisation as Constitutionalisation," *Oxford University Commonwealth Law Journal* 1, no. 1 (2001): 5.

[1209] Michael Taggart, "Reinventing Administrative Law," in *Public Law in a Multi-Layered Constitution*, ed. Nicholas Bamforth and Peter Leyland (Oxford; Portland, Or: Hart, 2003), 251.

[1210] *R. v Secretary of State for Health, ex parte Rose* [2003] A.C.D. 6 (HC, Queen's Bench Division, 26 July 2002), 21.

[1211] Trevor Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference,'" *CLJ* 65, no. 3 (2006): 671.

[1212] Taggart, "Reinventing Administrative Law"; Murray Hunt, "Sovereignty's Blight: Why Contemporary. Public Law Needs the Concept of 'Due Deference,'" in *Public Law in a Multi-Layered Constitution*, ed. Nicholas Bamforth and Peter Leyland (Oxford; Portland, Or: Hart, 2003), 337.

[1213] Kavanagh, *Constitutional Review under the UK Human Rights Act*, 144.

[1214] Craig, *Administrative Law*, 2016 at 18-026; *Campbell v MGN Ltd* [2004] UKHL 22 (HL, 6 May 2004); *Douglas v Hello! Ltd* [2005] EWCA Civ 595 (CA, Civil Division, 18 May 2005).

[1215] Hunt, "The Human Rights Act and Legal Culture." 91 f.

[1216] Gavin Phillipson, "Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act," *The Modern Law Review* 66, no. 5 (2003): 731.

The new human rights culture arising in the UK is communitarian rather than libertarian.[1217] This represents a significant change in the ideological foundations of English public law. Taggart observes that a classic tenet of English administrative law has been its individualistic tendency, expressed mainly in judicial restraint.[1218] The HRA brought about a shift in this respect, providing for certain social rights, like the right to education. In some cases it imposes positive obligations on public authorities.[1219] English public law, from a model in which civil liberties are seen as negative, imposing public abstention, moves towards a model of rights as requirements of optimisation. Indeed, an "act" by a public authority under section 6 includes a failure to act as well. Further, the state might be held responsible for the violation of the Convention by a private party.[1220] With the progressive recognition of substantive legitimate expectations, a vehicle for the guarantee of certain social benefits and *acquis* is created as well. Indeed, legitimate expectations will often concern a benefit or commodity, which has been withdrawn due to a change of policy. Rights are not "trumps" as Dworkin advocated. They are qualified and come along with duties, allowing for public interference in the private sphere. Traditional liberal categories are replaced by a general quest for synthesis and harmony of conflicting social interests and values in each concrete case. Synthesis guides the application of the HRA and is expressed in the requirement of "*a fair balance (…) struck between the general interests of the community and the requirements of the protection of the individual's right*".[1221]

Proportionality balancing thus becomes a core feature of judicial reasoning and proliferates in English judicial review. It is an overarching head applied in all Convention rights cases, even when they involve unqualified rights.[1222] Its application is a matter of principle and neglects well-established categories and distinctions. As Lord Hope said in *Kebeline,*

> in the hands of the national courts (…) the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality.[1223]

[1217] Hunt, "The Human Rights Act and Legal Culture." 88 f.

[1218] Taggart, "Reinventing Administrative Law."

[1219] *Kay v Lambeth*, [2006] UKHL 10 (HL, 8 March 2006). See however, even before the HRA, Andrew Clapham, *Human Rights in the Private Sphere*, Oxford Monographs in International Law (Oxford; New York: Clarendon Press; OUP, 1993).

[1220] Craig, *Administrative Law*, 2016 at 18-012; see *Rose*, cited above.

[1221] *Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v. The Hon. Vernon J. Symonette M.P. and 7 Others* [2000] UKPC 31 [Privy Council (Bahamas), 26 July 2000], para 62. See also *International Transport Roth GmbH and others v Secretary of State for the Home Department* [2003] Q.B. 728 (CA, Civil Division, 22 February 2002), para 27.

[1222] *Regina v Lambert* [2002] 2 A.C. 545 (HL, 5 July 2001)*, Regina v A (No 2)* [2002] 1 A.C. 45 (HL, 17 May 2001). Note however that Lord Steyn specifies that he applies proportionality at the stage of definition of the scope of the right and not at the stage of assessing the legality of its limitations.

[1223] R *v. Director of Public Prosecutions, ex parte Kebeline and Others* [2000] 2 A.C. 326 (HL, 28 October 1999), 380.

The form and intensity of proportionality review becomes a core issue in academic and judicial debates, since proportionality is a major feature of the constitutionalist shift. Contrary to the "blunt" Wednesbury test,[1224] which "never completely lost its flavour of excessive deference",[1225] it is widely accepted that proportionality leads to more exacting and precise justification of public decisions.[1226]

Judges as fundamental rights protectors. Judges acquire a new role as guarantors of fundamental rights. Legal, and especially judicial decision-making is progressively seen as political. In the writings of human rights enthusiasts, law and politics are no longer mutually exclusive but coexist in a relation of synthesis. Aileen Kavanagh contests the policy/principle distinction proposed by Conor Gearty in HRA adjudication. According to her, courts have always given weight to the political consequences of their decisions. Thus, judicial interpretation cannot be distinguished from law-making.[1227] Murray Hunt also stresses the importance of value-judgments in legal interpretation.[1228] The policy-making role of courts is expressed in the HRA itself. Section 3 recognises the creative aspect of statutory interpretation and section 4 provides for a declaration of incompatibility, addressed to the legislator and allowing for circumvention of the normal legislative procedure for the amendment of the impugned provision. Legal sources are no longer decisive for the attribution of public power. The English constitution is described as "multi-layered": public power is "dispersed and shared between several layers of constitutional actors, all of which profess an identical commitment to a set of values".[1229]

Judges are no longer monitoring public authorities. They are *participating* in the policy-making process. Metaphors describing the relationship between Parliament and the judiciary as a form of "partnership"[1230] or "dialogue"[1231] express this.[1232] The "statement of faith" imposed on the legislator by section 19 HRA ensures the pedagogical effect of case law on public decision-making. The new mission of courts is one of system-building and is very different from their corrective role under the common law orthodoxy. The traditional focus on remedies thus declines. Under section 8, judges enjoy a wide discretion as to the remedies that they will accord to individual applicants. Section 6 excludes the illegality head in relation to administrative action, in case it enforces provisions of primary legislation which cannot be interpreted compatibly with the Convention. This as we have seen is not far from the theory of

[1224] Stephen Sedley, "The Rocks or the Open Sea: Where Is the Human Rights Act Heading?," *Journal of Law and Society* 32, no. 1 (2005): 9.

[1225] Kavanagh, *Constitutional Review under the UK Human Rights Act*, 253.

[1226] Jeffrey Jowell, "Beyond the Rule of Law: Towards Constitutional Judicial Review," *PL*, 2000, 671. Tom Hickman, *Public Law after the Human Rights Act* (Oxford: Hart, 2010), 264 f.

[1227] Kavanagh, *Constitutional Review under the UK Human Rights Act*, 19 f; 185 f; 404 f.

[1228] Hunt, "The Human Rights Act and Legal Culture," 93.

[1229] Hunt, "Sovereignty's Blight: Why Contemporary. Public Law Needs the Concept of 'Due Deference,'" 339.

[1230] Kavanagh, *Constitutional Review under the UK Human Rights Act*, 408.

[1231] Richard Clayton, "Judicial Deference and Democratic Dialogue: The Legitimacy of Judicial Intervention under the Human Rights Act 1998," *PL*, 2004, 33. See also Hickman, *Public Law after the Human Rights Act*, 69 f; 81 f.

[1232] Robert Leckey, *Bills of Rights in the Common Law* (Cambridge: CUP, 2015).

the *loi écran* in the French system. Further, in most cases, the declaration of incompatibility leaves the individual who brought the case before the judge without any remedy at all. In *Nicklinson*, while the court found that English law violated the Convention, it refrained from issuing a declaration of incompatibility, in order to "*give Parliament the opportunity to consider the position without a declaration*", since "*it would be institutionally inappropriate at this juncture*" to do otherwise.[1233]

Proportionality proves very useful to judges in their new fundamental rights mission. The test is explicitly rights-based. First judges identify the right affected by the contested measures and then examine the justification provided by the public authority. Proportionality, as a pronged structure for consequentialist reasoning, also fits well with the policy making function of courts. English public lawyers seem to believe that it succeeds in guiding the judge in rights adjudication.[1234] Its use has helped judges to avoid "political bear-traps".[1235] Especially under the influence of the Joint Committee on Human Rights, proportionality has acquired a pedagogic function and is considered in parliamentary debates.[1236] On the other hand, by accentuating notions of substantive justice and justification, proportionality shifts the focus away from remedies to address the undergirding moral-political reasons for public action.

A legal transplant? Therefore, it seems that proportionality is a transplant in English public law, and a "successful" one. Its form and function much resemble those that the Alexyan legacy ascribes to it. Interestingly, Legrand's objection as to the possibility of legal transplants seems not to apply in this case. English legal culture does not "continue to articulate its moral inquiry according to traditional standards of justification". Instead, proportionality itself is part of a paradigmatic change in the culture that long impeded its reception.

However, the transplant metaphor gives no hints as to the reasons why proportionality had been initially rejected by English lawyers, nor as to the potential of proportionality language in English law. Most importantly, Alan Watson's theory fails to explain the "success" of proportionality in this context. Legal transfers are all but "socially easy" in English law. Indeed, English law is known for its insular tradition, which rejects ideas and principles coming from abroad, especially from Continental Europe. Foreign systems, if studied at all, are typically exposed in contradistinction to the common law and used as counter-examples by domestic authors. Why then, *this* transplant? How did the stakes attached to proportionality by domestic lawyers fit with the expectations of the global proportionality model? The answer to these questions could also give clues as to the possible future evolution of proportionality and its fundamental rights baggage in English public law.

[1233] R *v Ministry of Justice, ex parte Nicklinson and another; R v The Director of Public Prosecutions, ex parte AM; R v The Director of Public Prosecutions, ex parte AM* [2014] UKSC 38 (25 June 2014), para 116.

[1234] Craig, *Administrative Law*, 2016, para 19-026.

[1235] Loughlin, *The British Constitution*, 103.

[1236] See for example the debates on the Counter-Terrorism and Security Act 2015, 13 January 2015, http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/150113-0001.htm#15011360000366.

The meaning of proportionality in English law. In this chapter I argue that proportionality has represented a fusion of substance and form that is strange to the game-like nature of the common law. It has embodied a method of review, and a way of legal thinking more generally, situated in diametrical opposition to Diceyan analytical positivism. Hence, it has always found its obstacle in the principle of parliamentary sovereignty. This principle, and the idealisation of the political process that underpins it, has condemned English law to fragmentation, instrumentalism and formalism. Precisely due to its anti-Diceyan meaning, proportionality has been promoted as a principle that could establish coherence in English administrative law through the recognition of minimum substantive values. By using proportionality language, English lawyers have sought a little bit of myth and ritual in the common law and the judicial process. In this respect, the HRA officialised and enhanced more subtle and progressive cultural transformations. While it led to the proliferation of proportionality and to a fundamental rights shift in English law, it also constrained these evolutions within Parliament's will and thus in a sense demystified them. The spill-over dynamic of proportionality expresses the continuing search for rationalism and myth in the ongoing construction of English public law.

In order to identify the stakes attached to the use of proportionality, its initial rejection is just as important as its later success. Initially, proportionality failed in English public law as an objective unreasonableness test. Its application, echoing some kind of scientific theory *à la française*, was contrary to the economy of the common law in matters of substance (**Section 1**). Instead, proportionality was applied as an autonomous test within the scope of European law. As such, it irritated the basic tenets of the common law tradition and certain fundamental assumptions about the role of courts therein. Its application was strictly constrained within the scope of operation of European substantive rights (**Section 2**). Despite the conceptual fragmentation of proportionality in judicial practice, scholars progressively understood it as a universal idea, a principle coming from Continental law. The promotion of proportionality in legal writings was connected to modernisation rhetoric in English public law and led to the development of a local *doctrine*, similar to the French one (**Section 3**). While proportionality was rejected as a domestic head of judicial review, some instances of *Wednesbury* were perceived as implicit applications of the principle. This indicates that, for English lawyers, at least some of the stakes attached to the use of proportionality had been accomplished (**Section 4**). The incorporation of Convention rights in the domestic sphere engaged the rise of proportionality in English public law. Parliamentary sovereignty seems to be dying (**Section 5**). Institutional considerations and the quest for democratic government survive within the *doctrine*-made concept of deference. In this context, the intensity of substantive review is no longer a matter of legal forms, but a matter of choice left to courts (**Section 6**).

1. The absence of myth: the limited range of a "mathematical" perception of proportionality

The ambiguity of the *Wednesbury* standard. As we saw in Chapter 2, in its first applications in English law, proportionality was a shade of *Wednesbury* unreasonableness. This test had been introduced from 1947 in the famous *Wednesbury* case as an objective, outcome-based test.[1237] As such, it added an exception to the strict distribution of competences between the judiciary and the administration. It was commonly defined as a distinct head from illegality, which encompasses bad faith and irrelevant considerations. Analytically however, the distinction was not so easy to make. The ambiguity was already inherent in Lord Greene's dicta, according to which, judges intervene when a decision is "*so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another*".[1238] Lord Greene famously used the example of a school teacher fired due to her having red hair, a case that can be classified under the irrelevant considerations head.[1239] English public lawyers have been content to affirm that the irrationality and the illegality heads "overlap".[1240] Thus, under a commonly accepted account, *Wednesbury* unreasonableness has two senses: the first is the "umbrella sense", which corresponds to a review of the intent of the primary decision-maker and regroups flaws that are sanctioned under other heads of review; the second is the "substantive sense", which sanctions unacceptable outcomes.[1241]

However, in his 1986 study on French substantive review, Bell observed that, contrary to what was the case in France, substantive review was almost never exercised by English courts, and that most of the examples cited by scholars in this respect were hypothetical. This made the author suspect that *Wednesbury* unreasonableness "simply create[d] a presumption of unidentified error of law".[1242] Indeed, the extremeness of the substantive *Wednesbury* standard was abnormal, almost mythical, to the point that English lawyers doubted its actual existence. Lord Diplock in *GCHQ* said that the irrationality head only applied when "*a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it*".[1243] In his extra-legal writings Laws talked about "a crude duty not to emulate brute beasts that have no understanding".[1244]

[1237] See already Paul Craig, *Administrative Law*, 2nd ed. (London: Sweet & Maxwell, 1989), 281 f.; esp. 286.

[1238] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA, 7 November 1947), *per* Lord Greene. The ambiguity persists: see Craig, *Administrative Law*, 2016, para 19-002.

[1239] *Wednesbury*, cited above, *per* Lord Greene. On the unreasonableness and irrelevant considerations overlap, see Graham Taylor, "Judicial Review of Improper Purposes and Irrelevant Considerations," *CLJ* 35, no. 2 (1976): 275–76.

[1240] *Wednesbury*, cited above at 229, Taylor, 275–76; Craig, *Administrative Law*, 2016, para 17-002.

[1241] Craig, para 17-002.

[1242] John Bell, "The Expansion of Judicial Review over Discretionary Powers in France," *PL*, 1986, esp. para 118.

[1243] *Council of Civil Service Unions v Minister for the Civil Service (GCHQ)* [1984] 3 All ER 935 (HL, 22 November 1984) at 950.

[1244] John Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?," *Commonwealth Law Bulletin* 18 (1992): 1392.

Proportionality language accentuated the focus of *Wednesbury* on outcomes, while it preserved an ambiguous criticism of the intents of the reviewed authorities. In *Hook,* having characterised the sanction imposed on the claimant as disproportionate, Lord Denning concluded:

> the Barnsley Corporation, in all good faith but erroneously, have taken away this man's licence to trade without justification and without having that due inquiry which the law requires.[1245]

The judge took into account the impacts of the decision and talked about an "error" committed by the reviewed authority. Still, he criticised the justification advanced by the Barnsley Corporation and the failure to take into account the claimant's situation. Similarly, in *Assegai*, Woolf LJ considered the "*bias issue*" separately from unreasonableness and proportionality, which only concerned the substance of the measures at stake, their "*width*".[1246] Still, the judge stated that he would interfere under the unreasonableness standard, only if he found the measures to be "*capricious*" or "*perverse*".[1247]

Preserving the economy of the common law. The mystery surrounding the substantive standard of review is connected to a particular characteristic of the common law, that is, the absence of substantive values. In English legal tradition, the political process and parliamentary sovereignty were traditionally deemed sufficient to protect basic social values. The common law long did not contain *principes généraux du droit* or other norms, by reference to which public action could be evaluated in substance. Nor was proportionality as a free-standing principle in domestic law.[1248] In the common law, judges did not pronounce on matters of principle. They preferred reasoning by precedent and avoided far-reaching conclusions. They were imagined as "political, economic, and social eunuchs",[1249] analytically applying the law to adversarial procedures. John Allison calls English courts' dislike for abstractions of principle the "economy of the common law".[1250] *Wednesbury* sanctioned only manifest asymmetry and did not involve the judge in difficult policy questions. Its application spared the judge from the obligation to provide any justification at all. As Paul Craig observes, the extremeness of the standard preserved the commonly accepted constitutional role of English courts.[1251] It preserved the distinction between review and appeal, the formal rule of law and parliamentary sovereignty.

[1245] *R. v Barnsley MBC, ex parte Hook* [1976] 1 W.L.R. 1052 (CA, Civil Division, 20 February 1976), 1058.

[1246] Ibid.

[1247] *R v London Borough of Brent, ex parte Assegai* [1987] 151 LG Rev 891 (CA, Civil Division, 11 June 1987), *per* Woolf LJ.

[1248] See Part I, Chapter 2(1), and *GCHQ*, cited above, at 950.

[1249] John Griffith, *The Politics of the Judiciary*, 2nd ed., Fontana Originals (London: Fontana, 1981), 290.

[1250] See John Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge: CUP, 2007), 123 f. It is only Parliament that can define the values that public action should pursue and Parliament's will is enforced through the illegality standard.

[1251] Craig, *Administrative Law*, 2016, para 19-002.

As a shade of unreasonableness then, proportionality was deprived of any radical function of fundamental rights optimisation. In fact, no rights were involved in its application. Besides, as we saw, English public law did not comprise public law rights at all. Paul Craig observes that, according to constitutional orthodoxy, "talk of fundamental rights within our system is simply a misnomer: what we have are residual liberties".[1252] English public lawyers seem to share a belief that liberties exist independently of the law. To render them positive would be to affirm that Parliament has the power to take them away. In conformity with the precepts of classical liberalism, law was traditionally seen as a commandment and public action as an intervention in society, which provokes distrust. Traditionally there was no concept of discretionary authority, which for Albert Venn Dicey meant arbitrary power. Following the Whig narrative that dominated English legal analysis until the late 19th century, civil liberties are not the result of the constitution but its basis. In this line of thought, the English free constitution is superior to other systems and has guaranteed individual liberty better than any other.[1253] Again, it is the political checks and balances that are deemed to accomplish this function. Hence, the study of constitutional law is traditionally descriptive and focuses on institutional features.

In the absence of substantive values or rights, the function of *Wednesbury*, and of proportionality as one of its connotations, was quite similar to the manifest error in France. The test was concerned with the state of mind of the primary decision-maker: either it scrutinised the grounds for administrative action, or it was an "objective substitute for the abuse of power".[1254] Bell too proposed understanding the *Wednesbury* test as similar to the French instances of "minimum control".[1255] Still, the reach of *Wednesbury* was more limited than that of the manifest error, since it usually did not involve the judge in questions of policy. It is indicative that, as an instance of English review similar to the manifest error, Bell mentioned one of the most famous cases of judicial activism in English law, the *Bromley* case.[1256] In this case, the Labour-led Greater London Council (GLC) had imposed a reduction on transport fares, thus implementing its election manifesto's commitment to a fair fares policy. The cost of this reduction would be recovered through an extra tax imposed on physical and legal persons based in London. The Tory-led Borough of Bromley attacked the GLC's decision as *ultra vires* and the House of Lords accepted its arguments. According to the judges, the 1969 Transport Act imposed on the GLC to provide "*integrated, efficient and economic transport facilities and services for Greater London*". This, for the majority of the Lords, meant that it was to be run "*on business principles*" and thus the GLC could not

[1252] Craig, para 17-016. The author adds that "this may represent the traditional position. It ceased, however, to accurately reflect the reality of the common law jurisprudence."

[1253] Loughlin, *The British Constitution*, 27 f.; 87 f.; Atiyah, *Pragmatism and Theory in English Law*, 23.

[1254] Valérie Goesel-Le Bihan, "Réflexion iconoclaste sur le contrôle de proportionnalité exercé par le Conseil constitutionnel," *RFDC*, 1997, 237.

[1255] Bell, "The Expansion of Judicial Review over Discretionary Powers in France" at 118.

[1256] *Bromley London Borough Council v Greater London Council* [1982] All ER 153 (HL, 17 December 1981). On this case, see Griffith, *The Politics of the Judiciary*, 123 f.

promote social objectives through its fares policy.[1257] Thus, the House of Lords held that the GLC had committed an error of law.

A failed English theory of the *bilan* and proportionality. It is the same case that Bell mentioned as an example of the application of proportionality in English public law. Bell used proportionality in its commonly shared sense at the time in French law: a method for judicial balancing of the advantages and disadvantages bearing on the public utility of administrative operations.[1258] In *Bromley*, apart from an error of law, the Law Lords had also sanctioned the unlawful exercise of discretionary powers by the local authority. According to the court, the GLC had breached its fiduciary duty towards ratepayers, by imposing on them the charge of recovering the deficit that its fair fares policy created. Interestingly, Lord Diplock had actually used the term proportion several times in his opinion. In his words, "*the G.L.C. has a discretion as to the proportions in which that total financial burden should be allocated between passengers and the ratepayers*".[1259] However, he found that the GLC's decision was "*clearly a thriftless use of monies obtained by the G.L.C. from the ratepayers and a deliberate failure to deploy to the best advantage the full financial resources available to it*".[1260] In order to reach this conclusion, the judge followed a line of reasoning that is indeed similar to an application of the *théorie du bilan,* involving calculation of the financial disadvantages of the decision and their allocation.

A whole theory of judicial balancing and proportionality could have emerged from *Bromley*, as it did from *Ville Nouvelle Est* in France. Instead, the case is known as exceptional and contentious. Griffith characterised it as "blatantly party political".[1261] In contrast to their French colleagues, English lawyers are not enchanted by allegedly objective factual evaluations, even when they have a financial or mathematical nature. Thus, they usually avoid reference to "cost-benefit analysis".[1262] Mainstream public lawyers are aware of the fact that cost-benefit analysis "has an enormous appetite for data that is disputable, unknown, and, sometimes, unknowable".[1263] Suspicion towards judicial evaluations makes the taboo of merits review intelligible. As opposed to the French notion of *opportunité*, concerned with the state of mind of the primary decision-maker at the time the reviewed decision was taken, merits consist in the evaluation of the outcomes of administrative action at the time of judicial scrutiny. Hence, while the taboo of *opportunité* excludes a criticism of the intentions of public authorities, the merits taboo excludes judicial policy-making. The use of proportionality language has not concealed the subjectivity of factual evaluations in judicial opinions. English

[1257] See *Bromley*, cited above, at 845, *per* Lord Scarman.

[1258] Bell, "The Expansion of Judicial Review over Discretionary Powers in France," 113.

[1259] *Bromley* at 830, *per* Lord Diplock.

[1260] Ibid.

[1261] John Griffith, "The Brave New World of Sir John Laws," *The Modern Law Review* 63, no. 2 (2000): 172.

[1262] Hickman, *Public Law after the Human Rights Act*, 190 f.

[1263] Jerry Machaw, *Due Process in the Administrative State* (New Haven: Yale University Press, 1985), 115, cited by Craig, *Administrative Law*, 2016 at 12-020.

lawyers and judges have always been aware of the important constitutional shift that the adoption of proportionality as a domestic principle entailed.

More generally, English lawyers traditionally share an aversion to theory and abstraction.[1264] Until recently, scholarship has mainly hewed to the analysis of the concrete concepts used in formal legal sources. Dicey established a formalist legacy, in which the role of academics is to expose, explain and systematise law as it is. Legal categories are based on the practice of courts and lawyers do not search for underlying rationalising structures. Common lawyers are typically concerned with heads and not methods, and these heads are clear-cut: an act can be illegal, unfair or legal. In English law, public authorities are not idealised like in Continental traditions. Instead, they are treated similarly to private actors. Judges do not draw on scientific objectivity and rationalisation to impose their own views on primary decision-makers. They are not searching for a transcendent or scientific truth. Instead, they are compared to referees imposing the rules of a game.[1265] The image of a game itself expresses the traditional demystification of the judicial process in the common law. Claude Lévi-Strauss explains that the difference between game and ritual lies precisely in the fusion of substance and form that the latter implies: while both games and rites are "played" according to specific rules, a ritual is like a "favoured instance of a game, remembered from among the possible ones because it is the only one which results in a particular type of equilibrium between the two sides".[1266]

Proportionality then did not capture the English lawyerly imagination. As a scientific theory imported from France, it failed in justifying cases like *Bromley* and the extension of judicial powers that they entailed. For a long time the only field in which the mathematical connotations of proportionality persisted was that of administrative sanctions, where judges sometimes proceeded to a demanding proportionality review. This is illustrated in *Uchendu*, a case concerning imprisonment for debt. Albeit claiming that proportionality was nothing than an aspect of *Wednesbury* irrationality, Laws J held:

> the more serious the case, whether in terms of the amount outstanding or in terms of the degree of culpability or blame to be attached to the ratepayer for his non-payment, the closer will any period imposed approach the maximum. The principle of proportionality is as important for the court to consider in such a case as it is in a case of punishment properly so called.[1267]

[1264] Atiyah, *Pragmatism and Theory in English Law*, 3 f.

[1265] Antoine Garapon refers to the belief in a transcendent truth in the French system, in "French Legal Culture and the Shock of 'Globalization,'" *Social and Legal Studies* 4, no. Special issue on Legal culture, Diversity and Globalization (1995): 495 f. John Allison also makes this point in *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Oxford; New York: OUP, 1996), 216 f.

[1266] Claude Lévi-Strauss, *The Savage Mind* (Chicago: University of Chicago Press, 1966), 30. The author gives the example of the Guahuku-Gama, who played football (a game), but who played as many matches as necessary for the opposite teams to reach the same score (they played it as a rite).

[1267] *R v Highbury Corner Magistrates' Court, ex parte Uchendu*, 158 JP 409 (HC, Queen's Bench Division, 12 January 1994). See also *R v Eastbourne Magistrates' Court ex parte Hall* (HC, Queen's Bench)

Still, arguably the searching application of proportionality in this field did not so much result from a belief in its objective nature. Rather, it was connected to the need to adapt the common law to the European Convention. Indeed, for some time the harmonisation of domestic law to European precepts was the sole function of proportionality in the English context.

2. An irritant: constrained by the analytical tradition

A parasite from European law. With the ECA 1972, proportionality was established as an autonomous head of review. In this way, it acquired a new meaning mainly by reference to the relevant ECJ case law and in some cases it implied review of the merits of public decisions. Its application sometimes raised complex fact-finding issues, with which English judges were not accustomed to dealing. The irritating function of proportionality was a corollary of the important constitutional changes brought about by the ECA 1972, and especially of the recognition of substantive rights. For the first time, Parliament saw the extent of its sovereignty limited and the English legal order opened up to receive rules, rights and principles contained in EC Treaties, secondary EC law or developed in the case law of the Court of Justice. Within the scope of the ECA, courts did not implement the will of Parliament, but that of Community institutions. Hence, the traditional account of parliamentary sovereignty as absolute and uncontested was no longer adapted to describing judicial practice. In an influential analysis, William Wade used Herbert Hart's legal theory to talk about a judicial revolution. Under Wade's account, *Factortame* and other cases involving dissaplication of legislation posterior in time to the ECA indicated that courts had decided not to obey legal statutes. Wade argued that courts had departed from the principle of parliamentary sovereignty and had introduced a new "rule of recognition" in English law.[1268]

Others however, among which Herbert Hart himself, objected to the anodyne use of the term revolution. Courts did not appear to be perpetrating any revolution. Parliamentary sovereignty remained a fundamental rule in English law, and is still understood as such by courts, practitioners and scholars.[1269] The supremacy of EC law was accepted only *because and insofar as* Parliament itself had wanted it. This meant that if Parliament wanted to depart from EC law, it should explicitly and precisely state so. In other words, courts only imposed "rules of manner and form" on Parliament and did not promote substantive values.[1270] What John Allison calls "the economy of the common law" was preserved: courts did not have to decide on fundamental

CO/2026/92.

[1268] William Wade, "Sovereignty - Revolution or Evolution?," *LQR* 112 (1996): 568. The author cites Herbert Hart, *The Concept of Law* (Oxford: OUP, 1961).

[1269] Allison, *The English Historical Constitution*, 110 f.

[1270] This represented "the new view" of parliamentary supremacy, discussed by John Allison in 107–10.

constitutional issues of sovereignty.[1271] EC law rules and substantive standards came into play only in the limited scope of the EC Treaties. Proportionality was also perceived strictly as an EC law head. Rather than a transplant, it was a parasite on the domestic judicial review system, using its institutions and mechanisms, but not much mixing with its concepts and doctrines. Interestingly, the distinction of proportionality from domestic standards of review, like other instances of analytical formalism, preserved parliamentary sovereignty and the traditional *ultra vires* account of judicial review.[1272]

Similar observations apply for the application of proportionality as an ECHR principle. In this field, proportionality balancing was again connected to the operation of substantive standards coming from abroad, that is, rights guaranteed by the European Convention. Hence, it was applied only *insofar as* these rights were taken into account in judicial reasoning. This was the case for example in the "balance of convenience" performed in interlocutory injunctions proceedings. Courts also made recourse to the ECHR to clarify ambiguities in the common law. However, proportionality was rejected as a head of domestic judicial review. While EC law rights were part of domestic law through the "gateway" of the ECA, Convention rights did not constitute standards of legality for the breach of which administrative action could be impugned.[1273] In the dualist English system, applying proportionality would be as if judges incorporated the Convention into the domestic sphere "*by the back door*".[1274] Again, it was parliamentary sovereignty that was at stake. Therefore, proportionality's conceptual autonomy was long embedded in its parasitic function: it served the adjudication of substantive standards defined in *other* legal systems and was applied only insofar as these standards were at play.

The containment of proportionality. The irritating operation of proportionality was carefully contained, despite certain judges' efforts to the contrary. In *Hamble Fisheries*, Sedley J declared that the domestic law of legitimate expectations should align itself with the Community legal order, when applied in the UK's implementation of the common agricultural policy.[1275] Then, Sedley J went on to state that,

> legitimacy is itself a relative concept, to be gauged proportionately to the legal and policy implications of the expectation. This, no doubt, is why it has proved easier to establish a legitimate expectation that an applicant will be listened to than that a particular outcome will be arrived at by the

---

[1271] Allison, 107.

[1272] Allison, 123 f., citing Carol Harlow, "Disposing of Dicey: From Legal Autonomy to Constitutional Discourse?," *Political Studies* 48 (2000): 356.

[1273] Loughlin, *The British Constitution*, 36 f. See *Malone v Commissioner of Police of the Metropolis (No.2)* [1979] 1 Ch 344 (HC, Chancery Division, 28 February 1979); ECtHR, *Malone v The UK*, 2 August 1984, no. 8691/79 [1984] ECHR 10.

[1274] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 A.C. 696 (HL, 7 February 1991) at 762, *per* Lord Ackner. See *supra*, Part I, Chapter 2.1.iv.

[1275] *R v Ministry of Agriculture, Fisheries and Food, ex parte Hamble Fisheries* [1995] 1 C.M.L.R. 533 (HC, Queen's Bench Division, 3 November 1994).

> decision maker. But the same principle of fairness in my judgment governs both situations.[1276]

In this way, the judge attempted to introduce a new proportionality test in the assessment of the legitimacy of citizens' substantive expectations towards public authorities. This would render proportionality a criterion and a reason for the spill-over of EC law rights in domestic law. However, Sedley J's decision was characterised as "*heresy*" and was overruled by the Court of Appeal in *Hargreaves*.[1277] In the words of Hirst LJ, "*[o]n matters of substance (as contrasted with procedure) Wednesbury provides the correct test*".[1278] The judges emphatically denied the extension of available remedies by relying on fairness considerations, on law's internal logic and consistency. *Wednesbury* and the economy of principle that it implied was the only standard that fitted the casuistic approach of the common law.[1279]

As an ECHR principle, the application of proportionality was also rejected when the applicable common law principles needed no clarification. This was the case even when the reasonableness standard applied. As we saw, reasonableness exceeded the confines of public law. The promoters of proportionality thus encouraged proportionality's spread in private law cases.[1280] However, judges emphatically rejected horizontal application of proportionality balancing, as it would compromise party autonomy considerably. They refused to impose a proportionality requirement in cases that included no clear asymmetry between the parties of the dispute.[1281] *Allied Dunbar* concerned the validity of a covenant in restraint of trade. The promisor objected to the application of the clause on the basis of its disproportionate character. Millett J rejected his claim, by declaring that "*[t]he concept of proportionality as a test of the validity of a covenant in restraint of trade, is novel and dangerous and requires the Court to perform an impossible balancing act*".[1282] The judge considered that contractual restrictions should be left to negotiation between the parties. In his words, "*the price is the best means of adjusting the otherwise disproportionate advantages and disadvantages of the other terms of the contract*".[1283] In Millet J's view, the application of proportionality in this field would entail the "*revival of an obsolete and discredited doctrine*".[1284]

Convention rights as policy-making factors. The strict containment of proportionality's scope indicates that Convention rights had not yet acquired legal

---

[1276] Ibid, 544-5.

[1277] *R v Secretary of State for the Home Department and Another, ex parte Hargreaves* [1997] 1 W.L.R. 906 (CA, Civil Division, 20 November 1996).

[1278] Ibid, 917.

[1279] Allison, *A Continental Distinction in the Common Law*, 109 f.

[1280] Jeffrey Jowell and Anthony Lester, "Proportionality: Neither Novel nor Dangerous," in *New Directions in Judicial Review*, ed. Jeffrey Jowell and Dawn Oliver, Current Legal Problems Series (London: Stevens, 1988), 66; Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?," 1388.

[1281] *Express Newspapers Ltd v MacShane and another* [1980] 1 All ER 65 (HL, 13 December 1979), 72 f.

[1282] *Allied Dunbar (Frank Weisinger) Ltd v Frank Weisinger* [1988] I.R.L.R. 60 (HC, Queen's Bench Division, 1 January 1988).

[1283] Ibid.

[1284] Ibid.

status in the common law. Certainly, ECHR influence introduced fundamental rights considerations into pre-existing techniques and precedents. However, taking into account the Convention did not necessarily presuppose that the rights entrenched therein enjoyed *legal* status in the domestic sphere. Interestingly, in the *Spycatcher* litigation, the freedom of speech was not qualified as a right but as an aspect of the public interest. Proportionality itself was a method for defining the public interest and not for balancing constitutional rights. In Sir Donaldson's opinion it designated a kind of judicial reasoning that involved the balancing of "*countervailing public interests or, perhaps more accurately, those countervailing aspects of a single public interest*".[1285] The only right recognised in this decision was the common law right to confidentiality, irrespective of whether its beneficiary was the state or individual citizens.[1286] Besides, at the time at least, the idea that the common law and parliamentary sovereignty sufficiently protected fundamental rights persisted and permeated in judicial opinions. In this respect, Lord Goff's dictum in the last English *Spycatcher* case is illustrative:

> I wish to observe that I can see no inconsistency between English law on this subject and article 10 of the European Convention on Human Rights. This is scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world.[1287]

Convention rights were taken into account, among other circumstances of the case, as policy-making factors. Thus, their application was "trumped" in the presence of clear legal rules and common law principles, even when these rules and principles were no longer adapted to social reality or constituted a violation of the international obligations of the UK. Indeed, under the Diceyan tradition, law is seen as a commandment and law's autonomy and authority are crucial. Contextual accounts of law, embedding it in evolutions of the surrounding circumstances, similar to the ones we find in the French context, are rejected as denying legal autonomy, both in theory and practice.[1288] This was illustrated in the 1987 *Spycatcher* case.[1289] As we saw, after the publication of the book in the United States, the newspapers sought to have the injunctions prohibiting publication discharged. Their argument was that the book was already available to whoever wanted to buy it in the UK, and thus the purpose of the proceedings was lost. Sir Browne-Wilkinson did not apply proportionality himself, but

---

[1285] *Attorney General v Guardian Newspapers Ltd and Others, Attorney General v The Observer Ltd. and Others* [1989] 2 F.S.R. 3 (interlocutory injunction, HC, Chancery Division, 11 July 1986 – CA, 25 July 1986), 22.

[1286] See for example *Attorney-General v Guardian Newspapers Ltd. and Others (No. 2); Attorney-General v Observer Ltd. and Others; Attorney-General v Times Newspapers Ltd. and Another* [1988] 2 W.L.R. 805 (CA, Civil Division, 10 February 1988).

[1287] *Attorney General v Guardian Newspapers Ltd (No 2); Attorney General v The Observer Ltd and Others* [1990] 1 AC 109 (HL, 13 October 1988), *per* Lord Goff. See also *Derbyshire County Council v Times Newspapers Ltd. and Others* [1992] Q.B. 770 (CA, Civil Division, 19 February 1992).

[1288] Dicey famously criticised the historical method in legal analysis. See Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 9th ed. (London: Macmillan and Co, 1939), preface to the first edition. On this point, see Mark Walters, "Dicey on Writing the Law of the Constitution," *Oxford Journal of Legal Studies* 32, no. 1 (2012): 22.

[1289] *Attorney General v Guardian Newspapers Ltd and others; and related appeals* [1987] 1 W.L.R. 1248.

referred to Sir Donaldson's application of the principle in the previous *Spycatcher* case. He finally accepted the claimants' submissions by stating:

> I think the public interest requires that we have a legal system and courts which command public respect. It is frequently said that the law is an ass. I, of course, do not agree. But there is a limit to what can be achieved by orders of the court. If the courts were to make orders manifestly incapable of achieving their avowed purpose, such as to prevent the dissemination of information which is already disseminated, the law would to my mind indeed be an ass.[1290]

In this way the judge, following consequentialist reasoning, introduced an exception to a clearly defined legal rule, namely the prohibition from disseminating information obtained through breach of duty by a public official. However, Sir Browne-Wilkinson's decision was reversed by the Court of Appeal. In the appellate judges' decision law's formality and authority excluded the consideration of policy-making factors under proportionality balancing or any other type of consequentialist reasoning. Russell LJ stressed that

> The 'purpose' of the proceedings cannot be the preservation of secrecy in the British security service: that has been irretrievably lost. Nor can it be, save to a very limited extent, the restoration of confidence amongst other organisations. But, in my judgment, the law and the courts must still continue to strive, and must give all the appearances of continuing to strive, to deter the commercial dissemination of the contents of Spycatcher when every word written in the book is prima facie in breach of duty.[1291]

In other words, even though the injunctions did not serve any public interest, law should continue to be and to appear as rigid. Law's formality was also decisive in Lord Ackner's dicta, who responded to the proportionality argument of the newspapers by citing another judge 60 years before him:

> 'Amid the shifting sands and cross-currents of public life the law is like a great rock on which men may set their feet and be safe.'
>
> For the word 'rock' the appellants would have your Lordships now read 'jellyfish'![1292]

Balancing as policy-making. Rights being policy-making factors, it was only exceptionally that judges could consider them. It was the judges' role as *primary decision-makers* that allowed for such consideration. It was judges themselves that had decided the integration of Convention rights standards in their reasoning, both in the "balance

---

[1290] Ibid at 1269, *per* Sir Browne-Wilkinson V-C.

[1291] Ibid at 1281, *per* Russell LJ.

[1292] Ibid at 1306, *per* Lord Ackner, citing John Sankey, "The Principles and Practice of the Law Today" (University of London, March 14, 1928).

of convenience" and in the clarification of common law principles. In other words, what made possible the consideration of rights as aspects of the public interest was the fact that, in such cases, judges were competent to define this interest themselves. Exceptionally, in the field of interlocutory injunctions and the clarification of the common law, judges enjoyed a policy-making function. This is also what allowed for judicial balancing. Like in other common law jurisdictions, in English public law balancing has traditionally been perceived as a type of reasoning characteristic of policy-making, liberated from a strict application of legal forms. Thus, it long remained exceptional in judicial reasoning. As Lord Diplock noted in *GCHQ*, judges "*by their upbringing and experience are ill-qualified*" to perform balancing exercises.[1293]

This has been especially the case in judicial review. In this field, fundamental rights protection is traditionally a policy responsibility of the primary decision-maker. In the absence of standards of substantive legality in judicial review, judges could only sanction self-evident errors insofar as the merits of public decisions were concerned. Balancing was not an option; the only place for it was that of an equity method.[1294] This is connected to the limited fact-finding capacities of courts in judicial review procedures, which have an adversarial character. Thus, again, the application of proportionality in judicial review was long rejected as contrary to one of the most fundamental distinctions in English public law: that between review and appeal.[1295] In *Brind*, Lord Lowry, echoing Lord Diplock's dicta in *GCHQ*, pointed out that this was "*not a cause for regret*".[1296] Courts do not enjoy the democratic legitimacy of the other branches of government and are not trained or used to balancing exercises. Most importantly, judicial value-judgments on the merits of administrative decisions would endanger legal certainty and were likely to cause a huge amount of litigation before courts.[1297] Therefore proportionality balancing would not lead to better substantive policy outcomes either.

Irritating analytical rigour. Legal certainty is important in the common law, where judges enjoy norm-making powers and at the same time law is seen as the rules of a game. The choice of a particular legal form, (procedure, head of review, standard) is itself rigid and leads to well-defined patterns of reasoning, what English lawyers call *analysis*. Thus, we talk of *rights analysis, duty analysis* etc. In contrast to French legal thought, in the common law tradition, distinction between the different structures of legal reasoning is important, because these structures serve specific purposes and lead to specific remedies. The use of legal forms is instrumental, and coherence among different types of reasoning is not necessarily internal to the legal system, but can be established by recourse to extra-legal, pragmatic considerations. Judges often explain why they chose this or that type of reasoning, and why, without "*regret*", they rejected others as "*not appropriate*". Clarity and transparency are major assets of judicial opinions. They ensure the legitimacy of judges as an impartial and fair referees. English public

[1293] *GCHQ*, cited above, at 951, *per* Lord Diplock.
[1294] See Craig, *Administrative Law*, 2016 at 12-001 f.
[1295] See *supra*, Part I, Chapter 2.1.iv.
[1296] *Brind*, cited above, at 20.
[1297] Ibid.

lawyers focus more on heads than on methods of review, because the choice of this or the other head determines the universe of different possibilities for legal argumentation in the game of the judicial process.

The variable application of legal forms is completely strange to the English tradition of judicial review. Hence, even confined to the field of European law, proportionality provoked confusion among English public lawyers. This is perfectly illustrated in *Adams*.[1298] Gerry Adams, leader of Sinn Féin and occasionally member of the Westminster Parliament, was invited by an MP to express his views in the House of Commons. The Secretary of State, when informed about the invitation, issued an exclusion order, under the Provision of Terrorism Act 1989, prohibiting Adams from entering the UK for three years. The Secretary of State invoked the fact that Adams was participating in allegedly terrorist acts in Northern Ireland. Adams challenged the exclusion. Among other arguments, he claimed that the order was contrary to article 8 of the Maastricht Treaty, establishing the free movement of European citizens within the member states; that the Secretary of State had not provided substantial justification for this act; and that the length of the exclusion was disproportionate to the length and purpose of his visit.

Steyn J, at the time in the Queen's Bench Division, referred a question on proportionality to the Court of Justice. As he submitted,

> We take into account that there is no decision of the Court of Justice, which has considered the proportionality principle in a case involving freedom of speech and national security. More importantly, although the proportionality principle is part of our law through Community law, it seems to us that the explanations of the principle are not in harmony. We were referred to Johnston v Chief Constable of the Royal Ulster Constabulary Case 222/84 [1986] 3 All ER 135, [1986] ECR 1651. This decision has not removed our doubts. While acknowledging that we are raising a doubt about the precise scope of a cardinal principle of Community law, we consider that it is appropriate in this case that the ambit of the principle ought to be elucidated by a reference to the Court of Justice. As English judges it seems to us that explanations of the principle span a spectrum of views from a narrow doctrine not essentially very different from Wednesbury unreasonableness to a de novo review of the administrative decision. On the other hand, there may be better explanations placing the principle between these extremes. Even in respect of proportionality there may be a margin of appreciation. And it is not self-evident that the principle of proportionality may not need to be

[1298] *R v Secretary of State for the Home Department, ex parte Adams* [1995] All ER (EC) 177 (HC, Queen's Bench Division, 26 July 1994).

> adapted to the special circumstances of a case involving a tension between freedom of speech and national security.[1299]

The reference would have led to interesting answers not only as to the nature of proportionality review but also as to the scope and actual meaning of article 8 of the Maastricht Treaty at the time.[1300] However, the Luxembourg court did not have the occasion to respond, since the reference was withdrawn along with the withdrawal of the exclusion order in question.

One thing is sure; proportionality review was a "peculiar technology"[1301] for English judges. Its outcome-based nature irritated the economy of the common law and the traditional suspicion towards allegedly objective factual evaluations. Its consequentialist underpinnings irritated law's formalism and authority. Its variable intensity irritated the instrumental nature and the analytical rigour of judicial reasoning. Proportionality postulated rationalist principles underlying the fragmented common law precedents. It implied a faith in the internal coherence of law and in the judge that was completely strange to analytical positivism. It is not surprising that the promotion of proportionality as a European transfer went hand in hand with the contestation of the Diceyan tradition's basic tenets.

3. A transplant: the emergence of an English public law doctrine à la française

Proportionality as a Continental European idea. Contrary to the unitary *Wednesbury* unreasonableness standard, a crucial characteristic of proportionality at its early stages of development in English law was its conceptual fragmentation. The irritating effect of proportionality made it so that, in judicial practice, there was a clear distinction between the EC law proportionality test and the reasonableness-like standard applied in domestic cases. Yet, from the first announcement of proportionality as a head of review in *Goldstein*, it was also clear that the EC law test was understood as part of a more universal idea. As we saw, Lord Diplock evoked the concept of proportionality, derived from German law, which he translated into the following phrase: "You must not use a steam hammer to crack a nut, if a nutcracker would do".[1302] It seems that, paradoxically, the various facets of proportionality were perceived as manifestations of a more general idea, a principle which found its source in Continental public law.

[1299] Ibid.

[1300] This was a case that was wholly internal to the United Kingdom. Adams lived and worked in Northern Ireland.

[1301] Ian Ward, "Identity and Difference: The European Union and Postmodernism," in *New Legal Dynamics of European Union*, ed. Gillian More and Jo Shaw (New York: Clarendon Press, 1995), 24. The author refers to the deliberate indeterminacy of EU legal texts.

[1302] *Regina v Goldstein* [1982] 1 W.L.R. 804 (CA, Criminal Division, 2 April 1982); [1983] 1 W.L.R. 151 (HL, 20 January 1983), 155.

In *GCHQ,* Lord Diplock referred to the principle of proportionality as a possible future evolution of domestic grounds of judicial review. Yet he referred neither to the EC proportionality test nor to the reasonableness standard. Instead, he talked about the principle of proportionality "*recognised in the administrative law of several of our fellow members of the European Economic Community*".[1303] In *Pegasus,* responding to claims about a measure disproportionately damaging the rights of individuals, Schiemann J mentioned proportionality as a requirement of proper balance between individual rights and public interests. As such, proportionality was included in a recommendation adopted by the Committee of Ministers of the Council of Europe in 1980, pronouncing guiding principles for the exercise of administrative discretion in the member states.[1304] In *Waltham Forest,* proportionality was referred to as a principle applied by the ECJ but also by the French Council of State and other civil law administrative jurisdictions.[1305] Reference to proportionality as a Continental European principle is also found in scholarship. In one of their articles, Jeffrey Jowell and Anthony Lester proceed to a comparative analysis of the application of the principle in several European jurisdictions.[1306]

The meaning of proportionality as anti-Diceyan. Reference to a principle coming from abroad and being subject to variable application in the domestic sphere was quite new in English legal discourse. Since the mid '70s, however, the traditional Diceyan orthodoxy was contested by an increasing quest for a separate and coherent system of public law and for the explicit, even codified, articulation of constitutional principles guiding and constraining public action.[1307] By the end of the '80s, the need to hush "the sound of silence" of the English constitution was becoming the new orthodoxy.[1308] Martin Loughlin talks about a general search for constitutional reform, which soon took the name of "constitutional modernisation".[1309] Search for theory and principle was manifested in the increasingly explicit references to academic works in judicial decisions.[1310] Judges ceased to be the sole "oracles of the law",[1311] and scholars progressively assumed a system-building role similar to that of the French public law *doctrine*. Since the distinction public/private law was new, the modernisers turned to other systems to take examples. One observes a renaissance of comparative

---

[1303] *GCHQ*, cited above, at 950.

[1304] *R v Secretary of State for Transport, ex parte Pegasus Holidays (London) Ltd and another* [1989] 2 All E.R. 481 (HC, Queen's Bench Division, 7 August 1987).

[1305] *R v Waltham Forest London Borough, ex parte Waltham Borough Ratepayers Action Group* (HC, Queen's Bench, 29 July 1987), *The Times*, 31 July 1987.

[1306] See Jowell and Lester, "Proportionality: Neither Novel nor Dangerous."

[1307] Loughlin, *The British Constitution*, 36 f., esp. 39.

[1308] Stephen Sedley, "The Sound of Silence," in *Ashes and Sparks* (Cambridge: CUP, 2011), 64. The paper was first written in 1993. See also Trevor Allan, "Pragmatism and Theory in Public Law," *LQR* 104 (1988): 422. Leslie Scarman, "The Development of Administrative Law: Obstacles and Opportunities," *PL*, 1990, 490.

[1309] Allison, *The English Historical Constitution*, 3.

[1310] Atiyah, *Pragmatism and Theory in English Law*, 165 f.

[1311] Expression taken from John Philip Dawson, *The Oracles of the Law* (Westport, Conn: Greenwood Press, 1978).

scholarship in the English context.[1312] The promotion of proportionality should thus be read in this general context of discursive change.

Strangely, the promoters of proportionality focused on (what they perceived as) the use of the principle in French administrative law.[1313] This is mostly due to the influence that Guy Braibant's 1974 article on proportionality exercised in the English context.[1314] The fact that European supranational jurisdictions' decisions were written in French might have bolstered the perception of proportionality as a principle of French origin. However, the French "accent" of proportionality language expresses a more general tendency of the time to perceive public law novelties as French. English public lawyers have often looked at the French system of administrative law with a hidden sense of admiration.[1315] The evolution of domestic judicial review was very often compared to French judicial achievements.[1316] Judicial review concepts acquired special credit when they were claimed to have their origins in the French system, which was famous for the judicial construction of a coherent administrative law by "this magnificent judicial instrument", the French Council of State.[1317] The French origins of proportionality were thus part of the concept's meaning as antithetical to the Diceyan tradition of domestic legal discourse. Indeed, Dicey's rejection of French-style administrative law remains famous even today.

Proportionality, substantive rule of law and the judiciary. The construction of a public law system was related to the evolution in the domestic perception of the rule of law as comprising substantive values. Condemning decisions by the ECHR put in question the Whig narrative on the common law and civil liberties.[1318] The call for a rights-based approach was joined to the quest for modernisation and for limitation of government power. Democracy ceased to be perceived as lying exclusively in the supremacy of Parliament, and started to comprise the protection of certain basic values.[1319] As we saw, concretisation and promotion of the Continental principle of proportionality by practitioners coincided with its connection to ECHR rights.[1320]

[1312] Carol Harlow, "Administrative Liability: A Comparative Study of French and English Law" (The London School of Economics and Political Science (LSE), 1979); Spyridon Flogaitis, *Administrative Law et Droit administratif* (Paris: Pichon et Durand-Auzias, 1986); Bell, "The Expansion of Judicial Review over Discretionary Powers in France"; Allison, *A Continental Distinction in the Common Law*; Lord Woolf, "Droit Public - English Style," *PL*, 1995, 57; see on this Allison, *The English Historical Constitution*, 186 f.

[1313] See Jeffrey Jowell and Anthony Lester, "Beyond Wednesbury: Substantive Principles of Administrative Law," *Commonwealth Law Bulletin* 14 (1988): 858; Jowell and Lester, "Proportionality: Neither Novel nor Dangerous"; Sophie Boyron, "Proportionality in English Administrative Law: A Faulty Translation?," *Oxford Journal of Legal Studies* 12, no. 2 (1992): 237.

[1314] Jowell and Lester, "Proportionality: Neither Novel nor Dangerous," 54. On Guy Braibant's article, see *supra*, Part I, Chapter 1.1.i.

[1315] On this point, see Allison, *A Continental Distinction in the Common Law*. See also Lord Woolf, "Droit Public - English Style."

[1316] William Wade and Christopher Forsyth, *Administrative Law*, 5th ed. (Oxford; New York: Clarendon Press; OUP, 1982), 364; cited often by Bell, "The Expansion of Judicial Review over Discretionary Powers in France."

[1317] David Yardley, "The Abuse of Powers and Its Control in English Administrative Law," *The American Journal of Comparative Law* 18, no. 3 (1970): 566.

[1318] Allison, *The English Historical Constitution*, 186 f.

[1319] John Laws, "Law and Democracy," *PL*, 1995, 72.

[1320] See *supra*, Part I, Chapter 2.1.iii.

Proportionality as an autonomous public law concept expressed precisely the quest for the transformation in the meaning of the rule of law. It designated a requirement of fairness, equity or justice and implied further judicial scrutiny on the substance of the reviewed decisions, without leading to merits review.[1321] It was claimed that, though a decision may not meet the *Wednesbury* standard of perversity, it could still constitute an abuse of power.

Therefore, proportionality ceased to be a synonym of irrationality. In the context of judicial review it was progressively defined *by opposition* to the *Wednesbury* standard, as a standard going "beyond it".[1322] Indeed, the assumptions that underpinned the promotion of proportionality as a Continental principle were diametrically opposed to those underlying the traditional unreasonableness. While, in the Diceyan "webs of significance", *Wednesbury* was the opposite of rights-based adjudication, proportionality was increasingly perceived by English lawyers as a useful tool for courts in the accomplishment of their new constitutional mission of rights protection.[1323] Rights started to be perceived as objective moral values on which everyone agrees and the entrenchment of which is the core of the judicial role.[1324] The rise of fundamental rights language brought with it an idealisation of the judiciary similar to the one observed in France. Judges themselves significantly contributed to this through their increasing extra-judicial writings and speeches.[1325] Griffith observed with irony that "seldom, if ever, judges admit the possibility of human frailty on the part of their brethren"[1326] and compared their writings to a "pilgrimage".[1327]

A transplant. Hence, proportionality had all the characteristics of a transplant, and was perceived as such. It was seen as a feature of constitutional modernisation, as well as of openness to concepts and doctrines coming from abroad. It was a tool that would help the judges accomplish the new constitutional role that the modernisers attributed to them. By adopting it, English judicial review would "advance" further, towards a developed system of public law, having nothing to envy from a system with a written constitution. As is typical in transplant cases, certain personalities had a more prominent role in these evolutions than others. Notable barristers like Jeffrey Jowell, Anthony Lester and David Pannick, were ardent defenders of the principle and often based their argumentation on it, pushing judges to adopt it as a method of review.

[1321] Tom Bingham, "'There Is a World Elsewhere': The Changing Perspectives of English Law," *ICLQ* 41 (1992): 513.

[1322] Jowell and Lester, "Beyond Wednesbury," 860.

[1323] See Jowell and Lester, "Proportionality: Neither Novel nor Dangerous," 67 f.; Craig, *Administrative Law*, 1989, 298 f.

[1324] Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?" "Law and Democracy."

[1325] Scarman, "The Development of Administrative Law: Obstacles and Opportunities"; Bingham, "'There Is a World Elsewhere': The Changing Perspectives of English Law"; Nick Browne-Wilkinson, "The Infiltration of a Bill of Rights," *PL*, 1992, 397; Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?"; Laws, "Law and Democracy"; Stephen Sedley, "Human Rights: A Twenty-First Century Agenda," *PL*, 1995, 386; Lord Woolf, "Droit Public - English Style"; Tom Bingham, "The European Convention on Human Rights: Time to Incorporate," in *The Business of Judging Selected Essays and Speeches* (Oxford: OUP, 2000), 131.

[1326] Griffith, "The Brave New World of Sir John Laws," 162.

[1327] Ibid, 163.

Certain judges, leaders of the modernisation movement like Lord Diplock, Sir John Laws and Sir Stephen Sedley, pressured for the adoption of the principle in positive law through their decisions and their extra-judicial writings.[1328] Like the members of the French *doctrine*, the defenders of proportionality in the English context actively participated in the construction of a public law, not only through their academic writings, but also through their role in legal practice.

Since proportionality enjoyed no statutory basis similar to the ECA 1972, the way it could be transferred in domestic public law was also discussed by scholars and judges. Jeffrey Jowell and Anthony Lester proposed a presumption of statutory interpretation that unjustified infringement of fundamental rights was contrary to the will of Parliament.[1329] In *GCHQ*, Lord Diplock envisaged a case-by-case evolution. Similarly, in a well-known article Sir John Laws called for the reception of the principle of proportionality through the "incremental decision-making" process of the common law.[1330] The above debates are even more interesting if one considers that their existence *itself* was a considerable novelty for English public law at the time. Contrary to the *doctrine* in the French legal system, English public law scholarship has traditionally been descriptive, pragmatic and institution-oriented. In this respect, the quest for constitutional modernisation brought about an important change. Scholars became conscious of the importance of underpinning normative theories in the description and analysis of case law. In this context, the influential categorisations of "green light" or "red light" theories of judicial review appeared.[1331] The debate on proportionality too, as part of the more general modernisation movement, acquired a distinctive normative tone, which persisted in later writings.[1332]

Searching for coherence: the detachment of scholarly analyses from practice. Although presenting it as a change in the landscape of judicial review, the defenders of proportionality sought continuity with existing common law concepts in their analyses. This is because, as is sometimes said, "common lawyers have no respect for original thought".[1333] While at the level of domestic heads of review proportionality constituted a significant change, continuity was easy to find at the level of judicial methods. As we have seen, under the head of illegality English judges were already sanctioning public authorities' improper purposes or the taking into account of

---

[1328] See *supra,* Part I, Chapter 2.1 and Sections 2 and 4 of this Chapter. For some extra-judicial writings, see Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?," Sedley, "Human Rights: A Twenty-First Century Agenda." As a QC, that is, a barrister representing public authorities, John Laws usually argued against proportionality. See *R v The Pharmaceutical Society of Great Britain, ex parte Association of Pharmaceutical Importers* [1987] 3 C.M.L.R. 951 (CA, Civil Division, 30 July 1987); *R v Secretary of State for the Environment, ex parte National and Local Government Officers' Association* [1992] 5 Admin.L.R. 785 (HC, Queen's Bench Division, 20 December 1991).

[1329] See Jowell and Lester, "Beyond Wednesbury," 379.

[1330] Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?"

[1331] Carol Harlow, *Law and Administration*, Law in Context (London: Weidenfeld and Nicolson, 1984).

[1332] Trevor Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993). See also Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework.," *PL*, 1997, 467.

[1333] See Atiyah, *Pragmatism and Theory in English Law*, 7. This author refers to a Harvard Law School Professor that he does not name.

irrelevant considerations (similar to the suitability stage).[1334] As for the necessity test, judges already performed it as an EC ground. Cases involving balancing of competing interests were re-read as examples of proportionality reasoning. Most notably, *Hook* was rediscovered as an application of the principle.[1335] A whole proportionality mythology arose in English public law: domestic judges had been applying the doctrine, "just as Moliere's Monsieur Jourdain had been speaking prose for more than 40 years without knowing it".[1336] The requirement of proportion seemed "so characteristically English" that its explicit recognition was expected to increase the intellectual honesty of English law and the transparency of judicial reasoning.[1337]

Similarity with French writings on the matter is striking. Proportionality was deemed to encompass every kind of reasoning involving substantive evaluations. In fact, what was perceived to unify the various applications of the principle was a substantive requirement of equity, fairness or justice. The form of the scrutiny as an elimination of improper purposes, as a scrutiny of the means-ends relationship or as a balancing exercise was contingent. This significantly compromised the structural integrity of proportionality in the minds of English lawyers. Though legal writings and opinions often referred to the three-pronged test applied by foreign courts, and especially the German Federal Constitutional Court, the newly-formed English *doctrine* did not care so much about structure. Surprisingly, the muddled application of proportionality in practice was even perceived as an asset of flexibility. The *Wednesbury* unreasonableness test started being perceived as "monolithic", leading invariably to a self-evident standard of extreme irrationality. In contrast, proportionality was a general principle subject to variable application, according to the circumstances, following the example of Strasbourg case law.[1338] The defenders of proportionality thus proposed the abandonment of another feature that was valuable to the analytical common law tradition, the rigid application of legal forms.

But there is another way in which debates on proportionality departed from traditional legal writings: proportionality was perceived as applied, even when judges had not used relevant language. Proportionality scholars did not take the patterns of judicial reasoning seriously and focused on judicial *methods* rather than on heads of review. Their line of thought was that the principle of proportionality was already being applied by courts, though "true, to another tradition, judges have gone to lengths to disguise the principle in the language of pragmatism".[1339] Law, and proportionality as part of it, represented some kind of coherent knowledge that transcended the language actually used in judicial decisions. In other words, proportionality brought with it a new "legal formant" in English legal thought, a new source of legal knowledge in this

[1334] See Craig, *Administrative Law*, 1989, 281 f.

[1335] See Jowell and Lester, "Proportionality: Neither Novel nor Dangerous."

[1336] Jowell and Lester, "Beyond Wednesbury," 862–63. In their article, the authors refer to cases dating back from 1916. The use of the term "mythology" is inspired by Quentin Skinner, *Visions of Politics* (Cambridge: CUP, 2002), 60, who talks about "mythology of doctrines."

[1337] Jowell and Lester, "Beyond Wednesbury," 864.

[1338] Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?," 1390, 1392; Jowell and Lester, "Proportionality: Neither Novel nor Dangerous," 68–69.

[1339] Jowell and Lester, "Proportionality: Neither Novel nor Dangerous," 59–60.

context. It was connected to the *rationalisation* of English public law. The defenders of proportionality thought they had found the theory that could build the fragmented common law "bits and pieces"[1340] into a coherent and comprehensive system. For once, it seemed that common lawyers' "struggle for simplicity" proved fruitful.[1341] The explicit recognition of proportionality in judicial review was expected to add coherence and integrity to English administrative law. While anti-formalist, since it entailed rejection of the analytical tradition, proportionality was anti-pragmatist too. This characteristic of proportionality language persists even today. Indeed, the insistent rejection of proportionality in judicial review until the 2000s has not impeded domestic lawyers from interpreting some instances of judicial reasoning as applications of the principle. This is connected to the fact that some of the expectations that English public lawyers had attached to proportionality were actually fulfilled.

4. Proportionality "in all but name"?

The emergence of anxious scrutiny. The movement of modernisation and rationalisation found expression in judicial practice. By the end of the '80s the idea emerged that the more important the values at stake in the case before the judge, the more searching the judicial scrutiny should be. This was expressed in the concept of "anxious scrutiny" applied in fundamental rights cases, introduced by Lord Bridge in *Bugdaycay*:

> The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.[1342]

In this case the existence of a fundamental right pushed the court to examine evidence more closely. The case concerned the removal of a Ugandan refugee to Kenya. Mr Bugdaycay was facing fear of persecution and killing in Uganda, and he had evidence that, if removed to Kenya, Kenyan authorities would send him there. Until then judges accepted that, when a country was signatory to the Geneva Convention, there was a presumption that removal to that country was safe. This practice was challenged in *Bugdaycay*. According to Lord Bridge, the refugee could not be removed to Kenya without violating the Convention, if he provided evidence that he was facing a plausible fear of persecution after removal. Sedley J followed a similar approach in *McQuillan*.[1343]

[1340] Scarman, "The Development of Administrative Law: Obstacles and Opportunities," 491.

[1341] Michael Kirby, "Struggle for Simplicity: Lord Cooke and Fundamental Rights," *Commonwealth Law Bulletin* 24 (1998): 496.

[1342] *Bugdaycay v Secretary of State for the Home Department* [1986] UKHL 3 (HL, 19 February 1986), 12.

[1343] *R v Secretary of State for the Home Department, ex parte McQuillan* [1995] 4 All ER 400 (HC, Queen's Bench, 9 September 1994).

The introduction of the concept of anxious scrutiny marked an important step away from the formalist common law tradition. It implied that the use of a particular head of review did not lead invariably to identical methods of reasoning. Judicial scrutiny could be "anxious" or not, and this was a function of the *substantive* values at stake. Scholars noticed this fundamental change. They rediscovered cases where unreasonableness was not applied in such an extreme way as Lord Greene's words would suggest, and described them as applications of the so-called "relative *Wednesbury*".[1344] Also, cases where the threshold of perversity in order to quash a decision was set very high were described as applications of a "super-*Wednesbury*" standard.[1345] By the end of the '90s, it was clear that irrationality was a "*variable standard*", applied according to the importance of the values at stake.[1346] In *Begbie*, Laws J described *Wednesbury* unreasonableness as a "*sliding scale of review*". In his words,

> Fairness and reasonableness (and their contraries) are objective concepts; otherwise there would be no public law, or if there were it would be palm tree justice. But each is a spectrum, not a single point, and they shade into one another. It is now well established that the *Wednesbury* principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake.[1347]

Establishing coherence among different heads of review. Reference to substantive extra-legal values in the application of legal concepts rendered more cogent the idea of unity among the various heads of review and reduced the difference between proportionality and the domestic standard of substantive review. Judges condensed the purpose and essence of judicial review into one idea: repudiation of abuse, rule of reason or fair administration. This is especially clear in Laws J's opinions and extra-judicial writings. In *First City Trading*, the judge compared the EC law principle of proportionality to the domestic standard of review. He concluded that, whereas *Wednesbury* required a reasonable choice falling within the discretion of the reviewed public authority, proportionality required "*a fully reasoned case*", supported by "*substantial factual considerations*".[1348] However, according to the judge, proportionality was not a matter of whether the judge agreed or disagreed with the reviewed authority's balancing of the rights at stake. Thus, Laws J concluded that,

> *Wednesbury* and European review are different models—one loser, one tighter—of the same juridical concept, which is the imposition of

---

[1344] Paul Craig, "Unreasonableness and Proportionality in UK Law," in *The Principle of Proportionality in the Laws of Europe*, ed. Evelyn Elllis, 1st ed. (London: Bloomsbury Publishing, 1999), 96.

[1345] Typically, *Hammersmith* is described as such a case: *R v Secretary of State for the Environment, ex parte London Borough of Hammersmith and Fulham* [1991] 1 AC 521 (HL, 4 October 1990).

[1346] *Chesterfield Properties Plc v Secretary of State for the Environment* [1998] 76 P. & C.R. 117 (HC, Queen's Bench Division, 24 July 1997) at 130.

[1347] *R v The Department of Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 (CA, Civil Division, 20 August 1999), para 78.

[1348] *R v Ministry of Agriculture, Fisheries and Food and Another, ex parte First City Trading* [1997] 1 C.M.L.R. 250 (HC, Queen's Bench Division, 29 November 1996) at para 69.

> compulsory standards on decision-makers so as to secure the repudiation of arbitrary power.[1349]

The quest for coherence among different heads of review led to the diffusion and dilution of proportionality in domestic standards and deprived it of its conceptual clarity in judicial practice. Besides, in many cases the *Wednesbury* standard was reformulated in a way that echoed Strasbourg proportionality case law.[1350]

Progressively, the variable intensity of review was itself perceived as an expression of fairness and proportionality. Scholars have described the searching application of the traditional standards of judicial review as proportionality "in all but name."[1351] This seems to be the perception of certain judges at the time as well. In his *McQuillan* judgment, for example, Sedley J cited with approval John Laws' extra-judicial writings on the reception of the ECHR standards through the common law.[1352] He argued that, despite the House of Lords' decision in *Brind*, judicial supervision of public bodies' decisions should vary, according to whether the right affected was recognised by the law as fundamental or not. Sedley J concluded that,

> [o]nce this point is reached, the standard of justification of infringements of rights and freedoms by executive decision must vary in proportion to the significance of the right which is at issue. Such an approach is indeed already enjoined by *Ex p Bugdaycay* in relation to a predominant value of the common law -- the right to life -- which, as it happens, the convention reflects. Whether this in itself is a doctrine of proportionality I do not now pause to ask; if it is, the House of Lords has long since contemplated its arrival with equanimity.[1353]

Sedley J thus referred to proportionality as a standard imposed by the court on the *justification* of rights restrictions, according to the importance of the right at stake.

The commonly shared perception of anxious scrutiny as an instance of proportionality reasoning should not surprise. In reality, anxious scrutiny brought about the major part of the changes that domestic public lawyers had expected of the adoption of proportionality. It entailed a rejection of traditional common law formalism and pragmatism. By referring to substantive values, it expressed the significant change in the role of judges that was taking place at the time: from impartial referees they became guarantors of fairness and justice. As a judicial method, anxious scrutiny established coherence among previously fragmented standards and heads. In this way, it manifested in an exemplary way the modernisation process that English

---

[1349] Ibid. *Contra*, *R v Secretary of State for the Home Department, ex parte Arthur H Cox Ltd*, [1999] EuLR 677 (HC, Queen's Bench Division, 14 December 1998), where, despite the wide margin of appreciation, proportionality was not equated to irrationality. See the decision, Section I, para 1.

[1350] See *supra*, Part I, Chapter 2.1.iv.

[1351] Murray Hunt, *Using Human Rights Law in English Courts* (Oxford: Hart, 1997), 216; Kavanagh, *Constitutional Review under the UK Human Rights Act*, 268; Craig, *Administrative Law*, 2016, 624 f.

[1352] Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?"

[1353] *McQuillan*, cited above.

public law was undergoing. Once again, *plus c'est la même chose, plus ça change*. The rejection of proportionality as a head of judicial review did not impede the advent of the changes that domestic public lawyers had expected of it. As we saw, the conceptual autonomy of proportionality was embedded in its parasitic function. Inversely, the diffusion of proportionality in domestic concepts indicated that it was not a parasite anymore. English lawyers had acquired *their own* system of public law, similar to the ones that Continental lawyers had.

The *Smith & Grady* affair. Still, anxious scrutiny and the operation of fairness standards did not remove all incompatibilities between domestic case law and the ECHR. An important difference between English and Strasbourg rights-based review persisted and became apparent in the famous *Smith* case.[1354] In this case, the policy of the UK army to discharge its homosexual members was challenged as irrational and disproportionate. The policy was applied to all members of the army who had admitted their homosexual orientation, even if they had no homosexual activity and without regard to their record or character, or of the consequences that such an act had on them individually. The policy had often been reconsidered by Parliament but without change. The rule was justified by the need to preserve the morale and effectiveness of the military. It was claimed that the primary decision was not based on moral judgment but on the practical assessment of the consequences that the presence of homosexuals in the army had. David Pannick QC, representing the applicants, called for a more intensive scrutiny than the *Wednesbury* unreasonableness standard would entail, due to the importance of the human rights at stake. The Government in response argued that the *Wednesbury* threshold should be heightened due to the national security issues involved, which were traditionally considered non-justiciable in English law.

The Court of Appeal refused to depart from the traditional irrationality standard. However, this standard would not be mechanically applied:

> where an administrative decision was made in the context of human rights the court would require proportionately greater justification before being satisfied that the decision was within the range of responses open to a reasonable decision-maker, according to the seriousness of the interference with those rights; that in applying the test of irrationality, which was sufficiently flexible to cover all situations, the court would show greater caution where the nature of the decision was esoteric, policy-laden or security-based;[1355]

Following this reasoning, the court unanimously dismissed the appeals, even though 2 out of 3 judges expressed doubts as to the compatibility of the provision with the ECHR. Simon Brown LJ even expressed his "*hesitation and regret*" in handing out the judgment and urged the Government to re-examine the matter in light of the changing

[1354] R *v Admiralty Board of the Defence Council, ex parte Lustig-Prean; R v Admiralty Board of the Defence Council, ex parte Beckett; R v Secretary of State for Defence, ex parte Smith; R v Ministry of Defence, ex parte Grady* [1996] Q.B. 517 (CA, Civil Division, 3 November 1995).

[1355] Ibid, 517.

social circumstances.[1356] However, the judges did not substitute their view for that of the reviewed authority. The ECHR had not become part of English law and thus English courts were not "*entitled to ask whether the policy answer[ed] a pressing social need and whether the restriction on human rights involved [could] be shown proportionate to its benefits*".[1357] Rather, primary responsibility for these questions lay with Parliament, given that the belief in the existence of a practical risk for national security in this case was not deemed to be irrational or in defiance of accepted moral standards.

The persisting difference between domestic and European standards. The question arose of whether the domestic standard of review applied in *Smith* satisfied article 13 of the Convention. The European court had admitted that it did in *Vilvarajah*,[1358] and this was relied on by English judges.[1359] However, this case concerned article 3 of the Convention which establishes an absolute right. Therefore, proportionality was not at stake in the Strasbourg court's reasoning, nor was the comparative evaluation of competing interests. In *Smith & Grady*, on the contrary, the European court arrived at a different conclusion. According to its assessment,

> the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention.[1360]

The Strasbourg court thus found that there was a difference in the kind of review exercised under the irrationality and proportionality tests. While, when the circumstances warranted it, the ECtHR could impose its own view as to the justification or the proportionality of the reviewed measures, the English courts could never become appellate jurisdictions in judicial review cases. There was always a zone of immunity in the substantive review of administrative action.[1361]

Tom Hickman's distinction between standards of legality and standards of review proves useful in making sense of the difference between European and domestic review. According to this author, on the one hand, *standards of legality* supplement the conditions set out in the authorising statute for the legitimate exercise of administrative power and concern the outcomes of administrative action. On the other hand, *standards*

[1356] Ibid, 541.

[1357] Ibid.

[1358] ECtHR, *Vilvarajah v The UK*, 30 October 1991, nos. 13163/87, 13164/87, 13165/87, 13447/87, and 13448/87 [1991] 14 E.H.R.R. 248, 291, 292.

[1359] See *Smith*, cited above, 555-556. However Simon Brown LJ stated: "*I for my part strongly suspect that so far as this country's international obligations are concerned, the days of this policy are numbered.*" See the judgment, 542.

[1360] See ECtHR, *Smith & Grady v The UK*, 27 September 1999, nos. 33985/96 and 33986/96 [2000] 29 EHRR 493 at para 138.

[1361] See also the analysis by Mark Elliott, "The Human Rights Act 1998 and the Standard of Substantive Review," *CLJ* 60, no. 2 (2001): 301.

of review concern the conditions for permissible judicial interference with public authorities' decisions.[1362] The standard of anxious or proportionate scrutiny belongs to the standards of review. The adjective "anxious", which is distinctive of this kind of scrutiny, characterises the judicial inquiry itself and not the outcomes of the reviewed act. In the cases categorised under this label, the judicial scrutiny did not imply an evaluation of the balancing made by the primary decision-maker and did not lead the court to impose its own view as to the importance of the public interest at stake. Judges were confined to ascertaining that the balancing actually took place, and that the individual right was taken into account. In this context, the application of proportionality was akin to the way Greek courts applied the principle in administrative law: it implied a procedural requirement of equity and justice.[1363] In contrast, in some cases the ECtHR proportionality standard prescribed concrete outcomes as to the protection of the right at stake and thus functioned as a standard of legality.

The difference between domestic and European standards then reveals a deeper normative conflict between English public law and the Convention, which persisted at least before the entry into force of the HRA despite the introduction of anxious scrutiny. Even though fundamental rights were widely accepted as important values in the common law and influenced judicial reasoning, they remained policy-making factors. Their definition and protection was still mainly remitted to the political branches of government. Judges did not always feel the need to invoke a legal text or authority in their application.[1364] In judicial reasoning, rights generally remained the "background" of the application of legal forms, or at best, a "relevant consideration".[1365] Therefore they did not impose particular outcomes on public action. Merits review was totally excluded, no matter the importance of the right at stake or the intensity of interference with it. In the ECHR legal order, on the contrary, fundamental rights had a concrete legal content which in some cases allowed judicial intervention on the merits of public action. The rights' protective scope played an important role in *Smith & Grady*, where the restrictions concerned "*a most intimate part of an individual's private life*".[1366] This is what made the court require "*particularly serious reasons*" in order for interference with the right to be justified. The judges closely examined the justification provided by Government, the factual evidence supporting it, and substituted their own view for that of the Government as to the importance of the public interest involved.[1367]

[1362] For example, the principle of equality, prohibiting administrative action which discriminates among similar situations, is a standard of legality. On the contrary, irrationality, requiring that a decision be perverse in order for the court to interfere and quash it, is a standard of review. As the author himself recognises, standards of legality and standards of review can coincide, and the distinction is not always easy to draw. See Hickman, *Public Law after the Human Rights Act*, 99 f.

[1363] See *supra*, Part I, Chapter 3.1.iii.

[1364] In *Bugdaycay* for example, no text or authority was invoked for the application of the right to life. See the case, cited above.

[1365] See Hunt, *Using Human Rights Law in English Courts*, 221 f.

[1366] See ECtHR, *Smith & Grady v The UK*, cited above, at para 90.

[1367] Ibid, para 97.

Compromising the fundamental rights function of proportionality. That being said, domestic lawyers' perception of anxious scrutiny as an instance of proportionality reasoning is revealing as to the main stakes attached to the use of proportionality in English public law. This was not the optimisation of fundamental rights, since neither anxious scrutiny nor proportionality concerned the real impacts of public decisions on rights. This was apparent in the writings of the most fervent defenders of proportionality, who described it as an extension of "natural justice" requirements.[1368] In their analyses, proportionality's connection to fact-finding tests of necessity and cost-benefit balancing was only contingent. Instead, proportionality was connected to the normative priorities of the primary decision-maker. It was perceived and promoted as a standard of justification of the reviewed decision. It was connected to a duty, emerging at the time, of the administration to provide reasons.[1369] As John Laws put it,

> There is no room for [proportionality] at all in the fact-finding case; but if we are to entertain a form of review in which fundamental rights are to enjoy the court's distinct protection, the very exercise consists in an insistence that the decision-maker is not free to order his priorities as he chooses, confined only by a crude duty not to emulate the brute beasts that have no understanding (as the marriage service has it); an insistence that he accord the first priority to the right in question unless he can show a substantial, objective, public justification for overriding it.[1370]

Proportionality's connection to reason-giving is what made Paul Craig, in 1989 fear its dilution to a self-executing concept of fairness, equivalent to irrationality.[1371] In the words of Patrick Birkinshaw, proportionality compared to irrationality "allow[ed] a more probing form of review that investigate[d] reasons for acting and not one which assumes the propriety of reasons given unless they [were] ex facie absurd".[1372]

Proportionality was not so much about respecting the international obligations of the country either, since English public lawyers classify as instances of "proportionality" cases where domestic judicial review was found insufficient in Strasbourg, most notably *Smith & Grady*. In reality, at least at the time, the connection of proportionality to European fundamental rights was secondary. It is indicative that in the 1995 edition of the De Smith handbook, the authors included a relatively extended analysis of proportionality in which fundamental or human rights were hardly mentioned.[1373] Among the promoters of proportionality, we find Lord Diplock who was known for not being favourable to the incorporation of the ECHR in the domestic

---

[1368] See Jowell and Lester, "Proportionality: Neither Novel nor Dangerous," 59 f.

[1369] See Craig, *Administrative Law*, 1989, 221-22 and 304-05.

[1370] Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?," 1392.

[1371] Craig, *Administrative Law*, 1989, 299.

[1372] Patrick Birkinshaw, *European Public Law* (London: Butterworths, 2003), 333.

[1373] In this analysis, balancing was not perceived as a process of weighing individual rights against the public interest, but as a means-ends relationship. See Stanley Alexander De Smith et al., *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995).

sphere.[1374] Similarly, in his "Is the High Court the Protector of Fundamental Human Rights", Sir John Laws argued against the incorporation of the ECHR in the domestic sphere. In his words,

> we may have regard to ECHR (and, for that matter, other international texts) but not think of incorporating it; we should apply differential standards in judicial review according to the subject-matter, and to do so deploy the tool of proportionality, not the bludgeon of *Wednesbury;* that a function of this is to recognise that decision-makers whose decisions affect fundamental rights must inevitably justify what they do by giving good reasons; (…) I think this is, in the end, a modest way forward, involving no sea-change in the law; but the growth of the common law has always been an incoming tide, not a storm of hurricane force; and it is better so; the tide leaves no wake of destruction when it ebbs.[1375]

The conceptual assimilation of proportionality with anxious scrutiny demonstrates that what domestic lawyers expected of its application was a coherent system of judicial review, an English public law based on certain core substantive values. In this respect, proportionality and anxious scrutiny *were* similar. In the following years, efforts to construct an English public law were furthered by Parliament itself. Devolution, human rights and other issues of constitutional importance were codified in statutes. Constitutional reform, having been a constant preoccupation of English lawyers,[1376] led for the first time to the adoption of Acts explicitly using constitutional language in the Constitutional Reform Act.[1377] In an oft-commented upon book, Vernon Bogdanor has talked about the emergence of a "new" constitution in a "piecemeal" fashion.[1378] Today it is difficult to say that English law does not possess a written constitution. Hence, when inserted into the English context, proportionality expressed pre-existing tendencies in domestic legal discourse and embodied domestic lawyers' hopes and expectations. These expectations were quite different from the ones that Alexy attached to proportionality roughly at the same time. Understanding the stakes attached to the use of proportionality language in English law renders the current conceptual evolution of proportionality less enigmatic.

5. A successful transplant: the establishment of proportionality as an overarching method

The beginnings of an English mythopoeia: substantive values, epistemological optimism and institutional faith. The voting through of the HRA,

[1374] Hickman, *Public Law after the Human Rights Act*, 14.

[1375] Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?," 1395–96.

[1376] Jack Beatson, ed., *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford: Hart, 1998).

[1377] See CRA 2005. Loughlin, *The British Constitution*, 112 f.

[1378] Vernon Bogdanor, *The New British Constitution* (Hart, 2009), 5.

part of the Labour programme of constitutional modernisation, introduced into the common law a catalogue of precisely those rights that are so dear to foreign constitutionalists. As Martin Loughlin observed, "one thing seems certain: contrary to Dicey's contention, the law of the constitution is now the source rather than the consequence of our rights".[1379] Thus, the barriers to the application of proportionality as a fundamental rights principle were superseded. Proportionality ceased to be a standard of justification, so as to become a standard of legality. It no longer concerns the interference of the court in a domain of competence of public authorities. Instead, it is a requirement of fundamental rights protection addressed to public authorities themselves and concerned with the merits of their action. It requires the court to "*assess the balance*" effectuated by the primary decision-maker and may also require "*attention to be directed to the relative weight accorded to interests and considerations*".[1380] The precepts of Strasbourg case law were realised. Courts, from impartial referees became fundamental rights protectors. Balancing is now a form of *legal* reasoning in the minds of English lawyers and is solemnly announced by judges as the fourth step of the proportionality test.

The impact of public action on fundamental rights has become a central issue in judicial reasoning. As opposed to the traditional obsession with law's authority, proportionality establishes consequentialism and fact-finding as crucial features of adjudication. Everything seems to depend on the context. Procedures have been institutionalised so that judges have access to the facts the initial decision-maker took into account.[1381] English public lawyers do not show the optimism of their civil law colleagues as to the possibility of objective value-laden appreciations, and do not talk about rights optimisation nor of harmony. Still, most authors seem to believe in the potential of the proportionality framework to increase transparency in judicial reasoning and to ameliorate the results of judicial enquiry. The scientific terminology used by English lawyers gives a connotation of objectivity to proportionality evaluations: talk about the "relative" or "marginal" cost or benefit abounds in legal decisions and writings.[1382] Some recent uses of proportionality language acquire a connotation of mathematical exactness that brings them close to the way French public lawyers use the term.[1383] It seems that the HRA, and proportionality within it, implies an increase of institutional faith in the judiciary. Judges are considered more appropriate to adjudicate fundamental rights issues as against the will of parliamentary

[1379] Loughlin, *The British Constitution*, 104.

[1380] *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26 (HL, 23 May 2001), para 27, *per* Lord Steyn.

[1381] Taggart, "Reinventing Administrative Law," 325 f. See *supra*, Part I, Chapter 2.2.iii.

[1382] See for example *Lambert*, cited above, *per* Lord Steyn. The judge analyses the relative merits of the chosen provision compared to a less restrictive alternative. See also Hickman, *Public Law after the Human Rights Act*, 190 f.

[1383] See *R v Lord Chancellor, ex parte UNISON* [2017] UKSC 51 (SC, 26 July 2017) or *R v Legal Services Board, ex parte Lumsdon & Others* [2015] UKSC 41 (SC, 24 June 2015), where proportionality evaluations are mainly composed by numbers and statistics. See also David Neuberger, "Proportionate Costs" (The Law Society, May 29, 2012), https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/proportionate-costs-fifteenth-lecture-30052012.pdf.

majorities and administrative authorities.[1384] Courts are always deemed constitutionally competent to decide for themselves the question of the proportionality of the reviewed measures, even when they are legislative.[1385]

Proportionality and rationalisation. In the words of the President of the Supreme Court at the time, after the adoption of the HRA, English law has entered the "age of enlightenment".[1386] Under the impulsion of substantive values and principles, domestic legal reasoning becomes increasingly rationalist, resembling Continental methods and doctrines. Within the scope of the HRA, statutory text and precedent cease to be decisive. Insofar as proportionality requires the identification of public goals, analysis yields to purposive interpretation. Statutory text is progressively perceived as a "canvas" on which constitutional values are projected.[1387] According to section 3, "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". The technique of statutory presumption, similar to the *réserves d'interprétation*, was thus institutionalised as a major judicial tool in fundamental rights adjudication. The perspective that this provision entails is obvious in Lord Nicholl's dicta in *Ghaidan v Mendoza*: giving too much weight to statutory language when seeking a Convention-compatible interpretation "*would make the application of section 3 something of a semantic lottery*".[1388] It is substantive principles and not linguistic structures that ensure legal continuity and coherence.

English public law is on the road to rationalisation. Judicial review precedents cease to be "a disorganised mass of single instances"[1389] and are rearranged as instances of variable intensity of proportionality review. Furthermore, they are articulated according to a rationale that much-resembles the Continental concept of administrative discretion. Indeed, section 6(2) HRA introduces a similar idea, it excludes the application of the illegality head against administrative action, in cases where the reviewed authority could not have acted differently. This echoes the concept of "bound" competence, which excludes certain kinds of substantive review in France and Greece.[1390] The question of the discretion of public authorities implementing legislation was thoroughly discussed in *Sinclair Collis*.[1391]

[1384] Kavanagh, *Constitutional Review under the UK Human Rights Act*, 338 f.; Laws, "Law and Democracy."

[1385] See *R v Headteacher and Governors of Denbigh High School, ex parte Begum* [2006] UKHL 15 (HL, 22 March 2006), *per* Lord Bingham. Craig, *Administrative Law*, 2016 at 18-040 f.

[1386] David Neuberger, "The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK Experience," 2014, https://www.supremecourt.uk/docs/speech-140808.pdf no 5.

[1387] Mark Elliott, "A Tangled Constitutional Web: The Black-Spider Memos and the British Constitution's Relational Architecture," *PL*, 2015, 549; Michael Hain, "Guardians of the Constitution – the Constitutional Implications of a Substantive Rule of Law," *UK Constitutional Law Association* (blog), September 12, 2017, https://ukconstitutionallaw.org/2017/09/12/michal-hain-guardians-of-the-constitution-the-constitutional-implications-of-a-substantive-rule-of-law/.

[1388] *Ghaidan v Mendoza* [2004] 3 WLR 113 (HL, 21 June 2004), para 30.

[1389] Bell, "The Expansion of Judicial Review over Discretionary Powers in France," 119.

[1390] On the French system, this is an application of the theory of the *loi écran*. See Part I, Chapter 1, Introduction and Chapter 1.2.i. On the Greek system in particular, see Part I, Chapter 3.1.iii.

[1391] *R v Secretary of State for Health, ex parte Sinclair Collis Ltd* [2012] QB 394 (CA, Civil Division, 17

Discretion affects not only the scope of judicial review but also its intensity. In this context, the flexibility of the proportionality framework proves to be an important asset. In *Miss Behavin'*, the refusal of a local authority to licence sex shops was impugned under article 10 ECHR.[1392] Lord Hoffmann stated that in the domain of social control, local authorities enjoy a "*broad power of judgment*".[1393] Hence, the court accorded weight to the primary decision-maker's view on the balance struck between the competing interests at stake. It examined whether the reviewed authority was *entitled* to conclude that the impugned measures were proportionate. In the words of Lord Hoffmann, "*[i]f the local authority exercises that power rationally and in accordance with the purposes of the statute, it would require very unusual facts for it to amount to a disproportionate restriction on Convention rights*".[1394] While scrutiny in fields of judicial discretion remains fact-based, it is concerned with the state of mind of the decision-maker. Courts give more weight to the reviewed decision, when the competent authority has explicitly attempted to strike a balance between the Convention right and the public interest at stake.[1395] This, as we have seen, is not far from the way French courts employ the manifest error review in constitutional law or in cases of administrative discretion. Proportionality in English public law thus ceases to be synonymous to intensive scrutiny and encompasses minimum scrutiny as well.[1396]

Proportionality increasingly resembles a Continental legal theory. Scholars are recurrently cited in its application.[1397] Its defenders share "an evangelical belief in the principle's rationalizing potential in public law".[1398] Due to its vagueness and indeterminacy, it acquires a meaning similar to fairness, and is deemed to provide the principle that underpins every kind of judicial review. At the same time, proportionality is perceived as an "empty vessel" of structure and is deemed to offer a framework for all kinds of judicial decision-making.[1399] Proportionality is no longer conceptually fragmented in academic writings. Either applied in the context of fundamental rights, EU economic freedoms or -more rarely- in English administrative law, it is perceived as a unique method of review with variable intensity.[1400] Principle and pragmatism are

June 2011).

[1392] *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420 (HL, 25 April 2007).

[1393] Ibid, para 16.

[1394] Ibid, para 16.

[1395] Ibid, para 37, *per* Baroness Hale.

[1396] See *R v Secretary of State for Health, ex parte Eastside Cheese Company (a firm)* [1999] 3 C.M.L.R. 123 (CA, Civil Division, 1 July 1999), esp. paras 41-49, *per* Lord Bingham; *Sinclair Collis*, cited above, esp. paras 126-134, *per* Arden LJ.

[1397] See *Lumdson*, cited above, at para 23; *Kennedy v The Charity Commission* [2014] UKSC 20 (SC, 26 March 2014), para 54; *Pham v Secretary of State for the Home Department* [2015] UKSC 19 (SC, 25 March 2015), para 60; *Keyu and others v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69 (SC, 25 November 2015), para 303.

[1398] Hickman, *Public Law after the Human Rights Act*, 270.

[1399] Hickman, 267.

[1400] See for example the unified perception in Craig, *Administrative Law*, 2016 at 19-008 f. See also the application of proportionality outside the domain of the HRA but citing HRA decisions in *R v Office of Communications, ex parte ICO Satellite Ltd* [2011] EWCA Civ 1121 (CA, Civil Division, 11 October 2011). See however *Lumsdon*, cited above, esp. paras 23-82.

reconciled. Domestic lawyers talk about proportionality's "chameleon-like appeal",[1401] which serves in "expressing both change and continuity in one and the same breath".[1402] Laws LJ's dictum in *Sinclair Collis* shows this with particular force.

> Though proportionality has its inspiration in the civilian systems, its alliance of firm principle (the standards) and varying application (the margin of appreciation) is highly characteristic of the common law's method. Principle and pragmatism are conformed by such alliances, and the law is more effective accordingly.[1403]

Proportionality conquers the common law due to precisely those connotations of pragmatism which had long impeded its adoption. Common lawyers have traditionally preferred definitions and tests to principles and deduction. Proportionality fits well with the "grid aesthetic" of English legal reasoning.[1404] Argumentation under its prongs in the separate personal opinions of English judges acquires a level of analytical clarity impossible to find in French judgments, where compromise among the members of the judiciary impedes detailed judicial argumentation.

Proportionality's pervasive dynamic as a method. Proportionality becomes hegemonic and tends to absorb other reasoning methods. Since the HRA was voted through, lawyers, judges and scholars have pressured for the abandonment of *Wednesbury* and the adoption of proportionality as a general public law head of review. The story is well-known.[1405] In *Daly,* Lord Cooke argued that "*the day will come when it will be more widely recognised that (…) Wednesbury (…) was an unfortunately retrogressive decision in English administrative law*".[1406] In *ABCIFER*, Dyson LJ said that the case for proportionality made by David Pannick QC was "*a strong one*". He admitted his "*difficulty in seeing what justification there now is for retaining the Wednesbury test*". But he considered that it was not for the Court of Appeal "*to perform its burial rites*".[1407] In *Nadarajah,* the criterion for recognition of a substantive legitimate expectation was at stake. Laws LJ said that "*abuse of power is a (…) useful name, for it catches the moral impetus of the rule of law. (…) But it goes no distance to tell you, case by case, what is lawful and what is not*".[1408] According to him, in cases of *prima facie* legitimate expectations the correct criterion for assessing the lawfulness of public action is proportionality.[1409] In *Walker*,

---

[1401] Ian Leigh, "Taking Rights Proportionately : Judicial Review, the Human Rights Act and Strasbourg," *PL*, 2002, 279.

[1402] Allison, *The English Historical Constitution*, 232.

[1403] *Sinclair Collis,* cited above, para 82.

[1404] Pierre Schlag, "The Aesthetics of American Law," *Harvard Law Review* 115, no. 4 (2002): 1051; cited by Jacco Bomhoff, "Balancing Constitutional Rights: Introduction," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, November 13, 2013), 176, http://papers.ssrn.com/abstract=2343536.

[1405] Craig, *Administrative Law*, 2016 at 19-009 f;; Kavanagh, *Constitutional Review under the UK Human Rights Act*, 253 f.

[1406] *Daly*, cited above, para 32.

[1407] *R v Secretary of State for Defence, ex parte Association of British Civilian Internees: Far East Region* [2003] Q.B. 1397 (CA, Civil Division, 3 April 2003), paras 34-5.

[1408] *Nadarajah, Abdi v The Secretary of State for the Home Department* [2005] EWCA Civ 1363 (CA, Civil Division, 22 November 2005), para 67.

[1409] Ibid*,* para 68.

Laws J went further to argue that English judges "*are increasingly accustomed to the framing of substantive challenges to public decisions in terms of proportionality, and not only in European and human rights contexts*".[1410] Pressure for the adoption of proportionality as a general principle is also a recurrent theme in the literature.[1411]

Once again, the pervasive dynamic of proportionality deprives it of its conceptual neatness. Its defenders perceive it in continuity with domestic judicial review concepts, most notably *Wednesbury* unreasonableness. Hence, they contest the conceptual distinction between proportionality and irrationality established in *Daly*. The difference between the two standards is argued to be "one of degree rather than kind".[1412] In *Alconbury*, Lord Slynn argued that it was time to recognise proportionality as part of domestic law, even without reference to the HRA or to the ECA: "*[t]rying to keep the Wednesbury principle and proportionality in separate compartments [is] unnecessary and confusing*".[1413] And according to Paul Craig's analysis, often quoted in judicial opinions,

> Both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context. The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance or benefits and disadvantages.[1414]

The use of the head of proportionality or irrationality is progressively reduced into a matter of terminology, while the underlying judicial review method is perceived as similar, both under the common law and the Convention. For the most hard-core defenders of the legal constitution, *Brind* and *Smith* are revisited simply as bad applications of the proportionality test, and the HRA more generally implies no change compared to common law methods of adjudication.[1415] This view becomes progressively dominant in case law too. In Lord Phillips' words in *Q,*

> The common law of judicial review in England and Wales has not stood still in recent years. Starting from the received checklist of justiciable errors

---

[1410] *R v The Parole Board for England and Wales, ex parte Wells; R v The Secretary of State for the Home Department, ex parte Walker* [2007] EWHC 1835 (HC, Queen's Bench Division, 31 July 2007), para 38.

[1411] Kavanagh, *Constitutional Review under the UK Human Rights Act*, 253 f; Craig, *Administrative Law*, 2016 at 19-026 f. Murray Hunt, "Against Bifurcation," in *A Simple Common Lawyer: Essays in Honour of Michael Taggart*, ed. David Dyzenhaus, Murray Hunt, and Grant Huscroft (Oxford; Portland, Or: Hart, 2009), 108.

[1412] Elliott, "The Human Rights Act 1998 and the Standard of Substantive Review," 308.

[1413] *R v Secretary of State for the Environment, Transport and the Regions, ex parte Alconbury Developments Ltd and Others* [2001] UKHL 23 (HL, 9 May 2001) at 55.

[1414] Paul Craig, "The Nature of Reasonableness Review," *Current Legal Problems* 66, no. 1 (2013): 131. See *Kennedy*, cited above, para. 54, *per* Lord Mance. See also *Pham*, cited above, para. 60. In the same vein, see Kavanagh, *Constitutional Review under the UK Human Rights Act*, 243 f. On recent evolutions in this respect, see *infra*, Part III, Chapter 9(3).

[1415] Trevor Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford: OUP, 2013), 245 on the Smith case; Allan, 176 on section 3 HRA. This however is not the dominant view: see Kavanagh, *Constitutional Review under the UK Human Rights Act*, 49 f.; Craig, *Administrative Law*, 2016, 560.

> set out by Lord Diplock in the CCSU case [1985] AC 374, the courts (as Lord Diplock himself anticipated they would) have developed an issue-sensitive scale of intervention to enable them to perform their constitutional function in an increasingly complex polity. They continue to abstain from merits review – in effect, retaking the decision on the facts – but in appropriate classes of case they will today look very closely at the process by which facts have been ascertained and at the logic of the inferences drawn from them.[1416]

Continuity or change? The assimilation of proportionality to *Wednesbury* undermines its intrusiveness and rigour. This is stressed by many scholars and judges.[1417] It is pointed out that, even in the cases of the most "anxious" *Wednesbury* scrutiny, the judge will not assess the balance struck by the primary decision-maker, while this is an evaluation that proportionality sometimes entails. Furthermore, proportionality implies a structured approach and a shift in the burden of proof in favour of the individual claimant. Hence, it leads to more intensive scrutiny of public action than the traditional irrationality head.

Why do human rights enthusiasts assimilate the two heads of review then? Again, the answer is found in the particular stakes attached to the use of proportionality in English public law. As we saw, the promotion of proportionality was not so much about rights optimisation nor about compliance with Convention standards. Rather, it was about the rationalisation and modernisation of domestic public law. Interestingly, while the HRA institutionalised proportionality and its fundamental rights baggage, it also constrained them within its scope and thus within the "Diceyan prison".[1418] It preserved the conceptual distinction between proportionality and *Wednesbury* in English judicial practice and all that it represented: parliamentary sovereignty and analytical pragmatism. On the contrary, the idea of continuity between proportionality and irrationality, even at the cost of effective fundamental rights protection, better fulfils the domestic lawyers' expectations from proportionality. It is underpinned by the claim that the rationalisation of English administrative law is complete.

In this way, the debates on the spill-over of proportionality make sense: they reflect a more profound struggle for the fundamentals of the new English constitution. Will the constitution be based on the pragmatist precepts of the Diceyan legacy or on rationalist fundamental rights principles? Martin Loughlin talks about a "singular

---

[1416] *R v Secretary of State for the Home Department, ex parte Q* [2004] QB 36 (CA, Civil Division, 18 March 2003), para 112. See also *Kennedy*, cited above, paras 51 f., *per* Lord Mance.

[1417] Hickman, *Public Law after the Human Rights Act*, 99 f. The author proposes to preserve the conceptual clarity of proportionality. See also Veena Srirangam, "A Difference in Kind – Proportionality and Wednesbury," *IALS Student Law Review* 4, no. 1 (2016): 46. Paul Daly, "Proportionality and Rationality: The Debate Goes On," *Administrative Law Matters* (blog), February 17, 2016, http://www.administrativelawmatters.com/blog/2016/02/17/proportionality-and-rationality-the-debate-goes-on/. For some judicial opinions adopting this view, see *Keyu*, cited above, *per* Lord Kerr, *Kennedy*, cited above, *per* Lord Carnwath.

[1418] Hunt, "Sovereignty's Blight: Why Contemporary. Public Law Needs the Concept of 'Due Deference,'" 344.

moment of imaginative constitutional self-reflection".[1419] For once, parliamentary sovereignty, or supremacy, as it is lately called, seems to yield before the legal constitution. Notable members of the newly-formed English public law *doctrine*, among them the President of the Supreme Court, claim that if the Government was to repeal the HRA, the common law constitution would not change much.[1420] Indeed, the process of rationalisation has advanced well outside the scope of the HRA too. Most notably, Part I of the CRA 2005 explicitly confers constitutional status on the rule of law. Judges do not hesitate to proclaim their newly acquired powers. In the words of Lord Hope in *Jackson*, "*the rule of law enforced by the court is the ultimate controlling factor on which the constitution is based*".[1421] In the same decision, Lord Steyn stated:

> the European Convention on Human Rights as incorporated into our law by the Human Rights Act, 1998, created a new legal order. One must not assimilate the ECHR with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.[1422]

The reign of reason, introduced in the English system through HRA and the "*legal order*" that it created, replaces the reign of Parliament. Few are now the scholars that still believe in the political constitution.[1423] Martin Loughlin observes that, "[w]hether or not the ideal of the 'rule of law' is ever realized, we surely end up with the rule of lawyers."[1424]

[1419] Loughlin, *The British Constitution*, 83.

[1420] Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law*, 324; cited by Stuart Lakin, "The Sovereignty of Law: Freedom, Constitution and Common Law by Professor Trevor Allan: Some Preliminary Thoughts," *UK Constitutional Law Association* (blog), February 4, 2014, https://ukconstitutionallaw.org/2014/02/04/stuart-lakin-the-sovereignty-of-law-freedom-constitution-and-common-law-by-professor-trevor-allan-some-preliminary-thoughts/; See also Neuberger, "The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK Experience."

[1421] *R v Attorney General, ex parte Jackson and others* [2006] 1 A.C. 262 (HL, 13 October 2005) at 304.

[1422] Ibid, 302.

[1423] See on this point Allison, *The English Historical Constitution*, 205 f.; Martin Loughlin, "Constitutional Law: The Third Order of the Political," in *Public Law in a Multi-Layered Constitution*, ed. Nicholas Bamforth and Peter Leyland (Oxford: Hart, 2003), 27; Conor Gearty, *Civil Liberties*, Clarendon Law Series (Oxford; New York: OUP, 2007).

[1424] Loughlin, *The British Constitution*, 118.

6. The "afterlife" of parliamentary sovereignty:[1425] *the necessity of the concept of deference*

"Sovereignty's blight".[1426] Despite the evolutions described in the previous paragraph, the defenders of the legal constitution complain that the principle of parliamentary sovereignty "continues to blight contemporary public law and to prevent its evolution into a mature system regulating the legality of the exercise of power in a modern polity".[1427] Indeed, while some judges have argued for such an evolution, proportionality has not been *expressly* applied as a purely domestic principle, not even in the field of fundamental rights.

Interestingly, in the famous *Daly* case, which is perceived as the first application of proportionality in English public law, no judge expressly engages proportionality analysis. Lord Steyn confines himself to certain abstract observations about the status of the principle. As to the substance of the case, he was "*in complete agreement with the reasons given by Lord Bingham*".[1428] However, Lord Bingham underscored that he had reached his conclusions "*on an orthodox application of common law principles derived from the authorities and an orthodox domestic approach to judicial review*". [1429] After establishing an infringement to Mr Daly's individual common law rights, Lord Bingham examined whether "*the policy can be justified as a necessary and proper response*" to the acknowledged public interest.[1430] In this process, he evaluated himself the importance of the legitimate objectives invoked by the administration and he even proposed alternative, less restrictive solutions to the adopted measures.[1431] What allowed for such an intrusive judicial scrutiny was the judicial construction of the statute applicable in this case in light of the general principle of legality. Following this principle, the judges "read" into the law an implied prohibition of excessive interference with individual rights.

It can be said that in this case proportionality was indeed applied "in all but name". Lord Bingham himself mentioned that the application of the Convention would lead him to the same result, while he meticulously avoided the use of the term proportionality. *Name* however, is important, since it expresses a lot about the peculiarly English meaning of proportionality. The non-use of proportionality terminology is significant, even though the method and outcomes of the judicial reasoning might be identical. The distinction between proportionality and domestic standards persists. In *Keyu*, for instance, the Supreme Court explicitly refused to perform the burial rites of *Wednesbury* unreasonableness. However, the distinction

---

[1425] Title inspired by Nick Barber, "The Afterlife of Parliamentary Sovereignty," *International Journal of Constitutional Law* 9, no. 1 (2011): 144.

[1426] Hunt, "Sovereignty's Blight: Why Contemporary. Public Law Needs the Concept of 'Due Deference.'"

[1427] Hunt, 339.

[1428] *Daly*, cited above, para 24.

[1429] Ibid, para 23. However, he agreed with Lord Steyn that this would not always be the case. Lord Bingham's dicta could be qualified, after the judicial recognition of a general principle of legality.

[1430] *Daly,* para 17.

[1431] Ibid, para 19. See, similarly, *R v Secretary of State for the Home Department, ex parte Leech* [1994] Q.B. 198 (CA, Civil Division, 19 May 1993).

between domestic and European proportionality is increasingly played down by English judges.

Keyu concerned the refusal by the executive to hold a public inquiry into the killing by the Scots Guards of 24 unarmed civilians in Batang Kali. Persons closely related to the victims challenged the refusal under the HRA and under the common law judicial review procedure. At the time of the killings, in 1948, Batang Kali was a British protectorate and today is part of the Malaysian territory. Thus, the question of the territorial application of the HRA arose. The majority of the Supreme Court judges agreed on the fact that the Convention did not apply on the facts of the case. The appellants argued that proportionality should still be applied as a domestic standard of substantive review.

Lord Neuberger considered the question in detail since it held it to be of fundamental importance. However, in his view it was not necessary to provide an answer to this question to resolve the issue at stake, since both the proportionality and the *Wednesbury* claims of the appellants failed:

> the relevant members of the executive have given coherent and relevant reasons for not holding an inquiry, including expressing a justifiable concern that the truth may not be ascertainable, and a justifiable belief that, even if the appellants' expectations to the contrary were met, there would be little useful that could be learned from an inquiry so far as current actions and policies were concerned.[1432]

Claims as to the lack of difference in the practical outcome between proportionality and *Wednesbury* are recurrent in English judicial opinions.[1433] It seems that the practical consequences of the conceptual distinction between proportionality and irrationality have become somewhat of a mystery in English public law. This allows judges to avoid dealing with the crucial matter of the spill-over of proportionality. English analytical formalism preserves the principle of parliamentary supremacy. Thus, with respect to the fundamentals of the English constitution the economy of the common law persists.

Towards a contextual approach to the intensity of review. However, even without performing the burial rites of *Wednesbury*, Lord Neuberger certainly moved one step further away from parliamentary sovereignty. This can be shown through a comparison between *Keyu* and *Brind*. What was at stake in both cases was the spread of proportionality as a domestic head of review. As we saw, in *Brind* it was analytical formalism and parliamentary sovereignty that impeded an expansion of the scope of proportionality. This was no longer the case in *Keyu*. Rather, Lord Neuberger refused to provide an answer concerning the scope of proportionality, since it was not necessary for the case at hand. What underlay the judge's refusal were considerations of institutional order: in his words, "*[i]t would not be appropriate for a five-Justice panel of this*

[1432] *Keyu*, cited above, para 136.
[1433] See on this *infra*, Part III, Chapter 9(3).

court to accept, or indeed to reject, [the proportionality] argument, which potentially has implications which are profound in constitutional terms and very wide in applicable scope".[1434] Hence, Lord Neuberger considered that, if the proportionality claim was to succeed in the case at hand, the case should be reargued before a nine-Justice panel.

This kind of reasoning, familiar to civil lawyers, is quite strange to the common law tradition, where panel selection became an issue of discussion only since the 2000s, in the debates concerning the creation of the Supreme Court.[1435] The contrast with the adoption of the irrationality standard, which for half a century dominated English substantive review, is striking. The 1947 *Wednesbury* case was decided by the Court of Appeal and it is Lord Greene Master of the Rolls' dicta that are typically cited as authority. Considerations of institutional legitimacy and expertise are opposed to the traditional image of the judge as an impartial referee concerned with rules of form and procedure. However, they fit well with the new policy-making function of courts under the HRA. This is why they are a quite recurrent theme in this context. Initially, relevant issues were considered in judicial analysis under the concept of "margin of discretion" or "discretionary area of judgment".[1436] This spatial metaphor emerged together with the application of proportionality and was a reaction to the shift of power that it implied. The margin of discretion purported to reinstate a category of cases where the supremacy of Parliament was still preserved, and proportionality did not apply.[1437] However, the defenders of proportionality perceived the margin of discretion as a residue of Diceyan analytical formalism and promoted the jettisoning of categories in judicial reasoning.[1438] The spatial approach has been superseded by a more contextual approach to the intensity of review *within* the proportionality framework.

Reformulating the quest for democratic government. Once the margin of appreciation category falls apart, the idea of parliamentary sovereignty does not completely vanish. The quest for democratic government that it once embodied simply has to be reformulated in rationalist terms in order to be taken into account.[1439] This is the function of the concept of "deference". With few exceptions,[1440] proportionality enthusiasts talk about a duty of deference in the adjudication of HRA rights.[1441]

[1434] *Keyu,* para 132.

[1435] On this, see UK Supreme Court, "Selecting the Panel and the Size of the Court [Updated]," *UKSCBlog* (blog), October 4, 2009, http://ukscblog.com/selecting-the-panel-and-the-size-of-the-court-updated/.

[1436] See *Kebeline*, cited above, at 380, *per* Lord Hope.

[1437] Hunt, "Sovereignty's Blight: Why Contemporary. Public Law Needs the Concept of 'Due Deference,'" 344 f.

[1438] Kavanagh, *Constitutional Review under the UK Human Rights Act*, 257 f. *Contra* Leigh, "Taking Rights Proportionately."

[1439] Analysis inspired by Jack Balkin, "Nested Oppositions," *Yale Law Faculty Scholarship Series*, no. 281 (1990), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1280&context=fss_papers.

[1440] Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'"; Jowell, "Judicial Deference and Human Rights: A Question of Competence."

[1441] Julian Rivers, "Proportionality and Variable Intensity of Review," *CLJ* 65, no. 1 (2006): 174; Hunt, "Sovereignty's Blight: Why Contemporary. Public Law Needs the Concept of 'Due Deference'"; Kavanagh, *Constitutional Review under the UK Human Rights Act*, 167 f.; Craig, *Administrative Law*, 2016, para 18-033.

According to Julian Rivers, deference is "practically required and constitutionally appropriate";[1442] Aileen Kavanagh talks about a duty of "minimal deference" to the democratically elected branches of government;[1443] and Murray Hunt emphasizes that "contemporary public law needs a concept of due deference".[1444] Deference is omnipresent, because it ensures the judicial and the political process remain distinct. It expresses the idea that fundamental rights remain, at least partially, a political project left to democratic decision-making. Rivers talks about a "joint project" of Parliament and judiciary to render rights effective.[1445] Interestingly, a major contribution of common law scholars to the transnational proportionality theory has been the construction of an institutionally sensitive theory of judicial deference.[1446]

The quest for democratic government finds expression in judicial practice as well. In *Begbie*, Laws LJ stated that courts cannot impose their own broad conception of public interest on Parliament. He distinguished between "*questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court)*" and other cases "*the act or omission complained of may take place on a much smaller stage, with far fewer players*".[1447] According to the judge, on the general policy questions "*judges may well be in no position to adjudicate save at most on a bare Wednesbury basis, without themselves donning the garb of policy-maker, which they cannot wear*".[1448] In his words, "*in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups*".[1449] This is connected to the fact that, typically the final stage of proportionality analysis is necessity and no explicit balancing of fundamental rights and public interests takes place.[1450] After determining the scope of the right in question, the scope where the proportionality enquiry is at play, judges only define the much narrower concept of the "*irreducible minimum of Convention rights*".[1451] This concept is applied on a case by case basis and its application is a decision that involves "*no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark*".[1452] It concerns only the individual claimant who brought the case before the court.

Context and choice in *Nicklinson*. Still, under the new contextual approach that underpins judicial deference, judicial intervention ceases to be a matter of what legal forms impose and becomes a *choice* of the courts, according to certain factors. As Kavanagh observes, "deference is not a matter of the legal limits on jurisdiction, but rather a matter of judicial restraint out of respect for, and sensitivity to, the appropriate

[1442] Rivers, "Proportionality and Variable Intensity of Review," 207.
[1443] *Constitutional Review under the UK Human Rights Act*, 181 f.
[1444] Hunt, "Sovereignty's Blight: Why Contemporary. Public Law Needs the Concept of 'Due Deference.'"
[1445] Rivers, "Proportionality and Variable Intensity of Review," 207.
[1446] See *supra*, the general Introduction of this PhD, Section 2.
[1447] *Begbie*, cited above, at 1130 f.
[1448] Ibid.
[1449] Ibid.
[1450] Rivers, "Proportionality and Variable Intensity of Review."
[1451] *Roth,* cited above, para 28.
[1452] *Begbie,* 1131.

constitutional boundaries between the branches of government".[1453] Legal limits are replaced by institutional ones and are defined by courts themselves. This made Lord Hoffmann criticise the deference metaphor for its "*overtones of servility, or perhaps gracious concession*" in *ProLife Alliance*.[1454] Proportionality and deference are progressively perceived as instances of rational decision-making and conquer increasingly more fields of legal reasoning in the rationalist post-HRA era.[1455] In certain fields, English courts engage in proportionality analysis, even though the Strasbourg court uses the unstructured test of "fair balance". In the words of Lord Reed, proportionality "*has now become the established method of analysis*" and should continue to be followed.[1456] English judges perceive it as a "*useful analytic tool*" whenever Convention rights are at stake.[1457]

The shift that the contextualist approach provokes was illustrated in *Nicklinson*. Mr Nicklinson, completely paralysed after a stroke, wanted to end his life but could not do so without assistance. Assisted suicide is unlawful under English law and Mr Nicklinson sought a declaration of the current state of the law as incompatible with article 8 ECHR. The President of the Supreme Court, Lord Neuberger considered that the issue requires balancing of the competing rights and interests. He went on to state that "*the mere fact that there are moral issues involved plainly does not mean that the courts have to keep out*".[1458] Lord Mance gave the balancing issue an extended consideration. His dicta are worth citing.

> The third and fourth stages may raise potentially overlapping considerations, but the distinction between them is important. The third asks whether the aim could have been achieved without significant compromise by some less intrusive measure. The fourth involves the critical exercise of balancing the advantages of achieving the aim in the way chosen by the measure against the disadvantages to other interests. This balancing exercise, often involving the weighing of quite different rights or interests, is a core feature of the court's role, and can be described as involving proportionality in the strict sense of that word. How intensely the court will undertake the exercise, and to what extent the court will attach weight to the judgment of the primary decision-maker (be it legislature or executive), depends at each stage on the context, in particular the nature of the measure and of the respective rights or interests involved. The primary decision maker's choices as to the aim to adopt and the measure to achieve it may be entitled to considerable respect. But at the

[1453] *Constitutional Review under the UK Human Rights Act*, 177.

[1454] R *v. British Broadcasting Corporation, ex parte ProLife Alliance* [2003] UKHL 23 (HL, 15 May 2003), para 75.

[1455] See *Huang v Secretary of State for the Home Department; Kashmiri v Same* [2007] 2 A.C. 167 (HL, 21 March 2007), para 16, *per* Lord Bingham.

[1456] *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60 (SC, 16 November 2016), paras 47-50.

[1457] R *v Secretary of State and another, ex parte MM (Lebanon) & Others* [2017] UKSC 10 (SC, 22 February 2017), para 44.

[1458] *Nicklinson*, cited above, para 98.

> fourth stage other interests may come into play, the intrinsic and comparative weight of which the court may be as well or even better placed to judge in the light of all the material put before it.[1459]

Nicklinson is a much-discussed decision which upsets the previous understanding of the distribution of competences, even under the HRA. Both Neuberger and Mance referred to the Supreme Court as the guarantor of fundamental rights against the abuses of majorities. They both considered that sensitive political and moral issues should not necessarily be left to Parliament because judges may be better placed to decide on them. Even more, in defining the respective roles of Parliament and the Supreme Court under the proportionality framework, Lord Mance contended that although it is not for the court to decide the correct legislative scheme and to define its details, it is the responsibility of judges to determine a number of feasible and proportionate schemes among which Parliament has to choose.[1460] In this way, Lord Mance further reduced the difference in the institutional functions of judiciary and legislature.

Yet, it seems that *Nicklinson* remains an exceptional case. Since its issuance, Parliament re-examined the legislation concerning assisted suicide and decided to maintain the prohibition, considering that it sufficiently served important, legitimate aims. In a recent decision on the issue, the High Court confirmed the compatibility of English law with article 8 ECHR.[1461] In this way, the English judges avoided openly declaring an institutional war between judiciary and Parliament. That being said, *Nicklinson* is an example of the ongoing struggle between the Supreme Court and Parliament as to the definition of fundamental social values. In this context, law seems less and less capable of preserving institutional stability.

***

Proportionality in English public law has been always perceived as a transfer from Continental Europe. It has expressed a way of thinking completely strange to analytical positivism that since Dicey had dominated English legal thought. Initially applied as a European principle, it irritated traditional distinctions and semantic webs. Thus, it was strictly constrained within the "gateways" that Parliament had left for it. Its spread was rejected as contrary to the most fundamental of all principles in the English constitution: parliamentary sovereignty. Proportionality expressed a possibility of objective moral-legal evaluations that was contrary to the economy of the common law. It expressed the belief in a substantive truth that transcends and sacralises legal adjudication, a myth of law as science and of the judge as a conscientious scientist in search for a transcendent truth. Thus, it has been strange to the traditionally game-like nature of the judicial procedure, which remains impartial, no matter how fundamental

[1459] Ibid, para 167 f, 169.
[1460] Ibid, para 107.
[1461] *R v Secretary of State for Justice, ex parte Conway* [2017] EWHC 2447 (HC, 5 October 2017).

the interests or principles at stake. Proportionality's spread was long perceived as antithetical to the formalism and pragmatism that has traditionally permeated in English legal thought.

Precisely due to its antithetical relationship with the Diceyan tradition, proportionality has been promoted by certain judges and barristers in search of a domestic constitution that would gather together the bits and pieces of English administrative law. It soon ceased to designate a simple head of judicial review and became a judicial method or even an idea applied through domestic concepts and heads. In this way, proportionality reoriented domestic legal discourse towards a more rationalist approach to legal reasoning, which focuses on substance and values rather than reasoning patterns and forms. Proportionality gave new meaning to common law structures, concepts and institutions. It brought with it a new legacy of normative scholarship which increasingly participates in the production of coherent legal knowledge and is increasingly quoted in judicial decisions. English scholarship is increasingly akin to the French *faiseurs des systèmes* and *doctrine*.

The adoption of proportionality as a head of review under the HRA has furthered these evolutions, but at the same time it has contained them within the analytical tradition. Proportionality for the moment is applied as an HRA head of review and has not spread to other domains of English law. It is applied, at least in name, only insofar as Parliament has wanted so. However, in this crucial constitutional moment for English public law, it is the abandonment of the analytical tradition and of the principle of parliamentary sovereignty itself that is at stake. Domestic lawyers have to choose between the legal and the political constitution. While proportionality and its fundamental rights baggage conquer English law, the Diceyan legacy and the faith in the political process that underpinned it resurface in doctrines of margin of discretion and deference. Rationalism and contextualism become dominant in English legal thought and legal limits seem unable to ensure the avoidance of institutional conflicts any longer.

CHAPTER 6
Searching for "a species of sympathetic magic"

Proportionality in Greek law: a legal transplant? At first glance, it seems that the spread of proportionality in Greece, like in England, follows Alan Watson's legal transplant model. "Success" would seem a proper term to characterising the trajectory of the principle in domestic law. Proportionality, first timidly recognised in certain judicial decisions and scholarly writings, was soon proclaimed as a constitutional principle in case law and was even explicitly entrenched as such in 2001. Domestic lawyers have perceived proportionality as a fundamental rights principle, just like the one applied in Karlsruhe. They think of it as a pronged structure for legal reasoning, they are enthusiastic about its entrenchment and they consider it as a "correct" method for adjudication. In their writings on proportionality, they have never forgotten to point out its foreign roots and to refer to German theory and practice. Hence, the form and function of proportionality for Greek lawyers is very close to the theory developed by their German colleagues. The traditional structures of Greek public law discourse have not impeded the "triumphant march" of proportionality in this context.

Of course, the Watsonian model must be adjusted to accommodate the influence of other European jurisdictions as well. Indeed, the transfer of proportionality in Greek law has not been a two-player phenomenon, simply involving the introduction of a German principle in Greece. Scholars have often mentioned the ECJ and ECHR case law in relevant studies.[1462] The application of the principle in other countries, especially France, has also been important.[1463] After all, we must bear in mind that "no transplant is an island, and that complex modes of interaction color the process".[1464] Nevertheless, this does not discredit the fact that proportionality appeared in Greek law as a transplant and that its content in the minds of Greek lawyers has been defined by reference to its application in other jurisdictions.

Merits of the transplant model. Watson's approach also offers some indications of possible explanations for this phenomenon. Greek public lawyers often participate in the political or judicial classes with the power to produce legal change, and perfectly correspond to the law-making elites described by this author. In this sense, they resemble the French *doctrine*. At the same time, Greek lawyers are very different from their French colleagues in their education and openness to foreign academic influences. Having effectuated part of their studies in other countries, they are well

[1462] See for example Evaggelia Prevedourou, "Η αρχή της αναλογικότητας στη νομολογία του ΔΕΚ [The Principle of Proportionality in the ECJ Case Law]," *ΕΕΕυρ*Δ, 1997, 1, 297.

[1463] See for example Vassiliki Kapsali, "Η αρχή της αναλογικότητας στο γαλλικό δημόσιο δίκαιο [The Principle of Proportionality in French Public Law]," *ΔτΑΤΕΣ IV*, 2006, 309.

[1464] Margit Cohn, "Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom," *American Journal of Comparative Law* 58 (2010): 584.

aware of foreign academic debates, which they subsequently teach in universities and reproduce in Parliament, in judicial deliberations, or on media panels. Legal transplantation has been a major mode of legal change in Greece since the beginnings of the Greek state. This has been the case in the field of public law too, where France and Germany have been privileged sources of inspiration for domestic law-makers. Proportionality certainly benefitted from the openness of domestic legal discourse abroad.

Certain personalities have particularly promoted the spread of proportionality language in domestic law. For instance, Petros Pararas, constitutional law professor and prominent member of the Council of State, was one of the first to defend proportionality as a constitutional principle.[1465] He was Advocate General (*εισηγητής*, function resembling to that of the French *rapporteur public*) in some milestone decisions that used proportionality language.[1466] Having completed part of his studies in Paris, Pararas was prolific in the subject of European human rights and, despite some initial hesitations, he was enthusiastic about the 2001 reform.[1467] He has actively participated in the editing of *Human Rights* (*Δικαιώματα του Ανθρώπου*), an influential journal in which many studies on proportionality have been published. As a judge, he also participated *ad hoc* in *Tourkiki Enosi Xanthis*, where the Strasbourg court famously concluded that Greece had violated the principle of proportionality.[1468] Pararas is one among numerous influential personalities who promoted proportionality in the domestic context, others being Vassilios Skouris, Evaggelos Venizelos, Stefanos Matthias and Xenophon Contiades.

The image of an elite law-producing group is reinforced by the seclusion of Greek legal discourse from social and political reality. This feature has long been apparent, even in the language in which lawyers expressed themselves. Until the '80s, legal writings employed an artificial idiom called *katharevousa* (*καθαρεύουσα*, meaning "purifying" in Greek).[1469] This language, resembling to ancient Greek more than the language used in everyday life, was deemed to "purify" Greek cultural practices from oriental relics of the Ottoman occupation. Its use in legal writings and official state documents reproduced and amplified the chasm between social practices and the image of the Greek society that lawyers and state officials held. While *katharevousa*

[1465] Petros Pararas, "Παρατηρήσεις υπο την ΣτΕ (Ολ.) 2952/1975 [Comment on StE (Pl.) 2952/1975]," *ΤοΣ*, 1976, 350. Note that it is one of the first decisions after the entry into force of the 1975 Constitution.

[1466] StE (Pl.) 2112/1984 *ΤοΣ* 1985, 63; StE 3682/1986 in *ΘΕ ΣΤΕ* 1986, paras 292 f.

[1467] *Το κεκτημένου του ευρωπαϊκού συνταγματικού πολιτισμού [The Acquis of the European Constitutional Civilisation]* (Athens: Αντ. Ν. Σάκκουλας, 2001); Petros Pararas, "*Το νέο Σύνταγμα* [The New Constitution]," *Το Βήμα*, 19 January 2003; *Συνταγματικός πολιτισμός και Δικαιώματα του Ανθρώπου [Constitutional Civilsation and Human Rights]* (Athens; Komotini: Αντ. Ν. Σάκκουλας, 2011); "Το ευρωπαϊκό δίκαιο των Δικαιωματων του Ανθρώπου [European Human Rights Law]," *ΔτΑ* 86 (2012): 1131.

[1468] ECtHR, *Tourkiki Enosi Xanthis v Greece*, 27 March 2008, no. 26698/05. See more generally on the role of Petros Pararas in domestic constitutional law, Christina Akrivopoulou, "Βιβλιοπαρουσίαση: Πέτρος Ι. Παραράς, Συνταγματικός πολιτισμός και Δικαιώματα του Ανθρώπου [Book Review: Petros I. Pararas, Constitutional Civilization and Human Rights]," *Constitutionalism.gr* (blog), November 29, 2012, http://www.constitutionalism.gr/site/2436-biblioparoysiasi-petros-i-pararas-syntagmatikos-po/.

[1469] On this subject, cf. Yannis Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]* (Athens; Komotini: Αντ. Ν. Σάκκουλας, 1996), 116.

ceased to be the official language of the Greek state in 1982, it continued to be used in judicial decisions and other legal texts for some years. The abandonment of *katharevousa* did not bring about the appropriation of law by society. Although advances were made in this respect, law is still far from accessible to Greek citizens. It is indicative that the most important legal databases in Greece have been privately owned, and are accessible mainly to lawyers, in return for payment. Under the current state of economic emergency, a large part of the legal texts implemented by public authorities have been written in foreign languages, mostly English (for the Memoranda of Understanding and the connected Loan Agreements). Domestic implementation acts, when accessible to the public, often contain acronyms and technical terms that could look puzzling even to experts in economics. The lack of correspondence between law and the social reality surrounding its application, which Alivizatos has called the "Greek misfortune",[1470] makes legal transfers "socially easy"[1471]. This might account for the fact that the impressive spread of proportionality has been generally detached from socio-political context.

The insufficiency of the transplant metaphor. Thus, the transplant metaphor accounts well for the spread of proportionality in Greece. It loyally describes the way it emerged and came to dominate domestic public law discourse. It also provides us with some possible explanations as to the enthusiasm with which proportionality was received in this context. Still, the analysis in Chapter 3 has shown that while the content of proportionality as a pronged structure for judicial review was established very early in Greek legal thought, its application by courts has been fragmented and inconsistent. In domestic cases, proportionality has fluctuated from a manifest error test on the exercise of legislative power, to a standard of justification of administrative acts or to a value of equity in public action. In EU law cases, proportionality has been applied by means of translation of the relevant ECJ case law. The shift between the theoretical perception of proportionality and its actual application by courts can also be observed after the constitutional entrenchment of the principle. The content of proportionality as a structure for the optimisation of fundamental rights progressively became dominant in Greek legal theory. In judicial practice however, proportionality has rather resembled an efficiency test, when it does not simply correspond to a reasonableness requirement.

While the transplant metaphor accounts well for the spread of proportionality in Greek public law, it proves incapable of explaining the actual application of the principle by domestic courts. Thus, it only makes sense of a small part of the use of proportionality language in the Greek context. One can doubt the utility of a legal approach which only makes sense of certain instances of legal reasoning, the rest being rejected as irrational practices related to particularly local and obscure socio-cultural characteristics. How to make sense of the shift between the perception of

[1470] Nicos Alivizatos, *Ο αβέβαιος εκσυγχρονισμός και η θολή συνταγματική αναθεώρηση [Uncertain Modernization and Vague Constitutional Reform]* (Athens: Πόλις, 2001), 96: «ελληνική κακοδαιμονία».

[1471] Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed. (Athens, Ga: University of Georgia Press, 1974), 95.

proportionality shared by Greek public lawyers and its use in judicial practice? What does proportionality finally *mean* in the Greek context? Has its transfer achieved the expectations that domestic lawyers have attached to it? And if not, why is proportionality so important for Greek lawyers?

The meaning of proportionality in Greek public law. In this chapter, I argue that the enthusiastic embracement of proportionality by Greek lawyers has defied the traditional linguistic structures and patterns that surrounded its application in judicial review. The rational human rights paradigm that proportionality was purported to bear did not fit the myths that underpinned Greek judicial practice. Arguably, this has been a major factor of the infelicity of proportionality in this context. In order to make sense of proportionality in Greek public law, I propose to take its meaning as a transplant seriously. Nelken observes that, in many cases, legal transfers do not fit an existing social situation, but rather correspond to an imagined local future.[1472] This is the case when their goal is social change, namely when they are commonly *perceived* by legal actors as legal transplants. I argue that, like other legal transfers in the Greek context, proportionality has enjoyed a value in itself, as part of an imported legal civilisation. As such, it has been expected to bring about legal and even social change. In this context, proportionality has expressed domestic lawyers' belief in the possibility of law to *act upon* society, "[i]n what is almost a species of sympathetic magic".[1473]

In the following pages, I will attempt to show that proportionality emerged in Greek public law as a transplant but it did not bring with it a new perception of constitutional rights (**Section 1**). Hence, its function in judicial review has been constrained by the traditional distribution of competences between the judiciary and public authorities (**Section 2**). The shift between the theory of proportionality and its use in judicial practice has been part of its meaning as a transplant. The long process of transplantation of proportionality has represented an equally long process of acculturation of the Greek polity to a European constitutional civilisation, finally accomplished with the 2001 reform (**Section 3**). Ever since, the hegemony of proportionality in Greek constitutional law has been combined with the determination of its content by ECJ case law (**Section 4**). The replacement of domestic methods of legal reasoning with the European science of proportionality purports to establish a whole new vision of the Greek polity, which does not always correspond to local legal actors' worldview (**Section 5**).

[1472] David Nelken, "Comparatists and Transferability," in *Comparative Legal Studies: Traditions and Transitions*, ed. Pierre Legrand and Roderick Munday (Cambridge; New York: CUP, 2003), 457.

[1473] David Nelken, "Defining and Using the Concept of Legal Culture," in *Comparative Law: A Handbook*, ed. Esin Örücü and David Nelken (Oxford; Portland, Or: Hart, 2007), 118.

1. The "birth" of proportionality: a fundamental rights principle without fundamental rights

The novelty of proportionality as a judicial method. While proportionality had already emerged during the '70s, and had even been applied by the Council of State, the 2112/1984 decision brought about something new in its use. Greek public lawyers talked about the "birth" of proportionality in domestic constitutional law.[1474] In an article dedicated to the matter, Vassilios Skouris, subsequently president of the ECJ, argued that the decision "opened the way" to the introduction of the principle in Greek public law.[1475] Previous uses of the term were simply … forgotten. The change was expressed in the new terminology employed by the Council itself. Instead of referring to "relativity" or "proportion", as it had done in previous cases, the court used the term "proportionality", which before the '70s, was absent not only from domestic legal discourse, but from Greek language altogether. This is quite impressive for a court that used to write in *katharevousa*. Where did the novelty of the 2112/1984 decision lie?

Interestingly, while the Council of State did not cite the "neglected" cases of the '70s, it did refer to previous case law in its application of proportionality. Surprisingly, it cited decision 4036/1979, in which it had not used proportionality terminology at all.[1476] Instead what was relevant in this decision was that the court had affirmed the constitutional rank of professional freedom and had attached its protection to article 5(1) of the Constitution.[1477] Since the enactment of the 1975 Constitution, scholars had been reticent in attributing direct normative effect to this provision due to its vagueness and indeterminacy.[1478] In the 1979 decision, professional freedom had been generously defined by the Council, as encompassing both the choice and the exercise a certain profession. As far as liberal professions were concerned, the judges had stated that article 5 also protected the freedom of choice of the location where the exercise of the profession would take place.

Still, article 5(1) not only allowed for a broad definition of the scope of the rights protected therein. It empowered equally broad legislative limitations on these rights, in pursuit of other constitutional values, the protection of the rights of others or "good usages", meaning accepted moral standards. If this article was to place concrete

---

[1474] Dimitra Kontogiorga-Theocharopoulou, *Η αρχή της αναλογικότητας στο εσωτερικό δημόσιο δίκαιο [The Principle of Proportionality in Domestic Public Law]* (Thessaloniki: Σάκκουλα, 1989), 9: "γενέθλιος απόφαση"; see also 24. Sarantis Orfanoudakis, *Η αρχή της αναλογικότητας στην ελληνική έννομη τάξη : από τη νομολογιακή εφαρμογή της στη συνταγματική της καθιέρωση [The Principle of Proportionality in the Greek Legal Order: From Its Judicial Application to Its Constitutional Consecration]* (Thessaloniki: Σάκκουλα, 2003), 16 f; 79.

[1475] Vassilios Skouris, "Η συνταγματική αρχή της αναλογικότητας και οι νομοθετικοί περιορισμοί της επαγγελματικής ελευθερίας [The Constitutional Principle of Proportionality and Legislative Restrictions of Professional Freedom]," *Ελλ⊿νη* 28 (1987): 773.

[1476] See StE (Pl.) 4036/1979 *APM* 1980, 327.

[1477] Ibid; StE 630/1979 *ToΣ* 1980, 153. See also Skouris, 776 f.

[1478] Aristovoulos Manessis, *Συνταγματικά ⊿ικαιώματα [Constitutional Rights]*, vol. A (Thessaloniki: Σάκκουλα, 1978), 114 f; Aristovoulos Manessis, "Οι κύριες συνιστώσες του συστήματος θεμελιωδών δικαιωμάτων του Συντάγματος του 1975 [The Main Components of the Fundamental Rights System in the Constitution of 1975]," in *Συνταγματική θεωρία και πράξη*, vol. II (Athens: Σάκκουλα, 2007), 529 f.

constraints on Parliament, a denser normative framework was needed. In decision 4036/1979, legislation had limited the possibility for lawyers to transfer their professional rights across jurisdictions in Greece. The law defined that such transfer could take place only when exceptional circumstances justified it. In assessing the constitutionality of these provisions, the Council referred to the general requirements of article 5, but also imposed additional constraints on legislative action. According to the court, restrictions on professional freedom should be "*defined in a general and objective way*" and "*justified by important reasons of general public or social interest*".[1479] Furthermore, the legislative restrictions "*should not lead to a substantial weakening of the constitutionally protected right* (…). *They should constitute an exception from the principle of free choice*" of the professional location.[1480] The Council of State declared as unconstitutional the statute in question, since it had not respected the requirement for rights restrictions to have an exceptional character. It is this last point of the judicial reasoning that decision 2112/1984 replaced with an application of the principle of proportionality.

Proportionality then, was closely intertwined with the judicial enforcement of a concrete normative content for constitutional rights. Its application implied an impact-based evaluation of legislation by reference to rights. As we saw, proportionality blurred the traditional distinction in Greek judicial review between the "*if*" and the "*how*" of public action.[1481] It introduced an evaluation of the legislative *purpose* which was based on the *impact* of legislation on the plaintiffs. Indeed, in decision 2112/1984, after examining the effects of the law, the Council concluded that its "*strict provisions*" were unconstitutional, since they "*were not dictated by reasons of general public interest*".[1482] Scholars immediately perceived proportionality as a guarantee of the essence of rights or of their effective exercise.[1483] Proportionality's function was to ensure the exceptional character of rights restrictions.[1484] In this sense it was very akin to what German scholars call *Schranke-Schranke*, a phrase translated and often used by Greek proportionality scholars (*περιορισμός των περιορισμών*) meaning "limitation on limitations" on constitutional rights.[1485] The novelty of the 1984 decision thus did not

[1479] StE (Pl.) 4036/1979, cited above.

[1480] Ibid.

[1481] See *supra*, Part I, Chapter 3.2.ii.

[1482] StE 2112/1984, cited above. On this point, see *supra*, Part I, Chapter 3.1.ii.

[1483] Apostolos Gerontas, "Η αρχή της αναλογικότητας στο γερμανικό δημόσιο δίκαιο [The Principle of Proportionality in German Public Law]," *ΤοΣ*, 1983, 20. A similar argument is advanced by Prodromos Dagtoglou, who deduced proportionality from the obligation of the state to guarantee the effective exercise of rights (25(1) of the Constitution), in combination with the protection of personal freedom in article 5(1): in *Γενικό Διοικητικό Δίκαιο [General Administrative Law]*, 4th ed. (Athens; Komotini: Αντ. Σάκκουλας, 2004), 135.

[1484] Dimitrios Tsatsos, *Συνταγματικό Δίκαιο [Constitutional Law]*, vol. Γ', Θεμελιώδη Δικαιώματα [Fundamental Rights] (Athens: Αντ. Ν. Σάκκουλας, 1988), 245; see also Theocharis Dalakouras, *Η αρχή της αναλογικότητας και τα μέτρα δικονομικού καταναγκασμού [The Principle of Proportionality and Coercive Measures in Criminal Proceedings]* (Thessaloniki: Σάκκουλα, 1993), 24.

[1485] Dimitra Kontogiorga-Theocharopoulou, "Σημεία εργασίας επί της αρχής της αναλογικότητος [Elements of Study on the Principle of Proportionality]," in *Σύμμεικτα προς τιμήν Γεωργίου Μ. Παπαχατζή* (Athens: Σάκκουλα, 1989), 899; Orfanoudakis, *Η αρχή της αναλογικότητας στην ελληνική έννομη τάξη : από τη νομολογιακή εφαρμογή της στη συνταγματική της καθιέρωση [The Principle of Proportionality in the Greek Legal Order: From Its Judicial Application to Its Constitutional Consecration]*, 16 f., citing the relevant literature.

lay in the application of proportionality nor in the entrenchment of constitutional rights. It lay in the *concrete connection* that the Council of State effected between the two.

Proportionality as a transplant and the timid interpretative turn in Greek legal theory. Concrete connection to constitutional rights was a major feature of the new conceptual content of proportionality. This is what made scholars talk about the "birth" of the principle, and what differentiated this new version from the vague requirement of equity that it had represented before. Dimitra Kontogiorga observed that the 1984 decision "promoted and elevated proportionality from an empirical to a legal principle".[1486] For the first time in this decision, proportionality acquired a concrete form and function in Greek public law. The principle's constitutional status, affirmed already in its early uses during the '70s, produced concrete legal consequences and actually led to the disapplication of legislation. For the first time, proportionality was articulated and applied as a requirement concerning the outcomes of legislation. The "birth" of proportionality meant its emergence as a legal transplant, namely as a concrete, imported judicial technique that was purported to serve rights adjudication.

Hence, with decision 2112/1984, proportionality also acquired a concrete audience: the judge. Indeed, the institutional implications of its explicit recognition were immediately noticed by scholars commenting on the 1984 decision. The power of the judge as against the political branches was affirmed.[1487] Vassilios Voutsakis pointed out that proportionality allowed for creative judicial interpretation (*διάπλαση*) and implied a change of paradigm in Greek judicial methodology, which was henceforth to be guided by the goals of the legal order.[1488]

The spread of proportionality in Greek public law should be read in the background of the timid interpretative turn in Greek legal theory during the '90s. This new theoretical tendency was mainly expressed in the writings of Antonis Manitakis, an influential public law scholar and constitutional law professor. In a book published in 1994, Manitakis defended an interpretative approach close to that of Ronald Dworkin and Gustavo Zagrebelsky. This author's goal was to "reconnect Law to Morality and social values",[1489] thus to incorporate into legal technique empirical and normative features that, according the positivist orthodoxy, were external to it. The ideal of a state ruled by law, apart from a procedural and formal function, would also assume a substantive one, protecting minorities from the abuses of the majority and mandating public intervention in order to protect the most vulnerable. The judge, from

---

[1486] Kontogiorga-Theocharopoulou, "Σημεία εργασίας επί της αρχής της αναλογικότητος [Elements of Study on the Principle of Proportionality]," 906. Kontogiorga-Theocharopoulou, *Η αρχή της αναλογικότητας στο εσωτερικό δημόσιο δίκαιο [The Principle of Proportionality in Domestic Public Law]*, 24.

[1487] Skouris, "Η συνταγματική αρχή της αναλογικότητας και οι νομοθετικοί περιορισμοί της επαγγελματικής ελευθερίας [The Constitutional Principle of Proportionality and Legislative Restrictions of Professional Freedom]," 778.

[1488] Vassilios Voutsakis, "Η αρχή της αναλογικότητας: από την ερμηνεία στη διάπλαση του δικαίου [The Principle of Proportionality: From Legal Interpretation to Legal Formation]," in *Όψεις του Κράτους Δικαίου*, ed. Konstantinos Stamatis and Antonis Manitakis (Thessaloniki: Σάκκουλα, 1990), 205.

[1489] *Κράτος δικαίου και δικαστικός έλεγχος της συνταγματικότητας [The Ideal of a State Ruled by Law and Judicial Review of Constitutionality]* (Thessaloniki: Σάκκουλα, 1994), see the Introduction.

a "servant of the law" was to become "a guarantor of constitutional rights and a mediator of [social] conflicts",[1490] a "central figure" of the contemporary constitutional state.[1491] Proportionality, by imposing "relevance", in the sense of reasonableness, between legislative means and constitutionally acceptable ends, was to establish the Constitution as a central point of reference in legal practice.[1492] Scholars stressed that proportionality brought about a shift of the attention, from the interpretation of constitutional rules, to the *realisation* of constitutional values.[1493]

The absence of a fundamental rights theory surrounding proportionality. Still, theoretical remarks on proportionality and the role of the judge were not combined with the spread of fundamental rights language in case law, nor with a theory of rights as principles in scholarship.[1494] Domestic public lawyers did not pay much attention to the structural implications of proportionality. In his comment on the 1984 decision, Vassilios Skouris mentioned that in Germany the principle of proportionality was related to the "theory of stages of protection" (*Stufentheorie*).[1495] According to this theory, when legislative measures interfere with the *exercise* of a certain profession, the court must scrutinise the coherence between the content of the law and its public interest aim. In contrast, when the law affects the *choice* of a certain profession, judicial scrutiny must be more intrusive. Apart from the existence of a compelling public interest, the court must also check the strict necessity of the measures in question. However, Skouris himself observed that the Council's reasoning did not follow the German theory.

Proportionality was "born" as a fundamental rights principle without a fundamental rights background. While it contributed to the multiplication of constitutional rights claims and the "diffusion" of the Constitution in everyday life, it did not lead to systematisation of judicial review methods under a coherent constitutional rights theory. Constitutional rights claims only increased the "dust of numerous trivial and fragmented invocations" of the Constitution.[1496]

[1490] Antonis Manitakis, "Ο δικαστής υπηρέτης του νόμου ή εγγυητής των συνταγματικών δικαιωμάτων και μεσολαβητής διαφορών [The Judge, Servant of the Law or Guarantor of Constitutional Rights and Mediator in Legal Disputes]," *NoB* 47, no. 2 (1999): 177.

[1491] Manitakis, 184.

[1492] Manitakis, 186 f.

[1493] Voutsakis, "Η αρχή της αναλογικότητας: από την ερμηνεία στη διάπλαση του δικαίου [The Principle of Proportionality: From Legal Interpretation to Legal Formation]"; Antonis Manitakis, "Πρόλογος [Preface]," in *Όψεις του Κράτους Δικαίου*, ed. Konstantinos Stamatis and Antonis Manitakis (Thessaloniki: Σάκκουλα, 1990), 5–6.

[1494] Proportionality did not spill over in constitutional case law. During the '80s, *Areios Pagos,* the supreme civil court, had applied the principle of "*proportional equality*" (*αναλογική ισότητα*), which, in its words, always possessed a "*relative*" content. The use of proportionality language in the application of the principle of equality was encouraged by the formulation of article 88(2) of the Constitution. See AP (Pl.) 53/1983 *NOB* 1983, 1370; AP (Pl.) 1104/1986 *NOB* 1987, 759. See also Theodora Antoniou, *Η ισότητα εντός και διά του νόμου [Equality In and Through the Law]* (Athens; Komotini: Αντ. Ν. Σάκκουλας, 1998), 88 f.

[1495] Skouris, "Η συνταγματική αρχή της αναλογικότητας και οι νομοθετικοί περιορισμοί της επαγγελματικής ελευθερίας [The Constitutional Principle of Proportionality and Legislative Restrictions of Professional Freedom]."

[1496] Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]*, 498.

One of the rare scholars who provided us with a theory of rights at the time of the emergence of proportionality is Prodromos Dagtoglou, an influential public and European lawyer with German academic roots.[1497] Interestingly, Dagtoglou was also among the first to systematically analyse proportionality as a constitutional principle and as a general principle of European law. This author adopted an ultra-liberal view of the state as a threat to the individual. For him, the application of the general will could easily degenerate into a tyranny of the majority. Individual freedoms, clearly distinct from social rights due to their normative density, were inherent in the human nature and constituted the necessary preconditions for democracy.[1498] However, proportionality was not central in Dagtoglou's analyses, nor was it presented as necessary for rights' adjudication. Loyal to his liberal conception of rights, this author did not attribute particular importance to the balancing of competing constitutional values as a method of constitutional adjudication. Rather, Dagtoglou seemed to believe in the possibility of objective delimitation of the scope of constitutional provisions through categorical reasoning. Hence, he talked about limitations and delimitations that are "inherent" in the scope of constitutional rights.[1499]

Andreas Dimitropoulos lamented Greek public lawyers' lack of attention to the structure of constitutional rights. This author studied the spread and implications of another German theory, the *Drittwirkung*, translated as "third party effect" (*τριτενέργεια*).[1500] According to this theory, the scope of constitutional rights and proportionality expand to encompass private relations.[1501] The validity or "correctness" of the theory has been accepted by many Greek scholars since the mid-'80s.[1502] More critical scholars however, have objected that the theory was redundant in Greek law.[1503]

[1497] On this point, see Drossos, 555 f.

[1498] Prodromos Dagtoglou, *Συνταγματικό Δίκαιο. Ατομικά Δικαιώματα [Constitutional Law. Individual Rights]* (Athens; Komotini: Αντ. Ν. Σάκκουλας, 1991); Prodromos Dagtoglou, *Συνταγματικό Δίκαιο. Ατομικά Δικαιώματα [Constitutional Law. Individual Rights]*, 2nd rev ed., vol. A' (Athens; Komotini: Αντ. Ν. Σάκκουλας, 2005); for a similar perception of constitutional rights, see Athanasios Raikos, *Παραδόσεις Συνταγματικού Δικαίου. Θεμελιώδη Δικαιώματα [Constitutional Law Lessons. Fundamental Rights]*, vol. B (Athens: Σάκκουλα, 1983).

[1499] Dagtoglou, *Συνταγματικό Δίκαιο. Ατομικά Δικαιώματα [Constitutional Law. Individual Rights]*, 2005, A':138 f.

[1500] Andreas Dimitropoulos, *Τα αμυντικά δικαιώματα του ανθρώπου και η μεταβολή της έννομης τάξης [Negative Human Rights and the Transformation of the Legal Order]* (Athens; Komotini: Αντ. Ν. Σάκκουλας, 1981). In the absence of Greek literature on the matter, this scholar engaged in debates with German scholars, neglecting the structure of rights in domestic constitutional discourse.

[1501] Konstantinos Simantiras, *Γενικές αρχές αστικού δικαίου [General Principles of Civil Law]*, 4th ed. (Athens: Αντ. Σάκκουλας, 1990), 204.

[1502] Dagtoglou, *Συνταγματικό Δίκαιο. Ατομικά Δικαιώματα [Constitutional Law. Individual Rights]*, 1991, 94 f.; Dagtoglou, *Συνταγματικό Δίκαιο. Ατομικά Δικαιώματα [Constitutional Law. Individual Rights]*, 2005, A':115 f.; Dionysis Giakoumis, "Οι αόριστες έννοιες, η διακριτική ευχέρεια του δικαστή ως αόριστη νομική έννοια, η εξειδίκευσή της και η δυνατότητα αναιρετικού ελέγχου υπό το πρίσμα της αρχής της αναλογικότητας [Indeterminate Notions, Judicial Discretion as an Indeterminate Legal Notion, Its Concretisation, and the Possibility of Cassation under the Framework of the Principle of Proportionality]," *Δικ* 36 (2005): 48; Filippos Doris, "Η αρχή της αναλογικότητας στο πεδίο ρύθμισης των ιδιωτικού δικαίου σχέσεων και ιδιαίτερα στο αστικό δίκαιο [The Principle of Proportionality in the Field of Private Law Relations and Especially in Civil Law]," in *Τόμος τιμητικός του Συμβουλίου της Επικρατείας - 75 χρόνια* (Thessaloniki: Σάκκουλα, 2004), 229.

[1503] Antonis Manitakis, "Η τριτενέργεια, μια περιττή για την ελληνική έννομη τάξη έννοια [Third-Party Effect: A Superfluous Notion for the Greek Legal Order]," *Χρον ΙΜΔΑ*, 1991, 289 f.; Georgios Mitsopoulos, "«Τριτενέργεια» και «αναλογικότητα» ως διατάξεις του αναθεωρηθέντος Συντάγματος ['Third

In this line of thought, reference to the "*third* party" effect of constitutional rights implied the existence, and at the same time the abandonment of an individualistic perception of rights as requirements of abstention addressed to state authorities. Such a perception of rights never existed in the Greek context and was perceived as outdated even in Germany, the source context of the doctrine.[1504] Still, all this has not excluded the spread of the *Drittwirkung* theory in Greek constitutional law. In the Greek context, it is recurrent that the various legal techniques and theories imported from abroad correspond to different, or even incompatible perceptions of the state, of law and of fundamental rights.

Proportionality in a "heaven" of legal transplants. The eclectic nature of Greek legal discourse is connected to the fact that legal transfers are thought of as an unavoidable evolution of legal science.[1505] Comparative law is a "legal formant" in Greek public law, it constitutes what local legal actors perceive as "correct" legal knowledge. In this context, proportionality has also been perceived as some kind of "correct" law. Recurrent reference to reasoning "errors", "successful" interpretations or "fatal" judicial mistakes in relevant analyses reveals this.[1506] The reception of proportionality was not perceived as a "spectacular innovation", but rather as "a natural and necessary evolution, maturation and perfecting of the classical scrutiny" exercised by the Council of State.[1507] Strikingly, in contrast to their French and English colleagues, Greek public lawyers did not at all object to the deconstruction of traditional judicial review distinctions that proportionality potentially implied. More generally, the rise in power of the judiciary that proportionality enhanced was perceived as "an irreversible historical tendency of the post-industrial society". Hence, discussion on whether it was wanted or not was dismissed as "unnecessary".[1508]

Once imported, legal transfers are often confined to the "heaven" of concepts used in Greek legal theory.[1509] Similarly to what is observed in France, they form part of an alternative, "scientific" legal discourse but they are not necessarily expressed in official legal texts. Domestic judicial practice is much more nuanced than the ideal

---

Party Effect' and 'Proportionality' as Provisions of the Amended Constitution]," *ΔτΑ* 15 (2002): 641. Also Manessis, *Συνταγματικά Δικαιώματα [Constitutional Rights]* criticises the individualistic vision of rights transpiring the doctrine. Raikos, *Παραδόσεις Συνταγματικού Δικαίου. Θεμελιώδη Δικαιώματα [Constitutional Law Lessons. Fundamental Rights]*, B: 151.

[1504] See Dimitropoulos, *Τα αμυντικά δικαιώματα του ανθρώπου και η μεταβολή της έννομης τάξης [Negative Human Rights and the Transformation of the Legal Order]*. Indeed, as we saw in the Introduction, it is precisely this individualistic perception of rights that the Alexyan proportionality theory purports to overcome.

[1505] On such tendencies observed in constitutional transfers during the 19th century, see Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]*, 39 f.

[1506] See for example, Giorgos Kassimatis, "Παρατηρήσεις στην ΣτΕ (Ολ.) 58/1977 [Comment on StE (Pl.) 58/1977]," *ΤοΣ*, 1977, 627–28; Pararas, "Παρατηρήσεις υπο την ΣτΕ (Ολ.) 2952/1975 [Comment on StE (Pl.) 2952/1975]," 350.

[1507] Kontogiorga-Theocharopoulou, "Σημεία εργασίας επί της αρχής της αναλογικότητος [Elements of Study on the Principle of Proportionality]," 923.

[1508] Antonis Manitakis, "Η πολυσήμαντη επιστροφή του Κράτους Δικαίου [The Multifaceted Return of the Ideal of a State Ruled by Law]," in *Όψεις του Κράτους Δικαίου*, ed. Konstantinos Stamatis and Antonis Manitakis (Thessaloniki: Σάκκουλα, 1990), 21.

[1509] Rudolf von Jhering, "In the Heaven for Legal Concepts: A Fantasy," trans. Charlotte Levy, *Temple Law Quarterly* 58 (1985): 799.

scientific concepts described by lawyers in their academic writings. It is simply perceived as their "imperfect and deformed" application.[1510] Detachment from practice is a general characteristic of Greek legal thought. In contrast to their French colleagues, Greek public lawyers are not much interested in the study or systematisation of domestic judicial *methods*. In contrast to English lawyers too, they are generally indifferent to the *patterns* of domestic judicial reasoning, even though some important Greek jurists have been supreme judges. As the analysis in Part I showed, this has affected the local perception of proportionality. Proportionality has generally been thought of as a pronged framework for the adjudication of fundamental rights, similar to the one applied in Germany. However, this structure and function are typically forgotten when it comes to the application of the principle by courts.

Greek legal science does not completely correspond to the conceptual heaven described by Rudolf von Jhering: contrary to this ideal conceptual world, the Greek heaven does not owe its authority to its internal coherence. It owes it to its connection to foreign debates and theories instead. Greek scholars have often been taken by too-detailed translations of foreign academic analyses that have no echo nor relevance in the domestic context.[1511] The reduction of academic work to a process of translation marks Greek public law discourse since the beginnings of the Modern Greek state. In the words of Kalligas, a prominent legal scholar and politician of the mid-19th century,

> [w]hatever was translated was immediately considered Greek too, even though only the translator and his colleagues understood it. [Greek constitutional scholars] translated [foreign] constitutions and regimes and could not understand why they were not applied in practice, when no error existed in grammar or syntax.[1512]

Translation has been a major feature of the domestic theory of proportionality too. Proportionality scholars have often exclusively cited foreign academic analyses and debates and referred to the foreign terms that designate the legal concepts that they use.[1513] Obsession with the content of proportionality in other legal orders has turned scholarly attention away from the important structural changes that proportionality brought about in the domestic sphere, most notably the transfer of the manifest error test in the scrutiny of legislation.

[1510] von Jhering, 802.

[1511] Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]*, 175.

[1512] Pavlos Kalligas, *Η εξάντλησις των κομμάτων, ήτοι ηθικά γεγονότα της κοινωνίας μας [The effeteness of political parties, namely moral issues of our society]* (Athens, 1842), 29; cited by Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]*, 175–76.

[1513] See for example Kassimatis, "Παρατηρήσεις στην ΣτΕ (Ολ.) 58/1977 [Comment on StE (Pl.) 58/1977]"; for a more recent study, see Charalampos Anthopoulos, "Όψεις της συνταγματικής δημοκρατίας στο παράδειγμα του άρθρου 25 παρ. 1 του Συντάγματος [Aspects of Constitutional Democracy in the Example of Article 25 Par. 1 of the Constitution]," in *Το νέο Σύνταγμα*, ed. Dimitrios Tsatsos, Evaggelos Venizelos, and Xenophon Contiades (Athens; Komotini: Αντ. Ν. Σάκκουλας, 2001), 153.

2. The infelicity of proportionality: constrained by Modern Greek myths

Proportionality in practice: contained by the structures of judicial review. As we saw in Part I, some years after the enunciation of proportionality as a constitutional principle in decision 2112/1984, in decision 1149/1988 on Medical Centres the Council of State limited its function to that of a manifest error test.[1514] This conceptual mutation of proportionality was underpinned by a perception of constitutional rights that was completely different from the one underpinning decision 2112/1984. While in 1984 the Council had introduced a concrete connection between rights and proportionality, in 1988 proportionality was applied as a free-standing standard. Indeed, in contrast to what was the case in 1984, in 1988 the scope of article 5 was categorically defined. The Council affirmed that this article was not violated, since "*it allows for restrictions [to economic freedom] in pursuit of the public interest*".[1515] Hence, once it was ascertained that legislation pursued the public interest, article 5 was no longer at stake. The application of proportionality as a manifest error standard was completely disconnected from its scope. While four years before, rights protection was part of the notion of public interest, in 1988 the public interest was clearly a distinct notion *competing* with rights. In subsequent case law, proportionality was disconnected from rights analysis. As a self-standing standard, it was applied even when no constitutional rights were invoked by the claimants.[1516] In fact, typically the review of whether a legislative measure manifestly overshot its goal was not connected to any individual right but to the goal itself.

Categorical reasoning is pervasive in domestic rights adjudication. Greek judicial review traditionally lacks the definitional generosity professed by proportionality enthusiasts and observed in Karlsruhe case law. Vague constitutional provisions on human dignity, the free development of personality, as well as social rights were long deprived of concrete normative force.[1517] The definition of the protective scope of constitutional rights has generally not been a question of balancing competing constitutional values, but of interpretation. Like in English law, balancing has traditionally been perceived as a method for setting policy objectives and not for judicial decision-making. In judicial decisions, balancing has usually served the *reconstruction* of the policy-making reasoning of Parliament in a constitutionally legitimate way, and not the explication of the judicial reasoning itself. Hence, rather than a judicial method balancing has been a *ritual* and has invariably led to the approval of legislative intentions. This was noticed very early by Prokopis Pavlopoulos, who criticised the deferent use of balancing by the Council of State. This author (now President of the Republic) pointed out that balancing served the legitimation of legislative value choices, by presenting them as an instance of reconciliation between

[1514] See *supra*, Part I, Chapter 3.2.ii.

[1515] StE 1149/1988 *ΤοΣ* 1988, 324.

[1516] StE 268/1993 *ΑΡΜ* 1993, 180.

[1517] See for example decision ES 28/1994 *ΔΙΕΝ* 1994, 439 (Court of Audit). Constantinos Yannakopoulos, "Τα δικαιώματα στη νομολογία του Συμβουλίου της Επικρατείας [Rights in the Council of State Case Law]," in *Τα δικαιώματα στην Ελλάδα 1953-2003*, ed. Michalis Tsapogas and Dimitris Christopoulos (Athens: Καστανιώτης, 2004), 439 f.; esp. 456.

competing constitutional values. Pavlopoulos concluded that balancing finally led the court to interpret the Constitution in the light of legal statutes, and not the inverse.[1518]

Since judicial balancing only has an exceptional character in case law, the rare instances in which judges have engaged in balancing are noted with suspicion by domestic legal actors, as examples of judicial activism. This is most notably the case with the Council of State's environmental case law during the '90s.[1519] In application of the principle of "sustainable growth" (*βιώσιμη ανάπτυξη*), judges sometimes took to an impact-based balancing of the protection of the environment with other constitutional values and substituted their own view for that of public authorities on the matter. However, judicial balancing in this context was not combined with the formulation of the relevant questions in fundamental rights terms. Judges did not necessarily characterise the protection of the environment as a fundamental right. Instead, stringent application of the principle of sustainable growth was based on a more general theoretical construction on the "sustainable state", mainly developed by the judges themselves.[1520] This theory places environmental protection among the primary goals of the modern state. Written in a scientific tone and replete with analogies to biology and *sciences exactes*, it echoes corporatist accounts of the state developed in Germany and France almost a century before.[1521] In this sense, it is very different from the Alexyan view of law as an instance of practical reasoning.

The conservative function of proportionality. In this context, proportionality was long deprived of radical potential. Apart from exceptional cases and despite its content in legal theory, until the late '90s, its application did not contest the traditional distribution of competences between the judge and the political branches. Instead of bringing about a change in the role of the judge, proportionality's function conserved the institutional *status quo* and expressed the "binding arrangements" between local legal discourse and its political context. Indeed, what long impeded its application as an impact-based test was the perception of the judges as to their own competence, and most importantly, the distinction between expediency and legality. In decision 1149/1988, the court stated that "*[t]he question of whether more expedient, namely less restrictive, measures [are available]* (…), *concerns the expediency of the measure and not its legality, and as such, it is not within the competence of the judge of legality*".[1522] This dictum exemplifies the Council of State's traditional vision of constitutional rights. Far from being enforced as optimisation requirements, rights were freedoms, objective requirements

[1518] Prokopis Pavlopoulos, "Δικαστικός έλεγχος της συνταγματικότητας των νόμων ή δικαστικός έλεγχος της νομιμότητας του Συντάγματος; [Judicial Review of the Constitutionality of Legislation or Judicial Review of the Legality of the Constitution?]," *NoB* 36 (1988): 13.

[1519] Alivizatos, *Ο αβέβαιος εκσυγχρονισμός και η θολή συνταγματική αναθεώρηση [Uncertain Modernization and Vague Constitutional Reform]*, 52.

[1520] Michail Dekleris, *Ο δωδεκαδελτος του περιβαλλοντος. Εγκόλπιο βιώσιμου αναπτύξεως [The Twelve Tables of the Environment. A Handbook of Sustainable Growth]* (Athens; Komotini: Αντ. Ν. Σάκκουλας, 1996); Maria Karamanof, *Βιώσιμο κράτος και δημόσια κτήση. Τα όρια των ιδιωτικοποιήσεων [Sustainable State and Public Property. The Limits of Privatization]* (Athens: Κυριακίδης Π., 2011).

[1521] Véronique Champeil-Desplats, *Méthodologies du droit et des sciences du droit* (Paris: Dalloz, 2016), 71 f.

[1522] StE 1149/1988, cited above.

of abstention. Their function was to delimit the competence of Parliament. Once parliamentary competence was ascertained, the intensity of legislative interference with rights was a question of expediency. For a long time, whenever a constitutional provision empowered Parliament to regulate the exercise of a right, this provision was interpreted as providing Parliament with the competence to limit the right in question. Hence, for a long time, the so-called "clauses of legislative competence" in constitutional rights provisions were an obstacle to effective rights-based review.[1523]

This focus on competence also characterised the form and function of proportionality. Proportionality, rather than concerning the effective protection of constitutional rights, concerned the *distribution of competences* between the judiciary and Parliament. Rather than imposing concrete substantive outcomes on legislative action, its function as a manifest error test usually resembled that of the *Wednesbury* unreasonableness standard in English law.[1524] Therefore, it is not surprising that its spread frustrated scholarly expectations. Proportionality did not bring about the rise in power of the judiciary. Contrary to the dominant proportionality narrative in Greek public law, domestic courts have very rarely used proportionality language in their "activist" decisions.[1525] In the field of environmental protection in particular, the conservative function of proportionality persisted even after its constitutional entrenchment. Since 2001, the manifest disproportionality standard has replaced the principle of sustainable growth, which *actually involved* balancing of competing values. Ensuring judicial restraint on the matter was one of the objectives of the 2001 reform, which explicitly qualified the assessments in the field of environmental protection as "technical" and governed by "the rules of science".[1526] Hence, whenever manifest disproportionality has been used to contest the balancing effectuated by public authorities in this field, it has provoked suspicion among Greek public lawyers.[1527]

Proportionality expressing local myths. The suspicion that balancing provokes in Greek rights-based adjudication is connected to the myths that underpin judicial review in this context. In contrast to the common law tradition, in Greek public law legislation is deemed to preserve certain core substantive values. In other words, in Greece, like in France, one observes a fusion between substantive values and legal

---

[1523] Michail Vrontakis, "Ο δικαστής ως κριτής σταθμίσεων, αξιών και επιλογών του νομοθέτη κατά την πρόκριση των προς θέσπιση ρυθμίσεων [The Judge as a Reviewer of Legislative Weighing, Values and Choices in Legal Norm-Production]" (Aristoteleio University of Thessaloniki, February 28, 2011) at I.1. More generally, on the evolution of judicial review concerning the legislative implementation of constitutional norms, see Ifigeneia Kamtsidou, *Η επιφύλαξη υπέρ του νόμου [The Clause of Legislative Competence]* (Athens: Σάκκουλα, 2001).

[1524] Analysis inspired by Hickman's distinctions between standards of legality and standards of review. See *supra*, Chapter 5(4).

[1525] See for example the "sustainable growth" cases, concerning the protection of the environment: StE 53/1993 *ΤΝΠΔΣΑ*; StE (Pl.) 2537/1996 *ΤΝΠΔΣΑ*; AP (Pl.) 13/1999 *Ελλ.Δνη* 1999, 753. On this case, see Kostas Stratilatis, "Η συγκεκριμένη στάθμιση των συνταγματικών αξιών κατά τη δικαστική ερμηνεία του συντάγματος [The in Concreto Balancing of Constitutional Values in the Judicial Interpretation of the Constitution]," *ΤοΣ*, no. 3 (2001): 510 f.

[1526] Article 24 of the 1975/1986/2001 Constitution.

[1527] StE (Pl.) 613/2002 *NoB* 2002, 1972, para 7. The decision was criticised by George Gerapetritis, "Πρόσωπα και προσωπεία του ελέγχου της αναλογικότητας [Faces and Guises of Proportionality Review]," *ΔτΑΤΕΣ IV*, 2006, 272 f.

form. However, the justification of Greek judicial decisions cannot be compared to the transparent reasoning that one finds in Karlsruhe and hardly resembles an instance of Socratic contestation. Rather similarly to the French context, Greek judicial practice is characterised by an excision of value-laden argumentation from judicial reasoning. The definition of the substantive content of the law and the Constitution in judicial decisions follows the methods of an alleged legal science and is akin to a syllogism composed of long phrases. In this sense, Greek judicial reasoning is characterised by the "dogmatism" that has also been observed in the French context. Judges affirm the value-choices embodied in legislation as if they were positive facts.[1528]

Excision of value-laden reasoning from judicial review renders the function of proportionality in the Greek context intelligible. It fits the formalist perception of the principle in administrative law as a requirement of equity imposed through review of the justification of public acts. It also fits its use as a manifest error test in judicial review of legislation. In this context, proportionality has functioned as "an objective substitute for the abuse of power", thus expressing judicial deference to the value choices of Parliament. Since 2001, even though fundamental rights have spread in domestic public law, excision of value-laden elements is still characteristic of proportionality adjudication. Contrary to its dominant representation in legal theory, proportionality in judicial decisions corresponds to a fact-based efficiency test. Though in certain cases it has undoubtedly led to a factualisation and rationalisation of legislative goals, proportionality has not allowed the judge to interfere with value-laden choices of the primary decision-maker. Like in France, proportionality evaluations are more convincing for Greek lawyers when they refer to mathematics, variables and probabilities, than when they are based on fundamental values.[1529]

Similarly to what was observed in the French context, "dogmatism" is a corollary of mythopoeic reasoning and expresses local lawyers' tendency to idealise public authorities. In this sense, Antonis Manitakis observes that the state,

> as a Subject possesses its own reason and its own will and does not decide in its real capacity as a public power, but in another capacity, as a father or a god, a protector or a tyrant.[1530]

Idealisation of the political branches of government is expressed in the constant personification of public authorities in legal writings (the Administration and the Legislator are among the protagonists of Greek legal mythopoeia). In the absence of *commissaires du gouvernement* before the Council of State, it is the authority-party in the

---

[1528] See *supra*, Chapter 4, Introduction.

[1529] See for example Orfanoudakis, *Η αρχή της αναλογικότητας στην ελληνική έννομη τάξη : από τη νομολογιακή εφαρμογή της στη συνταγματική της καθιέρωση [The Principle of Proportionality in the Greek Legal Order: From Its Judicial Application to Its Constitutional Consecration]*, 41 fn. 56. The author talks about proportionality as a "loan from mathematical science."

[1530] Manitakis, *Κράτος δικαίου και δικαστικός έλεγχος της συνταγματικότητας [The Ideal of a State Ruled by Law and Judicial Review of Constitutionality]*, 116–17; cited by Constantinos Yannakopoulos, *Η επίδραση του δικαίου της Ευρωπαϊκής Ένωσης στον δικαστικό έλεγχο της συνταγματικότητας των νόμων [The Influence of EU Law on Judicial Review of the Constitutionality of Legislation]* (Athens; Thessaloniki: Σάκκουλα, 2013), 139–40.

proceedings that represents the public interest. This considerably undermines the fair character of the judicial process and brings it close to a ritual, a game in which the two sides are connected through "a particular type of equilibrium".[1531]

Idealisation is even more obvious insofar as Parliament is concerned. This is due to the memories of past authoritarian regimes. In the words of George Gerapetritis, "often, due to the self-evident importance of the representative system in a democracy, we tend to neglect that Parliament is a constituted authority".[1532] It has sometimes sufficed to Parliament to invoke a "*more general public interest*" in order to justify the circumvention of the most precise constitutional requirements.[1533] Hence, typically, controversy in judicial opinions or in lawyerly argumentation does not so much concern values, as the Alexyan model of proportionality would want it, but rather the construction of the public interest aim of legislation. The major criterion for assessing the validity of legal solutions in Greece is the possibility for them to be presented as the result of the presumed legislative will.[1534]

Proportionality and voluntarism. Hence, the Greek system of judicial review, again following its French model on this point, is dominated by a voluntarist perception of legal decision-making. Parliament's policy choices are deemed to be untouchable. As Kostas Stratilatis put it, "the aim of the legislator is perceived as a given, as a non-contestable constitutional "end in itself"".[1535] The 1975 Constitution has traditionally been thought of as a text that is "open" to the realisation of any political ideology parliamentary majorities adopt.[1536] Courts have shown restraint when it comes to important policy decisions.[1537] Judges do not participate in the definition of public policy goals. They sanction "*only the transgression of the extreme rational limits*" of public authorities' discretion.[1538] Yannakopoulos neatly observes that the 1975 Constitution has functioned as a "constitution of limits" on the exercise of public power. This means that the values that it entrenches, among which are constitutional

---

[1531] On Claude Lévi-Strauss' distinction between game and ritual, see *supra*, Chapter 5(1).

[1532] George Gerapetritis, *Σύνταγμα και Βουλή. Αυτονομία και ανέλεγκτο των εσωτερικών του σώματος [Constitution and Parliament. Autonomy and the Exemption of the Interna Corporis Affairs from Judicial Review]* (Athens: Νομική Βιβλιοθήκη, 2012), 5; cited by Yannakopoulos, *Η επίδραση του δικαίου της Ευρωπαϊκής Ένωσης στον δικαστικό έλεγχο της συνταγματικότητας των νόμων [The Influence of EU Law on Judicial Review of the Constitutionality of Legislation]*, 137.

[1533] StE 400/1986 *APM* 1987, 430. See Prodromos Dagtoglou, "Δημόσιο Συμφέρον Και Σύνταγμα [Public Interest and the Constitution]," *ToΣ*, 1986, 425.

[1534] For an illustrative example, see decision AED 36/1990 *ΔΙ/NH* 1993, 552 (Supreme Special Court), which concerned the proportionality of electoral representation. Despite the clarity of the mathematical rule that proportionality implied, the source of controversy was whether Parliament had wanted to strictly respect this rule.

[1535] Stratilatis, "Η συγκεκριμένη στάθμιση των συνταγματικών αξιών κατά τη δικαστική ερμηνεία του συντάγματος [The In Concreto Balancing of Constitutional Values in the Judicial Interpretation of the Constitution]," 532.

[1536] Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]*, 356.

[1537] Akritas Kaidatzis, "Δικαστικός έλεγχος των μέτρων οικονομικής πολιτικής. νομολογιακές τάσεις και προσαρμογές στο μεταβαλλόμενο οικονομικο-πολιτικό περιβάλλον [Judicial Review of Economic Policy Measures. Jurisprudential Tendencies and Adaptations to the Changing Economic-Political Circumstances]," *Constitutionalism.gr* (blog), October 6, 2010, 4 f., http://www.constitutionalism.gr/site/1616-dikastikos-eleghos-twn-metrwn-oikonomikis-politiki/.

[1538] AP 1094/1987 *ΔΕΝ* 1988, 412.

rights, have not been enforced as constitutionally imposed *goals* (nor as optimisation requirements) but as *limits*, as negative requirements of abstention.[1539] Voluntarism also transpires in the rare applications of proportionality as a necessity test.

In decision 4050/1990, Parliament had mandated the liquidation of companies facing serious economic problems. Liquidation was to take place under the responsibility of a public authority specially instituted for this purpose. A company submitted to the liquidation process contested the constitutionality of the relevant legislation, claiming a violation of its economic freedoms. In its decision, the Council of State followed the observations of the Advocate General, Petros Pararas. The court criticised the formulation of the law and enounced a *réserve d'interprétation*. In the judges' view, the statute should be interpreted as requiring that the competent authority undertakes the management of the company in question, in an effort to render it sustainable, before proceeding to its liquidation. According to the court, this "*interpretative manoeuvre*" resulted from the principle of proportionality, which was understood as a requirement for the legislator to employ the least restrictive means. Indeed, the use of the "*ultimate and most onerous means*" of liquidation before any attempt to render the company sustainable was contrary to proportionality.[1540]

It seems that optimisation of rights and proportionality played an important role in the evaluation of the validity of the measure. Nonetheless, close observation of the judicial reasoning in this case reveals that the intrusiveness of the scrutiny was rather the result of judicial second-guessing of the legislative aim. Before formulating its *reserve d'interprétation*, the Council identified the aim of the measures in question, referring to preliminary works in Parliament. In the view of the court, the measures mainly aimed to ensure the sustainability of private enterprises and it was this goal that "*should be primarily pursued by the Administration*".[1541] It was the affirmation by the judges of their power to co-define the legislative goals that led to a more stringent application of proportionality. Searching judicial scrutiny did not result from proportionality itself nor from the rights at stake. It resulted from the intrusion of the judges into the field of legislative intent. This is why attentive commentators have identified proportionality as an instance of teleological interpretation.[1542] As we will see, this kind of proportionality reasoning became more recurrent in ECHR cases during the '90s.[1543]

A fundamental rights principle without a fundamental rights background, a strong judicial weapon without a strong judiciary … what characterises the use of proportionality in Greek law is infelicity. Infelicity is not particular to proportionality but seems to be a more general characteristic of public law theories imported from

---

[1539] Constantinos Yannakopoulos, "Μεταξύ συνταγματικών σκοπών και συνταγματικών ορίων: η διαλεκτική εξέλιξη της συνταγματικής πραγματικότητας στην εθνική και στην κοινοτική έννομη τάξη [Between Constitutional Goals and Constitutional Limits: The Dialectical Evolution of Constitutional Reality in the National and the Community Legal Orders]," *Εφ⊥⊥*, no. 5 (2008): 733.

[1540] See StE 4050-1/1990 *⊥⊥ΙΚΗ* 1991, 566, para 6.

[1541] Ibid.

[1542] Mitsopoulos, "«Τριτενέργεια» και «αναλογικότητα» ως διατάξεις του αναθεωρηθέντος Συντάγματος ['Third Party Effect' and 'Proportionality' as Provisions of the Amended Constitution]."

[1543] See *infra*, Part III, Chapter 7(4).

abroad. How to make sense of the gap between the triumph of proportionality in legal theory and its application in practice? Why is proportionality still revered by Greek public lawyers while its application has frustrated their expectations?

3. Taking the transplant meaning seriously: proportionality as part of an imported constitutional civilisation

An eternally ongoing transplant. In order to understand the articulation of the different uses of proportionality by Greek public lawyers it is necessary to take its meaning as a transplant seriously. Indeed, proportionality language in this context makes much more sense as a reference to *foreign* theoretical developments. Proportionality was applied in urban planning, expropriation and labour law during the '70s because it is in *these* domains that it had found application in other European systems. It was perceived as a general constitutional principle even before its constitutional entrenchment because *this* is the status that German constitutional lawyers attributed to it. It was perceived as a three-pronged balancing test because *this* was its structure in the jurisprudence of the GFCC. It was venerated as a guarantee of the protection of constitutional rights because *this* had been its function in other jurisdictions. Its application as a manifest error test was not problematic because *this* was the way proportionality was applied in the French and the European legal orders. It reflected a post-industrial state and society because *this* was the representation that other European societies had of themselves. As Drossos observed with irony, "Greece, in its constitutional mirror does not see itself but … England".[1544] In the context of proportionality language, the desired constitutional idol would usually be Germany, or more generally Europe.

Reference to foreign theories has attributed conceptual unity to proportionality, despite the plurality of forms and functions in which it has vested in the domestic sphere. Decisions 2112/1984, 3682/1986, 1149/1988 have often been cited by domestic courts simultaneously, no matter the version of proportionality applied in the judicial reasoning that followed. Similarly, the conception of proportionality in scholarship was unitary. Like a mythical figure, proportionality was able to mean different things and take various forms. From a substantive point of view, it has corresponded to a universal value of equity or reasonableness, which was "as old as the notion of humanism".[1545] In this sense, proportionality was rediscovered in the writings of legendary authorities like Aristotle.[1546] More generally, there was a tendency among public lawyers to accept that the principle pre-existed the 1975 Constitution,

[1544] Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]*, 39; 148, observing similar patterns in constitutional transfers during the 19th century.

[1545] Kontogiorga-Theocharopoulou, "Σημεία εργασίας επί της αρχής της αναλογικότητος [Elements of Study on the Principle of Proportionality]," 893.

[1546] See for example, Kontogiorga-Theocharopoulou, 891; Gerapetritis, "Πρόσωπα και προσωπεία του ελέγχου της αναλογικότητας [Faces and Guises of Proportionality Review]," 187; Kostas Beis, "Η αρχή της αναλογικότητας [The Principle of Proportionality]," *Δτκ* 30, no. Δ (1999): 469 f.

that it had been tacitly inherent in it, and that the 1984 decision by the Council of State offered nothing but its solemn recognition. Proportionality was even attributed a name in the *katharevousa*: *ήττον επαχθές μέτρο*, meaning "less onerous means". At the level of constitutional technique however, proportionality's "correct" content was defined by reference to its application in jurisdictions perceived as more "advanced". This content was transplanted as such in the domestic context. Its inconsistent application by domestic courts was perceived as a deviant Greek particularity.

Indeed, what allowed for the total shift between theory and practice was another mythical feature: the perception of proportionality as an eternally ongoing transplant. Commenting on decision 1149/1988, Dimitra Kontogiorga observed that the review that proportionality implied was "embryonic".[1547] The use of this term expressed contemporary scholars' belief in a more intrusive future application of proportionality. However, a diachronic study of the scholarship shows that the perception of proportionality as a principle or method undergoing transplantation long persisted in Greek public law. In the minds of Greek lawyers, there was a continuous expectation for more, or more correct, proportionality. In 2005, Konstantinos Gogos still affirmed that "the full incorporation [of proportionality] in the Greek public law tool-box" was ongoing.[1548] In fact, the shift between the theory of proportionality and its application in practice was *part of the domestic meaning* of proportionality as a transplant. It expressed the perception of other European legal orders as models for the Greek legal order and as representations of its locally imagined future. Yannis Drossos observes that this feature has underpinned constitutional transfers since the beginnings of the Modern Greek state. This author goes as far as to suggest that legal transfers have contributed to the construction of the "*katharevousa politeia*" (*καθαρεύουσα πολιτεία*, meaning "pure polity"), a polity full of rituals, the function of which has mainly been metaphorical: it has represented the Greek society as if it were a modern, European one.[1549]

Importing a European legal civilisation. Proportionality was not an isolated transplant. As the story of the *Drittwirkung* or Vassilios Skouris' reference to the *Dreistufentheorie* show, a heteroclite "bricolage" of foreign theories, usually of German origin, was being fashioned since the enactment of the 1975 Constitution, and especially during the '80s.[1550] The Constitution itself was a fruit of the influence of the post-war European rights discourse. Declaring the rejection of the nationalist *junta*, it

[1547] Kontogiorga-Theocharopoulou, *Η αρχή της αναλογικότητας στο εσωτερικό δημόσιο δίκαιο [The Principle of Proportionality in Domestic Public Law]*, 51: «*εμβρυώδης ελεγχος*». The author might have been influenced by Michel Guibal's article in the French context, where the author criticises some French instances of proportionality review by using the same term ("*embryonnaire*", Michel Guibal, "De la proportionnalité," *AJDA*, 1978, 485.)

[1548] Konstantinos Gogos, "Πτυχές του ελέγχου αναλογικότητας στη νομολογία του Συμβουλίου της Επικρατείας [Aspects of Proportionality Review in the Case Law of the Council of State]," *ΔτΑΤΕΣ III*, 2005, 320.

[1549] Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]*, 116 f.; 129.

[1550] This tendency is not only a Greek particularity, but has been observed in other contexts as well. See Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective," in *Local Knowledge: Further Essays in Interpretive Anthropology*, 3rd ed. (New York: Basic Books, 1983), 218 f.

"reconnected Greece to the European constitutional tradition".[1551] Alivizatos observes that "for the Greek constitutional scholars, 1974 was what 1945 had been for their European colleagues".[1552] A whole legal science was thus imported from more experienced courts to guide domestic judges and other public authorities in the application of the new constitutional text in conformity with the European constitutionalist paradigm. Even more than offering a method for the correct or coherent application of constitutional provisions, reference to European constitutionalism attributed a particular prestige to domestic constitutional law and its agents.

The development of supranational rights orders, and of the ECHR in particular established European fundamental rights as part of a "constitutional civilisation" (*συνταγματικός πολιτισμός*) that was seen as a model for Greek constitutional law.[1553] The use of the term "civilisation" is indicative of the perception of this spirit as higher and progressive compared to the domestic reality.[1554] Some scholars argued that European rights constituted "a pre-hermeneutic theory", that is, a theory that pre-existed the drafting of the Constitution, had bound this drafting, and thus was binding in constitutional interpretation.[1555] Antonis Manitakis talked about the "real" Constitution, that is, the core of constitutional principles that is commonly accepted as valid by legal actors and orients the interpretation of constitutional provisions.[1556] The transfer of proportionality should be read in this particular context. While it did not bring about the expected results, it had a value in itself for Greek public lawyers, as part of a more general process of acculturation.

Proportionality and "humanisation" of the Greek state. Some judicial uses of proportionality before its constitutional entrenchment testify to it being perceived as part of a "civilisation" imposed on domestic legal authorities. In decision 219/1996, for example, proportionality led the judges to enunciate an absolute prohibition of imprisonment of elderly people for debt. In the words of the Athens Administrative Court of Appeal,

> according to the constitutional principle of proportionality resulting from the ideal of a State ruled by Law and the principle of respect for human dignity, the imprisonment of elderly people for debt is excluded in any

[1551] Alivizatos, *Ο αβέβαιος εκσυγχρονισμός και η θολή συνταγματική αναθεώρηση [Uncertain Modernization and Vague Constitutional Reform]*, 174.

[1552] Alivizatos, 23.

[1553] Kostas Chryssogonos, *Η ενσωμάτωση της Ευρωπαϊκής Σύμβασης των Δικαιωμάτων του Ανθρώπου στην εθνική έννομη τάξη [The Incorporation of the European Convention on Human Rights into the National Legal Order]* (Athens; Komotini: Αντ. Ν. Σάκκουλας, 2001), 192 f; 540; Pararas, *Το κεκτημένου του ευρωπαϊκού συνταγματικού πολιτισμού [The Acquis of the European Constitutional Civilisation]*; Dagtoglou, *Συνταγματικό Δίκαιο. Ατομικά Δικαιώματα [Constitutional Law. Individual Rights]*, 2005, Α':24.

[1554] On the many possible uses of "legal culture", see David Nelken, "Using Legal Culture: Purposes and Problems," in *Using Legal Culture*, ed. David Nelken, JCL Studies in Comparative Law, no. 6 (London: Wildy, Simmonds & Hill, 2012), 5 f.

[1555] Dimitrios Tsatsos, *Συνταγματικό Δίκαιο [Constitutional Law]*, 4th ed., vol. Α', Θεωρητικό Θεμέλιο [Theoretical Undepinnings] (Athens: Αντ. Ν. Σάκκουλας, 1994).

[1556] Manitakis, *Κράτος δικαίου και δικαστικός έλεγχος της συνταγματικότητας [The Ideal of a State Ruled by Law and Judicial Review of Constitutionality]*, 310.

> case, since it acquires a character of cruelty that is incompatible with our legal civilisation.[1557]

In a similar tone, the Larissa Court of Appeal declared that the principle of proportionality implied that, "*according to the common conscience of justice, the national legal tradition and the practices of the civilised world*", the legislator should not impose penalties that consist of cruel and inhuman treatment.[1558]

Interestingly, while in the above cases the principle of proportionality had a value-laden content, it did not imply an outcome-based balancing. Rather, it mandated a particular prioritisation of constitutional values. This shows that, during the '90s, the importation of the European constitutional civilisation was not expected to change legal reasoning methods, but the *state of mind* of public decision-makers. Indeed, decisions or measures not complying with the European order of rights were not criticised in legal-technical terms but were deemed to be a result of a particularly Greek "mentality",[1559] which expressed an "outdated perception" of law and the state.[1560] The abandonment of this mentality was perceived as necessary. The European constitutional civilisation required the "humanisation" (*εξανθρωπισμός*) of the legal order,[1561] in the sense of a shift in the focus of legal and constitutional practice, from public interests, to individuals and their rights. In this context, articles 2 and 5 of the Constitution, guaranteeing the right to human dignity and the free development of one's personality respectively, were progressively understood to enjoy a particular position in the constitutional order, colouring with value-laden content its concepts and techniques.[1562] Proportionality, as a principle concerning the intent of public authorities, expressed a call for humanisation of the legal order and not for the optimisation of constitutional rights.

The achievement of constitutional acculturation. This is what the 2001 constitutional reform changed, at least at the level of legal theory. Article 25(1) of the Constitution explicitly establishes rights as optimisation requirements imposed on public authorities: "All agents of the State shall be obliged to ensure the unhindered and effective exercise thereof".[1563] By explicitly entrenching proportionality as a limitation imposed on the legislative limitations of rights, the Greek Constitution was said to have achieved the "progress" that the ECHR had already achieved since the

---

[1557] DEfAth 219/1996 *ΔΦΟΡΝΟΜΟΘ* 1997, 891.

[1558] See similarly EfLar 1345/1999, *ΔΙΚΟΓΡΑΦΙΑ* 2000, 133 (Larissa Court of Appeal), on the confiscation of the professional driving licence inflicted as a penalty upon a truck driver for illegally transporting third country nationals not having the permission to enter to the country.

[1559] See Nicos Alivizatos, "Η ελευθερία έκφρασης επί εθνικών θεμάτων [Freedom of Expression on National Matters] (1996)," in *Ο αβέβαιος εκσυγχρονισμός και η θολή συνταγματική αναθεώρηση [Uncertain Modernization and Vague Constitutional Reform]* (Athens: Πόλις, 2001), 251–59.

[1560] See DStrThess 482/1993 *APM* 1993, 1166 (Administrative Military Court of Thessaloniki).

[1561] Giorgos Vellis, "Η προσωπική κράτηση μετά το Ν. 2462/1997 [Personal Detention after Law n. 2462/1997]," *Ελλάδνη* 40 (1999): 12.

[1562] ES 28/1994 *ΔΕΝ* 1994, 439 (Court of Audit); AP 1597/2000 *Δ/ΝΗ* 2001, 130, see the minority opinion. See also Dagtoglou, *Συνταγματικό Δίκαιο. Ατομικά Δικαιώματα [Constitutional Law. Individual Rights]*, 1991, 180–81.

[1563] Source of translation: http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf.

'50s.[1564] Again, the hegemony of proportionality in Greek public law since 2001 makes sense by reference to developments abroad. Its perception as a fundamental rights principle by domestic lawyers has been based on its function in the European rights paradigm and not on its actual application by domestic courts.[1565] Scholarly description of the theory of rights advanced by the new constitutional text is animated by the same faith in law and the judge that animate German constitutionalist writings, often cited in Greek analyses.[1566] The only reason for criticising the constitutional entrenchment of proportionality has been the fact that such entrenchment is absent from other European constitutional texts.[1567]

The constitutional amendment, often paralleled with the adoption of the EU Fundamental Rights Charter, institutionalised the "cultural baggage" of proportionality. It entrenched the "European constitutional perception of fundamental rights".[1568] In other words, the amendment accomplished the process of constitutional acculturation that proportionality was purported to have brought about. Scholars celebrated the "renewal" of the formal Constitution in order to meet the "real" one.[1569] The domestic constitutional text now enshrines the "European public order in the field of human rights".[1570] The European constitutional civilisation is appropriated by domestic lawyers as an *acquis* of Greek constitutional civilisation. The

---

[1564] Evaggelos Venizelos, *Το αναθεωρητικό κεκτημένο. Το συνταγματικό φαινόμενο στον 21ο αιώνα και η εισφορά της αναθεώρησης του 2001 [The Amendment's Achievement. The Constitutional Phenomenon in the 21st Century and the Contribution of the 2001Amendment]* (Athens: Αντ. Ν. Σάκκουλας, 2002), 141.

[1565] It is characteristic that during parliamentary discussions on the reform, a few Communist MPs objected the entrenchment of proportionality. Based on the case law of Greek courts, they observed that proportionality had served as a tool for limiting collective labour rights, especially for prohibiting strikes as abusive. Constitutional scholars retorted to this "suspicious" remark that according to their expertise, proportionality had a tendency to increase constitutional rights' protection and that this was the function that it had in other European legal orders. See Giorgos Katrougkalos, "Νομική και πολιτική σημασία της αναθεώρησης του άρθρου 25 του Συντάγματος [Legal and Political Significance of the Reform of Article 25 of the Constitution]," *ΔτΑ* 10 (2001): 469–70.

[1566] See, for example, Xenophon Contiades, *Ο νέος συνταγματισμός και τα θεμελιώδη δικαιώματα μετά την αναθεώρηση του 2001 [The New Constitutionalism and Fundamental Rights after the 2001 Reform]* (Athens; Komotini: Αντ. Ν. Σάκκουλας, 2002), who, citing mainly German authors, proposes a new paradigm of rights very akin to the rational human rights paradigm for Greek constitutionalism.

[1567] See for example Kostas Chryssogonos, "Η προστασία των θεμελιωδών δικαιωμάτων στην Ελλάδα πριν και μετά την αναθεώρηση του 2001 [The Protection of Fundamental Rights in Greece before and after the 2001 Reform]," *ΔτΑ* 10 (2001): 535.

[1568] Apostolos Gerontas, "Η αρχή της αναλογικότητας και η τριτενέργεια των θεμελιωδών δικαιωμάτων μετά την αναθεώρηση του 2001 [The Principle of Proportionality and the Third Party Effect of Fundamental Rights after the 2001 Reform]," in *Πέντε χρόνια μετά τη συνταγματική αναθεώρηση του 2001*, ed. Xenophon Contiades, vol. A (Athens; Komotini: Αντ. Ν. Σάκκουλας, 2006), 467; Evaggelos Venizelos, *Το σχέδιο της αναθεώρησης του Συντάγματος [The Draft of the Constitutional Amendment]* (Athens: Αντ. Ν. Σάκκουλας, 2000); Anthopoulos, "Όψεις της συνταγματικής δημοκρατίας στο παράδειγμα του άρθρου 25 παρ. 1 του Συντάγματος [Aspects of Constitutional Democracy in the Example of Article 25 Par. 1 of the Constitution]," 171.

[1569] Anthopoulos, "Όψεις της συνταγματικής δημοκρατίας στο παράδειγμα του άρθρου 25 παρ. 1 του Συντάγματος [Aspects of Constitutional Democracy in the Example of Article 25 Par. 1 of the Constitution]," 153; Venizelos, *Το αναθεωρητικό κεκτημένο. Το συνταγματικό φαινόμενο στον 21ο αιώνα και η εισφορά της αναθεώρησης του 2001 [The Amendment's Achievement. The Constitutional Phenomenon in the 21st Century and the Contribution of the 2001Amendment]*, 468.

[1570] Kostas Chryssogonos, *Μια βεβαιωτική αναθεώρηση. Η αναθεώρηση των διατάξεων του Συντάγματος για τα ατομικά και κοινωνικά δικαιώματα [A Confirmatory Amendment. The Amendment of the Constitutional Provisions on Individual and Social Rights]* (Athens: Αντ. Ν. Σάκκουλας, 2000), esp. 541: «ευρωπαϊκής δημόσιας τάξης στο πεδίο των ανθρωπίνων δικαιωμάτων».

application of proportionality, part of this civilisation, sometimes expresses a kind of patriotism, even pitted against the states traditionally perceived as constitutional models. In decision 630/2001, the Athens Court of Appeal dealt with Greek citizens' claims for indemnity against the German state for crimes and torts committed during the Second World War. The court accepted that, in principle, state immunity from tort liability applies even for acts committed in war situations. However, it went on to declare that,

> when these torts acquire the character of crimes against humanity or are committed against innocent citizens (…), without being dictated by the necessities of war operations, then immunity ceases to apply, because it is not in harmony with global and in any case European public order inhering in the constitutions of European states and in the European Convention for Human Rights, and especially (because it is not in harmony) with the legal principle of proportionality, which is part of the hard-core of pan-European public order.[1571]

The appropriation of European constitutional values has revitalised scholarly interest in the application of proportionality by domestic courts. In one of the most extensive and comprehensive studies on proportionality, Orfanoudakis only scarcely referred to the application of the principle abroad.[1572] Proportionality started being perceived as ubiquitous in *domestic* case law. Manifestations of balancing have been discovered in the most historic Greek constitutional decisions, even in the oral arguments of the public prosecutor Tzivanopoulos in the 19th century, who first called for *Areios Pagos* to review the constitutionality of legislation.[1573] Similarly to their French colleagues, Greek public lawyers have re-read Council of State case law dating from the '30s as an instance of proportionality reasoning.[1574] Yet, despite the appropriation of proportionality by domestic legal actors, its content was still to be defined abroad.

4. Proportionality as a European science: transcending constitutional limits

The realisation of the "Greek-as-European" metaphor. Claude Lévi-Strauss observed that "the transformation of a metaphor is achieved in a metonymy". The

---

[1571] EfAth 630/2001 *Ελλάδνη* 2001, 1370.

[1572] Orfanoudakis, *Η αρχή της αναλογικότητας στην ελληνική έννομη τάξη : από τη νομολογιακή εφαρμογή της στη συνταγματική της καθιέρωση [The Principle of Proportionality in the Greek Legal Order: From Its Judicial Application to Its Constitutional Consecration]*.

[1573] Orfanoudakis, 13 f.; Nikoleta Renesi, "Η αρχή της αναλογικότητας στη νομολογία του Ελεγκτικού Συνεδρίου [The Principle of Proportionality in the Case Law of the Court of Audit]," *Δικ* 17 (2005): 1401 f.

[1574] Voutsakis, "Η αρχή της αναλογικότητας: από την ερμηνεία στη διάπλαση του δικαίου [The Principle of Proportionality: From Legal Interpretation to Legal Formation]," 216 f.; Beis, "Η Αρχή Της Αναλογικότητας [The Principle of Proportionality]," 468; Orfanoudakis, *Η αρχή της αναλογικότητας στην ελληνική έννομη τάξη : από τη νομολογιακή εφαρμογή της στη συνταγματική της καθιέρωση [The Principle of Proportionality in the Greek Legal Order: From Its Judicial Application to Its Constitutional Consecration]*, 72 f. Among the decisions mentioned, one finds most notably StE (Pl.) 300/1936 *ΤΝΠΔΣΑ*.

metaphor "Greek-as-European" did not escape this rule.[1575] With the accomplishment of the process of legal acculturation, supranational legal rules began to be interpreted as imposing not only particular goals and mentalities, but also *specific legal methods*. In the minds of domestic lawyers, the "Greek-as-European" metaphor was now to become literal, the Greek polity was *to become* European, and this was to be accomplished first at the level of law. Thus, proportionality as part of a European legal science became the "correct" method for domestic legal reasoning and acquired a hegemonic place in Greek law.

Still, the version of proportionality developed in European case law was considerably different from the traditional manifest error standard applied by the Council of State. While this difference was tolerable under the traditional perception of proportionality as an eternally ongoing transplant, it ceased to be so with the establishment of proportionality as a scientific tool. Difference between the domestic and the European versions of proportionality was more apparent in economic freedoms cases, where EU law imposed the application of the ECJ version as a legal obligation on Greek courts. As a scientific legal tool, proportionality *should* have the same content in the domestic and the European legal order, independent of the existence of a transnational element in the dispute. Which version of proportionality would prevail?

Two conflicting versions of proportionality. The matter first arose in litigation concerning customs law offences.[1576] The Greek customs code imposes very strict pecuniary sanctions for such offences, ranging from twice to ten times the losses incurred by the state due to the infraction. The amount of the fine depends on the degree of involvement of the offender, her intent to defraud as well as her tendency to recidivate and is decided by customs authorities after examination of the circumstances of the case. According to case law, the strict sanctions aimed not only to collect the evaded customs duties but also to punish the offender and to deter future offenders. Hence, before 2001, the Council of State had applied its traditional version of proportionality as a manifest error test to declare that the law was constitutional.[1577]

In 2002, the fourth section of the Council of State adopted the same solution. Mr Mamidakis, a well-known businessman active in the field of petrol, received a fine eight times the amount of the duties that his businesses had evaded. The case arrived before the Council in cassation, and it was impossible for the claimant to contest the amount of the individual sanction that he was subject to. Instead, he argued that the fines generally imposed by the law constituted an "unacceptable violation of the constitutional principle of proportionality, which is simultaneously a general principle of EC law".[1578] The Council enounced proportionality as a three-pronged requirement of necessity, relevance and reasonableness as between the concrete measure and its

[1575] *The Savage Mind* (University of Chicago Press, 1966), 106.

[1576] Gerapetritis, "Πρόσωπα και προσωπεία του ελέγχου της αναλογικότητας [Faces and Guises of Proportionality Review]."

[1577] StE 1926/2000 *Ελλάδη* 2002, 1191, para 14.

[1578] StE 1006/2002 *ΔΕΕ* 2003, 1229, para 12.

goal. However, the judges went on to apply their consistent proportionality case law until then and declared that a legislative measure would be found to be incompatible with proportionality, "*only if it [was] by nature manifestly inappropriate for pursuing the legislative goal, or if it equally manifestly overshot this goal*".[1579] In the concrete case, the judges accepted the compatibility of the law with the Constitution.

The fourth section judges were conscious of the difference between the traditional domestic version of proportionality and the intrusive, fact-oriented review that the ECJ would have exercised in a similar case. However, given that the case at hand did not concern intra-community trade, the application of proportionality as an EC law principle was rejected.[1580] This solution was also dictated by considerations of institutional competence. The appreciation of the concrete facts of the case was within the competence of lower courts. However, the president of the section, Petros Pararas, did not share the opinion of his colleagues. He argued that both in EC law cases and in purely domestic cases, "*the question of the compatibility of the contested administrative sanction with the principle of proportionality should have a unitary solution* (...)"[1581] Invoking ECJ case law on the matter, Pararas argued that the Council should exercise a stringent review of the appropriateness and necessity of the contested provisions, in view of their application in Mr Mamidakis' case. The application of a different version of proportionality led the judge to a different substantive outcome. In his view, the legislation in question was disproportionate and the reviewed decision that had applied it should be quashed.

Thus, two visions of proportionality underpinned the different opinions of the 1006/2002 decision. On the one hand, in the opinion of the majority, the application of proportionality was formal. In administrative law it preserved its content as equity, a quality of public decisions to be achieved primarily by the administration after consideration of the concrete circumstances of the case. In the judicial review of the legislator, it only implied a manifest error test. In Pararas' opinion, on the contrary, the application of proportionality in the domestic context should follow the ECJ jurisprudence and should take the form of an objective test concerning the *concrete* impact of legislation on the plaintiff. In this judge's view, institutional considerations should not matter much in the assessment of proportionality, which was to be effectuated by the judge herself. Indeed, in support of his arguments Pararas stressed that the Government had admitted the inefficiency of the strict customs sanctions in recent parliamentary debates, and newly voted-through legislation had considerably reduced the legislative fines.[1582] Therefore, Pararas' vision of proportionality would even allow the Council to identify and implement a *change of mind* of Parliament (or of the Government?) as to the effectiveness of onerous legislative measures. Due to its importance, the case was referred to the Council of State Plenum.

[1579] Ibid, para 14.
[1580] Ibid, para 15.
[1581] Ibid.
[1582] Ibid.

Two years later, in decision 990/2004, the Plenum confirmed the fourth section's decision.[1583] The judges started by solemnly announcing that,

> the principle of proportionality, resulting from the ideal and the guarantees of a State ruled by Law, is explicitly entrenched in the Constitution (article 25 § 1) and according to the consistent case law of the Court of the European Communities, is among the general principles of Community law.[1584]

In this way, the Council of State avoided a conceptual distinction between the domestic and the European versions of proportionality that was untenable in Greek legal theory. The court continued by stressing that proportionality implies a necessity and relevance requirement for the restrictions of individual rights. However, in the following reasoning the Council again applied a more deferent version of proportionality. In the words of the judges,

> [a] measure defined in a legislative provision as a sanction (…) is contrary to the principle of proportionality only when, due to its kind or nature, it is manifestly inappropriate for obtaining the aim that it pursues or when [its] impact is manifestly disproportionate or overshoots [its] purpose.[1585]

While the traditional formulation of proportionality was slightly altered, with the addition of the "manifestly disproportionate" standard, the court did not alter its actual reasoning, nor did it structure its justification according to the proportionality prongs. The judges contented themselves with observing that none of the stated criteria were fulfilled in the case at hand. Furthermore, they stressed that the law provided the administration with the necessary discretion for appraising the proportionality of the sanction in the circumstances of each case. Thus, the court accepted the compatibility of the contested legislation with the Constitution.

The pervasive force of the EC law perception of proportionality. Decision 990/2004 is certainly one of the most criticised instances of proportionality reasoning in Greek judicial practice. The domestic court's indifference towards the concrete impact of legislation on individual rights was also criticised by the ECHR.[1586] The different "faces" and "guises" of proportionality in Greek case law provoked scholarly suspicion. George Gerapetritis argued for a more consistent application of the principle according to the ECJ precepts, appealing to "a common scientific understanding of its conceptual content".[1587] Manouela Papadopoulou also argued that, even though there was no doubt that Mr Mamidakis' case did not fall within the scope of EC law, it was "apparent" that the Council of State should have applied

---

[1583] StE (Pl.) 990/2004, *Ε.Δ.Κ.Α.* 2004, 585.

[1584] Ibid.

[1585] Ibid.

[1586] ECtHR, *Mamidakis v Greece*, 11 January 2007, no. 35533/04, para 48.

[1587] Gerapetritis, "Πρόσωπα και προσωπεία του ελέγχου της αναλογικότητας [Faces and Guises of Proportionality Review]," 278.

proportionality in this case "following the criteria formulated by the ECJ case law".[1588] It seems that, at least in Greek public law scholarship, the conceptual content of proportionality as a scientific tool was to be defined … by the ECJ.[1589] The European version of proportionality was being established as dominant, even scientific in Greek public law and acquired a pervasive dynamic. Pressure for its consistent application defied the "*long applied provisions of the customs code dating from 1918*",[1590] as well as traditional formalist considerations concerning the distribution of competences between courts and public authorities. It seems that, as a European science, proportionality transcended the formality of domestic legal discourse. In subsequent case law, the application of proportionality defied even the clearest constitutional provisions added with the 2001 reform.

The *Michaniki* affair. This is observable in the story of the famous *Michaniki* affair, commonly called the "major shareholder affair" (*υπόθεση του βασικού μετόχου*). This affair, which traumatised Greek public lawyers, concerned the reconciliation of the amended Constitution with EC competition law. The relevant litigation lasted almost 10 years and was at the source of three Council of State decisions and one ECJ preliminary ruling. The story starts with article 14(9) of Constitution, which after the 2001 amendment declares:

> The capacity of owner, partner, major shareholder or managing director of an information media enterprise, is incompatible with the capacity of owner, partner, major shareholder or managing director of an enterprise that undertakes towards the Public Administration or towards a legal entity of the wider public sector to perform works or to supply goods or services.[1591]

The incompatibility was also extended to "all types of intermediary persons, such as spouses, relatives, financially dependent persons or companies".[1592] According to the Constitution, legislation can provide for sanctions in case of infringement of the above provisions. These sanctions can comprise license withdrawal for a radio or television station and prohibition of the conclusion, or annulment of the public contract in question. By including the above provisions in article 14(9), the reformers conferred constitutional status on a statute which had already stipulated them.[1593]

[1588] Manouela Papadopoulou, "Η κοινοτική αρχή της αναλογικότητας ενώπιον του εθνικού δικαστή [The EC Principle of Proportionality before National Judges]," *ΔτΑΤΕΣ IV*, 2006, 298.

[1589] As Yannakopoulos has shown in another context, the determination of domestic concepts by EU law is a more general characteristic of domestic legal thought and of domestic judicial practice. See Yannakopoulos, "Μεταξύ συνταγματικών σκοπών και συνταγματικών ορίων: η διαλεκτική εξέλιξη της συνταγματικής πραγματικότητας στην εθνική και στην κοινοτική έννομη τάξη [Between Constitutional Goals and Constitutional Limits: The Dialectical Evolution of Constitutional Reality in the National and the Community Legal Orders]." See also *infra*, Part III, Chapter 7(4) and Chapter 8(4).

[1590] StE 1006/2002, cited above, para 15.

[1591] Source of translation: http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf.

[1592] Ibid.

[1593] 11 par. 1 law n. 2328/95.

The goal of the new provisions met with broad consensus in Parliament and in public opinion. It consisted in the prevention of illegitimate media influence on the award of public contracts and on politics more generally.[1594] Otherwise, the constitutional text delegated the regulation of the matter to Parliament. However, the statute implementing article 14(9) of the Constitution, dating from 2002, stood in stark contrast to the "very rigid, even draconian" constitutional regime.[1595] According to the law, the sole proof of the spouses' and relatives' economic independence, sufficed for the presumption of article 14(9) that they act as "intermediaries" not to apply.[1596]

In application of the law, the National Radio-Television Council (*ESR*) issued an act in 2002, certifying that the incompatibility established by article 14(9) did not concern the company Sarantopoulos (later called Pantechniki), even if one of its major shareholders and vice-chairman of its board of directors was the father of G. Sarantopoulos, a member of the board of directors of two companies that were active in the field of the media. The *ESR* considered that, since father and son were financially independent, the presumption that they acted as intermediaries did not apply and the company was free to conclude the public contract in question. Michaniki, a concurrent of Pantechniki, attacked the *ESR* certificate in annulment, claiming that the 2002 statute had rendered the constitutional presumptions reversible and had thus reduced the scope of article 14(9) of the Constitution.

The Council of State section decision. In the first decision on the matter in 2004, the sixth section of the Council of State gave support to Michaniki's arguments. The judges started by specifying that article 14(9) did not only aim at the "*ex post retribution*" of concrete acts of illegitimate influence of the media on the award of public contracts. In their view, such influence "*in any case [was] difficult to establish with certainty and thus difficult to prevent by threatening with sanctions only in the cases where it would be ascertained*".[1597] Therefore, the court considered that the constitutional provision "*primarily aim[ed] to prevent the creation of conditions that could generate a risk of such illegitimate influence, which is particularly detrimental to the public interest*".[1598] The preventive function of the constitutional measures was understood as maximal, taking place at a very early stage. The court also considered that the presumption that spouses and relatives act as "intermediaries" was irrefutable. In its view, only this interpretation could ensure "*the effective application of the constitutional rules*".[1599] Hence, the section judges concluded as to

[1594] See Antonis Manitakis, "Οι θεσμικές παρενέργειες της «υπόθεσης του βασικού μετόχου» [The Institutional Side-Effects of the 'Major Shareholder Affair']" (Thessaloniki, 2014), http://www.manitakis.gr/i-thesmikes-parenergies-tis-ypothesis-tou-vasikou-metochou-i-eknomefsi-tou-syntagmatos-ke-i-paragnorisi-ton-adilon-tropopiiseon/, before fn. 7. See StE 3242/2004 *NoB* 2005, 1878, para 14, referring to the relevant parliamentary debates.

[1595] See the parliamentary report of the majority, Venizelos, *Το σχέδιο της αναθεώρησης του Συντάγματος [The Draft of the Constitutional Amendment]*.

[1596] Law n. 3021/2002.

[1597] See StE 3242/2004, cited above, para 14.

[1598] Ibid.

[1599] Ibid.

the unconstitutionality of the implementing statute and referred the case to the Council of State Plenum, in application of article 100(5) of the Constitution.

In the meantime, the 2002 statute was already rigid enough to provoke the reaction of European institutions, who considered it to be incompatible with EC competition law. Article 24 of the Directive 93/37/EEC defined certain reasons for the exclusion of enterprises from public contract contests but did not stipulate incompatibilities such as the ones defined in article 14(9). The sixth section of the Council of State had refused to examine the compatibility of the Constitution with the Directive. For the judges, a preliminary reference to the ECJ to ascertain whether an imperative provision of the Greek Constitution is compatible with a provision of primary, let alone secondary Community law, was "*in any case inconceivable*".[1600] Moreover, in the majority's view, the domestic legislation on the matter did not enter the scope of article 24 of the Directive, which aimed only for the partial harmonisation of national regimes. Thus, coherence between domestic and European law was preserved through the delimitation of their respective scope.

The preliminary reference to the ECJ by the Council of State Plenum. Two years later, the Council of State Plenum also adopted a rigid stance as far as the incompatibilities of article 14(9) were concerned. In the court's view, the Constitution established an absolute prohibition on media companies from concluding public contracts. The goal of this provision was preventive. Thus, the Constitution imposed an obligation on Parliament to "*institute sanctions that [would] be sufficiently deterrent*" in case of breach of article 14(9).[1601] Therefore, in the judges' view, an interpretation of article 14(9) "*in the light of*" the principle of proportionality would "*void [the constitutional provision] of its content or would reverse its clear formulation and its equally clear goals*".[1602] As for the "intermediaries", the court accepted the possibility of reversing the presumption established for spouses, relatives and economically dependent persons only if these persons could prove that in the concrete case at hand they acted independently and for their own sake, pursuing exclusively their own interest.[1603] Hence, the Council still held the implementing legislation to be too lenient and inefficient in pursuing the goals set by the Constitution.

However, contrary to the section judges, the Plenum decided that the conformity of article 14(9) provisions with European law should be examined by the ECJ.[1604] In its preliminary reference to the ECJ the Council asked, among others, whether the domestic constitutional provision pursued legitimate goals under the Directive and whether the domestic measures were compatible with proportionality as applied in EC law.[1605] According to the view that prevailed, in case of incompatibility, the domestic

[1600] Ibid, para 19.
[1601] StE (Pl.) 3670/2006 Ε⊥⊥⊥ 2009, 461, para 14.
[1602] Ibid, para 14.
[1603] Ibid, para 15.
[1604] Ibid, paras 28 f.
[1605] Ibid, paras 28 f.

regime as a whole should not be applied, despite its constitutional basis.[1606] In the Council's decision then, the validity of proportionality as a European principle transcended the domestic Constitution, which was to be applied only "in the proportion" that it was compatible with European law. The Constitution was deprived of its function as "an act of separation and definition of the limits" between the domestic and the European legal spheres.[1607] This function was ascribed to proportionality instead.

The Greek Constitution declared contrary to the EC competition rules. The ECJ's response came in the well-known *Michaniki* decision.[1608] The Luxembourg judges declared the rigid provisions of article 14(9) contrary to the principle of proportionality. The domestic provisions, excluding a whole category of media enterprises from the public contract sector without affording them any possibility to prove that no risk of illegitimate influence exists in concrete cases, went beyond what was necessary to eliminate the risk of corruption.[1609] The fact that, in the 2006 decision, the Council of State had held that the presumption concerning spouses, relatives and economically dependent persons was refutable, was not enough to reconcile the provision with EC law. The European court criticised the *formulation* of the domestic constitutional text itself. In its view, the breadth of the concepts "major shareholder" and "intermediary" contributed to the disproportionate character of the domestic provisions.[1610] Greek courts were thus faced with two contradicting constitutional provisions: article 28 prescribed the validity of EC law in the domestic sphere, sometimes in limitation of national sovereignty; article 14(9) clearly prescribed an incompatibility that was itself incompatible with EC law. Greek judges *had to* establish coherence between the domestic Constitution and European law, at least at the level of aesthetics.

5. Displacing local knowledge: proportionality and the aesthetics of modernisation[1611]

The final *Michaniki* decision and the "true meaning" of the Greek Constitution. In the final "major shareholder" case in 2011, the Council of State Plenum implemented the ECJ decision. By doing so, it unanimously reversed the interpretation of article 14(9) that it had adopted in previous cases. Instead of a "preventive incompatibility", which was general, abstract and absolute, article 14(9) was now taken to establish an *ad hoc* "incompatibility of actions".[1612] This means that,

---

[1606] Ibid, para 20.

[1607] Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]*, 647.

[1608] ECJ, C-213/07, 16 December 2008, *Michaniki*, ECLI:EU:C:2008:731.

[1609] Ibid, paras 62-63.

[1610] Ibid, para 83.

[1611] Analysis in this section inspired by a discussion with Jacco Bomhoff, whom I thank.

[1612] See Charalampos Anthopoulos, "Το ασυμβίβαστο των ιδιοκτητών μέσων ενημέρωσης πριν και μετά το νέο άρθρο 14 παρ. 9 του Συντάγματος [The Incompatibility Concerning Media Owners before and after the New Article 14 Par. 9 of the Constitution]," in *Πέντε χρόνια μετά τη συνταγματική αναθεώρηση του 2001*, ed. Xenophon Contiades, vol. I (Athens; Komotini: Αντ. Ν. Σάκκουλας, 2006), 313.

every businessman active in the field of the media is allowed to conclude a public contract, unless "*it is established with certainty that the individual committed an illegal or illegitimate act in the process of award*".[1613] The requirement of proof and certainty stands opposed to the preventive approach that the court had adopted in its previous decisions. In total contrast to these decisions, the Council declared the 2002 statute as unconstitutional, not because it was too lenient, but due to the general and absolute character of the incompatibilities and presumptions that it contained. The supreme judges unanimously concluded that the law was "*contrary to the true meaning of [article 14(9)] and* (…) *should not be applied*".[1614]

What allowed for this striking change was the interpretation of the constitutional provisions according to the principle of proportionality, "*a principle both of the Greek legal order* (…) *and of Community [law]*".[1615] Proportionality was employed as a tool for the harmonisation of the domestic Constitution with the Luxembourg precepts. The court perceived harmonisation as an obligation, resulting from the interpretative clause of article 28 and from the will expressed in the 2001 reform.[1616] Prominent Greek scholars had also defended this interpretation of article 14(9).[1617] Therefore, combined with article 28, proportionality assumed a function of "tacit constitutional reform".[1618] What in 2006 had been deemed to "*void*" article 14(9) of its content and to "*reverse its clear formulation and its equally clear goals*", was now declared to be its "*true meaning*". The constitutional text was interpreted according to the "real" Constitution, the one that is in conformity with European law.[1619]

Contrary to decision 990/2004, decision 3471/2011 is one of the most applauded applications of proportionality in the Greek context.[1620] The rupture in the Council of

[1613] StE (Pl.) 3470-1/2011 *Ε⊥⊥⊥* 2012, 199.

[1614] Ibid, para 14.

[1615] StE (Pl.) 3470/2011, para 9; 3741/2011, para 13.

[1616] StE (Pl.) 3471/2011, para 13.

[1617] See, among others, Contiades, *Ο νέος συνταγματισμός και τα θεμελιώδη δικαιώματα μετά την αναθεώρηση του 2001 [The New Constitutionalism and Fundamental Rights after the 2001 Reform]*, 305–6; Anthopoulos, "Το ασυμβίβαστο των ιδιοκτητών μέσων ενημέρωσης πριν και μετά το νέο άρθρο 14 παρ. 9 του Συντάγματος [The Incompatibility Concerning Media Owners before and after the New Article 14 Par. 9 of the Constitution]." Venizelos also proposed such an interpretation of article 14(9) in Evaggelos Venizelos, "Οι εγγυήσεις πολυφωνίας και διαφάνειας στα ΜΜΕ κατά το άρθρο 14 παρ. 9. Οι κανόνες ερμηνείας του Συντάγματος και οι σχέσεις Συντάγματος - Κοινοτικού Δικαίου [The Guarantees of Media Pluralism and Transparency according to Article 14 Par. 9. The Rules for the Interpretation of the Constitution and the Relations between the Constitution and Community Law]," *NoB* 53 (2005): 425.

[1618] On this matter, see Lina Papadopoulou, "Η συνταγματική οικοδόμηση της Ευρώπης από τη σκοπιά του ελληνικού Συντάγματος [The Constitutional Construction of Europe from the Point of View of the Greek Constitution]," in *Η προοπτική ενός Συντάγματος για την Ευρώπη*, ed. Lina Papadopoulou and Antonis Manitakis (Athens: Σάκκουλα, 2003), 176. The author cites Julia Iliopoulou-Stragga, *Ελληνικό συνταγματικό δίκαιο και ευρωπαϊκή ενοποίηση [Greek Constitutional Law and European Integration]* (Athens: Αντ. Ν. Σάκκουλας, 1996), 37.

[1619] Antonis Manitakis, "Η αναγκαιότητα της αναθεώρησης μεταξύ πλειοψηφικού κοινοβουλευτισμού και αναθεωρητικής συναίνεσης [The Need for the Constitutional Reform, between Majoritarian Parliamentarism and Consensus]," *ΤοΣ*, 2007, 3.

[1620] Dimitris Nikiforos, "Η αναλογικότητα ως διάμεσος της εθνικής και της ενωσιακής έννομης τάξης [Proportionality as an Intermediary between the Domestic and the EU Legal Order]," *Constitutionalism.gr* (blog), September 17, 2012, http://www.constitutionalism.gr/site/2403-i-analogikotita-ws-diamesos-tis-etnikis-kai-tis-en/; Antonis Manitakis, "Η προτεραιότητα εφαρμογής του κοινοτικού δικαίου έναντι του Συντάγματος, η εναρμονισμένη με το κοινοτικό δίκαιο ερμηνεία του Συντάγματος και η τεχνική της

State case law that it introduced does not seem to bother Greek public lawyers. More important than the internal coherence of domestic constitutional discourse seems to be its coherence with the EU legal order. Proportionality functioned as an "intermediary" between the two and rendered escapable the conflict of the domestic Constitution with European law.[1621] As Yannakopoulos observes, establishing coherence between domestic and European law, both operating in the domestic legal sphere, is a crucial function of Greek judicial review more generally.[1622] Thus, *Michaniki* was perceived as a fair compromise that did not undermine the authority of the national Constitution.

Proportionality and modernisation. Even more, "in what is almost a species of sympathetic magic", the application of proportionality in *Michaniki* represented the Greek society as modern and European. Indeed, behind the different interpretations in the "major shareholder" cases are different views of the Greek socio-political reality altogether. In the 2004 and 2006 decisions, the media were distrusted as *a priori* suspects of corruption.[1623] In the words of the court, "*in view of the –well-known to everyone– huge influence [of the media] on public opinion in contemporary societies*", illegitimate media influence could "*even lead to a distortion of popular sovereignty* (…)*, which is the foundation of the polity*".[1624] This dictum stands in total contrast to the Council's dicta in 2011. In the words of the latest decision, article 14(9) "*certainly does not aim at the prevention of any influence of the media on the exercise of political power in general, which, moreover, is inherent in the role of the media in contemporary modern societies*".[1625] Surprisingly, in 2011, democracy and popular sovereignty were no longer at danger due to opaque media practices but due to restrictive state interference with their political role. The media were trusted as normal political actors in modern societies. In fact, the "draconian" interpretation of article 14(9) was abandoned because it depicted the Greek constitutional-political reality in a way that did not correspond to a "*contemporary modern society*".

Like in the English case, the application of proportionality in Greece has been to a large extent about modernisation and constitutional reform. Modernisation was a much-praised rationale of the 2001 reform, which entrenched proportionality. Writing at the time of the relevant public debates, Apostolos Papatolias observed that "it [wa]s almost impossible to track down even one argument concerning the reform which

---

αναλογικότητας [The Primacy of Community Law over the Constitution, the Interpretation of the Constitution in Conformity with Community Law and the Technique of Proportionality]," (accessed May 15, 2018), http://www.manitakis.gr/i-protereotita-efarmogis-tou-kinotikou-dikeou-enanti-tou-syntagmatos-i-enarmonismeni-me-to-kinotiko-dikeo-erminia-tou-syntagmatos-ke/.

[1621] Nikiforos, "Η αναλογικότητα ως διάμεσος της εθνικής και της ενωσιακής έννομης τάξης [Proportionality as an Intermediary between the Domestic and the EU Legal Order]."

[1622] Yannakopoulos, *Η επίδραση του δικαίου της Ευρωπαϊκής Ένωσης στον δικαστικό έλεγχο της συνταγματικότητας των νόμων [The Influence of EU Law on Judicial Review of the Constitutionality of Legislation]*, 309 f.

[1623] Nikiforos, 7; Anthopoulos, "Το ασυμβίβαστο των ιδιοκτητών μέσων ενημέρωσης πριν και μετά το νέο άρθρο 14 παρ. 9 του Συντάγματος [The Incompatibility Concerning Media Owners before and after the New Article 14 Par. 9 of the Constitution]," 320–21.

[1624] StE 3242/2004, cited above, para 14.

[1625] StE (Pl.) 3471/2011, cited above, para 13.

[did] not refer to the epode of modernisation".[1626] The quest for modernisation was expressed in neologisms included in the constitutional text, like "genetic identity" or "Society of Information".[1627] These new terms and formulas were purported to symbolise the adaptation of the Constitution to the evolving social, economic, technological, and other circumstances and its possibility to act upon them. Proportionality, itself a "neoteric" element, was purported to express this rationale.[1628] In *Michaniki*, the application of proportionality by the Council of State *performed* the image of the Greek society as a modern "Society of Information", in which the media are a legitimate source of power.

As we saw, modernisation in the English context has proceeded through the quest for substantive values, myth and ritual to unify the bits and pieces of the common law. In contrast, in Greece modernisation has implied efficiency, rationalisation and the excision of values from legal reasoning. Most importantly, what the reformers claimed to convey in 2001 was an outcome-based legitimation of state authorities, adapted to the post-modern "risk society".[1629] As Petros Pararas observed, in 2001 the Constitution "abandoned its ideal sacredness for the sake of its functionality".[1630] The reformers' concern with efficiency was expressed in the technocratic spirit permeating the constitutional text, which provided for a number of specialised and independent administrative authorities. This made Giorgos Sotirelis lament that the 2001 reform substituted "a sterile technocratic-legal conception (…) to lively constitutional politics".[1631] The "scientific" connotations of proportionality express this spirit of technocracy too. Proportionality as an efficiency and rationalisation test articulates an instrumental perception of legal rules, since it can justify only efficient legal solutions.

Paradoxically however, the establishment of proportionality as science does not seem to fit local legal imagination. While proportionality flourishes in a context of epistemological optimism and institutional faith, in Greece there seems to be a climate of suspicion among constitutional actors. Accusations of "hermeneutic relativism" are unleashed against the Council of State when applying proportionality.[1632] Greek public

---

[1626] Apostolos Papatolias, *Συνταγματικές επιχειρηματολογίες για την συνταγματική αναθεώρηση [Constitutional Argumentation on the Constitutional Reform]* (Athens: Αντ. Ν. Σάκκουλας, 1999), 33.

[1627] Articles 5 and 5A of the Constitution respectively.

[1628] Venizelos, *Το αναθεωρητικό κεκτημένο. Το συνταγματικό φαινόμενο στον 21ο αιώνα και η εισφορά της αναθεώρησης του 2001 [The Amendment's Achievement. The Constitutional Phenomenon in the 21st Century and the Contribution of the 2001Amendment]*, 92.

[1629] Panagiotis Mantzoufas, "Ασφάλεια και πρόληψη στην εποχή της διακινδύνευσης [Security and Prevention in the Age of Risk]," in *Τόμος τιμητικός του Συμβουλίου της Επικρατείας - 75 χρόνια* (Thessaloniki: Σάκκουλα, 2004), 55. See more generally Contiades, *Ο νέος συνταγματισμός και τα θεμελιώδη δικαιώματα μετά την αναθεώρηση του 2001 [The New Constitutionalism and Fundamental Rights after the 2001 Reform]*.

[1630] Petros Pararas, "Κριτικό σημείωμα - Recension X. Contiades (Ed.), Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA," *ΔτΑ* 55 (2012): 899; see also Nicos Alivizatos, "Συνολική αποτίμηση του αναθεωρητικού εγχειρήματος [Overall Evaluation of the Reform]," in *Το νέο Σύνταγμα*, ed. Dimitrios Tsatsos, Evaggelos Venizelos, and Xenophon Contiades (Athens; Komotini: Αντ. Ν. Σάκκουλας, 2001), 446.

[1631] Giorgos Sotirelis, ed., *Σύνταγμα και δημοκρατία στην εποχή της παγκοσμιοποίησης [Constitution and Democracy in the Age of Globalization]* (Athens: Αντ. Ν. Σάκκουλας, 2000), 53–54.

[1632] Evaggelos Venizelos, "Ερμηνευτικός σχετικισμός, δικονομικοί καταναγκασμοί, δογματικές αντιφάσεις και πολιτικά διλήμματα στη νομολογία του Συμβουλίου της Επικρατείας για τις σχέσεις εθνικού Συντάγματος και Ευρωπαϊκού Κοινοτικού δικαίου [Hermeneutic Relativism, Procedural Constraints,

lawyers have not been convinced by the modernisation rhetoric of the 2001 reform.[1633] Nor are they optimistic as to the effectiveness of the new interpretation of article 14(9) in preventing corruption. Antonis Manitakis, for instance, expresses his serious doubt in this respect and criticises the reform of article 14(9) as "inoperative and deceitful".[1634] In this context of constitutional pessimism and institutional distrust, proportionality is deprived of its purpose, it is a scientific tool without a science. As such, it displaces some kind of "local knowledge", which sustained the credibility of the domestic Constitution until then, at least in the minds of Greek public lawyers.[1635] This can be observed in the *Michaniki* case.

Proportionality v local knowledge. A close look at the last "major shareholder" decision shows that the re-interpretation of article 14(9) that proportionality produced obliged the Council to reformulate the goal of the constitutional provision as a whole. It rendered this goal much more concrete and far less preventive. It transformed it to an *objective*, a "projected reality".[1636] According to the 2011 decision, the constitutional restrictions aimed "*only to prevent* (…) *the concrete illegitimate influence that can be exercised on the procedure of public contracts, with an intention to obtain the award of the contract*".[1637] It is this concrete case of deliberate influence that was held to be the target of the constitutional restrictions, and not generally the "*creation of conditions that could generate a risk*" of corruption, as the court had stated in previous decisions. The reformulation of the constitutional goal allowed the court to limit the scope of the constitutional provisions to *concrete* and *ascertained* attempts at corruption, in conformity with proportionality. Under the new interpretation of article 14(9), prevention takes place at a much later stage. This is at odds with a belief expressed by the administrative judges in previous decisions, that the institution of *ex post* sanctions would be ineffective and would even void the constitutional provision of its content. Not only did the European principle of proportionality impose a new interpretation of constitutional provisions and of their goal, but also a *particular vision* of what was an effective sanction in fighting corruption.

Indeed, the belief in the effectiveness of *ex post* sanctions that proportionality bore resulted from a whole new faith in the possibility of fact-determination in the field of corruption. In previous cases, the Council of State judges had described the particular

---

Doctrinal Inconsistencies and Political Dilemmas in the Council of State Case Law on the Relationship between the National Constitution and European Community Law]," *Εφ⊥⊥*, no. 1 (2008): 85; Nikiforos, "Η αναλογικότητα ως διάμεσος της εθνικής και της ενωσιακής έννομης τάξης [Proportionality as an Intermediary between the Domestic and the EU Legal Order]."

[1633] Alivizatos, *Ο αβέβαιος εκσυγχρονισμός και η θολή συνταγματική αναθεώρηση [Uncertain Modernization and Vague Constitutional Reform]*.

[1634] See Manitakis, "Οι θεσμικές παρενέργειες της «υπόθεσης του βασικού μετόχου» [The Institutional Side-Effects of the 'Major Shareholder Affair']" at Ib.

[1635] See Geertz, "Local Knowledge: Fact and Law in Comparative Perspective," 215. The author observes that, "[law] comes to describing a particular course of events and an overall conception of life in such a way that the credibility of each reinforces the credibility of the other. Any legal system that hopes to be viable must contrive to connect the if-then structure of existence, as locally imagined, and the as-therefore course of experience, as locally perceived, so that they seem but depth and surface versions of the same thing."

[1636] Antonio Marzal Yetano, *La dynamique du principe de proportionnalité: essai dans le contexte des libertés de circulation du droit de l'Union européenne*, (Clermont-Ferrand: Institut universitaire Varenne, 2013), n. 235.

[1637] StE (Pl.) 3471/2011, cited above, para 13.

image of illegitimate media influence that they had in mind. In their words, such influence "*is normally opaque, and is combined with the line generally followed by the media and with the position that they adopt on political matters*".[1638] As for the "intermediaries" presumption, in 2004 the Council had justified its irrefutable character by invoking the particular conditions concerning family relations in Greece:

> according to empirical data on the social conditions that are dominant particularly in Greece, special relations of dependence are created among relatives. [These relations] do not only have an economic character, but are based on various social, even psychological factors and therefore take the form of informal influence relations, which are extremely difficult to establish.[1639]

The judges expressed some kind of local "superstition", according to which, media influence on politics is often illegitimate and family relations always produce informal influence. This superstition was based on generally mentioned "*empirical data*" and on the "*opaque*" and "*difficult to establish*" character of the relevant influence relations. It concerned "*the social conditions that are dominant particularly in Greece*" and not those generally dominant in constitutional democracies. On the contrary, in the 2011 decision, judicial suspicion towards the media was rationalised. The fear of corruption was concretised and demystified. Only "*the concrete illegitimate influence that can be exercised on the procedure of public contracts, with an intention to obtain the award of the contract*" was considered detrimental to democracy. By limiting the scope of the constitutional provision in this way, the Council of State expressed its belief that attempts to achieve illegitimate influence *can* be "*established with certainty*".[1640] It also expressed a faith in the ability of fact-finding authorities to ascertain and prove such illegitimate acts.[1641]

This was not the first time that proportionality as a European science displaced local superstitions. In 1997, the Greek Government had subjected the compensation of medical expenses incurred by Greek nationals abroad to approval by social security organisations. Approval was obligatory whenever medical treatment by domestic health services would have been insufficient. In 2001, the Athens Administrative Court of First Instance, following the ECJ case law on the matter, examined the compatibility of this provision with the freedom to provide services under EC law. After establishing that the measure constituted an obstacle to trade, the court stressed that it should be justified by public interest reasons and conform to the principle of proportionality, understood as a strict necessity requirement. The court went on to state that,

> [t]he assessment of the possibility of medical treatment in the country (…) is not solely based on medical approaches dominant in this country, but

[1638] StE 3242/2004, cited above, para 14.

[1639] Ibid; StE (Pl.) 3670/2006, cited above, para 15, minority.

[1640] StE (Pl.) 3471/2011, cited above, para 14.

[1641] Analysis inspired by Geertz, "Local Knowledge: Fact and Law in Comparative Perspective," 171.

> on the data of international medical science, taking every treatment that has been tried and internationally recognised into account.[1642]

Thus, it was for the *judiciary* to assess the possibility of medical treatment in Greece, substituting its view on the issue for that of the social security organisation or for medical experts. This solution was subsequently adopted by other courts.[1643] In this series of cases, proportionality not only ensured the effective application of EU legal rules, but also the dominance of an internationally recognised medical science in the domestic sphere. Its function was to censure peculiarly local medical "*approaches*" that do not conform to international scientific "*data*".

By transforming law into science, proportionality increasingly postulates its hegemony over other types of scientific discourse.[1644] Its mission is to expand the reach of law to "conquer and "civilise" formerly extra-legal spaces and fields that belonged to the realm of expediency".[1645] However, in the Greek context, the science that proportionality conveys is not a domestic constitutional science. Instead, the content of proportionality is defined outside the borders of domestic constitutional discourse, in Europe, and especially in Luxembourg. What has preserved the normativity of the domestic Constitution has been its *aesthetic* coherence with European law and the corollary representation of the Greek polity as modern and European. It seems that the 2001 reform has instituted a new "*katharevousa politeia*", which rejects "indigenous needs" when they do not correspond to its modern, European image.[1646]

***

In Greece, like in France, proportionality has been part of a legal theory that claims scientific correctness. Thus, its development as a legal concept has been detached from its application in case law, from the structures of judicial review, and from formal legal sources more generally. Still, contrary to what is observed in the French context, the use of proportionality language has not expressed a particularly local image as to how law is determined by its surrounding factual context. Instead, the legal theory of which proportionality was part expressed an imagined local *future* that never arrived. Greek public lawyers aspired to transform the Greek polity to a European and "civilised" polity, to transform the Greek society itself to a European and "civilised" society. They pursued this locally imagined future through importation of legal rules and methods from abroad. Since its emergence then, proportionality has had the meaning of a legal transplant from Europe. Its transfer was part of a more general process of

---

[1642] DPrAth 7287/2001 *ΔΔΙΚΗ* 2002, 736.

[1643] On the relevant case law, see Giorgos Katrougkalos, "Αρχή της αναλογικότητας και κοινωνικά δικαιώματα [The Principle of Proportionality and Social Rights]," *ΔτΑΤΕΣ IV*, 2006, 150.

[1644] Analysis inspired by Gunther Teubner, "Altera Pars Audiatur: Law in the Collision of Discourses," in *Law, Society and Economy*, ed. Richard Rawlings (Oxford; New York: OUP, 1997), 149.

[1645] Manitakis, "Πρόλογος [Preface]," 20.

[1646] Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]*, 116 f; esp. 174-5.

constitutional acculturation. In this respect proportionality language followed long existing tendencies in Greek legal culture and long existing paths of cultural change.

The process of constitutional acculturation was finally accomplished with the 2001 constitutional reform and the institutionalisation of the European human rights paradigm in the Greek Constitution. Ever since, proportionality has been appropriated by Greek public lawyers as an *acquis* of domestic constitutional civilisation. It has expressed their view as to how law *acts upon* its surrounding factual context. Its application has been disconnected from Greek social reality and from local perceptions of causality and effectiveness. Proportionality as a European science has been hegemonic. It has replaced other methods of legal reasoning and has blurred constitutional limits. Its main function has been to establish coherence between the domestic Constitution and European law, a coherence that is so precious for Greek lawyers. Hence, the use of proportionality language represents the Greek Constitution as a "pure polity" and symbolically connects Greece to its European models, while it rejects local needs and particularities. This symbolic or even aesthetic function has been a more general feature of domestic constitutional discourse until the crisis.

Comparative conclusions
Proportionality, formalism, and rationalisation

The expressive function of proportionality. The study of difference in the use of proportionality unveils certain core characteristics of the legal cultures that embrace it. As proportionality spreads in different jurisdictions its meaning changes to adapt to local criteria for evaluating legal arguments and to local actors' expectations of its use. It assumes a function that is sometimes very different from the one it has in the global model or in German constitutionalism. Proportionality becomes a French legal theory claiming scientific exactness, a tool for the construction of an English public law or a transplant for the Europeanisation of the Greek polity. The different meanings of proportionality in different contexts make sense, at least in part, of differences in its form and evolution observed in Part I. Indeed, even though German and European influence is present in the conceptual development of proportionality in all contexts, it is not decisive for the content that proportionality will assume each time. Albeit using elements of a transnational idiom, local actors serve their own goals, which are conceived of and set within a particular culture. Hence, proportionality, precisely due to its transnational character, acquires an expressive function. The way its meaning, form and function vary across jurisdictions despite the commonality of the terminology used, reveals the peculiar logic of local legal discourses. It reveals local ways of thinking, taboos and myths, expectations and ambitions. It also reveals local patterns of legal change.

Proportionality and the autonomy of law. In all the jurisdictions studied, proportionality has been inserted into a context of autonomy of law from other discursive systems, such as morality, religion, politics or economics. Traditionally, local actors perceive moral and political reasoning to be external to law. The study of law as it is, is perceived as different from the study of law as it ought to be. This feature, an instance of legal formality, renders law in these contexts quite different from its Alexyan perception as an instance of practical reasoning. Preserving the formality of law seems important for local legal actors.[1647] Formal legal sources thus play a much more decisive role in legal argumentation and legal reasoning than the defenders of proportionality maintain. For a long time, proportionality was not even thought of as a fundamental rights transplant in France and was rejected as such in England. In Greece too, even though proportionality was received with enthusiasm as a pronged fundamental rights principle, its use did not bring about the changes that domestic lawyers expected.

For a long time, convergence between French, English and Greek judicial review has lain in the unitary perception of democracy that underpins their fundamental

[1647] Jacco Bomhoff considers this to be a preoccupation of legal argumentation that is generally present in Western legal systems, in "Comparing Legal Argument," in *Practice and Theory in Comparative Law*, ed. Maurice Adams and Jacco Bomhoff (Cambridge; New York: CUP, 2012), 74.

concepts and distinctions. In the contexts studied, democratic decision-making, institutional structures and procedural rules are traditionally deemed sufficient for legitimately defining the public interest. In substance, this definition is traditionally perceived as external to legal technique and judicial review. Practical reasoning is external to legal reasoning, even when it concerns values entrenched in the Constitution. When it is not completely absent in judicial reasoning, balancing corresponds to a *ritual* that serves the reconstruction of legislative intentions in a constitutionally legitimate way. In this context, law does not assume a function of social integration, like in German constitutionalism. Social integration and the reconciliation of conflicting values is the mission of parliamentary decision-making and of administrative action. For a long time, proportionality corresponded to a requirement of reasonableness or "good administration", inspired by the liberal suspicion towards the executive. Thus, the use of proportionality language in France, England and Greece expressed a common European constitutional civilisation. However, this civilisation was one of liberal neutrality rather than fundamental rights.

Expressing local myths and representations: local visions of legal formalism. Legal formality has been preserved and justified in different ways across systems. It has been underpinned by narratives that are commonly shared among local legal actors. Like myths, these narratives are stories that make sense of the present, the past and the future of law, society and the state. They usually represent an idealistic image of the respective local polities and of the community of legal actors.[1648] Locally shared narratives result in specifically local legal structures, distinctions, rituals, taboos and representations.

In France, autonomy of law in the sense of its insularity from political-moral considerations is connected to the dominant voluntarist perception of legal norm-production and to the idealisation of the "Legislator" and the "State". Both these features are inherited from the 1789 Revolution and are deemed antithetical to the institutional and legal structures of the *Ancien Regime*. Similar patterns are observed in Greece, where idealisation of public authorities is connected instead to the turbulent political history of the country and to the shared dream for a stable and well-functioning democratic regime, following the model of Western constitutional democracies. The 1975 Constitution represents the connection of Greece to the European constitutional civilisation. In both the French and the Greek contexts, law is deemed to represent the general will and by definition serves the public interest. Traditionally, the value-choices of Parliament are deemed infallible, when they invest in the form of legal statutes. Hence, in French and Greek legal thought, legal form incorporates substantive value-choices. The fusion between substantive values and legal form confers a quasi-sacred status to law. Adjudication and the corollary process of interpretation resemble a ritual for the "consecration" of concrete legal solutions. In this ritual, the judge is a modest and conscientious public official. She seeks a true

[1648] Analysis inspired by Claude Lévi-Strauss, "The Structural Study of Myth," *The Journal of American Folklore* 68, no. 270 (1955): 430, and Duncan Kennedy, "American Constitutionalism as Civil Religion: Notes of an Atheist," *Nova L. Rev.* 19 (1995): 908.

and transcendent meaning for the principle of legality and its manifestation in the concrete circumstances of each case.

Interestingly, Jacco Bomhoff observes the same tendency to synthesise substance and form in the context of German constitutionalism.[1649] Nonetheless, while in Germany fusion of substance and form leads to the inclusion of considerations of political morality into constitutional reasoning and adjudication, in French and Greek legal thought it is traditionally expressed in "dogmatism". Substantive value-choices embodied in legislation are traditionally immune from judicial scrutiny, they are affirmed as if they were positive facts. In France, this is manifested in the distinction between conditions and content of public action when it comes to facts-based review. In Greece this corresponds to the distinction between the "*if*" and the "*how*" of public competence. Traditionally, concrete judicial review is limited to the conditions set by the legal order for the exercise of public discretion and do not concern its *opportunité*. Put differently, while judges can check "*if*" a public authority enjoys discretion to take a decision, they cannot check "*how*" this discretion is used. This is because, whereas the "*if*" concerns the objective and abstract legal rules constraining public action, the "*how*" concerns primary decision-makers' concrete and subjective assessments of expediency which are external to legal science.

In France and Greece then, law is a kind of objective, commonly shared knowledge, part of a common-sense or civilisation on which social life is based. Proportionality itself is part of this civilisation. The term designates a value or an ideal of public decision-making, part of the general interest. Hence, proportionality is considered a natural quality of legislation, and even a general principle of law. As such, it does not lead to a rational justification process and it has a limited function in the judicial review of Parliament. For a long time, the use of proportionality language in French judicial practice was marginal, mainly limited to expropriation case law, while proportionality as equity has had a more important role to play in Greek administrative law.

Quite differently, in English judicial review formality and excision of value-laden reasoning is the result of the expulsion of substance altogether, what domestic lawyers call the economy of the common law in matters of principle. Following the account of Whig historians, the parliamentary process and the common law have long succeeded in protecting civil liberties and democracy in the UK, without needing substantive constitutional rights and ideals, nor even any constitution whatsoever. In this context, myth is external to law and lies in the idealisation of the political process itself. Law is typically seen as a patchwork of commandments equally imposed on private and public action. Judicial review is seen as imposing the rules of a game on individual players. The judge is represented as an impartial referee concerned with rules "of manner and form", as opposed to substance. The process is thus inverted with respect to the administrative judicial procedure in France and Greece. While in these systems,

[1649] Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse*, Cambridge Studies in Constitutional Law (Cambridge; New York: CUP, 2013), 217 f.

through the enforcement of the principle of legality, the administrative trial dissolves private interests into a quest for the general interest, in England the general interest (and proportionality as part of it) is external to law. Legality itself consists of a world of possibilities for individual actors to pursue their private interests against those of other members of society. While in France and in Greece the judicial process conjoins, in England it disjoins.[1650]

Negotiating the autonomy of law: making sense of the traditional version of proportionality. As Jacco Bomhoff observes, the relative autonomy of law from other discursive systems is constantly negotiated by local participants.[1651] Or, in the words of Gunther Teubner, every social sub-system is "structurally coupled to its niche when it uses events in the environment as perturbations in order to build or to change its internal structures".[1652] The transfer of proportionality itself is part of the process of negotiation of legal autonomy to the profit of considerations of substantive justice. However, initially at least, proportionality was constrained by pre-existing linguistic structures.

In English judicial review, considerations of substantive justice have generally been accommodated through the incremental evolution of the common law. Thus, requirements of procedural fairness and equity were progressively generalised in judicial review and the illegality head was refined to include errors of law and relevancy. Most notably, in *Wednesbury*, the judges reserved for themselves the possibility to interfere with the merits of public decisions, even though the substantive aspect of the irrationality standard long remained quite mystical. The use of proportionality language in this context accentuated the focus of *Wednesbury* unreasonableness on the substance of public decisions. Still, the economy of the common law long constrained the dynamic of proportionality within traditional judicial review concepts and distinctions.

In French and Greek judicial review, fusion between substance and form provokes tension. Since law embodies substantive moral and political choices, opposition to these choices by local actors often proceeds through contestation of the autonomy of the legal discourse. Thus, a recurrent type of critique in these contexts consists of an exposure of ideological or strategic considerations hidden behind allegedly objective legal solutions. Another typical criticism is that law is not adapted to institutional, economic or societal evolution. This leads to the development of an alternative, anti-formalist *doctrine*, which contrasts to the formal style of official legal documents. In France, this *doctrine* often draws on developments in other disciplines and in the *sciences exactes*. In Greece, the study of foreign and European law has a major role as a source of inspiration for the construction of local legal theories. Proportionality acquires an increasingly important role in this alternative legal discourse. However, even though the elegant, scientific theories developed by the

[1650] On similar patterns observed in rituals and games, see Claude Lévi-Strauss, *The Savage Mind* (Chicago: University of Chicago Press, 1966), 30 f.

[1651] Bomhoff, "Comparing Legal Argument," 88.

[1652] Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism," *Cardozo Law Review* 13 (1991/1992): 1146.

doctrine shape what local legal actors perceive as valid legal knowledge, they are only partially incorporated into official legal texts.

In the Continental systems studied, tension between substance and form is managed through the distinction between goals and limits, identified by Constantinos Yannakopoulos in the Greek context. In France and Greece, the Constitution is open as to the goals of public action. Traditionally, the general interest is considered the ultimate goal of the constitutional order. It is impersonal and defined by public authorities themselves. On the contrary, law sets substantive *limits* on the exercise of public discretion, which are enforced through the judicial process. Legal limits are said to be set by the Legislator and, in a State of Law, by the Constitution. They are deemed to be accessible to objective legal knowledge, following the rules of legal science and technique. Law thus accommodates political, economic, and other substantive considerations, only insofar as they can claim the objectivity of legal limits. This explains the continuous search for objectivity and exactness in the French and Greek contexts. In French judicial decisions, for instance, proportionality was long reduced to a "milimetred" requirement of proportion and involved no value-laden reasoning. As Pierre Legrand observes, "numbers are symbols of precision, accuracy, and objectivity. They suggest mechanical selection, dictated by the nature of the objects, even though all counting involves judgment and discretion".[1653]

The limit-like nature of law ensures that the judiciary is constrained in its institutional mission and eliminates risks for a *gouvernement des juges*. It is part of the "binding arrangements" between local legal discourses and politics. In contrast to the communitarian German constitutional culture, French and Greek cultures are animated by suspicion towards the judiciary. This explains the structure of constitutional rights as freedoms, which then are not goals imposed on public action or optimisation requirements, as the Alexyan theory professes. The judge cannot contest the expediency of public decisions on the basis of rights. Moral-political considerations underpinning public action are traditionally immune from judicial scrutiny. Constitutional rights are can be imagined as objective rules of competence. They require abstention on the part of public authorities from interfering with their scope and not state intervention for their realisation.

As the reach of law expands, theories of proportionality developed in *doctrine* are progressively appropriated by judges. However, formalism and suspicion lead to the adoption of a *particular* version of proportionality review in the French and Greek contexts. This version of proportionality is typically characterised by focus on the means-ends and does not involve balancing competing rights and interests. It is usually perceived as a threshold requirement of necessity, reasonableness, or equity, addressed to the state and involving the scrutiny of the empirical and logical considerations of the primary decision-maker. It is disconnected from the content of rights and has the form of an objective legal principle: the purpose of proportionality review is to

[1653] Pierre Legrand, "The Same and the Different," in *Comparative Legal Studies: Traditions and Transitions*, ed. Pierre Legrand and Roderick Munday (Cambridge; New York: CUP, 2003), 247.

eliminate arbitrary decisions, and thus it exceptionally leads to the censure of the reviewed act. Judicial intervention is usually limited to cases of manifest disproportionality. Structural features, like the pronged structure or the use of proportionality language, are not perceived as decisive by local legal actors in the application of proportionality, which still represents an ideal of reasonableness and a value of equity promoted through administrative decision-making. Instead of a concrete legal rule, proportionality is moral-political end of public action and rights are means of submitting its advancement to a minimal judicial scrutiny.

A deviant application? By excluding the public interest goal from judicial review, this version of proportionality is very different from the Alexyan theory, in which the public interest itself results from a structured balancing of rights as principles. In this traditional version, proportionality fails in its function of justification and rational optimisation of the common good. Indeed, it changes little traditional methods of reasoning and the substantive outcomes of judicial review. It seems that a perception of rights akin to the rational human rights paradigm is indeed a condition for the success of proportionality. Therefore, Kai Möller is right when he observes that "proportionality is not just an isolated standard of review but part and parcel of a conception of rights that must be adopted or rejected as a whole".[1654]

Still, it would be inaccurate to characterise this version of proportionality as a deviant or imperfect application of the concept, since it is very close to the original version of the principle in Prussian administrative law. Indeed, as Moshe Cohen-Eliya and Iddo Porat observe, proportionality in its historical origins was opposed to balancing.[1655] It was a requirement of reasonableness, advanced by legal formalists and purporting to exclude administrative arbitrariness. As such, it was solely addressed to the state and focused on the means of public action.[1656] The formalist meaning of proportionality persisted when the principle was first mentioned in the case law of the GFCC.[1657] Indeed, as Jacco Bomhoff observes, in its first uses in German constitutional law balancing was not necessarily connected to proportionality.[1658] In

---

[1654] Kai Möller, "US Constitutional Law, Proportionality, and the Global Model," in *Proportionality: New Frontiers, New Challenges*, ed. Vicki Jackson and Mark Tushnet (Cambridge; New York: CUP, 2017), 131.

[1655] On this point, see Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture*, Cambridge Studies in Constitutional Law (Cambridge: CUP, 2013), 24 f.; Moshe Cohen-Eliya and Iddo Porat, "American Balancing and German Proportionality: The Historical Origins," *International Journal of Constitutional Law* 8, no. 2 (2010): 263.

[1656] Contrary to the mainstream formalist legal thought, drawing on logic, subsumption and deduction, it is *Interessenjurisprudenz* and *Freirechtsschule* scholars that perceived law as balancing of interests and advanced balancing instead of subsumption as a method for gap-filling in legal interpretation. See Jacco Bomhoff, "Genealogies of Balancing as Discourse," *Law & Ethics of Human Rights*, no. 4 (April 2010): 123 f. Yet, proportionality was not part of their analyses.

[1657] (1954) 3 BVerfGE, 383, where the court cites a previous decision which states the principle of necessity of rights' limitations. See Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence," *University of Toronto Law Journal* 57, no. 2 (2007): 385, note 10. See also Duncan Kennedy, "A Transnational Genealogy of Proportionality in Private Law," in *The Foundations of European Private Law*, ed. Roger Brownsword et al. (Oxford; Portland, Or: Hart, 2011), 185.

[1658] See for example, *Lüth Case* (1958) 7 BVerfGE 198, (B.II.4), as cited by Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed, revised and expanded (Durham, NC: Duke University Press, 2012), 447. On this point, see Bomhoff, *Balancing Constitutional Rights*, 87 f.

the well-known *Mephisto* case, the GFCC even invoked proportionality as a public law principle in contrast to balancing of interests in private law.[1659] In the words of the Constitutional Court,

> It is true that the Federal Constitutional Court has repeatedly emphasized that the principle of proportionality has constitutional rank and must therefore be considered whenever state authority encroaches on the citizen's sphere of liberty. But the instant case does not involve such an encroachment. The courts simply had to decide a claim based on private law made by one citizen against another (…). The primary function of private law is to settle conflicts of interests between persons of equal legal status in a manner as appropriate as possible.[1660]

Therefore, the traditional version of proportionality in French and Greek public law is not "deviant" or "wrong", but simply one of the possible ways of using it. Legal actors in France and Greece chose *this* version because it best advanced their purposes in their local culture.

The varying dynamic of proportionality. While proportionality is accommodated within local cultural forms and patterns, it remains a legal transfer. As such, it carries its own semantic baggage, connected to the sources of inspiration of the personalities that promote its use. Domestic expectations attached to its transfer are related to local efforts to expand the reach of law.[1661] In the various domestic contexts, proportionality is mobilised by alternative narratives to orthodox legal formalism. Thus, it acquires its proper dynamic, which is more or less radical, depending on the local context. Since alternative discourses are constructed in opposition to the dominant narrative each time, they vary considerably between them and they variably shape the content of proportionality. What they have in common is the idealisation of the judiciary that underpins them, a feature that also underpins the proportionality theory and its depiction of the judge as Socrates. In the various domestic contexts studied, the spread of proportionality expresses and enhances the belief that judges are well-qualified for policy decisions. Hence, proportionality entails the progressive affirmation of the competence of the judiciary to define and realise the general interest.

In France, proportionality finds its dynamic within domestic lawyers' efforts to rationalise the legislative will. As a scientific theory, it is inserted into the myth of the adaptation of law to fact and it enhances local lawyers' belief in the possibility of law as science. In this way, proportionality engineers the conceptual transformation of the manifest error to allow for judicial interference with the content of public decisions, and thus for a minimal evaluation of their *opportunité*. A similar evolution is observed at the level of judicial practice in Greece, where proportionality has led to an

[1659] *Mephisto Case* (1971) 30 BVerfGE 173.

[1660] Ibid, IV. 2, cited and translated by Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 358 f.

[1661] Bomhoff, "Comparing Legal Argument," 87 f.

increasingly intrusive review of legislation and since 2001 has functioned as a principle of efficiency and rationalisation. In Continental systems thus, in the name of common-sense and reason proportionality assumes a function of rationalisation of value choices, similar to the one it should have in a "culture of justification". Indeed, as the analysis of *Entreprises de presse* or of recent Greek case law shows, proportionality, albeit being an objective test, is not result-oriented but is concerned with the justification of public decisions. Its objectivity lies in its fact-oriented, allegedly scientific application. Thus, the spread of proportionality in this context is closely intertwined with local legal actors' "epistemological optimism", a characteristic that, as we saw in the Introduction of this Part, they share with their German colleagues. This tendency is also present in the writings of some proportionality scholars. David Beatty, for example, suggests that "[t]here is an objectivity and neutrality about facts that words rarely if ever match."[1662]

Still, while German lawyers entrust the GFCC with the mission of substantiation of the constitutional order of values, French and Greek lawyers do not share the same faith in the capacity of judges to optimally realise social values. In French and Greek public law, the spread of proportionality is not connected to the perception of law as rational value-laden reasoning, as the Alexyan theory wishes. In French public law in particular, the connection of proportionality to fundamental rights language provokes scholarly suspicion and criticism. Instead, in these contexts proportionality expresses and enhances a technocratic vision of policy-making, characterised by "ever-greater reliance on expertise and an aseptic formalization of legal reasons".[1663] The use of proportionality thus illustrates what Clifford Geertz has identified as a more general tendency of Western legal systems: the "rising expectations as to the possibilities of fact determination and its power to settle intractable issues."[1664] Vlad Perju calls this effect of proportionality the "administratization" of constitutional law, a tendency that in his view should be resisted.[1665] Built upon allegedly objective factual assessments, legal doctrine expands to cover issues previously considered inaccessible to legal knowledge. At the same time, however, the formality of law is somehow compromised, since legal reasoning is intruded by the methods of other disciplines.

Things were very different in England, where, especially since the '70s, negotiation of legal formality has been more radical and has gone so far as to contest the fundamental assumptions of the common law tradition. It has been expressed through a quest for modernisation and through efforts to construct an English public law, following the model of Continental systems. Proportionality was initially mobilised by this modernisation rhetoric as a transplant that could bring about rationalisation. As opposed to what is observed in the civil law systems, here rationalisation does not entail demystification. On the contrary, it consists in a quest for myth and ritual around the bits and pieces of the common law. In the writings of English lawyers during the

[1662] David Beatty, *The Ultimate Rule of Law* (Oxford; New York: OUP, 2004), 72–73.

[1663] Vlad Perju, "Proportionality and freedom—An Essay on Method in Constitutional Law," *Global Constitutionalism* 1, no. 2 (2012): 367.

[1664] Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective," in *Local Knowledge: Further Essays in Interpretive Anthropology*, 3rd ed. (New York: Basic Books, 1983), 171.

[1665] Perju, "Proportionality and freedom—An Essay on Method in Constitutional Law."

'80s and the '90s, proportionality included the consideration of certain core substantive values into legal reasoning. In this way, it detached itself from judicial reasoning patterns to become a *method* of review. As a method, it allowed for the reconstruction of the fragmented common law precedents into a coherent whole. Proportionality became a tool in the hands of a newly-formed English *doctrine*, which sacrificed the traditional precepts of analytical positivism for the pursuit of moral-political values. However, its application in practice long irritated the principle of parliamentary sovereignty and the basic assumptions of Diceyan formalism. Until the 2000s, this impeded the spread of proportionality in English public law and rendered its application parasitic to the operation of European substantive rights and values.

Proportionality and European integration. The HRA 1998 had as a goal the incorporation of the rights of the European Convention into English public law. Nonetheless, its function has been much more far-reaching than that of a "gateway" for the application of supranational rules and principles. The Act produced a fundamental rights turn in English public law and the proliferation of proportionality language. In the post-HRA era, proportionality engineers spectacular constitutional transformation and is a core issue of debate among public lawyers. It carries with it a heavy Continental "cultural baggage" and participates in a mythopoeia which establishes itself as a new truth. In the "brave new world" of the HRA, the rule of law has a substantive content for the preserving of core societal values. Judges, in their mission as fundamental rights protectors, acquire important policy-making powers. Proportionality becomes an overarching method (and not head) of review that tends to replace other kinds of judicial reasoning in defiance of parliamentary sovereignty. Concepts like "abstract review", "variable intensity", "manifest error", and "discretionary power" are developed in English public law. Pre-existing judicial review concepts and heads are reorganised around a rational basis. The common law, with its renovated rationalist outfitting, seems to supersede parliamentary sovereignty. The quest for democratic governance that this principle has long embodied must itself be reformulated in the rationalist terms of deference in order to be taken seriously by local legal actors. Interestingly, the construction of an elaborate, institutionally sensitive doctrine of deference is a major contribution of common lawyers to the transnational proportionality theory.

Similarly to England, European integration has played a crucial role in the spread of proportionality in Greece, albeit in a more "magical" way. Despite the formalist and inconsistent application of proportionality in judicial practice, Greek lawyers have perceived it as a transplant. Their obsession with the content of proportionality in foreign and supranational jurisdictions has led them to largely neglect structural evolutions in domestic judicial reasoning. In Greek legal theory, proportionality frameworks developed in Europe have been uncontestably accepted as scientific in the domestic sphere and have evolved in a "heaven" of legal transplants. This is because, in Greece, the kind of knowledge, science or civilisation that law represents is not home-bred but imported. Comparative law, in the sense of translation of foreign legal concepts, rules and doctrines, is a "legal formant", it constitutes local legal knowledge.

In this context, the importation of proportionality from abroad acquired a value in itself as part of a more general process of acculturation that was expected to bring about the modernisation of the Greek polity. This makes sense of the explicit entrenchment of proportionality and of the European rights paradigm with the 2001 constitutional reform. Ever since, proportionality has become hegemonic, a scientific theory that transcends the limits set by the Constitution. By establishing an aesthetic compatibility between the domestic constitutional order and the European Treaties, proportionality has acquired a symbolic power: its application represents the Greek polity as a modern European one.

Proportionality, but also peripheral notions of formalism, modernisation and rationalisation, have very different meanings in local contexts, according to the particularly local criteria for the evaluation of legal arguments. These criteria are in turn related to particularly local perceptions of democracy, rights and law, as well as to particularly local aspirations for the future. This does not exclude the possibility of legal convergence. Proportionality, charged with its transnational semantic burden, brings closer the discourses into which it is inserted. For instance, by attracting local actors' attention to the structure of legal arguments, proportionality introduces a kind of legal *analysis* in Continental jurisdictions. In a quite inverse trajectory, due to its abstract and value-laden character, proportionality enhances prescriptive legal discourse in England. The English tradition of analytical formalism and the Continental *doctrine* thus resemble each other more. Still, describing proportionality as a successful constitutional transplant that will eventually lead to the adoption of a global fundamental rights grammar is too simplistic. "New dissonances" arise from the convergence that proportionality provokes at the level of legal terms.[1666] The application of proportionality across time expresses pre-existing arrangements and tendencies in its host legal culture. It reveals the way lawyers see the state, law, rights and society. Whenever the use of proportionality has evolved away from local cultural features, this was not so much connected to proportionality's inherent qualities and nature, but was rather the result of European influence. It is to this aspect of the evolution of proportionality that we will now turn our attention.

[1666] Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 1998), 20, http://papers.ssrn.com/abstract=876950.

PART III

EUROPEAN INTEGRATIONS

Proportionality and integration through law in Europe. While the idea of integration through law might not have entirely captured the imaginations of legal actors in France, England and Greece, it has certainly captured the imaginations of European lawyers and judges. It is well-known that the building of European regional organisations has followed institutional models found within the nation state. For example, the institutional design of the ECJ has largely been based on that of the French Council of State, while common law influences have been more important in the organisation and methods of the ECtHR. European courts themselves have engaged different processes of European integration, inspired by the "*constitutional traditions common to the member states*".[1667]

In the development of European rules and institutions, comparative law has assumed a "scientific" function.[1668] Comparison is the daily work of supranational institutions' research and documentation services. It serves to identify similarities and possible paths of convergence between the legal systems in force in the member states. Hence, for example, the ECtHR takes consensus among contracting parties on rights issues into account when deciding the extent of the margin of appreciation that it will leave to national authorities. The most well-known examples of communication between domestic and European law are the general principles of law, elaborated most notably in the ECJ jurisprudence. These principles find their source in domestic, mainly public law and govern the organisation of the state and its relations with individuals. However, once appropriated by the ECJ they acquire an autonomous EU law content and serve the promotion of supranational goals. Takis Tridimas observes that general principles "are children of national law but, as brought up by the Court, they become *enfants terribles*: they are extended, narrowed, restated, transformed by a creative and eclectic judicial process".[1669]

General principles of law have been elaborated without textual basis in the European Treaties and exemplify the creative role of the ECJ in the making of the EU a "constitutional order of states".[1670] Most importantly, they were used by the Court of Justice in the incorporation of a bill of rights in the European legal order, which did not exist before.[1671] Indeed, among the general principles of Community law the ECJ was very early in proclaiming the protection of fundamental rights and proportionality. This evolution was a response to the German hesitation to giving primacy to EC law and first took place in the field of EU discretionary policy choices. In the famous *Internationale Handellsgeselschaft* case, the Court stated that "*respect for fundamental rights*

[1667] C-11/70, 17 December 1970, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114, para 2.

[1668] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach To Comparative Law', *American Journal of Comparative Law* 39 (1991): 3 f.

[1669] Takis Tridimas, *The General Principles of EC Law*, Oxford EC Law Library (Oxford; New York: OUP, 1999), 4.

[1670] Alan Dashwood, 'The Limits of European Community Powers', *European Law Review* 21 (1996): 113; cited by Tridimas, *The General Principles of EC Law*, 4.

[1671] Bruno De Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in *The EU and Human Rights*, ed. Philip Alston (Oxford; New York: OUP, 1999), 859.

forms an integral part of the general principles of law", whose protection it ensures.[1672] While proportionality was not solemnly pronounced in the decision, reference to the principle was evident in the necessity, appropriateness, and disproportionality review to which the court proceeded.[1673] In his opinion, the Advocate General Dutheillet de Lamothe classified proportionality among the general principles forming the "philosophical, political and legal sub-stratum common to the Member States".[1674] Since this, proportionality expanded in the ECJ case law to become a general ground of review. By the end of the '90s there were "few areas of Community law, if any at all", where proportionality was not relevant.[1675]

Empowering individuals was a major step in the advancement of European integration. Proportionality and rights provided national legal actors with a concrete interest in invoking EU law before domestic courts. The supremacy and the direct effect doctrines had already provided domestic courts with the technical means for enforcing EU law against national policies. Soon, proportionality acquired a pervasive dynamic in the field of market freedoms and became the major criterion for identifying indirect discriminations. In other fields however, the ECJ long applied a formalist version of proportionality, which resembled its application in Greek constitutional case law at the time. Indeed, in the 1990 *Fedesa* case, the ECJ established a manifest inappropriateness standard in the scrutiny of EU policy interventions.[1676] In the field of penalties and charges imposed on individuals for the advancement of EU policy objectives, proportionality took the form of *nécessité des peines* and no specific right was mentioned in its application.[1677] Thus, for some time, in the ECJ case law proportionality was solely an aspect of the formal rule of law and expressed the constitutional civilisation of liberal neutrality and freedom.[1678] As a requirement of moderation imposed on the exercise of public power, it functioned as a "substitute for fundamental rights".[1679]

It was under the impulsion of the ECtHR that proportionality obtained the appeal of a European fundamental rights principle. According to a typical restriction clause

---

[1672] C-11/70, *Internationale Handelsgesellschaft*, cited above, para 4.

[1673] Ibidem.

[1674] Olivier Dutheillet de Lamothe, opinion on C-11/70, *Internationale Handelsgesellschaft*, delivered on 2 December 1970, ECLI: ECLI:EU:C:1970:100, p. 1146.

[1675] Francis Jacobs, opinion on C-120/94, *Commission v. Greece*, delivered on 6 April 1995, ECLI:EU:C:1995:109, para 70, cited and translated by Tridimas, *The General Principles of EC Law*, 89. On this evolution more generally, see Tridimas, 93 f.

[1676] ECJ, C-331/88, 13 November 1990, *Fedesa*, ECLI:EU:C:1990:391.

[1677] See already C-11/70, *Internationale Handelsgesellschaft*, cited above, para 2. See also C-114/76, 5 July 1977, *Bela-Mühle*. In this case, the court sanctions the discriminatory distribution of burdens. Tridimas, *The General Principles of EC Law*, 100 f. compares the function of proportionality in this field to *Wednesbury* unreasonableness. On this version of proportionality generally, see Paul Craig, *EU Administrative Law*, 2nd ed, Collected Courses of the Academy of European Law (Oxford; New York: OUP, 2012), 611 f.

[1678] On the formal conception of the rule of law in the EU, see Joseph Weiler, 'Deciphering the Political and Legal DNA of European Integration', in *Philosophical Foundations of European Union Law*, ed. Julie Dickson and Pavlos Eleftheriadis (Oxford: OUP, 2012), 149 f.

[1679] Jürgen Schwarze, *European Administrative Law* (Luxembourg; London: Office for Official Publications of the European Communities; Sweet & Maxwell, 1992), 719.

in the Convention, rights such as the freedom of expression or the freedom of religion can be subject to restrictions in accordance with the law if the restrictions pursue a legitimate aim and are "necessary in a democratic society".[1680] In the 1976 *Handyside* case, the ECtHR interpreted this last formula as implying a requirement of proportionality imposed on rights limitations. Proportionality has enhanced the dynamic interpretation of the Convention and has significantly increased the powers of judges, especially lower courts, in its enforcement.[1681] In the meantime, the language of rights became increasingly important in EU law, where it has assumed a legitimising and integrationist function, albeit with a nuanced impact on social reality.[1682] Strasbourg case law has been a source of inspiration for the ECJ.[1683] The status of proportionality as a fundamental rights principle is now consolidated in EU law. The TEU explicitly entrenches proportionality as a principle that governs the competence of EU institutions and proclaims the protection of rights guaranteed in domestic constitutional traditions and the ECHR.[1684] Moreover, article 52 of the EU Fundamental Rights Charter explicitly establishes proportionality as a principle that governs rights limitations.

European integration from the point of view of the proportionality literature. Mainstream proportionality literature accords particular importance to the application of proportionality by European supranational courts. Scholars often use ECtHR decisions to illustrate the application of the Alexyan proportionality model,[1685] and sometimes to criticise it.[1686] European case law and the margin of appreciation doctrine have also served the further refinement of the model to accommodate complex institutional problems faced by international courts.[1687] Most importantly, European courts have a special place in the narrative of the global spread of proportionality. Luxembourg and Strasbourg have exercised formal pressure upon domestic judges to consistently apply proportionality and have certainly enhanced the diffusion of proportionality language in domestic case law. Due to this, proportionality scholars tend to assume that European supranational courts have *actually obtained* uniform application of proportionality in the scope of European law. Hence, the

---

[1680] See the second paragraph of articles 8-11 ECHR.

[1681] On this point, see Helen Keller and Alec Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Orders', in *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, ed. Helen Keller and Alec Stone Sweet (Oxford: OUP, 2008), 675.

[1682] See generally Gráinne de Búrca, 'The Language of Rights and European Integration', in *New Legal Dynamics of European Union*, ed. Gillian More and Jo Shaw (New York: Clarendon Press, 1995), 29.

[1683] C-4/73, *Nold*, 11 January 1977, ECLI:EU:C:1975:114, para 13.

[1684] Articles 5(3) and 6 TEU.

[1685] See for instance Mattias Kumm, 'What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement', New York University Public Law and Legal Theory Working Papers, no. Paper 46 (2006): 18 f., http://lsr.nellco.org/nyu_plltwp/46; 'Democracy Is Not Enough: Rights, Proportionality and the Point of Judicial Review', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 11 March 2009), 10 f., http://papers.ssrn.com/abstract=1356793; Julian Rivers, 'Proportionality and Variable Intensity of Review', *CLJ* 65, no. 1 (2006): 182 f.

[1686] See for instance Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?', New York School Jean Monnet Working Paper Series, no. Paper 9 (2008), www.JeanMonnetProgram.org.

[1687] See for example Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review: A Theoretical and Comparative Study*, European Administrative Law Series (Groningen: Europa Law Pub, 2013).

adoption of proportionality by the ECJ and the ECtHR are seen as "critical milestones" in the migration of the global proportionality model.[1688] Alec Stone Sweet and Jud Mathews observe that the ECJ and the ECtHR, by mandating that national courts apply proportionality and by supervising national practice in this respect, have engaged a process of "coercive isomorphism".[1689] In the view of these authors, this in turn has established normative consensus among legal experts on proportionality as "the emerging best-practice standard" and has produced mimetic tendencies in other jurisdictions.[1690]

In the relevant analyses, structural differences between European and domestic proportionality reasoning are typically neglected.[1691] Again, the use of proportionality *language* is assimilated into the use of proportionality as a *reasoning process*. However, legal concepts, like language, escape the intentions of their author. Simply because the ECJ and the ECtHR impose proportionality as a legal obligation upon domestic courts does not mean the latter actually apply proportionality as European judges would. What is more, even when domestic judges refer to the principle of proportionality in European case law they do not necessarily apply it as such. The classification of the reception of proportionality in this context as a case of "forced adaptation"[1692] is certainly useful if one seeks to causally explain the spread of proportionality language. Yet it gives little information about the *meaning* of this language in different settings. Domestic legal actors can always misinterpret and mistranslate the obligations that European law imposes on them, obeying local reasoning patterns and rules instead. The indeterminacy of European legal terms and the possibility for divergence and change that they leave is at the core of European integration itself.[1693] In fact, supranational courts' case law has not led to a uniform understanding of proportionality across the states subjected to their jurisdiction, not even in the scope of European law. The practice of proportionality in this field reveals itself to be an instance of "systematically

---

[1688] Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture*, Cambridge Studies in Constitutional Law (Cambridge: CUP, 2013), 11. In the same vein, Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge Studies in Constitutional Law (Cambridge: CUP, 2012), 181 f.

[1689] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism', *Columbia Journal of Transnational Law* 47 (2008): 161 f. The authors cite Walter Powell and Paul DiMaggio, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields', in *The New Institutionalism in Organizational Analysis*, ed. Walter Powell and Paul DiMaggio (Chicago: University of Chicago Press, 1991), 67 f.

[1690] Stone Sweet and Mathews, 'Proportionality Balancing and Global Constitutionalism', 162.

[1691] For instance, in their country-specific analyses on the reception of the ECHR in domestic spheres, Helen Keller and Alec Stone Sweet typically refer to the application of "the proportionality test", regardless of whether domestic courts apply it as a pronged structure or a unitary standard and of the kind of reasoning that proportionality implies. See Helen Keller and Alec Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford: OUP, 2008).

[1692] See, for instance, Elisabeth Lambert Abdelgawad and Anne Weber, 'The Reception Process in Greece and Turkey', in *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, ed. Helen Keller and Alec Stone Sweet (Oxford: OUP, 2008), 107.

[1693] Ian Ward, 'Identity and Difference: The European Union and Postmodernism', in *New Legal Dynamics of European Union*, ed. Gillian More and Jo Shaw (New York: Clarendon Press, 1995), 26.

distorted communication" between European and domestic legal actors.[1694]

European integration and legal culture. European integration and the idea of convergence between legal systems in Europe has been challenged by comparative law scholars who consider cultural diversity to be valuable in its own right. The most radical critic, Pierre Legrand, argues that "European legal systems are not converging" and that "the ambition of a European *concordantia* is (and must be) a chimera".[1695] This is even more the case in public law, which is closely intertwined with the surrounding socio-political values and beliefs and thus has a distinctively national character. Legrand observes that European integration, especially in the context of the EU, has neglected the cultural particularity of the common law. Taking the example of reasonableness and proportionality, this author argues that there is an irreducible difference between common law and civil law representations of judicial review. Legrand's appeal to culture is a way to resist the rhetoric of harmonisation and the "totalitarian rationality" that underpins it,[1696] which in his view is "dictated by the ethos of capital and technology".[1697] Thus, this author does not use the term culture in the case of the EU. Quite differently, Carol Harlow admits that the EU has its own legal culture and "mindset".[1698] Still, she argues against Europeanisation, which in her view takes place in a political vacuum. Harlow reproves European integrationist tendencies for perverting the national democratic process by transferring decision-making powers from parliaments to the judiciary and to supranational institutions.

More moderate scholars have criticised Legrand and Harlow's radical scepticism towards European integration. Gráinne de Búrca recalls that it is too simplistic to see the EU as an elite-driven liberal trade regime and the nation state as a site of pluralist democracy. She stresses that the EU evolves to promote its own distinctive human rights policy, which might have a desirable impact in national democratic decision-making.[1699] In a similar vein, Neil Walker rejects convergence and divergence fundamentalism and points to the desirability of contingent or selective convergence, which can accommodate pluralism in Europe.[1700] European integration has not only been about the construction of a common market but also of a "*communauté de culture*

[1694] Gunther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism', *Cardozo Law Review* 13 (1991/1992): 1455.

[1695] Pierre Legrand, 'European Legal Systems Are Not Converging', *International & Comparative Law Quarterly* 45, no. 1 (1996): 81.

[1696] Pierre Legrand, 'Public Law, Europeanisation and Convergence', in *Convergence and Divergence in European Public Law*, ed. Paul Beaumont, Carole Lyons, and Neil Walker (Oxford; Portland, Or.: Hart, 2002), 256.

[1697] Pierre Legrand, 'The Same and the Different', in *Comparative Legal Studies: Traditions and Transitions*, ed. Pierre Legrand and Roderick Munday (Cambridge; New York: CUP, 2003), 294.

[1698] Carol Harlow, 'Voices of Difference in a Plural Community', in *Convergence and Divergence in European Public Law*, ed. Paul Beaumont, Carole Lyons, and Neil Walker (Oxford; Portland, Or.: Hart, 2002), 177.

[1699] Gráinne de Búrca, 'Convergence and Divergence in European Public Law: The Case of Human Rights', in *Convergence and Divergence in European Public Law*, ed. Paul Beaumont, Carole Lyons, and Neil Walker (Oxford; Portland, Or.: Hart, 2002), 131.

[1700] Neil Walker, 'Culture, Democracy and the Convergence of Public Law: Some Scepticisms about Scepticism', in *Convergence and Divergence in European Public Law*, ed. Paul Beaumont, Carole Lyons, and Neil Walker (Oxford; Portland, Or.: Hart, 2002), 257.

constitutionnelle" between European states.[1701] As Walker observes, even if we accept the cultural contingency of constitutional law and politics, "public lawyers should not give up the struggle to make their designs relevant to different times and places".[1702]

The relevant debate focuses on the EU, due to the specific legitimacy concerns that its market-centred approach raises. Insofar as the ECHR is concerned, the debate joins a more general discussion in international law, conducted in terms of statist democracy v global or cosmopolitan constitutionalism.[1703] Critics of global constitutional law typically stress the ineffectiveness and inconsistent practice of international law. They lament the internationalisation of public law principles for the harm this provokes to democratic self-government by excessively empowering the judiciary and neglecting local cultural particularity. The defenders of global constitutionalism however, argue that the use of a constitutionalist framework in the context of international law better makes sense of the way this law is perceived and practiced, as well as of the complex institutional architecture of certain international organisations. Hence, they typically promote the entrenchment of human rights in international treaties and their enforcement by supranational courts. Mattias Kumm observes that "unwarranted wholesale skepticism about the use of moral categories to describe international law is the flip side of an equally unwarranted wholesale idealization of national constitutional law".[1704] Constitutionalism beyond the nation state could strengthen human rights culture and empower minorities that are excluded from the national political process. Further, Kumm observes that international human rights treaties establish "a common point of reference" for the discussion of human rights, which could "create awareness for cognitive limitations connected to national parochialism".[1705]

Regardless of its desirability, supranational integration is a fact, especially in Europe. As Neil Walker stresses, focus on statist democracy "fails to have adequate regard to the multi-level institutional design and legitimacy requirements of the new Europe".[1706] Cultures overlap geographically and that the nation state is no longer the privileged site of formation for a collective identity. National cultures are themselves highly heterogeneous, while transnational or supranational movements raise alternative

---

[1701] Pedro Cruz Villalón AG, opinion on C-62/14, *Peter Gauweiler and others v Deutscher Bundestag*, delivered on 14 January 2015, ECLI:EU:C:2015:7, para 61 (citation omitted).

[1702] Walker, 'Culture, Democracy and the Convergence of Public Law: Some Scepticisms about Scepticism', 271.

[1703] On this debate see, among others, Horatia Muir-Watt and Guillaume Tusseau, 'Repenser Le Dévoilement de L'idéologie Juridique : Une Approche Fictionnelle de La Gouvernance Globale', in *Traité Des Rapports Entre Ordres Juridiques*, ed. Baptiste Bonnet (Paris: LGDJ, 2016), 215 f.

[1704] Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State', in *Ruling the World?: Constitutionalism, International Law, and Global Governance*, ed. Jeffrey Dunoff and Joel Trachtman (Cambridge; New York: CUP, 2009), 318.

[1705] Kumm, 307. See also Anne Peters, 'The Merits of Global Constitutionalism', *Indiana Journal of Global Legal Studies* XVI (2009): 397–411.

[1706] Walker, 'Culture, Democracy and the Convergence of Public Law: Some Scepticisms about Scepticism', 264 f.

claims to cultural recognition.[1707] Horatia Muir-Watt identifies the move from nation states to epistemic communities and the creation of a transnational public space as the methodological challenge of contemporary comparative law. Globalisation language is performative and leads to the spread of ideas and ways of thinking about the law. It creates network effects such as exchanges among judges or NGOs.[1708] To ignore these evolutions and to deny any possibility of communication between national legal systems would be to ignore an important aspect of legal culture and meaning itself. How does Europeanisation colour the use of proportionality? How does proportionality as a European law principle deploy its integration dynamics in domestic legal spheres?

Expressing local visions of European integration. The purpose of this Part is to inquire into the way proportionality transforms local legal culture, and is itself transformed by this culture, in the particular context of European integration. This is a valuable inquiry, not only because it enriches our understanding of the local meanings of proportionality. The study of the different paths of reception of proportionality as a principle of European law might unveil additional local patterns of legal change. More importantly, it gives valuable information about local visions of Europe and Europeanisation. These visions are central to our understanding of European integration itself. Indeed, the acknowledgment of legal diversity in Europe, and of the existence of different legal perceptions of proportionality and of Europe itself, is not inspired by *a priori* opposition to Europeanisation. Instead, it is inspired by the idea that preserving diversity is *the only* possible way to further European integration. Following Ian Ward, "[i]ntegration can only be identified by the plurality of disintegration. It is the ambition to do away with difference which is both dangerous and inherently flawed".[1709] Divergence and diversity are within Europe itself, since integration presumes difference. Resisting the "modernist ambition of a "totalized" and teleologically determinable political "union"", we can accept that "integration and disintegration are not, finally, mutually exclusive".[1710]

In other words, the goal of this Part is to enhance our understanding of local expectations of European integration, by advancing our understanding of the different ways in which local legal actors have received proportionality as a European principle. This inquiry presupposes that we have identified *what* is being received. That is, the legal baggage of proportionality in European case law. In this respect, I schematically distinguish between three phases of European integration, which produce three different readings of proportionality and inscribe their particular logics into its use in different settings. The ECtHR has as a mission to integrate the contracting parties into a European legal order of rights. In this court's case law, proportionality has assumed

[1707] Ibidem. See also David Nelken, 'Using Legal Culture: Purposes and Problems', in *Using Legal Culture*, ed. David Nelken, JCL Studies in Comparative Law (London: Wildy, Simmonds & Hill, 2012), 1.

[1708] Horatia Muir-Watt, 'Globalization and Comparative Law', in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford: OUP, 2006), 583 f.

[1709] Ward, 'Identity and Difference: The European Union and Postmodernism', 28.

[1710] Ibidem.

the function of promoting a European culture of rights (**Chapter 7**). Quite differently, EU integration has largely proceeded through the construction of a common market. In this context, proportionality has primarily functioned as a principle of economic integration (**Chapter 8**). Recent socio-political shocks force legal actors to awareness of normative conflict and diversity in Europe. The use of proportionality in domestic law expresses a tendency towards disintegration, which, paradoxically, is transnational (**Chapter 9**).

The analysis should be distinguished both from arguments about the ideology underpinning European case law, and from realist or critical studies of European integration. What I am focused on here are not the particular economic, political, or other interests that national and European legal actors promote when applying or invoking European law. Nor is it my purpose to classify different uses of proportionality as activist or hostile towards European integration. Instead, I examine the way European legal orders, seen as particular discursive contexts with their own cultural characteristics, shape peculiar logics of legal reasoning, which affect the use of proportionality. My purpose is not to provide an exhaustive account of the application of proportionality by supranational courts. More modestly, it is to identify the dynamic ascribed to proportionality as *force agissante et transformatrice*,[1711] as a carrier of European integration dynamics. Contrary to what the mainstream proportionality literature seems to assume, these dynamics do not coincide with proportionality's German constitutional baggage but are peculiar to the supranational context in which each version of proportionality evolves. Hence, in the context of European integration, proportionality is an example of "intertextuality", in the sense of the mutual invasion between texts that compromises semantic integrity and defeats any search for an autonomous structure of meaning.[1712]

In each chapter, the identification of proportionality's supranational baggage is followed by an analysis of how this baggage unfolds in the three domestic contexts studied. The different phases of European integration do not occur simultaneously or in an orderly manner, either at a European or at a domestic level. They are not linked by any relation of evolutionary progress or moral hierarchy. Nor do the different versions of proportionality deploy their dynamics in a uniform way in domestic legal spheres. Proportionality as a European principle has been understood differently by domestic actors, according to local paths of cultural change and to law's local binding arrangements with other discourses. The analysis in the following chapters examines how its reception has been affected by pre-existing understandings of the relationship between domestic and international law, like monism or dualism, and how its use has

[1711] Antonio Marzal Yetano, *La dynamique du principe de proportionnalité: essai dans le contexte des libertés de circulation du droit de l'Union européenne*, (Clermont-Ferrand: Institut universitaire Varenne, 2013), n. 74.

[1712] On the use of Jacques Derrida's concept of intertextuality in debates on intellectual history, see Annabel Brett, 'What Is Intellectual History Now?', in *What Is History Now?*, ed. David Cannadine (New York: Palgrave Macmillan, 2002), 122. On this point, I benefitted from a discussion with Mirko Caricato, whom I thank.

been constrained by particularly local characteristics of legal thought, like pragmatism or rationalism.

Nonetheless, proportionality in the scope of European law is not a purely internal construction of each domestic legal discourse. It carries European baggage and creates convergence among local legal practices in various ways. It is difficult to infer causal explanations linking the local understanding of proportionality and its context. Law's binding arrangements are not real but symbolic, and leave possibilities for many interpretations. In all the systems studied proportionality and European integration have ultimately acquired a radical dynamic and have significantly transformed local legal culture. However, this development is related to different phases of European integration every time. While in England the radicalism of proportionality lies in its rationalising function in the context of European human rights, in Greece it is entwined with its modernising connotations in the context of the common market. Quite paradoxically, in France proportionality becomes radical in a context of disintegration, which forces domestic lawyers to an awareness of the "parochialism" of their traditional republican perception of rights and society.

CHAPTER 7
A common European culture of rights

Law and integration in the ECHR. The Preamble of the ECHR declares that "the aim of the Council of Europe is the achievement of greater unity between its Members and one of the methods by which the aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms". The idea of integration through law underpins the Convention and is to be advanced by institutions independent of the contracting parties, charged with monitoring domestic measures and practices and enforcing compliance with the rights proclaimed therein. The most notable of these institutions are the ECtHR, and until 1998, the European Commission of Human Rights. Individual petition to the court is possible by persons claiming to be victims of a violation of a Convention right, after exhaustion of domestic remedies. Access for individuals to supranational justice has been crucial to the integration dynamic of the Convention. It is only since the mid-'70s that the court became an important institutional actor and its case law started to influence domestic legal orders.[1713]

At least in the beginning, the Convention was not destined to protect all the values that national legal orders protect. The ideal of the formal rule of law is expressed in the obligation for states to hold free and democratic elections, as well as in the requirement that all rights limitations have a legitimate aim and be prescribed by law. Concerning substantive rule of law elements, the Convention only proclaims individual rights. These rights were originally conceived as the English "civil liberties" or the French "public freedoms", that is, requirements of abstention on the part of the state considered necessary for the normal functioning of democracy.[1714] The promotion of other constitutional values like national security, morals, public health or economic wealth were purported to remain within the competence of domestic authorities.[1715] However, the tendency to expand the reach of Convention rights progressively blurred this distinction.

Often departing from the classic interpretative principles in the field of international conventions, Strasbourg institutions have adopted a teleological and

[1713] On the evolution of the Convention and the relevant practice of the ECtHR, see Pieter Van Dijk and Yutaka Arai, *Theory and Practice of the European Convention on Human Rights*, 4th ed. (Antwerp: Intersentia, 2006); Frédéric Sudre, *La Convention européenne des droits de l'Homme*, 6th ed. (Paris: PUF, 2004). On the reception of the Convention by national courts, see Helen Keller and Alec Stone Sweet, "The Reception of the ECHR in National Legal Orders," in *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, ed. Helen Keller and Alec Stone Sweet (Oxford: OUP, 2008), 3.

[1714] Conor Gearty, *Civil Liberties*, Clarendon Law Series (Oxford; New York: OUP, 2007), 22 f.

[1715] In this sense, Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights?," New York School Jean Monnet Working Paper Series, no. Paper 9 (2008), www.JeanMonnetProgram.org.

dynamic interpretation of the Convention's provisions.[1716] As the court has repeatedly stressed, "*the Convention is a living instrument which (…), must be interpreted in the light of present-day conditions*".[1717] It is the interpretation that best advances the goal of ECHR provisions that is chosen and not the one which restricts the obligations of the signatory states.[1718] The ECtHR interprets Convention rights expansively, while it restricts the scope of their limitations.[1719] It has inferred the existence of "implicit" rights, such as the right to access to courts and the right to the execution of judicial decisions, derived from article 6 of the Convention.[1720] Furthermore, it has established positive obligations of protection that are imposed on the contracting states[1721] and has attributed an indirect horizontal effect to certain rights.[1722] The court's definitional generosity sometimes blurs doctrinal distinctions. Effectiveness of human rights standards is not only sought at the level of norms but also in the application of these norms.[1723] Exegesis and the intention of the contracting parties counts little to the court's final decision.[1724] Thus, as far as rights are concerned the ECHR has few reasons to envy a domestic Constitution.[1725]

Convention rights and domestic constitutions. Domestic legal orders have responded differently to pressure for European integration. France is among the initial contracting parties to the ECHR. Article 55 of the 1958 Constitution attributes supra-legal status to international treaties, on the condition that they are regularly ratified and published, and that they are respected by the other contracting parties. Concerning fundamental rights treaties in particular, domestic courts accept that their application in the domestic sphere is not conditioned by reciprocal respect for the obligations contracted therein.[1726] Hence, the ECHR acquired legal status in France with its

---

[1716] See on this Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights*, International Courts and Tribunals Series (Oxford: OUP, 2010); Frédéric Vanneste, *General International Law before Human Rights Courts: Assessing the Specialty Claims of Human Rights Law* (Antwerp: Intersentia, 2009).

[1717] *Tyrer v UK,* 25 April 1978, no. 5856/72, para 31.

[1718] See *Wemhoff v Germany*, 27 June 1968, no. 2122/64, para 8.

[1719] Sébastien Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme: prendre l'idée simple au sérieux* (Bruxelles: Publications Fac St Louis, 2001), 49 f. The author mentions as an example the rejection of the theory of "inherent limitations" of the rights of persons subjected to a special legal relationship with the state, like prisoners, members of the army or public servants. *Golder v UK*, 21 February 1975, no. 4451/70. Moreover, according to Strasbourg jurisprudence, only the objectives mentioned in the limitation clauses can legitimately be pursued by public authorities. See *Sidiropoulos and Others v Greece*, 10 July 1998, no. 26695/95, para 38.

[1720] See Van Drooghenbroeck, 63 f. and *Hornsby v Greece,* 19 March 1997, no. 18357/91, para 40.

[1721] *Marckx v Belgium*, 13 June 1979, no. 6833/74, para 31.

[1722] *X and Y v the Netherlands*, 26 March 1985, no. 8978/80, para 23.

[1723] *Philis v Greece*, 27 August 1991, nos. 12750/87, 13780/88, and 14003/88, para 61: "It is not for the Court to assess the merits of the Greek system for the payment of engineers' fees as such; it will therefore confine itself, in so far as possible, to examining the issues raised by the specific case before it. In order to do so, however, it must examine the provisions in question to the extent to which the impediment to the individual's right of access was in fact the result of their application".

[1724] Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, International Studies in Human Rights (Leiden; Boston: Martinus Nijhoff Publishers, 2009), 44 f.

[1725] Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review: A Theoretical and Comparative Study*, European Administrative Law Series (Groningen: Europa Law Pub, 2013), 202.

[1726] Frédéric Sudre, *Droit européen et international des droits de l'homme*, 13th ed. (Paris: PUF, 2016), 57 f.

ratification, which took place in 1974 twenty four years after the signature of the Convention. France allowed for individual petition under Protocol 11 in 1981. It was at this moment that European human rights and the Strasbourg case law started to exercise significant influence in the French sphere.[1727] However, another caveat restrained the full effect of the Convention. The Constitutional Council, in its *IVG I* decision, had refused to review legislation on the basis of international treaties and had invited ordinary courts to do so.[1728] While the *Cour de cassation* accepted this invitation in 1975,[1729] the Council of State did not enforce international law provisions against legislation enacted after the ratification of those provisions until 1989. This considerably undermined the possibilities for contesting the compatibility of legislation with the ECHR. Furthermore, the theory of the *loi-écran* also excluded the Convention-compatibility review of all administrative acts that simply executed legislation enacted after 1974. In *Nicolo*, the Council of State abandoned this case law.[1730] Ever since, the Convention has served as a bill of rights, which, albeit not home grown, has been increasingly invoked by plaintiffs, including against Parliament. To understand the significance of this development, one must take into account the fact that until 2010, when the *QPC* constitutional amendment entered into force, the Constitutional Council exercised only an *a priori* review of legislation, before its promulgation.

The English have a special relationship with the Convention, since its drafting was an initiative of the UK Government, conceived as a response to the rise of Communism in post-war Europe. Individual petition before the court was allowed as early as 1965 and the first judgments against the UK were already pronounced in the mid-'70s. However, in the dualist UK legal order the Convention did not acquire legal status until its incorporation in the domestic sphere. Until 2000, the influence of the Convention on English law was only indirect.[1731] The ECHR could be applied only through the intermediary of the ECA 1972, whenever ECJ case law necessitated the taking into account of Convention rights.[1732] Otherwise, it was only informally taken into account as a policy-making factor in the balance of convenience, in the development of the common law, or in the choice of the appropriate standard of

[1727] The first decision in 1986 declared French law incompatible with the Convention. See ECtHR, *Bozano v France*, 18 December 1986, no. 9990/82. More generally, on the evolution of the application of the ECHR by French courts and public officials, see Didier Girard, *La France devant la Cour européenne des droits de l'Homme: contribution à l'analyse du comportement étatique devant une juridiction internationale*, Logiques juridiques (Paris: L'Harmattan, 2015).

[1728] Decision no. 74-54 DC, 15 January 1975, *Loi relative à l'interruption volontaire de la grossesse (IVG I)*, ECLI:FR:CC:1975:74.54.DC.

[1729] Cass, 24 May 1975, *Société des cafés Jacques Vabre*, no. 73-13556.

[1730] CE (Pl.), 20 October 1989, *Nicolo*, no. 108243, ECLI:FR:CEASS:1989:108243.19891020. This decision came following the Constitutional Council's invitation to all state organs to apply international treaties within the scope of their competences (see Decision no. 86-216 DC, 3 September 1986, *Loi relative aux conditions d'entrée et de séjour des étrangers en France*, ECLI:FR:CC:1986:86.216.DC, cons. 6). On the application of the ECHR by French courts, see Helen Keller and Alec Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford: OUP, 2008) chap. 3.

[1731] See *supra*, Part I, Chapter 2.1.iv.

[1732] See for example *R v Secretary of State for the Home Department, ex parte Adams* [1995] All ER (EC) 177 (HC, Queen's Bench Division, 26 July 1994), where the High Court envisages to apply the freedom of speech as a general principle of EC law.

scrutiny in judicial review applications.[1733] As we saw, the purpose of the HRA was to "bring rights home" so that they were directly enforced by English courts.[1734] Since the entry into force of the Act, fundamental rights language has rapidly expanded in English public law and affects the most fundamental assumptions of the common law tradition.

Greece has been a member of the Council of Europe since 1949 and acceded to the Convention in 1953. However, the military *junta* renounced the Convention in 1970 and the country had to re-accede in 1974. The Convention was ratified the same year and acquired supra-legal status. Article 28(1) declares that the generally accepted rules of international law, as well as ratified international conventions "shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law".[1735] Domestic courts have monitored the compatibility of domestic legal statutes and of administrative acts with the ECHR, in the same incidental and diffused way that they review compatibility with the domestic Constitution. Interestingly, from the point of view of the domestic constitutional text, the Convention and EU Treaties enjoy the same legal status. Since a very early stage, the Convention has enjoyed particular prestige in the domestic sphere and its relationship to the Constitution has been studied by the most prominent public law scholars.[1736] With the recognition of the possibility for individual applications to Strasbourg in 1985, condemnations for rights violations have been increasingly resonant and have enhanced the spread of fundamental rights language in the Greek legal order. By the late '90s, the Convention was admired as part of a European human rights paradigm, which became dominant in legal theory and was even institutionalised in article 25 of the Constitution with the 2001 reform.[1737]

Proportionality and local narratives on rights. This Chapter proceeds through a comparative analysis of the application of proportionality in the field of Convention rights. The purpose of **Section 1** is to identify the function of proportionality in Strasbourg case law. We will see that in this context, proportionality functions as a principle of acculturation. It sanctions particular mentalities of domestic public authorities and imposes the taking of rights into account, both when setting policy goals and when appreciating concrete factual situations. The rest of the Chapter consists of case-specific analyses of the application of proportionality in the scope of the Convention, and of its evolution. I argue that the differences observed in the way proportionality is applied by domestic courts are connected to traditional narratives concerning the autonomy of law and human rights protection in each domestic context. In France, *la patrie des droits de l'Homme,* the acculturation function of

[1733] See *supra*, Part II, Chapter 5.

[1734] Labour White Paper, (accessed May 16, 2018), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf.

[1735] Source of translation: http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf.

[1736] Phédon Vegleris, *Η Σύμβαση των Δικαιωμάτων του Ανθρώπου και το Σύνταγμα [The European Convention on Human Rights and the Constitution]* (Athens: Σάκκουλας, 1977).

[1737] See *supra*, Part II, Chapter 6(3).

proportionality has generally been neglected by domestic lawyers. Scholars and judges have instead focused on the substantive outcomes of proportionality in concrete cases. This has led to the residual employment of proportionality language in judicial reasoning, in apparent contrast to the generally shared perception of proportionality as a general principle in French *doctrine*. The integration dynamic of proportionality has been constrained by traditional judicial review structures **(Section 2)**. In the instrumentalist common law tradition, on the contrary, proportionality has served the fulfilment of the UK's international obligations. Since the passing of the HRA, its acculturation function has been taken seriously and has provoked a fundamental rights shift in English public law **(Section 3)**. In Greece, proportionality has been received by domestic lawyers as part of an imported European constitutional civilisation. As a legal reasoning method, it has been used by domestic judges in the reinvention of traditional legal concepts and institutions in light of their *telos*. In this context however, proportionality has not taken the form of a remedy generally applied in cases of human rights infringements **(Section 4)**.

1. Proportionality as a principle of acculturation

The scope and content of proportionality in the ECtHR case law. Proportionality has been employed in the Strasbourg case law since 1976, in cases concerning limitations on the rights entrenched in articles 8-11 of the Convention. That is the right to private life, freedom of thought, freedom of speech, and freedom of association.[1738] Progressively, proportionality has expanded to other fields, such as the right to property, non-discrimination and access to court. It tends to become a general principle in the European case law.[1739] Concerning positive obligations of protection imposed on public authorities, the Strasbourg court has affirmed that "*the applicable principles are broadly similar*".[1740] Yet except some rare cases,[1741] it is the term "fair balance" and not proportionality that is employed.[1742] Categorically defined rights still exist in the Convention case law. The most prominent example is the absolute prohibition of inhuman and degrading treatment declared in article 3, whose application excludes the use of proportionality.[1743] In some cases, the ECtHR refers to the "very essence" of a right, yet in the domains where proportionality is applied, it is

[1738] On the application of proportionality in this context, see, among others, Jeremy McBride, "Proportionality and the European Convention on Human Rights," in *The Principle of Proportionality in the Laws of Europe*, ed. Evelyn Ellis (Oxford; Portland, Or: Hart, 1999), 23; Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme*; Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp; Oxford: Intersentia, 2002); Christoffersen, *Fair Balance*; Pirker, *Proportionality Analysis and Models of Judicial Review*, 202 f.

[1739] Van Drooghenbroeck, 148 f.

[1740] See *Powell and Rayner v UK*, 21 February 1990, no. 9310/81, para 41.

[1741] *Gaskin v UK,* 7 July 1989, no. 10454/83.

[1742] See for example *Harroudj v France,* 4 October 2012, no. 43631/09.

[1743] See *M.S.S. v Belgium and Greece*, 21 January 2011, no. 30696/09. The adjudication of article 6 often involves categorical reasoning.

not clear if this concept has a content which is independent from proportionality reasoning.[1744]

Proportionality is a crucial feature of Strasbourg jurisprudence and of the integration function of the ECHR. However, as many commentators have underlined, the reasoning of the ECtHR in relevant cases is anything but clear. There is no leading case where the principle of proportionality is announced and explained.[1745] Proportionality is applied in diverse ways and with variable intensity. The court follows a case by case approach, in which context and circumstances play a crucial role. Critics have reproved the court for "abandoning any pedagogical ambition of systematisation".[1746] While Strasbourg judges are influenced by Karlsruhe and Luxembourg in their application of proportionality, differences in terminology and structure indicate influence from the United States as well. Questions of institutional restraint are accommodated through the doctrine of the margin of appreciation, whose nature is also ambiguous.[1747] The variable practice of the court creates doubt as to the possibility of deducing a norm or a general principle of proportionality with a homogeneous content and function.[1748] That being said, the presentation of some exemplary cases allows us to observe some basic features of the use of proportionality in the Strasbourg case law.

Leyla Şahin concerned various disciplinary measures imposed on a Turkish student by her university for wearing an Islamic headscarf. The national authorities justified the ban on religious symbols in universities by invoking the principle of secularism. As they claimed, their goal was to protect the freedoms of others and public order, which could be damaged by the development of extremist movements.[1749] As is typical in Strasbourg case law, the court first examined if there had been an interference with a Convention right and if this interference was in accordance with law. It found that the national measures had affected the applicant's freedom of thought, conscience and religion, guaranteed by article 9 ECHR, and that they had a legal basis.[1750] The next step in the court's reasoning typically consists in the identification of the aim invoked by the national government and in the evaluation of its legitimacy in Convention terms. In *Leyla Şahin*, the court found that the ban on religious symbols in universities "*primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order*".[1751] After identifying the values that are competing in the case before it, the

[1744] Julian Rivers, "Proportionality and Variable Intensity of Review," *CLJ* 65, no. 1 (2006): 174.

[1745] Christoffersen, *Fair Balance*, 69 f.; Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l'homme*, 71 f.

[1746] Van Drooghenbroeck, 611. See also McBride, "Proportionality and the European Convention on Human Rights," 28 f.

[1747] For more detailed analysis and relevant literature, see Van Drooghenbroeck, 483 f.; Pirker, *Proportionality Analysis and Models of Judicial Review*, 202 f.; Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*.

[1748] Van Drooghenbroeck, 167 f.

[1749] *Leyla Şahin v Turkey,* 10 November 2005, no. 44774/98, paras 70 f.

[1750] Ibid*,* paras 78 and 98.

[1751] Ibid*,* para 99; *Handyside v The UK*, 7 December 1976, no. 5493/72, paras 42-46; *Dudgeon v UK*, 22 October 1981, no. 7525/76, paras 42-49.

court typically proceeds to the examination of whether the contested measures are necessary in a democratic society.

Before engaging in the proportionality test, the court typically states certain normative considerations which it calls "general principles". They concern the aim of the measure, the existence of a consensus on the matter among the signatory states, the importance of the right at stake in a democratic society or the nature of the restriction in question. For example, in *Leyla Şahin*, the court stated that "*freedom of thought, conscience and religion is one of the foundations of a "democratic society"*".[1752] Then it went on to define the scope of the right and the possibilities for restrictions on its exercise, while underscoring that "*[p]luralism, tolerance and broadmindedness are hallmarks of a "democratic society".*"[1753] This kind of political-moral reasoning, which sometimes resembles an instance of balancing, is typical in Strasbourg case law and is expressed in settled formulas. Concerning the freedom of expression guaranteed by article 10 ECHR, for example, the judges typically state that it "*constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment*".[1754] Normative considerations determine the standard of review that the court will apply. In *Leyla Şahin*, the judges stated that, "*[w]here questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance*". Nevertheless, deference to state authorities went "*hand in hand with a European supervision*".[1755] The court finally checked if the interference met a "*pressing social need*"[1756] and whether it was "*justified in principle and proportionate to the aim pursued*".[1757]

Neither optimisation nor formalism. Proportionality in this context does not function as a principle of optimisation of results.[1758] The court refers to a "*reasonable relationship of proportionality*"[1759] and contents itself with ensuring that the measures are justified "*in principle*" and not in every concrete case. National authorities, among them judges, enjoy a margin of appreciation in the application of the necessary in a democratic society standard.[1760] Typically, the reasons justifying the measure must be "*relevant and sufficient*".[1761] In this respect, the court often defers to the national evaluation. *Handyside* for example, concerned the seizure of hundreds of copies of *The Little Red Schoolbook* by the English authorities. The Government invoked the

---

[1752] *Leyla Şahin*, cited above, para 104.

[1753] Ibid, para 108.

[1754] See *Association Ekin v France*, 17 July 2001, no. 39288/98, para 56.

[1755] *Leyla Şahin*, paras 109-110. See also *Handyside*, cited above, paras 48-50; *The Sunday Times v The UK*, 26 April 1979, no. 6538/74, para 59; *Dudgeon*, cited above, paras 50-54.

[1756] *Leyla Şahin*, para 115. See also *Handyside*, para 48; *Sunday Times*, para 59; *Dudgeon*, para 51. See, more recently *S. and Marper v the United Kingdom*, 4 December 2008, nos. 30562/04 and 30566/04.

[1757] *Leyla Şahin*, para 122.

[1758] This is more obvious in cases concerning the right to property. See *James and Others v The UK*, 21 February 1986, no. 8793/79, para 51. On positive obligations resulting from Convention rights, see *Gaskin*, cited above; *Powell and Rayner*, cited above, paras 43-44. On the deferent stance of the court in these cases, see Pirker, *Proportionality Analysis and Models of Judicial Review*, 202 f.

[1759] *Leyla Şahin*, cited above, para 117.

[1760] See *Handyside*, cited above, para 48.

[1761] Ibid, paras 48-50. See also *Sunday Times,* cited above, para 62.

protection of morals, since in its view, the book's content was likely to "*deprave and corrupt*".[1762] The court found that the measures had a legitimate aim. It declared that "*the competent English judges were entitled, in the exercise of their discretion, to think at the relevant time that the Schoolbook would have pernicious effects on the morals of many of the children and adolescents who would read it*".[1763] In some cases, after ascertaining the legitimacy of the state's intentions, the court imposes a rather formal standard of review, ensuring that "*due regard*" was paid to the right at stake.[1764]

While not a principle of optimisation, proportionality does not solely consist in a review of the intent of domestic authorities. As early as *Handyside,* the court clarified that the margin of appreciation did not designate an area of unfettered discretion.[1765] This became clearer in *Dudgeon*, which concerned the criminalisation of homosexual acts in the UK:

> Without any doubt, faced with these various considerations, the United Kingdom Government acted carefully and in good faith; what is more, they made every effort to arrive at a balanced judgment between the differing viewpoints before reaching the conclusion that such a substantial body of opinion in Northern Ireland was opposed to a change in the law that no further action should be taken (…). Nevertheless, this cannot of itself be decisive as to the necessity for the interference with the applicant's private life resulting from the measures being challenged (…). Notwithstanding the margin of appreciation left to the national authorities, it is for the Court to make the final evaluation as to whether the reasons it has found to be relevant were sufficient in the circumstances, in particular whether the interference complained of was proportionate to the social need claimed for it (…).[1766]

Since the final evaluation of proportionality belongs to the Strasbourg court, the scope of the complained restrictions on Convention rights plays an important role. Particularly broad restrictions warrant intrusive review. *Sunday Times*, for example, concerned the censure of a newspaper article on the Thalidomide case. The UK authorities considered that publication would affect the authority and impartiality of the judiciary, since litigation on the matter was pending before domestic courts. The Strasbourg court underscored that the injunction granted by the House of Lords did not only cover the publication of the article in *Sunday Times*, but also impeded the claimants from "*passing the results of their research to certain Government committees and to a Member of Parliament and from continuing their research, delayed plans for publishing a book and*

[1762] Ibid, para 25.

[1763] *Handyside,* cited above, para 52; *James and Others*, cited above, para 77. See however *Darby v Sweden*, 23 October 1990, no. 11581/85, paras 33 f.

[1764] See also *Otto-Preminger-Institut v Austria,* 20 September 1994, no. 13470/87, para 56.

[1765] *Handyside*, cited above, para 49.

[1766] *Dudgeon,* cited above, para 59.

debarred the editor of The Sunday Times from commenting on the matter or replying to criticism aimed at him".[1767] This led to a "*particularly close scrutiny*" of its necessity.[1768]

Moreover, the character of the interference and the aspect of the right affected are also important. In *Smith and Grady*, for example, the sequel to the English *Smith* case, the court underscored that since the restriction concerned "*a most intimate part of an individual's private life*", there must exist "*particularly serious reasons*" for it to satisfy the conditions of article 8.[1769]

In cases of intrusive scrutiny, the relevance of the motives advanced by domestic authorities is still easily accepted. However, the motives themselves are not always found sufficient. In their appraisal, the Strasbourg judges take into account the real impact of the measures. In *Smith and Grady*, for example, the court stressed that the risk for the operational effectiveness of the army caused by the presence of homosexuals should be "*substantiated by specific examples*".[1770] The Government invoked a report by a team of civil servants charged with the investigation of the issue of homosexuals in the army. However, the court contested the report as to its methods and reliability.[1771] The judges also considered the effects of the measures on the individual claimants. They underscored that the investigation process preceding the claimants' discharge from the armed forces had an "*exceptionally intrusive character*" and that the discharge itself had "*a profound effect on their careers and prospects*".[1772] Proportionality review was thus impact-based. As we saw, the impact-oriented approach adopted by Strasbourg judges has led to an opposition with English courts in the application of proportionality.[1773]

Neither solely concerned with the intent, nor always monitoring the impact of public action, judicial enquiry in the context of the ECHR lies between a formalist application of proportionality that does not contest the moral-political choices of the primary decision maker, and its application as an objective impact-based test, in which the court substitutes its own value-scale for that of the reviewed authority. On the one hand, the court holds that "*the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights*".[1774] Subsidiarity is ensured through the margin of appreciation, which in this context expresses a certain normative relativism underlying Strasbourg case law and allows for a pluralism of value-systems among the contracting states.[1775] On the other hand, proportionality requires that Convention rights are taken seriously in national decision-making. In some cases, it serves to

---

[1767] *Sunday Times*, cited above, para 63.

[1768] Ibid.

[1769] *Smith & Grady v The UK*, 27 September 1999, nos. 33985/96 and 33986/96, para 89. See also *Dudgeon*, cited above, para 52.

[1770] *Smith & Grady*, para 89.

[1771] Ibid, para 95.

[1772] Ibid, paras 91 and 92. Similarly, *Dudgeon*, cited above, paras 60 f.

[1773] See *supra*, Part II, Chapter 5(4).

[1774] *Handyside,* cited above, para 48.

[1775] See Víctor Ferreres Comella, *Constitutional Courts and Democratic Values : A European Perspective* (New Haven: Yale University Press, 2009), 139 f.

eliminate unacceptable interferences with Convention rights *per se*. In this sense, Matscher argues that proportionality's function is corrective and restrictive in relation to the margin of appreciation doctrine.[1776]

Setting rights as decision-making standards. In their comparative study on proportionality and balancing, Cohen-Eliya and Porat identify this kind of intermediate type of review as "indifference" review: its function is to ensure that domestic authorities are not indifferent to rights infringements. As the authors observe, indifference review is still concerned "with the state of mind of the decisionmaker".[1777] The function of proportionality is to legally impose rights as decision-making standards or parameters on national authorities. When state authorities fail to formulate their aims in Convention terms, the court typically sanctions the restrictive measures in question. In *Darby* for example, Swedish law discriminated between residents and non-residents concerning an exemption from a tax to the Lutheran Church. While the Government provided some reasons for the discrimination before the court, the judges observed that "*the Government Bill* (…) *did not mention the special situation which the amendments would create for non-residents* (…) *In fact, the Government stated at the hearing before the Court that they did not argue that the distinction in treatment had a legitimate aim*".[1778] The lack of consideration for the Convention was enough for the court to sanction the provision.

Sidiropoulos is a good example of Strasbourg proportionality review. The case concerned the refusal of Greek courts to recognise an association of Greek citizens claiming to be of Macedonian ethnic origin. The national courts had based their decision on the conviction that the claimants intended to dispute the Greek identity of Macedonia and to menace the territorial integrity of the Greek state. The court declared:

> When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 11 the decisions they delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and,

[1776] Franz Matscher, "Methods of Interpretation of the Convention," in *The European System for the Protection of Human Rights*, ed. Ronald Macdonald, Franz Matscher, and Herbert Petzold (Dordrecht ; Boston: M. Nijhoff, 1993), 63.

[1777] Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture*, Cambridge Studies in Constitutional Law (Cambridge: CUP, 2013), 73 f.

[1778] *Darby v Sweden*, 23 October 1990, no. 11581/85, para 33.

> moreover, that they based their decisions on an acceptable assessment of the relevant facts.[1779]

Judicial review does not only serve to exclude illegitimate motives, but also concerns the proportionality of the measure itself with respect to its goal, the relevance and the sufficiency of the reasons advanced. What the European court checks is not so much the results in fundamental rights protection but rather the criteria and procedures of national decision-making, the standards that national authorities applied. Hence, conforming with the ECHR often implies the adoption of proportionality by national authorities.[1780] In this sense, proportionality resembles a procedural standard. With the expansion of the scope of the Convention to encompass positive obligations of protection, Convention rights often conflict. In cases of conflict, the court generally recognises a wide margin of appreciation to the national authorities and the procedural aspect of proportionality is accentuated. Hence, the Strasbourg court simply satisfies itself that the national authorities sought for balance and equilibrium, which is "*the foundation of a "democratic society"*".[1781]

Still, even more than formal-procedural requirements, the court seeks to impose a particular *mentality* on primary decision-makers when restricting Convention rights. The standards that it imposes do not only operate in the legal sphere. They are the standards of a democratic *society*. In this context, then, proportionality functions as a principle of acculturation. Convention standards apply in the balancing of competing interests, but also in the evaluation of the mischief that the national authority purports to face. This is clear in *Sidiropoulos*, where the court talked about an "*acceptable assessment of the relevant facts*". Indeed, it had previously specified in its reasoning that the reasons advanced by domestic authorities must be both "*compelling*" and "*convincing*".[1782] While in the view of the judges, national security was a compelling reason for restricting the applicants' freedom of association, the court held that the domestic authorities decision was based on "*a mere suspicion*" of the applicants' intentions and not on reliable evidence.[1783]

In other cases, it is not so much the factual evidence taken into account by national authorities but rather their normative considerations that are criticised by the court. In *Open Door*, for example, the Irish Government had prohibited the distribution of information on possibilities for aborting abroad. To justify this prohibition, it invoked the protection of the life of the unborn and the prevention of crime. The goal invoked by the national authorities was re-qualified by the Strasbourg judges. In their view, it was not the "protection of the rights of others" that was a stake but rather the "protection of morals".[1784] In *Smith and Grady*, the court excluded the UK

[1779] *Sidiropoulos*, cited above, para 40.

[1780] See Keller and Stone Sweet, *A Europe of Rights*, 10 f.

[1781] *Chassagnou v France*, 29 April 1999, nos. 25088/94, 28331/95, and 28443/95, para 113; *Leyla Şahin,* cited above, para 108. See Pirker, *Proportionality Analysis and Models of Judicial Review*, 216 f.

[1782] *Sidiropoulos*, cited above, para 40.

[1783] Ibid, para 45 f.

[1784] *Open Door and Dublin Well Woman v Ireland*, 29 October 1992, no. 14234/88, paras 61 f.

Government's arguments concerning the protection of national security and the well-functioning of the army, because the alleged malfunctions would result only from "*negative attitudes of heterosexual personnel towards those of homosexual orientation*".[1785] In these cases, the European court substituted its own evaluations about the existence of a pressing social need for those of national authorities. Hence, Strasbourg case law pushes national authorities to reformulate their goals and policies in terms that are acceptable in the context of the Convention.

The weight that the court will accord to national decision makers' normative standards will also depend on the eventual existence of consensus among the contracting states on the interest or value that the restrictions are purported to preserve. In *Handyside,* for example, the court observed that "*it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals*" and that the relevant domestic conceptions vary "*from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject*", the court stated:

> By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.[1786]

The court's stance was different, however, in *Sunday Times*, where the "*far more objective*" notion of authority of the judiciary was at stake:

> The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area. This is reflected in a number of provisions of the Convention, including Article 6, which have no equivalent as far as "morals" are concerned. Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation.[1787]

The judges went on to examine the real effectiveness of the measure and to weigh the interests at hand. They concluded that "*the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression*".[1788] The margin of appreciation left to the state authorities was practically non-existent.

[1785] *Smith and Grady*, cited above, paras 96-97.

[1786] *Handyside*, cited above, para 48.

[1787] *Sunday Times*, cited above, para 59.

[1788] Ibid, para 67. Compare with the dissenting opinion of Judges Wiarda, Cremona, Thór Vilhjálmsson, Ryssdal, Ganshof van der Meersch, Fitzmaurice, Bindschedler-Robert, Liesch and Matscher.

Domestic public lawyers and courts have perceived the role of proportionality and of the margin of appreciation in the context of the ECHR very differently, according to domestic narratives on law and fundamental rights.

2. A corrective patch: disproportionality as an effet pervers of legislation in France

Assimilation of domestic and Convention concepts as an instance of rationalism. The analysis in Chapter 1 has shown that proportionality, since its emergence as a European principle in French public law, has been assimilated to pre-existing methods of review that domestic lawyers classify as instances of *contrôle de proportionnalité*. Because of their shared *nom propre*, European proportionality and domestic *proportionnalité* have been taken to share the same content. They have been understood as having the same meaning, structure and function in legal reasoning. We saw that this has led to a generalisation and intensification of traditional tests like necessity review. Still, French courts' proportionality scrutiny has been much less intrusive than that exercised by European courts.[1789]

Assimilation of the concepts of international treaties to "homonymous" domestic concepts is not only a characteristic of proportionality nor is it limited to the application of the ECHR. It is deeply rooted in French public law tradition and is a corollary of a formalism that is peculiar to French legal thought. The interpretation of international treaties in conformity with domestic law has been a way of managing the conflicts between domestic and international law. It has preserved the coherence of the law applicable by domestic judges, which is so dear to French lawyers. It is indicative that, until 1990, the Council of State referred questions on the interpretation of international treaties to the Minister of Foreign Affairs. Hence, despite the fact that the Constitution conferred treaties with a supra-legislative status, in case of doubt the content of their provisions was to be defined by the French Government. This was due to the court's traditional refusal to interfere with diplomatic affairs. International treaties' terms and notions *could have no other content* than the one that domestic authorities gave to them. Even though in the 1990 *GISTI* case the Council affirmed to itself the power to interpret international conventions, it did so by reference to the "*pieces of the [administrative] file*".[1790]

However, in particular insofar as the ECHR is concerned, the tendency towards assimilation of domestic and European concepts is also underpinned by another feature: French public lawyers' shared belief in a common European civilisation of rights, of which France is the motherland. Indeed, international human rights

[1789] See *supra*, Part I, Chapter 1.2.i. Analysis on this point inspired by Constantinos Yannakopoulos, "Μεταξύ συνταγματικών σκοπών και συνταγματικών ορίων: η διαλεκτική εξέλιξη της συνταγματικής πραγματικότητας στην εθνική και στην κοινοτική έννομη τάξη [Between Constitutional Goals and Constitutional Limits: The Dialectical Evolution of Constitutional Reality in the National and the Community Legal Orders]," *Εφ⊥⊥*, no. 5 (2008): 733.

[1790] CE (Pl.), 29 June 1990, *GISTI*, no. 78519, ECLI:FR:CEASS:1990:78519.19900629.

standards have been received in France, *la patrie des droits de l'Homme,* as already part of domestic law.[1791] In this context, they have been reinvented as objective republican values. The assimilation of ECHR concepts to domestic ones can be understood as an instance of the rationalism that characterises French legal thought. It fits with the perception of law as a system, a coherent whole, imbued with rational moral-legal principles. These principles were acquired with the French Revolution and have been entrenched in republican legislation ever since. Their application in concrete cases does not lead to extensive judicial reasoning. Instead it is considered self-evident and resembles an instance of republican inculcation.[1792] Thus, the acculturation process into which the ECtHR invited domestic authorities has not been perceived as necessary in the French context.

These features characterise the domestic perception of proportionality in the field of European rights. Domestic lawyers have typically neglected the structural aspects of proportionality as a remedy for violations of the Convention and have focused on its substantive content. Proportionality as an ECHR principle has been deemed to prescribe concrete legal rules and solutions rather than a particular process of reasoning. Either applied in domestic cases, in EU law or in the context of the ECHR, in the minds of French public lawyers, proportionality has corresponded to an objective liberal principle mandating the moderation of public power. It has been perceived as part of a common European paradigm of rights that was already expressed in French revolutionary texts. We saw that proportionality, even before its connection to the *bilan*, was connected to the *DDHC*, especially in its version of *necessité des peines*. During the '80s, despite the absence of explicit recognition of proportionality as a principle in domestic case law, the French *doctrine* considered it part of the *bloc de légalité*, that is, the norms of reference used by the administrative judge.[1793] For mainstream scholarship then, ECtHR jurisprudence has added nothing to already existing theories on judicial review. Simply, by including proportionality in the *bloc de conventionnalité*, the ECHR has expanded its scope of application, and most importantly, has opened the way for its application by ordinary courts against Parliament.[1794]

The process of accommodation of the ECHR in domestic law. While the *droits de l'Homme* were born in France, they flourished in Europe. Under the impulse of the Aix School, French public lawyers started to share an increasing admiration for the jurisprudence of German, Italian, Spanish and European supranational courts in the field of fundamental rights. In his article on proportionality, Jacques Ziller studied the way the principle was applied by various courts outside the French borders.[1795] This author saw proportionality as part of a European liberal civilisation, fruit of the mutual influences of European legal systems. Ziller argued that France was no exception to

[1791] Girard, *La France devant la Cour européenne des droits de l'Homme: contribution à l'analyse du comportement étatique devant une juridiction internationale*, 276.

[1792] See *supra*, Part II, Chapter 4(5).

[1793] See the analysis *supra*, in Part I, Chapter 1.1.ii and iii.

[1794] On the *bloc de conventionnalité*, see Jean-Paul Markus, "Le contrôle de conventionnalité des lois par le Conseil d'État," *AJDA*, 1999, 99.

[1795] Jacques Ziller, "Le principe de proportionnalité," *AJDA*, no. spécial (1996): 185.

this civilisation, albeit that it applied proportionality in its own particular way. However, condemnations by Strasbourg provoked unrest among domestic lawyers, who did not want to see France, once admired as the motherland of human rights, lag behind other European countries. Condemnatory Strasbourg decisions were perceived as "failures" of domestic judicial review in the field of rights protection.[1796] In this context, the lack of explicit recognition of the principle of proportionality on the part of French courts was perceived a sign of closed-mindedness. Michel Fromont concluded his comparative analysis on proportionality by stating: "It remains desirable that France joins the big family of legal systems that entrench the principle of proportionality. Southern European countries already endeavour towards this direction".[1797]

Adaptation to ECHR standards has proceeded through their accommodation within the French public law tradition, sometimes without even referring to the Convention at all. In this tradition, human rights are protected *through* law and not against it. Thus, compliance with Convention standards has not acquired the form of a concrete head of judicial review. It has sometimes proceeded through the judicial construction of legislation and has not necessarily been connected to the use of proportionality language by courts. During the '80s and the '90s, the domestic public freedoms regime was incrementally adapted to European fundamental rights requirements. Even the most venerated public law principles, like the *principe de laïcité*, were reinterpreted to accommodate international human rights.[1798] Simultaneously, as we saw, the European fundamental rights civilisation was reinvented and objectivised. In *Morsang-sur-Orge*, for example, the Council of State declared that the protection of human dignity was part of the notion of public order, the preservation of which justifies restrictions on other freedoms. By doing so, the Council overruled a long-standing interpretation of public order as mainly comprising the protection of security, tranquillity and public health.[1799]

Judges and law-makers have often cooperated in the process of adaptation of domestic public law to supranational standards. For example, long before the direct application of article 8 by the Council of State, a governmental decree had instituted family reunification for foreign country nationals.[1800] Based on this and on the Preamble of the 1946 Constitution, the administrative court had recognised the status of the right to family life as a general principle of law.[1801] Furthermore, legislation dating

---

[1796] Markus, "Le contrôle de conventionnalité des lois par le Conseil d'État," before fn. 141 (citation omitted).

[1797] Michel Fromont, "Le principe de proportionnalité," *AJDA*, no. spécial (1995): 156, after fn. 71.

[1798] CE, 2 November 1992, no. 130394, ECLI:FR:CESSR:1992:130394.19921102. See also the famous opinion by the Council of State, CE, 27 November 1989, no. 346893, *Avis "Port du foulard islamique"*, where the court refers to the Convention and other international texts in the *visas*.

[1799] CE (Pl.), 27 October 1995, *Commune de Morsang-sur-Orge*, no. 136727, ECLI:FR:CEASS:1995:136727.19951027. See, however, CE, 18 December 1959, *Films Lutétia*, nos. 36385 and 36428, ECLI:FR:CESJS:1959:36385.19591218, concerning the censure of a film, where the Council of State had included the protection of public morality in the notion of public order.

[1800] Decree of 29 April 1976.

[1801] CE (Pl.), 8 December 1978, *GISTI, CFDT et CGT*, nos. 10097, 10677, and 10679, ECLI:FR:CEASS:1978:10097.19781208.

from 1979 had set the conditions and guarantees applicable to the procedure of expulsion, thus leading the judge to scrutinise, albeit with restraint, some of the relevant administrative acts.[1802] The status of foreigners was further ameliorated by legislation at the end of the '80s, and certain categories of foreigners were excluded from expulsion. In the definition of these categories, the personal and family situation of the affected persons was taken into account. The Council of State interpreted the relevant provisions broadly and applied a manifest error test in assessing whether immigration authorities respected them.[1803] With the emergence of the disproportionality standard in *Babas* and *Belgacem*, the manifest error review lost its utility in such cases, and was progressively abandoned.[1804] Still, one cannot help but notice the continuity in administrative case law, which nuances the importance of the introduction of the disproportionality standard itself.

As we saw, as a judicial tool, proportionality did not bring about radical changes in domestic judicial review. The whole of the French institutional apparatus has strived to abide by the substantive requirements of Strasbourg case law, without radically challenging traditional reasoning methods and the traditional distribution of competences in judicial review. Indeed, in 1986 the Constitutional Council delegated the fulfillment of international rights obligations to "*the various State authorities* (…) *in the context of their respective competences*".[1805] The Constitutional Council itself has actively participated in the process of adaptation of the domestic constitutional order to international law. It did so by proclaiming the constitutional status of international and especially European fundamental rights and principles, among them proportionality.[1806] Sometimes, the court has forced legislation to pay due regard to fundamental rights by enouncing *réserves d'interprétation* in this respect.[1807]

More generally, French courts have held that law-makers do not necessarily need to "speak" the language of the Convention. It is the judge who, in the application of the law, "translates" legislative concepts in Convention terms. Following a "natural

[1802] Law of 11 July 1979. On this point, see Marceau Long et al., *Les grands arrêts de la jurisprudence administrative*, 21st ed. (Paris: Dalloz, 2017) n. 83.10.

[1803] See CE (Pl.), 29 June 1990, no. 115971, ECLI:FR:CEASS:1990:115971.19900629. Interestingly, this decision was issued the same day with the *GISTI* case, where the Council abandoned the practice of referring the interpretation of international conventions to the Minister. The legislation applied are the Laws of 2 August 1989 and 10 January 1990, modifying the *ordonnance* of 2 November 1945.

[1804] See, however, CE, 11 October 1991, no. 125101, ECLI:FR:CEORD:1991:125101.19911011, where both manifest error and proportionality are applied cumulatively.

[1805] Decision no. 86-216 DC, 3 September 1986, *Loi relative aux conditions d'entrée et de séjour des étrangers en France*, ECLI:FR:CC:1986:86.216.DC, cons. 6.

[1806] For example, on the protection of human dignity, see Decision no. 94-343/344 DC, 27 July 1994, *Loi relative au respect du corps humain et loi relative au don et à l'utilisation des éléments et produits du corps humain, à l'assistance médicale à la procréation et au diagnostic prénatal*, ECLI:FR:CC:1994:94.343.DC; on the right to private and family life, see Decision no. 93-325 DC, 13 August 1993, *Loi relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France*, ECLI:FR:CC:1993:93.325.DC, cons. 104; on the principle of proportionality Decision no. 94-352 DC, 18 January 1995, *Loi d'orientation et de programmation relative à la sécurité*, ECLI:FR:CC:1995:94.352.DC. On this particular point, see supra, Part I, Chapter 1.1.iii.

[1807] Decision no. 93-325 DC, 13 August 1993, cited above, cons. 127.

tendency of a national judge",[1808] domestic courts have tried to correct or conceal incompatibilities of domestic law with the Convention through interpretation. This solution was also necessitated by practical considerations, since legislation in France was often enacted long before the rise of the *lingua franca* of fundamental rights.

The corrective function of proportionality. In this context, the function of proportionality as an ECHR standard in the Council of State case law has been a corrective one. Just like the direct application of the Convention more generally, proportionality review has only served to clear French law of "flaws, rust and incongruities that it accumulated with time".[1809] Its role has been that of a "patch". In certain cases, domestic courts have used it as such to ensure the Convention-compatibility of legislation. For example, the town planning code imposed duties on the owners of certain properties to the benefit of neighbouring properties, while it excluded the owners' compensation for the damages that they suffered in result. An aggrieved individual contested the compatibility of this provision with article 1 FAP ECHR before the Council of State. The court decided that the legislation in question should be interpreted, contrary to its plain reading, as not always impeding the owner from obtaining compensation. Compensation was still due "*in the exceptional cases where it results from all the conditions and circumstances* (…)*that the property owner suffers a unusual and excessive charge, out of proportion with the general interest pursued*" by the law.[1810] The exception of disproportionality added by the Council of State was sufficient to render domestic legislation compatible with the Convention. More generally, in French public law disproportionality has functioned as an exception, a condition for defeating domestic general rules in particular circumstances.

The corrective function of proportionality as an ECHR standard is confirmed by a reading of the *Commissaire du gouvernement* Abraham's opinion in the *Belgacem and Babas*, where it first appeared. Indeed, what mainly pushed the judge, and subsequently the Council of State to exercise a proportionality review of immigration police measures was the fear that if domestic courts did not do so, it would be Strasbourg that would rule in this field.[1811] The corrective function of proportionality terminology is also confirmed by its residual use in administrative case law, which contrasts with its doctrinal perception as a general principle of law. Indeed, in judicial review, the Council of State has employed the disproportionality standard mainly in ECHR cases, and especially in the *contentieux des étrangers*. Among the approximately 10,500 Council of State decisions that mention the term "disproportionate", more than 8,600 concern the right to family life under article 8 ECHR.[1812] Otherwise, the use of proportionality

[1808] Bruno Genevois, "Note sous CE Ass. 20 octobre 1989, *Nicolo*," *RFDA*, 1989, 832; cited by Paul Cassia and Emmanuelle Saulnier, "Le Conseil d'État et la Convention européenne des droits de l'Homme," *AJDA*, 1997, 411 fn. 44.

[1809] Cassia and Saulnier, fn. 45, citing Yves Madiot.

[1810] CE, 3 July 1998, no. 158592, ECLI:FR:CESJS:1998:158592.19980703.

[1811] Ronny Abraham, "Conclusions sur CE Ass., 19 avril 1991, *Belgacem* et *Babas*," *RFDA*, 1991, 502; on this point, see Joël Andriantsimbazovina, *L'autorité des décisions de justice constitutionnelles et européennes sur le juge administratif français* (Paris: LGDJ, 1998), 437.

[1812] Based on a research of terms in the Council of State database, http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/ArianeWeb, on 23 January 2018. More than 9,100

by the supreme administrative court has been inconsistent. In margin of appreciation cases, courts have typically declared domestic measures compatible with the Convention without using proportionality at all. The residual application of proportionality has led to a paradox. While proportionality is understood as a fundamental rights principle, its invocation as such has mainly served foreigners. And at a closer look, it has not much served them either. As a corrective standard, proportionality operates when traditional concepts and methods of review are insufficient to fulfill Convention requirements. In the *patrie des droits de l'Homme,* this happens only exceptionally. Hence, in most cases, deportation orders against immigrants have been found to be justified in a democratic society.[1813]

Preserving the traditional distribution of competences. Mainly serving the compliance with the Convention, the disproportionality standard has not contested the procedural and institutional features that generally characterise the application of Convention requirements. Most notably, until recently the Council of State hesitated to review the Convention-compatibility of domestic legislation in the *référé-libertés* procedure.[1814] What is more, confusion as to the intensity of review that proportionality implies has also impeded for some time its application in the *référé-libertés* procedure against the administration. Under this procedure, the administrative judge checks whether the reviewed measures constitute "a serious and manifestly illegal interference" with the plaintiffs' fundamental freedoms.[1815] Anxious of exceeding their competence, the interim judges initially required that public measures be manifestly disproportionate in order to suspend their application.[1816] The difference as compared with the normal application of the disproportionate standard, already exceptional, was difficult to discern. The court thus ended by generally avoiding the use of proportionality terminology in interim measures case law.[1817] In recent cases, the three prongs of proportionality are announced as a requirement imposed on rights restrictions but proportionality is not applied in the reasoning that follows.[1818]

---

decisions concern the right to family life more generally, provided for by other international texts or by domestic legislation.

[1813] On the application of proportionality in this field see *supra*, Part I, Chapter 1.2.i.

[1814] On this point, see Louis Dutheillet de Lamothe and Guillaume Odinet, "Contrôle de conventionnalité : in concreto veritas ?," *AJDA*, 2016, 1398. For other such procedural and institutional requirements, see Markus, "Le contrôle de conventionnalité des lois par le Conseil d'État" in "Le déclenchement du contrôle." See CE, 30 December 2002, *Carminati,* no. 240430, ECLI:FR:CESSR:2002:240430.20021230. The *Gonzalez-Gomez* case brought about significant change in this respect and is extensively debated in French *doctrine* during the last years. The case will be discussed *infra*, Part III, Chapter 9(2), due to its exceptional nature, which attributes a particularly expressive function to it.

[1815] Article L. 521-2 code de justice administrative.

[1816] CE ord., 30 October 2001, no. 238211, ECLI:FR:CESJS:2001:238211.20011030.

[1817] See CE ord., 9 November 2005, no. 286321.

[1818] See CE ord., 9 January 2014, *Ministre de l'intérieur c/ Société Les Productions de la Plume et M. Dieudonné M'Bala M'Bala*, no. 374508, ECLI:FR:CEORD:2014:374508.20140109, cons. 5 f.; CE, 9 November 2015, Le *Mur (Dieudonné)*, no. 376107, ECLI:FR:CESSR:2015:376107.20151109; CE ord., 27 January 2016, *Ligue des droits de l'homme et autres*, no. 396220, ECLI:FR:CEORD:2016:396220.20160127; CE ord., 26 August 2016, *Ligue des droits de l'homme et autres - association de défense des droits de l'homme collectif contre l'islamophobie en France*, nos. 402742 and 402777, ECLI:FR:CEORD:2016:402742.20160826.

For a long time, the preservation of traditional concepts and methods also preserved traditional taboos, representations and myths. Most importantly, the role of the legislator as the protector of public freedoms, even of those enshrined in the Convention, was not questioned. Indeed, domestic courts typically refused to declare legislation incompatible with the ECHR. Violations of the Convention were presented not as the result of legislation itself but of a distortion *in its application*.[1819] They were perceived as a distortion of the legislative will, an *effet pervers* connected to the circumstances of the case. As we have seen, it is in view of these circumstances that the Council declared domestic measures incompatible with the Convention. In family life cases, the Council typically took into account the duration and the importance of the family relations invoked by the claimant, her attachment to her country of origin and the risk that her remaining in France caused to public order.[1820]

The strict separation between the law and its application effected by the court can be illustrated through a presentation of the *Meyet* case, which concerned a prohibition on publishing election polls during the week that precedes the elections.[1821] The claimants contested the compatibility of the prohibition with article 10 ECHR. In previous decisions on the matter, domestic courts had held that this prohibition was provided for by law and served the legitimate aim of avoiding the influence that election polls exercise on the choice of voters. Hence, they had decided that the prohibition protected the "rights of others" and was compatible with the Convention. However, since the mid-'90s, the results of such surveys conducted in neighbouring countries were accessible to the French public via the internet. Domestic legislation was thus circumvented by press, who provided links to foreign sources. Under the new circumstances, the claimant questioned the necessity of the prohibition in a democratic society. The question was not easy to resolve, especially since contradicting decisions by civil law courts had been issued on the matter.

The case resembled much the *Spycatcher* case, which, as we saw, consolidated the meaning of proportionality as an ECHR principle in the English context long before the passing of the HRA. In *Meyet,* the French judges arrived at the same solution with their English colleagues in *Spycatcher*. Surprisingly however, proportionality does not appear in their reasoning at all.[1822] The Council of State observed that the claimant did not contest the compatibility of the domestic measures *themselves* with the Convention. Rather, he claimed that the provisions had become incompatible with article 10 due to their ineffective application. The court stated that "*the obstacles encountered in the effective application of [the law] do not constitute a change in the legal circumstances that can engender its incompatibility between with article 10 of the Convention*". The Council went on to specify that,

[1819] See in this sense, Girard, *La France devant la Cour européenne des droits de l'Homme: contribution à l'analyse du comportement étatique devant une juridiction internationale*, 25.

[1820] See *supra*, Part I, Chapter 1.2.i.

[1821] CE, 2 June 1999, no. 207752, ECLI:FR:CESJS:1999:207752.19990602.

[1822] On *Spycatcher*, see *supra*, Part I, Chapter 2.1.iii and Part II, Chapter 5(2).

> while a change in the factual circumstances – in reality invoked by the claimant – can lead the legislator, in the exercise of his power of appreciation, to reconsider certain measures or even [the law] as a whole, it could not possibly have an impact on the scope of the law and on the obligation of administrative authorities to ensure its application.[1823]

Therefore, the Council decided that the prohibition was compatible with the Convention. By applying a formalist separation between law and its application, which directly resulted from the traditional separation between *être* and *devoir être*, the court deprived proportionality of any function in this case. Moreover the Council rejected the non-discrimination argument advanced by the plaintiffs invoking the "*general and impersonal character*" of the law. Clearly, the respect for Convention rights was not a matter of results but a matter of intent and was appreciated at the time of the reviewed act. Courts did not intrude into questions of effectiveness and expediency. Ensuring the effective protection of ECHR rights was a duty of the legislator.

The formalist application of the Convention has been criticised repeatedly by the ECtHR since the end of the '90s. This has sometimes led domestic courts to adopt more pragmatic methods of adjudication, though without always referring to the Convention ("each one has his dignity", in the words of Olivier Dutheillet de Lamothe, member of the Constitutional Council at the time).[1824] In *Association Ekin* in 2001, the Strasbourg court censured the practice of French judges of avoiding declarations of incompatibility of domestic legislation.[1825] After this decision, the Council of State started to abandon its deferent stance and to apply proportionality against Parliament too.[1826] This opened the way for lower courts to disapply domestic legal provisions that they found disproportionate. The preliminary reference procedure before the Council of State allowed for guidance in the application of the principle in important cases.[1827]

Still, the application of proportionality by French courts in the context of the Convention has not radically changed domestic judicial review structures, underlying

---

[1823] See *Meyet*, cited above.

[1824] Olivier Dutheillet de Lamothe, "La Convention européenne et le Conseil constitutionnel," *RIDC*, no. 2 (2008): 301. The author refers to the requirement for a "sufficient general interest" in order to accept the constitutionality of retroactive validations of administrative acts by legislation. This requirement was imposed after a Strasbourg decision, which had criticised the deferent stance of the Constitutional Council on the matter. See Decision no. 99-422 DC, 21 December 1999, *Loi de financement de la sécurité sociale pour 2000,* ECLI:FR:CC:1999:99.422.DC, para 64. The relevant Strasbourg decision is *Zielinski, Pradal, Gonzalez and others v France*, 28 October 1999, nos. 24846/94, 34165/96 - 34173/96. Interestingly, this incident introduced balancing in French constitutional case law, at the level of the scrutiny of legislative intentions. However, balancing is very rarely applied and even more rarely does it lead to the censure of legislative goals.

[1825] ECtHR, *Association Ekin v France*, 17 October 2001, no. 39288/98.

[1826] CE (Pl.), 30 November 2001, *Diop*, no. 212179, ECLI:FR:CEASS:2001:212179.20011130; CE, 24 February 2006, no. 250704, ECLI:FR:CESSR:2006:250704.20060224, concerning the *loi "anti-Perruche"*. The Council of State's decision followed a Strasbourg decision that had found violation of the legitimate expectations of the victims under article 1 FAP ECHR. See ECtHR, *Maurice v France,* 6 October 2005, no. 11810/03. On the application of proportionality against the legislator, see Markus, "Le contrôle de conventionnalité des lois par le Conseil d'État", section "Les manifestations d'un contrôle de proportionnalité."

[1827] CE (Pl.), 27 May 2005, no. 277975, ECLI:FR:CEASS:2005:277975.20050527.

myths and substantive outcomes. As a European fundamental rights principle proportionality has had a more significant impact in the development and expansion of pre-existing methods of review. Whenever it has been explicitly applied in the form of the disproportionate standard, its function has mainly been symbolic in the effort of domestic courts to affirm the conformity of French law to European rights precepts and their proper role as fundamental rights protectors. In other words, proportionality's function has been one of "signalisation".[1828] Addressed to domestic public lawyers and to Strasbourg judges, proportionality has expressed the domestic judges' attempt to persuade as to the compliance of domestic law with ECHR requirements.

Most often, the self-evident affirmation of the legitimacy of domestic measures has not even proceeded through the use of proportionality language. The reasoning of the *Cour de cassation* in the *SAS* affair is a prominent example of the containment of the acculturation dynamic of the Convention in the French context. Four years after the Constitutional Council's decision on the ban on wearing the *burqa* in public spaces, a woman condemned to a "citizenship internship" in application of this legislation raised the question of its compatibility with the ECHR. In response to her claims, the supreme civil court observed that article 9 of the Convention allowed for restrictions to the freedom of thought, conscience and religion if they are necessary in a democratic society for the protection of legitimate public interests. Without further justification, the court stated that "*this is the case of the law prohibiting the integral concealing of the face in public spaces, since it aims at the protection of public order and security, by imposing on all persons to show their faces when in a public space*".[1829] Just like the application of proportionality by the Constitutional Council in the *Burqa* case, the application of the ECHR by the *Cour de cassation* resembled a process of republican inculcation. As we saw, when the case arrived before the ECtHR, the Strasbourg judges also rejected the applicant's claims based on the Convention.[1830] However, the formalist application of European rights precepts by the French court stands in stark contrast to the thorough proportionality scrutiny of the *burqa* ban by the European judges. It also stands in stark contrast to the way English judges have applied proportionality in the context of the HRA.

3. A tool for complying with Convention rights: proportionality and the human rights culture in England

The distinction between domestic and ECHR standards as an instance of instrumentalism. The common law tradition of analytical formalism has not allowed for an unthinking assimilation of domestic and ECHR concepts in the English context.

[1828] Margit Cohn, "Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom," *American Journal of Comparative Law* 58 (2010): 588, citing Assaf Likhovski.

[1829] Cass. crim., 5 March 2013, no. 12-80891, Bull. crim., 2013, no. 54.

[1830] See *supra*, the analysis of the *Burqa* case, in Part II, Chapter 4(5). See also ECtHR, *Henrioud c. France,* 5 November 2015, no. 21444/11.

The analysis in Chapter 5 has shown that the application of proportionality as a fundamental rights principle contested certain basic features of the English legal culture, such as parliamentary sovereignty, pragmatism and legal certainty. Since the incorporation of the Convention into domestic law, the rationalist contextual approach that underpins proportionality progressively spread in English judicial review. Nonetheless, proportionality itself as a head of review for the adjudication of rights is constrained within the scope of the HRA. Outside this scope traditional judicial review categories and doctrines still operate.

Contrary to what is observed in rationalist French legal thought, a plurality of formal and conceptual frameworks is not necessarily a problem for English lawyers. Rather, it demonstrates "the traditional English preference for "muddling through"".[1831] Poole talks about "a polyglot patchwork of decision-making institutions and players" in public administration.[1832] In English legal thought, like in other common law cultures, form is not a uniform whole imposed by some kind of rational and objective reality. Instead, it is understood as a tool, chosen by decision-makers (including judges), for the regulation of various activities in order to achieve the distinctive purposes of each.[1833] Even Paul Craig, among the most prominent defenders of proportionality's spill-over, admits that proportionality is not appropriate for certain kinds of judicial decision-making.[1834] Indeed, for proportionality sceptics, what "modern-day arch-simplifiers"[1835] neglect is that in the English legal culture forms also exist because they *serve* various purposes in the various contexts where they are employed. Thomas Poole criticises the discourse on the reign of human rights and proportionality as typical of lawyers obsessed with courts and judicial review.[1836] Fragmentation and complexity in English administrative law serve the fragmented and complex functioning of public administration, which is its main object. In the same vein, Tom Hickman warns that the spread of proportionality to cover the whole of judicial review would damage the elaborate architecture of English public law.[1837]

Serving the UK's compliance with the Convention. In this instrumentalist context, proportionality also serves something, namely the judicial enforcement of human rights standards. This is what impedes it from acquiring the status of a general principle, which it enjoys in French and Greek public law. Interestingly, the critics of proportionality's reign share a belief in the possibility of categorising the various administrative law fields according to the substantive values that underpin them. Michael Taggart for example talked about the "bifurcation" of administrative law cases

---

[1831] Patrick Atiyah, *Pragmatism and Theory in English Law* (London: Sweet & Maxwell, 1987), 4.

[1832] Thomas Poole, "The Reformation of English Administrative Law," *CLJ* 68, no. 1 (2009): 153 f.

[1833] See Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse*, Cambridge Studies in Constitutional Law (Cambridge; New York: CUP, 2013). The author describes how in the US form is connected with ideology. On the contrary, in English legal thought it is not so much the case. Form is not connected with *particular* substantive outcomes but with the effectiveness of law in serving its purpose.

[1834] Paul Craig, *Administrative Law*, 8th ed. (London: Sweet & Maxwell, 2016) at 19-027.

[1835] Tom Hickman, *Public Law after the Human Rights Act* (Oxford: Hart, 2010), 270.

[1836] Poole, "The Reformation of English Administrative Law."

[1837] Hickman, *Public Law after the Human Rights Act*, 257.

into those involving rights and those involving "public wrongs".[1838] In this author's view, proportionality is an appropriate form only for the first type of cases. Similarly, Tom Hickman and Jeff King argue for the application of proportionality only where it is justified by the importance of the value at stake. They identify categories of substantive values, with fundamental rights being the central one.[1839] What the containment of proportionality within the field of human rights reveals is that the "righting" of English public law is not yet complete.[1840] Human rights are not deemed to be a framework sufficient to frame the whole of public action. They are constrained within a category, though it is generally admitted that the boundaries of this category are not clear-cut.

Categorisation is mainly achieved through the hetero-determination of human rights values. That is, their definition by reference to the ECHR and to Strasbourg case law. English legal writings typically employ the term "Convention rights" to designate rights standards. This is not surprising; as we saw, before the introduction of the HRA, rights corresponded to moral-political ideals in the common law. Following the Whig historians' account, civil liberties have been ensured in the UK through the rigorous application of the law and the enforcement of the sovereignty of Parliament. The HRA innovated in this respect by incorporating into domestic law the rights entrenched in the ECHR. The identification of rights with Convention rights is also expressed in positive law. When applying the HRA, courts do not perceive their role as one of enforcement of a domestic fundamental rights bill. Instead, they claim that in their capacity as public authorities under section 6 HRA, they act in conformity with the UK's international obligations.[1841] In *Al-Skeini,* the House of Lords held that "*the central purpose of the 1998 Act was to provide a remedial structure in domestic law for the rights guaranteed by the Convention*".[1842] That is why the right to an effective domestic remedy is not incorporated by the HRA: the Act itself is deemed to accomplish the purpose of this article. More than a fundamental rights principle then, proportionality is a remedy provided by the 1998 Act for the violation of the Convention. As such, it serves to achieve the UK's compliance with its international obligations. This has the result that, in contrast to what is observed in French public law, in English judicial review it is the formal-procedural rather than the substantive aspects of proportionality that are accentuated in this field.

This is especially true in relation to the scope of the application of proportionality as a HRA head. Just like Convention rights, only "victims" of fundamental rights violations have the right to bring proceedings under the HRA and to contest public measures as disproportionate. This results in a narrower *locus standi* than in ordinary

[1838] "Proportionality, Deference, Wednesbury," *NZLR*, 2008, 423.

[1839] Hickman, *Public Law after the Human Rights Act*; Jeff King, "Proportionality: A Halfway House," *New Zealand Law Review* 2010 (2010): 327.

[1840] See Michael Taggart, "Reinventing Administrative Law," in *Public Law in a Multi-Layered Constitution*, ed. Nicholas Bamforth and Peter Leyland (Oxford; Portland, Or: Hart, 2003), 323 f.

[1841] *Wilson v First County Trust Ltd* [2003] UKHL 40 (HL, 10 July 2003).

[1842] *R v Secretary of State for Defence, ex parte Al-Skeini* [2008] 1 A.C. 153 (HL, 13 June 2007), at 154.

judicial review cases.[1843] The scope of the applicability of rights and proportionality is limited by the scope of the Convention, which often differs from the scope of the HRA itself.[1844] Moreover, proportionality is applied with the variations that one finds in the ECHR case law. In *Daly,* Lord Steyn specified that his observations on the distinct nature of proportionality review as compared to the traditional *Wednesbury* standard apply "*making due allowance for important structural differences between various convention rights*".[1845] In some cases concerning matters of social policy proportionality corresponds to a unitary standard, following the ECtHR approach to positive obligations imposed on national authorities.[1846] Similarly, in cases involving the right to property, domestic courts do not impose a strict necessity requirement on public authorities.[1847] The definition of the HRA proportionality by reference to Strasbourg is at the source of its conceptual fragmentation. Domestic courts typically distinguish the proportionality head applied under the HRA from the one applied in EU law cases. Since in both of these contexts proportionality is a method for specifying the international obligations of the UK, and since these obligations differ, proportionality acquires a different function and form according to the field in which it operates.[1848]

The "mirror principle". Chapter 5 has shown that the spread of rationalism that underpin proportionality contributes to the construction of a public law that operates in the domestic sphere. However, this public law is not yet exactly *English*. It is the reflection of the Convention in English law. Section 2 HRA imposes on domestic courts the obligation to "take into account" Strasbourg case law and is thus perceived as constraining domestic courts' interpretation of the Convention. Following the opinion that prevailed in judicial practice, in the cases where Strasbourg has had the occasion to deal with the subject matter at hand, domestic jurisprudence should reflect Strasbourg case law like a mirror. Departure from Strasbourg solutions should be exceptional. In the words of Lord Rodger's illustrative dictum, "*Argentoratum locutum, iudicium finitum -Strasbourg has spoken, the case is closed*".[1849] As a consequence, domestic judges have presumed an obligation not to "outpace" ECtHR case law. That is, they have often refused to accord more extensive protection to Convention rights than the Strasbourg court. In *Ullah*, Lord Bingham clearly stated this:

> It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for

[1843] Mark Elliott, "The Human Rights Act 1998 and the Standard of Substantive Review," *CLJ* 60, no. 2 (2001): 301; Craig, *Administrative Law* chapter 24.

[1844] *Regina v Lambert* [2002] 2 A.C. 545 (HL, 5 July 2001); *In re McCaughey* [2011] UKSC 20 (SC, 18 May 2011).

[1845] *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26 (HL, 23 May 2001), para 27.

[1846] *R v. British Broadcasting Corporation, ex parte ProLife Alliance* [2003] UKHL 23 (HL, 15 May 2003).

[1847] *R v Attorney General & Another, ex parte Countryside Alliance and others* [2007] UKHL 52 (HL, 28 November 2007), para 75, *per* Lord Hope. See also *Wilson*, cited above.

[1848] Ibid. See also, more recently, *R v Legal Services Board, ex parte Lumsdon & others* [2015] UKSC 41 (24 June 2015).

[1849] *Secretary of State for the Home Department v AF, AN and AE* (No3) [2009] UKHL 28, (HL, 10 June 2009), para 98.

> rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.[1850]

In the same vein, in *Ambrose v Harris* Lord Hope underscored that,

> Lord Bingham's point, (…) with which I respectfully agree, was that Parliament never intended to give the courts of this country the power to give a more generous scope to those rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the treaty obligation, into free-standing rights of the court's own creation.[1851]

Neither Convention rights nor proportionality acquire a free-standing status in English judicial review. They are applied only through the "gateway" of the HRA. If English judges want to develop fundamental rights case law, they must do it through the common law. The proportionality head would have no place in such an evolution, though synonym methods of reasoning might be used. For certain authors, in the area of common law rights proportionality's rationalising function seems to be assumed by the principle of legality.[1852] Despite its emergence as a Commonwealth principle in *Daly*, proportionality is perceived and defined as a European head. This idea was initially accepted even by certain fundamental rights enthusiasts,[1853] but is increasingly criticised by the defenders of proportionality.[1854]

However, the lack of free-standing status for Convention rights in the domestic sphere becomes problematic in margin of appreciation cases. In such cases, reference to the ECHR case law leads to further reference by Strasbourg to domestic authorities. If Convention rights had no domestic legal status at all, the whole process would be a non-sense and would necessarily lead to the validation of domestic legislation. This, as we have seen, is the way the margin of appreciation has typically been understood by French courts, who presume that legislation has considered Convention rights and thus neglect the acculturation function of the ECHR. In contrast, the English understand the HRA as establishing Convention rights as domestic legal standards, imposed on the decision-making process of public authorities within the scope of the

---

[1850] *R v Special Adjudicator, ex parte Ullah* [2004] UKHR 26 (HL, 17 June 2004), para 20.

[1851] *Ambrose v Harris* [2011] UKSC 43 (SC, 6 October 2011), para 19.

[1852] Poole, "The Reformation of English Administrative Law," 2 citing Simms.

[1853] See, for example, Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: CUP, 2009), 153 f.

[1854] Francesca Klug and Helen Wildbore, "Follow or Lead?: The Human Rights Act and the European Court of Human Rights," *European Human Rights Law Review* 6 (2010): 621. On this debate, see Helen Fenwick, "What's Wrong with s.2 of the Human Rights Act?," *UK Constitutional Law Association* (blog), October 9, 2012, https://ukconstitutionallaw.org/2012/10/09/helen-fenwick-whats-wrong-with-s-2-of-the-human-rights-act/.

Convention. In this sense, in *re P*, Lord Hoffmann stated that "*Convention rights are domestic and not international rights*".[1855] The case concerned the bar set by Northern Irish legislation to adoption by unmarried couples. In a decision on the matter, the ECtHR had left the question to the margin of appreciation of national authorities. In Lord Hoffmann's view this meant that domestic courts should apply "*the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the United Kingdom*".[1856] Thus, the court applied traditional constitutional principles in this case. The Northern Irish Adoption Order was found to be irrational – proportionality was not at play.[1857]

Taking proportionality seriously. Despite the instrumental perception of proportionality, or precisely *due* to this perception, English lawyers and judges take its function seriously in the cases where it operates. Contrary to what is observed in the French *contrôle de conventionnalité*, proportionality provokes fundamental constitutional change under the HRA. In the review of legislation, it leads the judge to reframe the policy objectives of Parliament in terms that are acceptable to the Convention. In the words of Lord Nicholls,

> The Human Rights Act 1998 requires the court to exercise a new role in respect of primary legislation. This new role is fundamentally different from interpreting and applying legislation. The courts are now required to evaluate the effect of primary legislation in terms of Convention rights and, where appropriate, make a formal declaration of incompatibility. (…) If the legislation impinges upon a Convention right the court must then compare the policy objective of the legislation with the policy objective which under the Convention may justify a prima facie infringement of the Convention right. When making these two comparisons the court will look primarily at the legislation, but not exclusively so. Convention rights are concerned with practicalities. When identifying the practical effect of an impugned statutory provision the court may need to look outside the statute in order to see the complete picture (…). As to the objective of the statute, at one level this will be coincident with its effect. (…) But that is not the relevant level for Convention purposes. What is relevant is the underlying social purpose sought to be achieved by the statutory provision.[1858]

[1855] *In re P (Adoption: Unmarried Couple)* [2009] 1 AC 173 (HL, 18 June 2008), para 33, *per* Lord Hoffmann.

[1856] Ibid, para 37.

[1857] These observations do not apply to the *Nicklinson* case, where, despite the margin of appreciation left to national authorities by the ECtHR in the field of assisted suicide, the judges went on to apply proportionality reasoning (though, for Lord Neuberger, still without explicitly applying the proportionality head). See *R v Ministry of Justice, ex parte Nicklinson and another; R v The Director of Public Prosecutions, ex parte AM; R v The Director of Public Prosecutions, ex parte AM* [2014] UKSC 38 (SC, 25 June 2014). However, for the purposes of this analysis, *Nicklinson* can be considered an exceptional case and for the moment it is perceived as such by domestic lawyers. Of course, this does not exclude the application of *Nicklinson* in future case law.

[1858] *Wilson*, cited above, para 61, *per* Lord Nicholls.

The social purpose of legislation can also be sought in "*ministerial and other promoters' statements*" during parliamentary debates.[1859] Recourse to the *Hansard* is said to only establish the background of legislation, which can be used by judges as an external aid in the identification of the law's object. Hence, it is not considered to violate article 9 of the 1689 Bill of Rights. Still, the dividing line between identification of the legislative will and its judicial construction is not so clear. Kavanagh shows that consideration of parliamentary debates does influence English courts' weight on legislative appraisals.[1860]

This does not pass without a certain idealisation of the legislative will in cases where Parliament has considered Convention rights. In *Countryside Alliance*, for example, Lord Bingham gave the following reasons for deferring to the choice of Parliament:

> There are of course many in England and Wales who do not consider that there is a pressing (or any) social need for the ban imposed by the Act. But after an intense debate a majority of the country's democratically elected representatives decided otherwise. It is of course true that the existence of duly enacted legislation does not conclude the issue. (...) Here we are dealing with a law which is very recent and must (...) be taken to reflect the conscience of a majority of the nation.[1861]

Proportionality, due to the variable intensity of review that it entails, encourages Parliament to internalise human rights standards in its decision-making process. Besides, section 19 of the HRA mandates the competent Minister to make a statement concerning the compatibility of government bills with Convention rights. Internalisation of rights standards in the parliamentary process was furthered with the institution of the Joint Committee on Human Rights, which considers the compatibility of legislation with fundamental rights principles.[1862] Hence, Parliament and government ministers often reason in proportionality terms. The proportionality of domestic legislation, just like the protection of human rights, becomes a "joint project", in which the legislature and the judiciary cooperate.[1863]

While courts evaluate the effect of legislation, proportionality is not understood as an optimisation principle. Just like the ECtHR, domestic courts defer to Parliament's appreciations concerning the appropriateness or the necessity of the contested measures. *Wilson*, for example, concerned a provision in the Consumer Credit Act that precluded the enforcement of an obligation resulting from an improperly executed consumer credit agreement. The House of Lords accepted that, in some cases, the

---

[1859] Ibid, para 60.

[1860] Aileen Kavanagh, "Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory," *Oxford Journal of Legal Studies* 34, no. 3 (2014): 443.

[1861] *Countryside Alliance*, cited above, para 45. See also *R v Secretary of State for Work and Pensions, ex parte SG & Others* [2015] UKSC 16 (SC, 18 March 2015), para 95, *per* Lord Reed.

[1862] Janet Hiebert, "Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?," *International Journal of Constitutional Law* 4, no. 1 (2006): 1.

[1863] Rivers, "Proportionality and Variable Intensity of Review," 207.

sanction imposed on the creditor for not fulfilling the formalities of the Act would be too harsh. However, the dissuasive goal of the legislation in question rendered the measure proportionate. Lord Nicholls underscored that the Consumer Credit Act pursued the protection of consumers. In his view, imposing the sanction only in cases where it would be proportionate would not achieve the goal of the legislation. As he put it, "*[s]omething more drastic was needed in order to focus attention on the need for lenders to comply strictly with these particular obligations*".[1864] In his words,

> the purpose or policy underlying the statutory bar on enforceability of a regulated loan agreement where no document containing all the prescribed terms has been signed by the debtor cannot, in my opinion, be categorised as disproportionate. The need to control moneylending transactions is as old as our civilization and I know of no legal system that has not imposed such controls.[1865]

Thus, the preventive goal of the measures justified the Government's assessment as to their appropriateness and necessity. According to the judge, the measures at hand could not be said to be contrary to the European legal civilisation that the Convention purports to establish. Interestingly this kind of reasoning stands in contrast to the application of proportionality in *Michaniki* by the ECJ and the Greek Council of State.

Proportionality and institutional culture. In the context of the HRA, proportionality is neither totally intent-based nor an objective, impact-based test. Like in the ECtHR jurisprudence, it purports to sanction domestic authorities' indifference towards Convention rights. In English public law then, proportionality assumes the function of acculturation that the Strasbourg court has ascribed to it. Since the passing of the HRA, English lawyers have perceived the Act as establishing a "human rights culture" or a "culture of justification".[1866] In the words of Lord Hope in *Kebeline*, "*the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules*".[1867] Proportionality plays a crucial role in the cultural shift produced by the HRA, since it places the burden of justifying and adducing evidence as to the legitimacy of rights restrictions on public authorities. Contrary to the patchwork-like role it assumes in France, in English public law proportionality applies as a matter of principle within the scope of the HRA. Far from only exceptionally serving foreigners, like in the French case, it transforms the whole of English public law and has become a core issue of debate in this context. Exceptions to its application are framed as such and justified by domestic courts. In *Kay*, for example, the House of Lords declared that in some

---

[1864] Ibid, para 71.

[1865] *Wilson*, cited above, para 169, *per* Lord Nicholls.

[1866] Murray Hunt, "The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession," *Journal of Law and Society* 26, no. 1 (1999): 86; Kavanagh, *Constitutional Review under the UK Human Rights Act*, 241 f.; Hickman, *Public Law after the Human Rights Act*, 236 f.; Poole, "The Reformation of English Administrative Law", who talks about an "administrative culture of rights-conscious justification"; David Mead, "Outcomes Aren't All: Defending Process-Based Review of Public Authority Decisions under the Human Rights Act," *PL*, 2012, 63; Taggart, "Reinventing Administrative Law," 332 f.

[1867] *Kebeline*, cited above, 380.

cases it would presume the proportionality of legislation to avoid "*a colossal waste of time and money*".[1868] This would be the case when "*complex, ever-changing law is testimony to the elaborate steps taken by Parliament to strike an appropriate balance between the competing interests*".[1869]

The culture that the HRA establishes is not solely moral-legal but also institutional.[1870] English courts already impose proportionality as a reasoning framework on tribunals when deciding on public authorities' decisions on appeal.[1871] The idea thus emerges that proportionality should be employed in the decision-making process of public bodies too.[1872] Certain scholars and judges have assumed a positive requirement to explicitly use the proportionality framework by policy-makers. This was criticised by Thomas Poole and other scholars as leading to some kind of "new formalism".[1873] The House of Lords emphatically rejected it in *Begum*:[1874] public bodies "*cannot be expected to make such decisions with textbooks on human rights law at their elbows*".[1875] Nevertheless, courts have made clear that they will give weight to the considered opinions of the reviewed authorities[1876] and that they will find it difficult to interfere when these authorities have explicitly attempted to strike a balance between the competing rights and interests at stake.[1877] Far from being symbolic, the function of proportionality in English law is one of profound cultural and constitutional transformation that tends to affect the whole of public action. It is a function of constitutional transformation that proportionality was ascribed in the Greek context too, albeit in a very different way.

4. A method for teleological interpretation: proportionality and the telos of Greek legislation

Voluntarism and insularity in the domestic interpretation of rights. As Chapter 6 has shown, the 1975 Constitution has been inspired by the post-war European paradigm of rights. Domestic lawyers perceive this Constitution as the text

---

[1868] *Kay v Lambeth LBC* [2006] 2 A.C. 465 (HL, 8 March 2006), para 55.

[1869] Ibid, para 53. On the same issue, see also *Doherty and others v Birmingham City Council* [2008] UKHL 57 (HL, 30 July 2008) and *Manchester City Council v Pinnock* [2010] UKSC 45 (SC, 3 November 2010).

[1870] Hickman, *Public Law after the Human Rights Act*, 236 f.

[1871] See *Huang v Secretary of State for the Home Department; Kashmiri v Same* [2007] 2 A.C. 167 (HL, 21 March 2007).

[1872] See for example *R v. Governors of Denbigh High School, ex parte Begum*, [2005] 1 W.L.R. 3372 (CA, Civil Division, 2 March 2005), *per* Brooke LJ. On this point, see Hickman, *Public Law after the Human Rights Act*, 245 f.; Mead, "Outcomes Aren't All"; Kavanagh, "Proportionality and Parliamentary Debates."

[1873] Thomas Poole, "Of Headscarves and Heresies: The Denbigh High School Case and Public Authority Decision Making under the Human Rights Act," *PL*, 2005, 685; "The Reformation of English Administrative Law," 691 f.

[1874] *R v Headteacher and Governors of Denbigh High School, ex parte Begum* [2006] UKHL 15 (HL, 22 March 2006), esp. para 31; see also *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420 (HL, 25 April 2007).

[1875] *Begum* (HL), cited above, para 68, *per* Lord Hoffmann.

[1876] *Kebeline*, cited above, *per* Lord Hope.

[1877] *Miss Behavin',* cited above, para 37, *per* Baroness Hale; Craig, *Administrative Law* at 19-018.

that reconnected the domestic constitutional civilisation to the European one. Initially, reverence for the post-*junta* constitutional establishment encouraged a formalist application of constitutional rights according to the presumed will of the original drafters of the constitutional text. Since the 1975 Constitution was drafted with the Convention in mind, European concepts were perceived as synonymous with their literal translation in the domestic sphere. Like in the French case, because certain European and Greek concepts shared the same *nom propre*, they were also presumed to share the same conceptual content. Over a long period, when the ECHR was invoked it was the relevant domestic constitutional right that applied.[1878] This led to an "originalist" interpretation both of the Constitution and of the Convention. Assimilation of domestic and European values resulted from an excessive judicial deference to Parliament. The ECtHR case law was not taken into account by domestic courts in rights adjudication.[1879] Proportionality long remained a domestic principle and not a European test in the minds of Greek public lawyers.

In some cases, judges refused to apply Strasbourg precepts by referring to the domestic Constitution. The most prominent example was the insistent refusal to attribute supra-legal protection to obligations, as opposed to real rights, in contrast to Strasbourg case law on the matter. Decision 28/1994 by the Court of Audit concerned the constitutionality of a statute dating from 1990, which had imposed maximum limits on pension rights.[1880] The statute was implemented through individual acts requiring the reimbursement of amounts already paid to pensioners that exceeded the legally defined limit. A pensioner affected by the provision contested its compatibility with article 1 of the FAP ECHR. The Court of Audit, following its consistent case law, refused to attribute supra-legal protection to pension rights. In its view, since article 17 of the Constitution only protected real rights, the protection of pecuniary rights like pensions was left to the discretion of Parliament. Thus, contrary provisions of the ECHR, or contrary solutions resulting from Strasbourg case law, were not applicable in the domestic order.

Insularity in the definition of the scope of rights constrained the dynamics of proportionality. The Court of Audit concluded that the impugned measures could "*not be regarded as not being in proportion with the public interest served*".[1881] The Convention did not add substantive standards in the domestic constitutional order and thus, proportionality did not impose further limits on the pursuit of legislative goals. A different solution would lead the court to encroach upon the constitutional powers of the democratically elected Parliament. Indeed, what the Court of Audit was concerned with was enforcing the constitutional distribution of competences and not protecting

[1878] See StE (Pl.) 2376/1988 *APM* 1989, 1034. In this decision the court held that the constitutional provision guaranteeing the right to education ensures the protection of pluralism in education, guaranteed by article 2 FAP ECHR.

[1879] On the case law of Greek courts expressing this dogmatic perception of the operation of the ECHR in the domestic order, see Kostas Chryssogonos, *Η ενσωμάτωση της Ευρωπαϊκής Σύμβασης των Δικαιωμάτων του Ανθρώπου στην εθνική έννομη τάξη [The Incorporation of the European Convention on Human Rights into the National Legal Order]* (Athens; Komotini: Αντ. Ν. Σάκκουλας, 2001).

[1880] ES 28/1994 *ΔΕΝ* 1994, 439 (Court of Audit).

[1881] Ibid.

fundamental rights. In its decision, it repeatedly stated that "*the common legislator is entitled to limit*" pension rights.[1882] Besides, according to constitutional orthodoxy, the protection of Convention rights was deemed to be primarily the mission of the political branches of government and not of the judiciary. Preserving the powers of Parliament against anti-parliamentarian forces was long perceived as a major task of the domestic constitutional order.

The process of acculturation and the powers of the judiciary. Since 1985, when individual petition was allowed before the ECtHR, condemnations of Greece for human rights violations became increasingly resonant in the domestic legal-political sphere. Rights protection thus became another goal of Greek constitutional discourse and practice. Still, like in the French case, it has been mainly the legislator and the administration that have strived to comply with Strasbourg precepts.[1883] The accommodation of Convention standards in the domestic sphere has rarely acquired the form of a specific remedy and has had little to do with proportionality. In studies concerning the influence of the ECHR on domestic law, proportionality is hardly mentioned or not mentioned at all.[1884] Domestic lawyers perceive the Convention as setting concrete requirements of rights protection in particular situations rather than establishing overarching methods of reasoning. Thus, like in France, the structural aspects of proportionality in the ECtHR case law have largely been neglected in Greek public law.

Contrary to what has been the case in France however, this has not been a result of disregard towards the acculturation function of the Convention. While many Greek lawyers perceive their country as the motherland of democracy, few are those who would say that it is a model of human rights protection. As we saw, domestic lawyers have looked with admiration at the Convention as part of a European constitutional civilisation that they saw as a model for Greek constitutionalism. Integration into the ECHR legal order was understood as part of a socio-political momentum that transcended legal forms. Antonis Manitakis observes that "[t]he application of the ECHR in Greece is not exhausted to a simple legal event, but exercises institutional influence and impacts on the state, the society and the political system".[1885] As democracy seemed to have been consolidated under the Constitution, the quest for "humanisation" of the Greek state became increasingly pressing. Soon, judges were also called to participate in the process of accommodating the European rights

---

[1882] Ibid.

[1883] Georgios Stavropoulos, "Η επίδραση της ΕΣΔΑ στην ελληνική έννομη τάξη [The Influence of the ECHR on the Greek Legal Order]," December 9, 2017, https://www.constitutionalism.gr/stavropoulos-esda-elliniki-ennomi-taxi/.

[1884] In his book concerning the application of the ECHR by domestic courts, Kostas Chryssogonos hardly mentions proportionality. See Chryssogonos, *Η ενσωμάτωση της Ευρωπαϊκής Σύμβασης των Δικαιωμάτων του Ανθρώπου στην εθνική έννομη τάξη [The Incorporation of the European Convention on Human Rights into the National Legal Order]*, esp. 173 f. For a more recent example, see Stavropoulos, "Η επίδραση της ΕΣΔΑ στην ελληνική έννομη τάξη [The Influence of the ECHR on the Greek Legal Order]."

[1885] Manitakis *in* Michalis Tsapogas and Dimitris Christopoulos, eds., *Τα δικαιώματα στην Ελλάδα. Από το τέλος του εμφυλίου στο τέλος της μεταπολίτευσης [Rights in the Greece 1953-2003. From the End of the Civil War to the End of Metapolitefsi]* (Athens: Καστανιώτης, 2004), 435.

civilisation. The application of the domestic Constitution in a way that contrasted to this civilisation was increasingly criticised as erroneous by domestic lawyers. In the beginning of the '90s, courts started taking international rights provisions into account when adjudicating on the Constitution. This movement started with lower judges, especially in the field of criminal law.

Proportionality and the reinvention of domestic measures. Decision 12/1991 concerned a measure granting temporary custody.[1886] This measure had long been hastily applied by domestic officials, whenever indications existed that the suspect was guilty. The judge charged with criminal investigations in Tripoli, on the contrary, considered that this should no longer be the case. Temporary custody is an "*extreme measure of procedural enforcement*", the consequences of which "*do not differ from serving the penalty*". Thus, it should only be imposed when absolutely necessary for the prevention of recidivism, when the accused is especially dangerous for society or suspected of attempting to flee trial. In order to reach this decision the judge invoked the United Nations Declaration of Human Rights, the ECHR and certain Strasbourg decisions. Interestingly, though the Constitution did not contain any relevant provisions, the judge stressed that the presumption of the accused's innocence declared by the international texts was "*constitutionally protected*", by virtue of article 28 the Constitution. By invoking international rights standards, the criminal judge affirmed to himself the power to define the legitimate aims of temporary custody. This affected the application of proportionality, which functioned as a narrowly tailored test.[1887] In the same vein, the military court of Thessaloniki invoked article 6 ECHR and the relevant Strasbourg case law to disapply a statute that imposed temporary custody as an obligatory measure for suspects accused of serious crimes. The judges held that this provision did not allow for *in concreto* decision-making according to the suspect's personality and other circumstances. Hence, it was an overkill in pursuit of the objectives of temporary custody.[1888]

In the above cases, proportionality led to an intrusive scrutiny of public measures. However, close attention to judicial reasoning shows that this was not due to its application as an impact-oriented balancing test but to the judicial reconstruction of the reviewed measures' *aims* in light of international rights.[1889] Indeed, in the above cases the ECHR and other international human rights texts were applied as part of domestic law, thus giving new meaning to pre-existing measures and institutions, "humanising" them. They projected a new value-laden content on the ideas of a state ruled by law, which acquired a protective function for individuals. In this way, human rights were imposed on Parliament's definition of policy goals. Proportionality as a narrowly tailored test came into play only *after* the judge had reinvented the goals of

[1886] Anakr Tripoli 12/1991 *ΠΟΙΝΧΡ* 1991, 932 (Tripoli instruction judge).

[1887] Ibid.

[1888] DStrThess 482/1993 *ΑΡΜ* 1993, 1166. This evolution took place in other fields as well. For example, see DPrAth 6628/1997 *ΕΔΙΚΑ* 1997, 642 (Athens Administrative Court of First Instance), concerning article 1 FAP ECHR.

[1889] This is connected to voluntarist vision of legislation that underpins the application of proportionality in this context. On this point, see *supra*, Part II, Chapter 6(2).

public policy measures in accordance with international human rights. Hence, it had a secondary, rather operational role in this process, since it did not concern the choice of the values promoted through judicial interpretation. Proportionality restricted or expanded the scope of legislative provisions in view of their *telos*. It consisted in a method of teleological interpretation.[1890] While its use was not exceptional or corrective like it was in France, it remained a scrutiny of the legislative means-ends, according to the circumstances of the case.

Under pressure from scholars, lawyers and judges, the supreme courts also affirmed their power to interpret domestic legislation in conformity with the Convention. In the beginning, they did so only implicitly.[1891] Connection to the Convention became more and more explicit however, since in some cases Greek courts were obliged to reverse their previous case law following Strasbourg condemnations.[1892] Old provisions and institutions of the Greek legal order were reinvented to adapt to the European constitutional civilisation that the Convention professed. In this process, proportionality functioned as an interpretative tool. In the meantime, its meaning as an ECHR principle was progressively established in the minds of Greek public lawyers.[1893]

Proportionality in imprisonment for debt cases. Imprisonment for debt cases in private law offer an illustration of the way the Convention and proportionality have operated in the domestic sphere. From the entering into force of the 1975 Constitution, some scholars had already argued that imprisonment for debt was contrary to the protection of human dignity, ensured by article 2(1). This opinion was reinforced after the ratification of the International Covenant on Civil and Political Rights in 1997. In its article 11 the Covenant explicitly prohibited the imprisonment of individuals solely because of their inability to repay their debts. Thus, in a series of decisions dating from 1997 and 1998, some Courts of Appeal had disapplied the relevant domestic legislation, holding that the ratification of the Covenant had implicitly abrogated it.[1894]

The above decisions were criticised in an article dating from 1999 by Giorgos

---

[1890] In this sense, see Georgios Mitsopoulos, "«Τριτενέργεια» και «αναλογικότητα» ως διατάξεις του αναθεωρηθέντος Συντάγματος ['Third Party Effect' and 'Proportionality' as Provisions of the Amended Constitution]," *ΔτΑ* 15 (2002): 641.

[1891] StE 3739/1999 *NoB* 2000, 1323. On this, see Chryssogonos, *Η ενσωμάτωση της Ευρωπαϊκής Σύμβασης των Δικαιωμάτων του Ανθρώπου στην εθνική έννομη τάξη [The Incorporation of the European Convention on Human Rights into the National Legal Order]*, 274.

[1892] AP (Pl.) 40/1998 *APM* 1999, 46; StE (Pl.) 542/1999 *ΤΝΠΔΣΑ*.

[1893] Sarantis Orfanoudakis, *Η αρχή της αναλογικότητας στην ελληνική έννομη τάξη : από τη νομολογιακή εφαρμογή της στη συνταγματική της καθιέρωση [The Principle of Proportionality in the Greek Legal Order: From Its Judicial Application to Its Constitutional Consecration]* (Thessaloniki: Σάκκουλα, 2003); Charalampos Anthopoulos, "Όψεις της συνταγματικής δημοκρατίας στο παράδειγμα του άρθρου 25 παρ. 1 του Συντάγματος [Aspects of Constitutional Democracy in the Example of Article 25 Par. 1 of the Constitution]," in *Το νέο Σύνταγμα*, ed. Dimitrios Tsatsos, Evaggelos Venizelos, and Xenophon Contiades (Athens; Komotini: Αντ. Ν. Σάκκουλας, 2001), 153.

[1894] See EfAth 6903/1997 *APM* 1997, 1393 (Athens Court of Appeal); EfPeir 1410/1997 *ΤΝΠΔΣΑ* (Piraeus Court of Appeal).

Vellis, Vice-President of *Areios Pagos* at the time.[1895] For Vellis, the constitutional protection of human dignity could not apply to dishonest debtors, since the purpose of the Covenant was not to protect bad faith. The conflict between domestic legislation and international rights should be resolved through application of proportionality. Vellis argued that while imprisonment for debt affected the rights of debtors to personal liberty and to human dignity, guaranteed by the ECHR and other international texts, at the same time it guaranteed creditors' right to fair trial and to effective judicial protection. Therefore, he analysed the situation as a conflict of rights, in which proportionality operated as a conflict-resolution norm by imposing a requirement of necessity or non-abuse. In the Vice-President's view, imprisonment could be vindicated, and thus was a right of the creditor, only when no less restrictive means were available. In any case, it should not be applied when the debtor had no property, since it would only serve to blackmail the debtor's family and friends and thus would depart from the goal of the legislation.

In Vellis' analysis then, proportionality once again assumed the function of rectifying the aims of legislative measures. The author identified the aim pursued by imprisonment for debt, not by reference to the will of the legislator that had originally provided for this measure, but *objectively*, in view of an aim that could be judged legitimate at the time of application of the measure. This had significant consequences for the reasoning that followed. The legislative provisions were applicable only insofar as they pursued this legitimate goal. In consequence, the notion of abuse of a right was objectivised as well. It no longer concerned the intentions of the rights holder but the scope of the right itself. Proportionality functioned as a method of teleological interpretation of legislative measures in light of their goal. This goal was not anymore the purpose of the *original* legislator but the function that the measures could assume in a democratic society. Put briefly, proportionality substituted dynamic for purposive interpretation and imposed a requirement of equity or of less onerous means on legislation that was applied according to the circumstances of the case. Vellis' article became dominant case law in subsequent decisions. By 2000 *Areios Pagos* had also explicitly proclaimed the application of proportionality in this way.[1896]

The "interpretative osmosis" of Greek and European law. As we saw in Chapter 6, domestic lawyers progressively appropriated the European civilisation that they saw as a model. This process culminated with the 2001 constitutional reform, which entrenched the European rights paradigm in the domestic Constitution. Scholars thought of the new article 25 as expressing the accession of the domestic Constitution to a "European public order in the field of human rights", which was ever-expanding.[1897] Appropriation of the European rights civilisation was expressed in the application of the Convention in the domestic sphere. Since 2001 in particular,

[1895] Giorgos Vellis, "Η προσωπική κράτηση μετά το Ν. 2462/1997 [Personal Detention after Law n. 2462/1997]," *Ελλ∠νη* 40 (1999): 9.

[1896] AP 1597/2000 *∠/NH* 2001, 1304; AP 254/2000 *EEMIT∠* 2000, 712.

[1897] Kostas Chryssogonos, "Η προστασία των θεμελιωδών δικαιωμάτων στην Ελλάδα πριν και μετά την αναθεώρηση του 2001 [The Protection of Fundamental Rights in Greece before and after the 2001 Reform]," *∠τA* 10 (2001): 541: «ευρωπαϊκής δημόσιας τάξης στο πεδίο των ανθρωπίνων δικαιωμάτων».

Greek courts have indiscriminately applied constitutional and Convention rights, as if they derived from the same text or from texts of the same legal status.[1898] Chryssogonos has talked about the "interpretative osmosis" of the domestic and the European legal orders.[1899] Proportionality as a method of teleological interpretation in the field of human rights has also affected the adjudication of domestic constitutional provisions. In cases involving procedural rights and access to court, judges have not hesitated to apply proportionality as a strict necessity requirement against Parliament.[1900]

Osmosis of domestic and European rights has sometimes led to the osmosis of domestic and European versions of the principle of proportionality. In decision 26/2003, *Areios Pagos* cumulatively applied the constitutional and ECHR provisions concerning the protection of property and professional freedom.[1901] The court started by proclaiming proportionality to be a domestic constitutional principle, guaranteed by article 25(1) of the Constitution but pre-existing its constitutional entrenchment. The judges specified that proportionality imposes the requirements of suitability, necessity and proportion on legislative measures that restrict rights. However, in the reasoning that followed the court went on to apply the "fair balance" standard used by the ECtHR in the field of property.

Paradoxically however, the appropriation of proportionality by Greek lawyers has deprived it of the dynamic that one observes in the English context. Indeed, in Greek judicial reasoning, proportionality functions as a *method* and not as a structure or head of review. Proportionality is not a remedy for the violation of the Convention. Its application is inconsistent and fragmented. It is absent from important domestic decisions concerning religious freedom or the freedom of association,[1902] despite condemnations by Strasbourg in these fields, often issued on the basis of proportionality.[1903] This is because Convention rights and Strasbourg case law are generally perceived as imposing *concrete substantive outcomes* in rights protection, and not particular justification or adjudication patterns. Strasbourg precepts are more often taken into account in the doctrinal definition of the scope of legal norms. Hence, in

---

[1898] See for example decision StE 1065/2002 *Ελλ⊥νη* 2003, 1073. In this case, the Council of State invoked both article 20 par. 1 of the Constitution and 6 ECHR concerning the right to effective judicial protection.

[1899] Chryssogonos, *Η ενσωμάτωση της Ευρωπαϊκής Σύμβασης των ⊥ικαιωμάτων του Ανθρώπου στην εθνική έννομη τάξη [The Incorporation of the European Convention on Human Rights into the National Legal Order]*, 192 f.; Apostolos Gerontas, "Η αρχή της αναλογικότητας και η τριτενέργεια των θεμελιωδών δικαιωμάτων μετά την αναθεώρηση του 2001 [The Principle of Proportionality and the Third Party Effect of Fundamental Rights after the 2001 Reform]," in *Πέντε χρόνια μετά τη συνταγματική αναθεώρηση του 2001*, ed. Xenophon Contiades, vol. A (Athens; Komotini: Αντ. Ν. Σάκκουλας, 2006), 491.

[1900] See AP (Pl.) 20/2000 *TNIL⊥ΣA*. On this case see Stefanos Matthias, "Το πεδίο λειτουργίας της αρχής της αναλογικότητας [The Scope of the Principle of Proportionality]," *Ελλ⊥νη* 47, no. 1 (2006): 1.

[1901] AP (Pl.) 26/2003 *Ελλ⊥νη* 2003, 1263.

[1902] For some examples, see StE (Pl.) 2281/2001 *⊥⊥ΙΚΗ* 2001, 959, validating the decision that prohibited the inscription of a person's religion on her official ID card; StE (Pl.) 4202/2012 *Ε⊥⊥⊥* 2013, 505, declaring as unconstitutional the preliminary license requirement for the establishment of non-Orthodox worship places, insofar as it empowered the competent Minister to refuse such a license on substantive grounds.

[1903] For some examples, see *Manoussakis and others v Greece*, 26 September 1996, no. 18748/91, *Kokkinakis v Greece,* 25 May 1993, no. 14307/88, *Sidiropoulos*, cited above, *Tourkiki Enosi Xanthis v Greece*, 27 March 2008, no. 26698/05.

contrast to what is observed in the English context, proportionality has not brought with it a culture of rights and justification. Once again in this field, the aesthetic coherence between domestic law and the Convention has been more important than the effective application of Convention standards. While integration into the ECHR legal order has been perceived as an instance of constitutional acculturation, it has not always changed well-established mentalities and institutional practices.

***

The application of proportionality in Strasbourg case law is difficult to systematise. While the content and impact of public decisions on rights are taken into account in the assessment of proportionality, the European court does not impose Convention rights as optimisation requirements. While the goals of public measures play an important role before the European judge, proportionality does not consist of a test solely concerned with the good faith and sincerity of public authorities. Strasbourg case law in the field of proportionality prompts domestic authorities to take the Convention into account in domestic policy-making and to reformulate public policy goals in terms that are acceptable "in a democratic society". Far from consisting of a simple procedural requirement, proportionality imposes rights as national decision-making standards, which operate not only at the level of legal theory but also in the concrete factual assessments by domestic authorities. While the margin of appreciation allows for a certain relativism in the protection of Convention rights, proportionality in the Strasbourg case law pushes towards the establishment of a human rights culture, both at the level of results and at the level of justification of rights restrictions. However, domestic lawyers and courts have perceived the function of proportionality and the operation of the Convention in the domestic sphere differently, according to the narratives that are dominant in each domestic context.

In France, *la patrie des droits de l'Homme*, the ECHR has represented a European rights civilisation that already permeated domestic law. Accommodation of Convention standards has not proceeded through transformation of the structures and theories of judicial review. Nor has it taken the form of a specific remedy for Convention violations. In French *doctrine,* proportionality has not been perceived as an ECHR head but as an objective general principle that already existed in the *bloc de légalité* and inspired judicial review. Hence, compliance with the Convention took place within the context of the traditional distribution of competences between domestic authorities. A partnership was established between the Parliament, the administration and the judiciary, so as to ensure the application of domestic law in accordance with Strasbourg precepts. Adaptation of the domestic legal order to the Convention has thus proceeded through legislative and administrative reform, as well as through the judicial reconstruction of legislative measures. In this context, violations of the Convention and of the principle of proportionality guaranteed therein, have been perceived as exceptional, resulting from the circumstances of concrete cases rather than from a shift between the French and the European constitutional civilisations. In

contrast to its perception as a general principle in the *doctrine,* in domestic judicial practice proportionality has acquired a corrective function. It has been residually applied as a "patch", mainly in the scope of the ECHR. Its function has mostly been to "signal" France's commitment to Convention rights. Otherwise, compliance to those rights has primarily been the competence of Parliament.

On the contrary, according to the Whig historians' account, rights in the UK have not been protected through law but through the enforcement of the principle of parliamentary sovereignty. Law's autonomy and effectiveness as a commandment have been crucial in this context. Legal structures, such as concepts, procedures and heads of review, are seen as tools, ensuring institutional balance and effective decision-making according to the will of Parliament. They are not perceived as a coherent whole but as a "polyglot patchwork". Since the introduction of Convention rights in the domestic sphere, proportionality has been added to the tool-box of domestic judges. As a head of review, it serves the adjudication of HRA rights and thus ensures the UK's compliance with its international obligations. This is why it is constrained within the scope of the HRA. It is not a domestic head of review, just as the HRA is not a domestic bill of rights. It is applied by reference to Strasbourg and does not outpace Strasbourg case law. Albeit constrained and instrumentalised, proportionality plainly assumes its acculturation function. In contrast to France, where its use in judicial reasoning is exceptional and circumstantial, in England the application of proportionality in the ever-expanding scope of human rights is a matter of principle. The rationalism that proportionality conveys provokes a paradigmatic change in domestic judicial review. Domestic legal actors increasingly reason in proportionality terms.

In Greece, the European rights culture that the ECHR professes has long been seen as a model by domestic lawyers. However, the judiciary was initially concerned with preserving the competence of the democratically elected Parliament and refused to give effect to Convention rights insofar as they imposed further limits on legislative power. Like in France, the dynamic of proportionality was constrained by the traditional structures of judicial review, and compliance with the Convention more often proceeded through legislative and administrative reform. It did not acquire the form of a concrete remedy for the violation of Convention rights. Progressively, as rights protection became a major goal of the domestic constitutional order, domestic courts started to enforce the requirements of the European rights civilisation. Adaptation to Strasbourg precepts has proceeded through the judicial reinvention of traditional provisions and institutions, in conformity with the standards of a democratic society. Proportionality has participated in this process as a method of teleological interpretation. In contrast to what is observed in France, it has not functioned as an exception applied according to the circumstances. Instead, it has determined the scope of domestic provisions in conformity with their legitimate goal, their *telos*. In contrast to what is observed in England however, proportionality in Greece is a *method* and not a head of review. Domestic lawyers have largely neglected the structural aspects of proportionality in the field of the ECHR and have focused on

the aesthetic coherence between the Convention and domestic law. This has considerably undermined its acculturation dynamic in this context.

CHAPTER 8
A common market

EU integration and domestic constitutions. The function of proportionality in the context of EU law is again a function of integration. Yet, whereas in the case of the ECHR integration has been value-oriented, consisting in the establishment of rights as decision-making standards, in the EU law context it has been mainly focused on concrete facts. It is well-known that initially EC Treaties were instrumental to the establishment of a common market, as one of the "concrete achievements"[1904] on the road to an "ever-closer union among the peoples of Europe".[1905] It became clear very early that the effects of EU law went far beyond those of other international orders, even of the ECHR, and transcended traditional categories applying to the operation of international law in domestic contexts. The Court of Justice declared EU law to be an integrated legal order and postulated its direct effect vis-à-vis private persons and its primacy over domestic law. Further, the principle of *effet utile,* well-established in ECJ case law, mandates the interpretation and application of EU law provisions in a way that best advances their purpose. Due to its focus on concrete cases, the effectiveness of EU law continually relies on national authorities' cooperation, and especially on the cooperation of national judges. The Luxembourg court asks domestic courts to be the "*juges communautaires de droit commun*".[1906]

EU integration has required the adaptation of domestic legal orders and has provoked important structural changes in local legal discourses. Domestic lawyers have reacted differently to pressure on the part of EU law. In some cases, the changes that the advancement of EU integration required were identified in domestic academic analyses or judicial opinions, while in others they remained unnoticed by domestic lawyers. Sometimes they were translated into legal or even constitutional change, while in others they were obtained through unofficial and incremental evolution.

In France, one observes a progressive openness of the domestic Constitution to EU integration. In its *Maastricht* decision dating from 1992, the Constitutional Council declared that the abandonment of the unanimity rule in the Council for certain decisions concerning external relations was contrary to the French Constitution.[1907] This provoked an amendment which added a special section to the French Constitution dedicated to the EC and the EU.[1908] Most notably, article 88-1 provides for the participation of the French Republic in these supranational organisations and

[1904] Robert Schuman, "Declaration of the French Government for the Creation of the European Coal and Steel Community," Paris, 9 May 1950.
[1905] Preamble of the Treaty of Rome, 25 March 1957.
[1906] TPI, T-51/89, 10 July 1990, *Tetra Pak Rausing SA*, ECLI:EU:T:1990:41, para 42.
[1907] Decision no. 92-308 DC, 9 April 1992, *Traité sur l'Union européenne.*
[1908] Loi - art. 5 JORF 26 juin 1992.

allows for the transfer of certain constitutional competences to European institutions. Based on this provision, since 2004 the Constitutional Council has accepted that the transposition of EU directives is a constitutional obligation of French public authorities.[1909] Furthermore, in its decision concerning the Constitutional Treaty in 2005, the constitutional court clearly accepted the integration of EU law in the domestic legal order and its special nature compared to other international obligations of the country. Hence, for the Council, ratification of the Constitutional Treaty did not require further constitutional amendment.[1910] That being said, the French people rejected the Constitution for Europe in a referendum in 2005.

In England, it is the ECA 1972 that initiated the process of European integration in the domestic sphere. As we saw, this Act incorporated EU Treaties and the substantive rights entrenched therein into domestic law. Still, the extent of the changes required for the effective application of EU law was not completely realised by domestic lawyers until the 1990s. In *Factortame*, English judges affirmed their power to disapply an Act of Parliament when it is in breach of EU law. Moreover, in the same case the House of Lords agreed to grant an interim injunction preventing the Crown from applying an Act of Parliament, while no such power was provided to courts by the English constitution before that.[1911] As we saw, the concept of parliamentary sovereignty had to be reinvented in order to accommodate limitations on Parliament's omnipotence in the context of EU law.[1912] Still, as the process of European integration was advancing, the question of democratic government became increasingly pressing. Submitting future Treaty amendments to referendum became a major political request. By 2008, when the EU Amendment Act incorporated the Lisbon Treaty (without a referendum), it was already clear that EU integration was not a project endorsed by the entirety of English people, and that in any case it was not for Parliament to take the final decision on this crucial point.

In Greece, the 1975 Constitution provided for EU integration even before the accession of the country to the European Communities. The second paragraph of article 28 declares that constitutional competences may be transferred to international agencies, when this "serves an important national interest and promotes cooperation with other States".[1913] In its third paragraph, this article provides for even more advanced international cooperation:

> Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of

[1909] Decision no. 2004-496 DC, 10 June 2004, *Loi pour la confiance dans l'économie numérique*, ECLI:FR:CC:2004:2004.496.DC.

[1910] Decision no. 2004-505 DC, 19 November 2004, *Traité établissant une Constitution pour l'Europe*, ECLI:FR:CC:2004:2004.505.DC.

[1911] *R v Secretary of State for Transport, ex parte Factortame Ltd* [1991] 1 AC 603 (HL, 11 October 1990).

[1912] See *supra*, Part I, Chapter 2(2).

[1913] Source of translation: http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf.

> democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity.[1914]

Since 2001, an interpretative clause added to article 28 specifies that this provision "constitutes the foundation for the participation of the Country in the European integration process".[1915] Despite the broad possibilities left by the Greek Constitution for advancing the EU integration project, facing the Eurozone crisis required measures that admittedly went far beyond constitutional provisions. Domestic constitutional scholars have talked about a "turning point" in the functioning of the domestic polity,[1916] a "deregulation" of the domestic constitutional order[1917] or even a "para-constitution" established by means of legal instruments for economic adjustment.[1918]

Proportionality and the appropriation of EU legal values by domestic lawyers. This Chapter consists in a survey of the varying application of proportionality by the ECJ and by domestic courts in the field of EU market freedoms. Of course, European integration has not only been about the common market. Overshooting the hopes and expectations of those who inspired its creation, today the EU promotes vaster and more far-reaching goals and values. Most notably, following the example of the ECHR and the Strasbourg court, EU institutions have affirmed their role as crucial actors in the field of fundamental rights protection in Europe.[1919] Despite the interest that these developments present, for the sake of simplicity the application of proportionality in the field of EU fundamental rights will not be studied here. Indeed, this Chapter does not purport to be exhaustive or to make general conclusions about proportionality in EU law. More modestly, through the selective study of some examples, it seeks to shed light on the different ways in which proportionality, and the peculiar dynamic of EU integration that it conveys, operate in domestic contexts. The choice of the field of economic freedoms is justified by the fact that the construction of the common market has been the major engine of European integration and constitutes its originality even today. Hence, the study of proportionality presented here in no way purports to undermine existing differences in the way proportionality

---

[1914] Ibid.

[1915] Ibid.

[1916] Yannis Drossos, "Το "Μνημόνιο" ως σημείο στροφής του πολιτεύματος [The 'Memorandum' as a Turning Point of the Regime]," *The Book's Journal* 6 (April 2011): 41.

[1917] Constantinos Yannakopoulos, "Μεταξύ εθνικής και ενωσιακής έννομης τάξης: το «Μνημόνιο» ως αναπαραγωγή της κρίσης του κράτους δικαίου [Between National and EU Legal Order: the "Memorandum" Reverberating the Crisis in the Ideal of a State Ruled by Law]," *Constitutionalism.gr* (blog), January 30, 2011, https://www.constitutionalism.gr/1914-metaxy-etnikis-kai-enwsiakis-ennomis-taxis-to-mnim/ after fn. 20.

[1918] Giorgos Katrougkalos, "Το "παρασύνταγμα" του Μνημονίου και ο άλλος δρόμος [The 'paraconstitution' of the Memorandum and the Alternative Way]," *NoB*, no. 59 (2011): 231.

[1919] See Gráinne De Búrca, "Fundamental Human Rights and the Reach of EC Law," *Oxford Journal of Legal Studies* 13, no. 3 (September 21, 1993): 283; Philip Alston, ed., *The EU and Human Rights* (Oxford: OUP, 1999); Gráinne De Búrca, Bruno De Witte, and Larissa Ogertschnig, *Social Rights in Europe* (New York: OUP, 2005); Gráinne De Búrca, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, September 1, 2013), http://papers.ssrn.com/abstract=2319175.

is used in other fields of ECJ case law, and especially in the field of fundamental rights.[1920]

The Chapter purports to show that local particularities in the application of proportionality express particular features of the way EU law operates in the domestic contexts more generally. **Section 1** investigates the application of proportionality in the ECJ market freedoms case law. In this field, proportionality functions as a principle of economic integration, by re-framing domestic policy goals and evaluating them from the point of view of the common market project. The rest of the Chapter consists of country-specific analyses of the application of proportionality in the field of EU market freedoms. I argue that when responding to pressure for EU integration, legal actors and especially courts have strived to avoid normative conflicts between EU law and domestic law. The success or failure of proportionality has largely depended on whether local actors have perceived the values promoted by the EU legal order as equally domestic or not.

In France, normative conflicts between domestic and EU law have traditionally been silenced. The Council of State has preserved the advancement of domestic constitutional goals through a process of "imprecise" translation of proportionality and other EU legal concepts to corresponding domestic concepts. Hence, the integration dynamic of proportionality has long been absorbed by traditional judicial review structures **(Section 2)**. English judges, contrary to their French colleagues, have assumed the mission of *juges communautaires de droit commun* that the ECA 1972 imposed on them. Normative conflicts between domestic and EU law has usually been avoided through analytical formalism and the strict delimitation of the scope of application of EU legal concepts. However, as the reach of EU law expanded, the accomplishment by courts of their European integration mission has sometimes entered into conflict with the sovereignty of Parliament in setting policy goals. This has led English and European judges to explicitly acknowledge normative pluralism within the EU **(Section 3)**. In contrast, the economic integration dynamic of proportionality has not met important constitutional obstacles in Greece. Since the end of the '90s, domestic lawyers have perceived the application of proportionality by the ECJ as scientifically correct and have applied it by means of translation in the domestic sphere. Hence, proportionality has functioned as a mechanism that serves the redefinition of domestic constitutional goals as parts of the common market project. In this context, the application of proportionality exemplifies Greek lawyers' tendency to search for the content of the domestic Constitution in Europe **(Section 4)**.

[1920] For an overview of proportionality in EU law more generally, see Gráinne De Búrca, "The Principle of Proportionality and Its Application in EC Law," *Yearbook of European Law* 13, no. 1 (1993): 105; Takis Tridimas, *The General Principles of EC Law*, Oxford EC Law Library (Oxford; New York: OUP, 1999), 215 f. and Jürgen Schwarze, *European Administrative Law* (Luxembourg : London: Office for Official Publications of the European Communities ; Sweet & Maxwell, 1992), 726. For a more recent, analysis, see Paul Craig, *EU Administrative Law*, 2nd ed, Collected Courses of the Academy of European Law (Oxford; New York: OUP, 2012), 605 f.

1. Proportionality as a principle of economic integration

The detachment of proportionality review from national authorities' intent. In the adjudication of EU market freedoms, proportionality review is quite different from the Alexyan model. The "paradigm case" of the principle's application is described by Paul Craig.[1921] A national measure affects one of the Treaty economic freedoms. The defendant member state invokes a legitimate objective mentioned in the Treaty, such as public health or public security. It can also invoke one of the "overriding requirements" that the ECJ has elaborated in its case law.[1922] These requirements comprise interests such as fundamental rights protection and the protection of consumers and workers. After proving that they have a legitimate objective, member states must prove that the restriction is appropriate to the advancement of this objective, and that it is necessary to obtain it. The balancing prong is usually absent from this version of proportionality. Let us take as an example the *Finalarte* case, which concerned German rules protecting the rights of posted workers in businesses established in Portugal and providing services in Germany.[1923] The court held that the national measures were in fact restricting the freedom of Portuguese businesses to provide services. Therefore, the measures could be justified, "*only if [they were] necessary in order to pursue, effectively and by appropriate means, an objective in the public interest*".[1924] The ECJ had identified this objective previously in its reasoning: "*[o]verriding reasons relating to the public interest already recognised by the Court include the protection of workers*".[1925]

Paul Craig observes that, at its origins in EU law, proportionality was "deduced" from the prohibition of economic protectionism. Article 36 TFEU prohibits "arbitrary discrimination or disguised restrictions on trade between Member States". Indeed, it is this prohibition that enabled the court to check whether restrictive measures went "beyond what was necessary".[1926] Proportionality in this context should thus resemble a test for the review of the intentions of domestic authorities, and should purport to exclude cases of nationality discrimination.[1927] The use of the terms "arbitrary" or "disguised" points in that direction. Yet, the intent-based character of the review progressively disappeared in the court's case law. Since the famous *Cassis de Dijon* case, proportionality became independent from discrimination on the basis of nationality.[1928] In subsequent case law, proportionality was even detached from state intervention

[1921] Craig, *EU Administrative Law*, 617.

[1922] Tridimas, *The General Principles of EC Law*, 137 f.

[1923] C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, 25 October 2001, ECLI:EU:C:2001:564.

[1924] Ibid, para 37.

[1925] Ibid, para 33.

[1926] Craig, *EU Administrative Law*, 617.

[1927] The distinction between intent-based and impact-based review is inspired by Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture*, Cambridge Studies in Constitutional Law (Cambridge: CUP, 2013), 73 f.

[1928] C-120/78, 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42.

altogether, since it was accepted that free movement rights enjoy a horizontal effect in certain cases.[1929]

An impact-based test. In the context of market freedoms then, proportionality is an impact-based test. The effects of national legislation on EU freedoms are examined in its concrete application.[1930] Indeed, the preliminary reference procedure will necessarily imply the application of the contested measure in a specific case before the national judge. *Finalarte* illustrates the way European judges perceive the appropriateness and necessity requirements. In this case, the Luxembourg court adopted an instrumental view of national measures, as means to an end. Following the identification of the public interest goal, proportionality implied a check on whether the national rules, "*viewed objectively*", promoted the interests of workers, in the sense of creating a "*genuine benefit (…) which significantly add[ed] to their social protection*".[1931] As for the necessity prong, proportionality implied an investigation of whether less restrictive alternatives than the measures chosen were not equally efficient in the promotion of their objective. Hence, while national rules were interpreted according to their purpose, they were scrutinised objectively. Often, the *in concreto* assessment of the justification of the measures is left to national authorities, especially courts.[1932]

In the context of market freedoms, proportionality functions as a consequentialist test, oriented towards the *in concreto* optimisation of results. Necessity and appropriateness are tests of efficiency, focused on the impact of the contested measures. The reasoning process the court invites national courts to adopt typically consists of a cost-benefit analysis. It can be analysed as an objective calculation of national measures' costs and benefits, in a search for equally effective and less restrictive alternatives.[1933] The court rarely uses the language of weighing and balancing in this field. The factual character of judicial scrutiny, recognised by the ECJ itself in some cases, provokes confusion in the distribution of competences between national and supranational judges.[1934] The court will sometimes leave the proportionality review wholly to the domestic court.[1935] In others, it will give more or less clear "*guidance*" for the factors that the national court must take into account in its application.[1936] Sometimes the ECJ will propose alternative measures.[1937] In yet other cases, the

[1929] C-415/93, 15 December 1995, *Bosman*, ECLI:EU:C:1995:463; C-112/00, 12 June 2003, *Schmidberger*, ECLI:EU:C:2003:333; C-341/05, 18 December 2007, *Laval*, ECLI:EU:C:2007:809; C-438/05, 11 December 2007, *Viking Line*, ECLI:EU:C:2007:772.

[1930] *Finalarte,* cited above, paras 28 f.

[1931] Ibid, paras 41-42.

[1932] Ibid, para 50.

[1933] Antonio Marzal Yetano, *La dynamique du principe de proportionnalité: essai dans le contexte des libertés de circulation du droit de l'Union européenne*, (Clermont-Ferrand: Institut universitaire Varenne, 2013), n. 92 f.; 618 f.

[1934] Marzal Yetano, n. 363 f.

[1935] C-145/88, 23 November 1989, *Torfaen Borough Council v B. & Q. Plc.,* ECLI:EU:C:1989:593, para 16.

[1936] C-438/05, *Viking Line*, cited above, para 85.

[1937] Ibid, paras 49-53. See also C-140/03, 21 April 2005, *Commission v Greece*, ECLI:EU:C:2005:242, where Greek law impeded a qualified optician from operating more than one shop. The court proposed less restrictive measures for the protection of public health. More generally, see Craig, *EU Administrative Law*, 629 f. De Búrca, "The Principle of Proportionality and Its Application in EC Law," 126 f.

Luxembourg court will engage the proportionality test itself.[1938] The criterion determining the attitude of the ECJ seems to be simply the sufficiency of elements before it.[1939] In certain cases, the court explicitly declares the meaning of national provisions to be contrary to EU law. It has held, for example, that the prohibition of a product is not necessary to protect consumers if this protection can be achieved through adequate labelling of the product.[1940]

National authorities maintain a normative discretion in setting policy goals. The European judge generally accepts that member states are free to choose the public interest objectives that their measure will pursue, as well as the level of protection of the public interest that they want to ensure.[1941] One exception bears mention: in principle, the court does not accept purely economic or budgetary objectives as justification for restrictions on Treaty freedoms.[1942] As was stated in *Finalarte*, "*measures restricting the freedom to provide services cannot be justified by economic aims, such as the protection of national businesses*".[1943] That is, except where these objectives are so serious that they touch upon other aspects of the public interest, like national security or public health.[1944] In some cases, the use of fundamental rights language by the court gives the impression that it attributes normative value to national objectives.[1945] In this context, member states enjoy a margin of appreciation, which varies according to the circumstances of the case.[1946]

Re-framing national policies in the common market rationale. Therefore, the version of proportionality in the field of EU market freedoms has nothing to do with the manifestly inappropriate standard applied in the scrutiny of EU policy measures. Takis Tridimas attributes the increased intensity of the court's review to the function of proportionality in this context as a "market integration mechanism". As he explains,

---

[1938] C-341/05, *Laval*, cited above.

[1939] Craig, *EU Administrative Law*, 636 f.

[1940] C-120/78, *Cassis de Dijon*, cited above. For another case where the court declared national measures contrary to EU law itself, see C-442/02, 5 October 2004, *Caixa-Bank France*, ECLI:EU:C:2004:586. See generally Craig, 617 f.

[1941] 1-90, 176-90, 25 July 1991, *Aragonesa*, ECLI:EU:C:1991:327, para 16: "*it must be stated that in the present state of Community law, in which there are no common or harmonized rules governing in a general manner the advertising of alcoholic beverages, it is for the Member States to decide on the degree of protection which they wish to afford to public health and on the way on which that protection is to be achieved. They may do so, however, only within the limits set by the Treaty and must, in particular, comply with the principle of proportionality.*"

[1942] On the exclusion of economic policy justifications, see Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law : Text and Materials*, 3rd ed. (New York: CUP, 2014), 898.

[1943] *Finalarte*, cited above, para 39. C-238/82, 7 February 1984, *Duphar*, ECLI:EU:C:1984:45, para 2; C-109/04, 17 March 2005, *Kranemann*, ECLI:EU:C:2005:187, para 34.

[1944] See C-72/83, 10 July 1984, *Campus Oil*, ECLI:EU:C:1984:256. In this case, the court accepted the economic justification provided by the Irish Government, since economic concerns were so serious that finally touched upon the state's security. The court gave clear guidance to the national authorities, so that the restriction to be applied only as far as it serves non-economic considerations. Tridimas, *The General Principles of EC Law*, 150.

[1945] See for example the *Finalarte* case where the court refers to article 10 ECHR.

[1946] C-171/07 and C-172/07, 19 May 2009, *Apothekerkammer des Saarlandes*, ECLI:EU:C:2007:311, paras 59-61. See Craig, *EU Administrative Law*, 632.

> Where proportionality is invoked as a ground for review of Community policy measures, the Court is called upon to balance a private *vis-à-vis* a public interest. (…) In contrast, where proportionality is invoked in order to challenge the compatibility with Community law of national measures affecting one of the fundamental freedoms, the Court is called upon to balance a Community *vis-à-vis* a national interest. The principle is applied as a market integration mechanism and the intensity of review is much stronger.[1947]

Indeed, proportionality has played a very important role in the establishment of the common market. Its evolution into an impact-based test proceeded through a wide interpretation of the notion of obstacles to free trade, which forced a wide range of national rules into the scope of European law.[1948] According to the settled ECJ case law, obstacles to trade comprise "*[a]ll measures which prohibit, impede or render less attractive the exercise*" of EU Treaty freedoms.[1949] The notion has virtually expanded to *any* possible obstacle, that is, to all measures "*capable of hindering, directly or indirectly, actually or potentially intra-Community trade*".[1950] Proportionality has thus absorbed and diluted categories that previously served to delimit the scope of European Treaties, such as the abuse of EU law or the existence of equivalent national measures in other member states.[1951]

Once an obstacle to trade is found, proportionality places the burden of its justification on the member state. Since practically every measure can constitute an obstacle to freedom of movement, every measure can be reviewed through proportionality, independent of its protectionist motives. Proportionality becomes the ultimate criterion of the infringement of EU economic freedoms.[1952] Its function is to re-frame and evaluate public policies by reference to the common market project. Indeed, national legislation is only considered insofar as it constitutes an obstacle to free trade. The fact that it may provoke only unimportant hindrances or that such hindrances are exceptional in the application of the measure is of little importance.[1953]

As we saw, proportionality takes the form of a cost-benefit analysis of national measures. Cost-benefit analysis presupposes commensurable values and interests. In the Alexyan proportionality theory, commensurability is obtained through the *ad hoc* balancing of the values at stake. When leaving the proportionality examination to national courts, the ECJ sometimes refers to a balancing or weighing of the burdens and advantages that the measures imply. However, when the court exercises proportionality review itself, no such balancing takes place. Many authors have

[1947] Tridimas, *The General Principles of EC Law*, 90.

[1948] Tridimas, 126 f.

[1949] See C-55/94, 30 November 1995, *Gebhard*, ECLI:EU:C:1995:411, para 37.

[1950] C-8/74, 11 July 1974, *Dassonville*, ECLI:EU:C:1974:82, para 5.

[1951] Marzal Yetano, *La dynamique du principe de proportionnalité*, n. 857 f.

[1952] Marzal Yetano, n. 771 f. See also, in this sense, Stephanie Reynolds, "Explaining the Constitutional Drivers behind a Perceived Judicial Preference for Free Movement over Fundamental Rights," *Common Market Law Review* 53, no. 3 (2016): 643.

[1953] C-243/01, 6 November 2003, *Piergiorgio Gambelli and Others*, ECLI:EU:C:2003:597, paras 48-49.

reconstructed the variable intensity of the court's review as resulting from such balancing exercise.[1954] Yet this is not based on the actual justification that the ECJ provides for its decisions.[1955] Balancing is only exceptional in the ECJ proportionality reasoning.[1956] What is more, even when balancing language is used, this often only has a rhetoric function and does not affect the reasoning that follows or the type of review exercised by the court.[1957] Nor does the court refer to any particular scale of values defined by EU law. In most cases, market freedoms are not attributed a concrete substantive content at all, but the delimitation of their protective scope is a question of proportionality.[1958]

The factualisation of domestic goals. Quite differently from the Alexyan theory, in the jurisprudence of the ECJ commensurability is obtained through excision of values and norms from the court's reasoning. The history of national rules, their place in the hierarchy of the domestic norms, their cultural or sentimental value are all factors that have little importance for the European judge. Indeed, the legitimacy of national measures does not result from the *legal* norms of procedure or institutional competence that were followed in their enactment. Nor is their applicability in concrete cases determined by *legal* concepts, like validity. Rather, it is the *factual* circumstances in the case at hand that play a crucial role. *Grunkin-Paul*, for example, concerned German authorities' refusal to register a child of German nationality with a double-barrelled surname. The child was born and registered in Denmark, where double-barrelled surnames are allowed. However, German law precludes such surnames, and following German private international law rules, the name of German citizens is determined by German law. The court stated:

> None of the grounds put forward in support of the connecting factor of nationality for determination of a person's surname, however legitimate those grounds may be in themselves, warrants having such importance attached to it as to justify, in circumstances such as those of the case in the main proceedings, a refusal by the competent authorities of a Member State to recognise the surname of a child as already determined and

[1954] De Búrca, "The Principle of Proportionality and Its Application in EC Law," 113 f.

[1955] Gareth Davies, "Free Movement, the Quality of Life, and the Myth That the Court Balances Interests," in *Exceptions from EU Free Movement Law. Derogation, Justification and Proportionality*, Modern Studies in European Law (Oxford: Hart, 2016), 218. The author argues that cases where the ECJ proceeds to a balancing of competing values and interests should be seen as exceptional. See also Vincent Réveillère, *Le juge et le travail des concepts juridiques : le cas de la citoyenneté de l'Union européenne*, EUI PhD Theses. (European University Institute, 2017), 417 f.

[1956] The most well-known exception is C-112/00, *Schmidberger*, cited above.

[1957] In *Viking Line* and *Laval*, for example, though the court refers to the balance between economic freedoms and objectives of social policy, it does not apply any proportionality *stricto sensu* stage, nor does any balancing reasoning appear elsewhere in the court's argumentation. For a detailed analysis on this point, see Marzal Yetano, *La dynamique du principe de proportionnalité*, n. 210 f.

[1958] In the sense that they are not categorically defined. See, however, C-212/97, 9 March 1999, *Centros*; see also C-208/00, 5 November 2002, *Überseering*, ECLI:EU:C:2002:632. In these cases, the court refers to an essential content of economic freedoms. See Marzal Yetano, n. 579 f.

> registered in another Member State in which that child was born and has been resident since birth.[1959]

Antonio Marzal neatly points out that the ECJ's impact-based review "factualises" national goals. The determination of these goals depends exclusively on an analysis of "effects", of which they constitute the "cause".[1960] Besides, the court cares little about the normative evaluations of national authorities in this respect:

> whilst the intention of the legislature, to be gathered from the political debates preceding the adoption of a law or from the statement of the grounds on which it was adopted, may be an indication of the aim of that law, it is not conclusive. (…) the stated intention of the legislature may lead to a more careful assessment of the alleged benefits conferred on workers by the measures it has adopted.[1961]

The factual approach of the court narrows national authorities' margin of discretion. Even in cases of epistemic uncertainty, the relevant risks that the measure is purported to confront must be "*sufficiently established*".[1962] Thus, the ECJ proportionality case law exemplifies a tendency towards factualisation that Clifford Geertz has identified as increasingly dominant in Western legal systems.[1963] European legal actors are increasingly optimistic as to the possibilities of fact-determination and of rationally resolving salient socio-political issues on the basis of facts.

In ECJ case law, factualisation is obtained through a process of "objectivisation" of national goals, in the sense of their description as concretised *objectives*, which correspond to a "projected reality", for which causal links and appraisals of efficiency are possible.[1964] Indeed, in the court's reasoning national legislative aims are not attached to general values, like public health or security. The aim of protection of public health, for example, invoked by national authorities, is translated in the "*objective of ensuring that the provision of medicinal products to the public is reliable and of good quality*".[1965] Through their transcription into concrete objectives, national aims are fragmented. The fact that they ultimately belong to more general and coherent policy projects is neglected. Gareth Davies observes that, "in the application of proportionality national

---

[1959] See for example, C-353/06, 14 October 2008, *Grunkin Paul*, ECLI:EU:C:2008:559, para 31.

[1960] Marzal Yetano, *La dynamique du principe de proportionnalité*, n. 109: « Plutôt qu' « objectivisée », la notion de « but » a été « factualisée », dans la mesure où sa détermination dépend exclusivement d'une analyse des « effets » dont la loi en question serait la « cause ». The process of factualisation leads to confusion between the legitimate aim test and the appropriateness test. Indeed, the latter consists in an efficiency test, where the member state is required to prove that the impugned measure really advances its goal. See C-270/02, 5 February 2004, *Commission v Italy,* ECLI:EU:C:2004:78.

[1961] *Finalarte*, paras 40 f.

[1962] C-41/02, 2 December 2004, *Commission v Netherlands*, ECLI:EU:C:2004:762. See Craig, *EU Administrative Law*, 617 f. On the high standards of proof imposed on member states, see C-639/11, 20 March 2014, *Commission v Poland,* ECLI:EU:C:2014:173.

[1963] Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective," in *Local Knowledge: Further Essays in Interpretive Anthropology*, 3rd ed. (New York: Basic Books, 1983), 171.

[1964] Marzal Yetano, *La dynamique du principe de proportionnalité*, n. 235.

[1965] See, for example, C-570/07 and C-571/07, 1 June 2010, *José Manuel Blanco Pérez*, ECLI:EU:C:2010:300, paras 63-66.

autonomy and the national capacity to formulate and carry out policy is rarely seen as a value in itself".[1966] The only policy project seen by the court in its proportionality reasoning is the construction of the common market. By re-framing domestic policies as obstacles to free trade, proportionality submits their effects to evaluation from the point of view of the common market project. In this way, it sets limits on the disparities that diverging national policies create. Put briefly, in this context proportionality functions as a principle of economic integration.

The function of the margin of appreciation. Sometimes, in the presence of moral, religious and cultural differences between member states, the ECJ seems more respectful of domestic normative evaluations and lets the national authorities "*to determine, in accordance with [their] own scale of values*" what is better for the public interest.[1967] The ECJ justifies the allocation of a margin of appreciation in different ways. Sometimes it refers to a common conception of the member states on the issue at hand, similar to the consensus identified by the ECtHR in its case law.[1968] In other cases, it refers to the embracing of the objective of the national measure by the EU legal order itself.[1969] In *Schmidberger*, the court referred to the protection of fundamental rights and to the ECHR.[1970] In such cases, normative relativism compromises harmonisation. National legislation acquires an intrinsic value as a whole and is not examined provision by provision.[1971] Its place in the hierarchy of national norms is taken into account.[1972] The scrutiny of the court focuses on the state of mind of the primary decision-maker. In some cases the ECJ has applied a "*manifestly unreasonable*" standard[1973] and it has generally deferred to the national authorities' choices, even in cases of severe restrictions to Treaty freedoms.[1974] In this type of review, the court is contented with smoking-out hidden, illicit protectionist objectives. Thus, it imposes a requirement of coherence on national legislation. The absence or the insufficiency of national regulation on the matter may reveal that the public policy concern is not as important as the national Government asserts.[1975] In more recent margin of appreciation cases, the ECJ makes sure that the national measure is "*in principle,*

[1966] Gareth Davies, "Constitutional Disagreement in Europe and the Search for Pluralism," in *Constitutional Pluralism in the European Union and beyond*, ed. Jan Komárek and Matej Avbelj (Oxford: Hart, 2012), 281.

[1967] C-42/07, 8 September 2009, *Liga Portuguesa*, ECLI:EU:C:2009:519, paras 57-59. On this matter, see Craig, *EU Administrative Law*, 633 f.

[1968] C-275/92, 24 March 1994, *Schindler*, ECLI:EU:C:1994:119.

[1969] C-36/02, 14 October 2004, *Omega*, ECLI:EU:C:2004:614. The court leaves a wide margin of appreciation, when the member states have as an objective the protection of a right guaranteed by the Convention.

[1970] See *Schmidberger*, cited above.

[1971] See, for example, C-121/85, 11 March 1986, *Conegate*, ECLI:EU:C:1986:114.

[1972] *Omega*, para 39: "*corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany*".

[1973] See *Aragonesa*, cited above, para 17. De Búrca, "The Principle of Proportionality and Its Application in EC Law," 137 f.

[1974] C-34/79, 14 December 1979, *Henn and Darby*, ECLI:EU:C:1979:295, paras 15 f.; C-41-74, 4 December 1974, *Van Duyn*, ECLI:EU:C:1974:133, paras 18 f.

[1975] *Conegate*, cited above, para 16. See Floris De Witte, "Sex, Drugs & EU Law: The Recognition of Ethical and Moral Diversity in Europe," *Common Market Law Review* 50, no. 6 (2013): 1545. The author talks about a "procedural" standard of proportionality.

justified",[1976] and contents itself with a check of whether national authorities were "*entitled to take the view*" that it was appropriate and necessary.[1977]

Generally, proportionality has a crucial role to play in ensuring the *effet utile* of EU law. By re-framing and evaluating national policy goals in the terms of the common market project, it leaves little space for alternative value-scales. Hence, it assumes the function of the optimal realisation of EU market freedoms. The ECJ often invites national courts to exercise a proportionality review themselves when EU freedoms are at stake, while it gives more or less guidance on the different factors that must be taken into account in the concrete assessment of the proportionality of domestic policy measures. However, national judges have not always uncritically assumed their role as *juges communautaires de droit commun* in this context.

2. Lost in translation: proportionality and the effet utile of EU market freedoms in the French Council of State case law

An "inaccurate" translation. The tendency to assimilate European proportionality with pre-existing review methods, observed in the context of the ECHR, also characterises the operation of EU law in the French context. Until the mid-2000s, structural differences between domestic and European versions of proportionality were generally neglected in French legal discourse. Mainstream public law scholarship perceived proportionality as an objective liberal principle prescribing the moderation of public power, regardless of its field of application. In his study on proportionality, Michel Fromont understood the domestic and EU law principles to be synonymous. He contended that the main difference between EU law and the domestic legal order on the matter was the lack of explicit recognition of proportionality as a general principle in French public law, which, in his view, compromised its coherent application.[1978] As we saw, the unitary perception of proportionality in this context is connected to the rationalism and the search for substantive coherence that underpins French legal thought.

In judicial practice, assimilation of European proportionality review with the domestic *contrôle de proportionnalité* came at a cost to the EU law test's structure and rigour. In domestic case law, proportionality did not correspond to a pronged test

[1976] See for example *Omega*, para 35; see also the laxity of the test in C-244/06, 14 February 2008, *Dynamic Medien*, ECLI:EU:C:2008:85.

[1977] *Liga Portuguesa*, cited above, para 69.

[1978] See Michel Fromont, "Le principe de proportionnalité," *AJDA*, no. spécial (1995): 156. In the same vein, Jean-Paul Markus, "Le contrôle de conventionnalité des lois par le Conseil d'État," *AJDA*, 1999, 99. Talking about the *contrôle de proportionnalité* and *conventionnalité*, Markus seems to perceive them as being in continuity with traditional Council of State methods for the review of the administration. See also Jacques Ziller, "Le principe de proportionnalité," *AJDA*, no. spécial (1996): 185. While Ziller is more sensitive to difference, he still rejects the idea of French exceptionalism and affirms that French courts do apply proportionality. He does not perceive different proportionality methods as leading to different substantive outcomes as to rights protection, but rather as different sources of inspiration for judges.

similar to the one applied by the ECJ. Rather, it implied a threshold review, according to the particular factual circumstances of the case. Hence, its application raised questions of institutional competence for the supreme courts and was generally left to lower judges. While progressively, in some EU law cases, the Council of State followed Luxembourg reasoning more closely, generally the application of the proportionality prongs was not perceived as an obligation for domestic courts and for a long time it did not much affect the intensity of judicial scrutiny. Domestic courts traditionally examined the legitimacy of the legislative aim and contented themselves with affirming the proportionality of domestic measures, providing only a minimal justification in this respect. Jean Sirinelli and Brunessen Bertrand, in their overview of the relevant domestic case law, characterise the application of proportionality by French courts, as "superficial", "perfectly dogmatic" and "arbitrary".[1979]

Containing the dynamics of proportionality. As already mentioned in Chapter 7, the assimilation of European proportionality with the domestic version of proportionality reveals French lawyers' tendency to apply European legal concepts in the form of their corresponding domestic ones, despite their structural differences.[1980] This tendency has seriously compromised the *effet utile* of EU law in the domestic sphere. A survey of the relevant Council of State case law illustrates this. Let us start from the Council of State decision on dangerous products, analysed in Chapter 1. As we saw, this case concerned the validity of an administrative decision that had suspended the distribution of certain products destined for oral use by infants for one year.[1981] Since the '70s, domestic legislation allowed for such measures, subject to the condition that they were "proportionate to the danger caused by the products". In this particular case, the claimant companies contested the compatibility of the restrictive decision both with domestic legislation and with the Directive 92/59/CEE. In response to these arguments, the Council applied a self-evident disproportionality test. It affirmed that the measures were "*not disproportionate with regard to the risks [that the products produced] for the health of young consumers*".[1982] In this way, the French court merged domestic and Luxembourg proportionality requirements, presuming that they were synonymous.

The process of assimilation did not end there. The court justified its decision by mentioning that the EC Treaties recognised health and safety as legitimate objectives of public interferences with market freedoms. Even more important for the judges was the fact that the Directive 92/59/CEE itself was perceived as pursuing the objective

---

[1979] Jean Sirinelli and Brunessen Bertrand, "La proportionnalité," in *L'influence du droit européen sur les catégories du droit public*, ed. Jean-Bernard Auby (Paris: Dalloz, 2010), 636.

[1980] Analysis inspired by Constantinos Yannakopoulos, "Μεταξύ συνταγματικών σκοπών και συνταγματικών ορίων: η διαλεκτική εξέλιξη της συνταγματικής πραγματικότητας στην εθνική και στην κοινοτική έννομη τάξη [Between Constitutional Goals and Constitutional Limits: The Dialectical Evolution of Constitutional Reality in the National and the Community Legal Orders]," *Εφ⊥⊥*, no. 5 (2008): 733. Assimilation between corresponding EU law and domestic legal concepts concerns the form and function of the concepts and not their scope of application. Thus, the European source of EU norms has generally impeded their invocation before the Constitutional Council.

[1981] CE, 28 July 2000, nos. 212115, 212135, ECLI:FR:CESSR:2000:212115.20000728.

[1982] Ibid.

of product safety. Domestic consumer legislation was thus deemed to share *the same goals* with the relevant Community legislation. Normative conflict between domestic and Community values was neglected. Hence, the domestic disproportionality standard was deemed sufficient to ensure the realisation of Community values too.

However, by characterising health and safety as *goals* of the EC legal order, the Council of State performed a subtle conceptual manoeuvre. Indeed, a significant difference existed between domestic and Community product safety, though these concepts shared the same *nom propre*. While, in domestic public law, product safety was identified as a goal of domestic legislation, the EC Treaty defined health and safety as *national* and not as Community objectives. As we have seen, in the context of Community law, the pursuit of legitimate national goals is seen as a source of *obstacles* to EU market freedoms. National policy goals are re-framed as fragmented objectives and assessed from the point of view of their contribution to the common market project. Only their effects are considered; they are factualised. A reading of the preamble of the Directive that the Council claimed to apply confirms this understanding of health and safety as national objectives. In its point 2, the text declares that its main goal was to "eliminate disparities in the Member States' horizontal legislation on product safety, since they were liable to create barriers to trade and distortions of competition within the internal market".[1983] Hence, it was not ensuring product safety *per se* that was in the mind of the Community legislator, but rather the *harmonisation* of domestic measures destined to ensure it, in view of the completion of the common market. Despite their similar *nom propre*, national and Community product safety had a quite different structure and function.

Constantinos Yannakopoulos observes that public interest goals institute public discretion by justifying or (more rarely) mandating public intervention for their optimal realisation.[1984] Indeed the framing of health and safety as European goals in the Council of State's decision justified broad discretion on the part of domestic authorities for their advancement, and implied the application of proportionality as a unitary, self-evident standard. On the contrary, had the Council of State qualified health and safety as solely national objectives, the principle of proportionality would impose a concrete appropriateness and necessity requirement on their advancement. Such framing would considerably limit the discretion of domestic authorities. By claiming that the goals set by the domestic legislator are also EU legal goals, the Council refused to subject them to the common market rationale. In this way, the domestic court undermined the effectiveness of EU requirements on public action. Proportionality's economic integration dynamic was contained. For some time, the process of "inaccurate" translation between domestic and EU law was recurrent in the Council of State case

[1983] See the Council Directive 92/59/EEC of 29 June 1992 on general product safety OJ L 228, Preamble point 2.

[1984] On the structural distinction between goals and limits, see Yannakopoulos, "Μεταξύ συνταγματικών σκοπών και συνταγματικών ορίων: η διαλεκτική εξέλιξη της συνταγματικής πραγματικότητας στην εθνική και στην κοινοτική έννομη τάξη [Between Constitutional Goals and Constitutional Limits: The Dialectical Evolution of Constitutional Reality in the National and the Community Legal Orders]." See also *supra*, Part II, Chapter 6(2) and Comparative conclusions.

law. Typically, EU legal concepts were projected on to domestic corresponding concepts and were applied as such.[1985]

Making sense of the varying application of EU law proportionality by the Council of State. This might also make sense of the fact that, interestingly, in cases where the goals pursued by domestic legislation were clearly not European, the Council of State generally followed ECJ case law more closely and exercised a more searching and structured proportionality scrutiny. Indeed, in such cases, the translation of domestic goals into EU legal terms was simply impossible or implausible. In the *Serc Fun Radio* decision, for example, the Parliament had imposed a quota of 40% of French songs on radio broadcasting. Among these songs, half should result from "new talents" or new productions.[1986] The *Conseil Superieur de l'Audiovisuel*, the independent administrative authority charged with the regulation of the radio sector, had implemented the legislative provisions by unilaterally modifying public contracts on radio broadcasting. Serc Fun Radio, a private company licensed to broadcast on French frequencies, attacked the modification of the contract binding it. Among other arguments, the company contested the compatibility of domestic legislation with the EC Treaties.

The Council started by observing that, while the modification of the radio-broadcasting contract did not entail quantitative restrictions on trade itself, it was likely to favour French songs and to affect the free broadcasting of radio programmes. Thus, the measure fell within the scope of European law. The domestic court went on to identify the objective of the relevant provisions, which was the promotion of French songs and particularly of those created by new talents or newly produced. The judges underscored that these provisions were part of a legislative policy in the field of culture, whose goal was to ensure the defense and the promotion of French language, as well as the renewal of French musical heritage. The judges affirmed that the general interest associated with the domestic provisions constituted "*a compelling reason, in the sense that the Court of Justice of the European Communities has given [to this term]*" and thus could justify restrictions on free trade and free provision of services.[1987] Finally, the Council went on to examine the proportionality of the concrete quota imposed by domestic legislation: in its view, the 40% percentage of French songs was "*not disproportionate to the pursued objective, since* (…) *it seems appropriate to ensure its realisation and does not exceed what is necessary in order to obtain it*".[1988] The Council thus rejected the claims of the plaintiffs and considered that there was no reason to send a preliminary reference to the ECJ. It is obvious that the test used by the Council in this case was more loyal to ECJ case law, even though, arguably, this did not affect the intensity of the court's scrutiny.[1989]

[1985] However, the Council left to the ECJ the appreciation of the proportionality of EU legislation. In 2003 it suspended proceedings to wait for the ECJ decision on a preliminary reference introduced by the UK High Court of Justice, concerning the proportionality of an EU directive. See CE, 29 October 2003, no. 260768, ECLI:FR:CEORD:2003:260768.20031029.

[1986] CE (Pl.), 8 April 1998, no. 161411, ECLI:FR:CEASS:1998:161411.19980408.

[1987] Ibid.

[1988] Ibid.

[1989] See also CE, 28 February 2001, no. 209419, ECLI:FR:CESSR:2001:209419.20010228,

Inverting the operation of translation. The perception of corresponding domestic and EU law concepts as synonymous long allowed the French administrative courts to interpret EU law in the light of domestic law and values. It can be seen as an instance of application of the theory of *acte clair*.[1990] The progressive abandonment of the theory of *acte clair* in recent case law coincides with the evolution of the Community to a Union to which French public lawyers progressively entrust the protection of values that they perceive as fundamental.[1991] Still, this evolution does not entail the end of the translation process between domestic and European legal concepts. Translation is fundamental for French public lawyers, since it ensures the coherence of the law applicable in the domestic sphere, despite the plurality of its sources. Using an Anglicism that seems somewhat original given its style, the French *doctrine* explicitly refers to an "*opération de translation*".[1992] However, while before it was EU concepts that were translated into domestic ones, now it is the French *bloc de constitutionnalité* that is "projected on to the Community legal order".[1993] In other words, the trajectory of the translation has been inverted to maximise the effectiveness of EU legal limits this time.

The Council of State is progressively established as the "*juge de droit commun* of the application of Community law".[1994] It ensures the effective application of EU law in the French legal order, while it accepts the final competence of the ECJ in the determination of the content of EU concepts and of the corresponding domestic concepts. This inevitably leads to the determination of the content of the domestic Constitution by EU law and by ECJ case law. Openness to EU integration is not only apparent in the Council of State case law, but is also expressed in case law from other courts. Most notably, in 2013 the Constitutional Council changed its long-standing case law and engaged a preliminary reference procedure under article 267 TFEU.[1995]

While French judges accept the implementation of the EU value-scale in the domestic sphere, they also try to preserve domestic constitutional values. This opens the door to pragmatism in the French rationalist tradition. Hence, while the Constitutional Council has declared the transposition of EU directives to be a domestic

---

concerning oil refiners' obligation to preserve a transportation capacity under the French flag. See also CE, 30 July 2003, no. 237649, mentioned in the *Recueil Lebon* tables, concerning the legality of domestic measures derogating from Schengen requirements.

[1990] On this theory see most notably CE, 19 June 1964, *Société des pétroles Shell-Berre*, no. 47007, Rec. 344; Cass. civ. 1, 19 December 1995, *Banque africaine de développement*, no. 93-20424, Bull. 1995, no. 470, 326.

[1991] See CE (Pl.), 9 February 2007, *Société Arcelor Atlantique et Lorraine et autres*, no. 287110, ECLI:FR:CEASS:2007:287110.20070208; CE (Pl.), 30 October 2009, *Dame Perreux*, no. 298348, ECLI:FR:CEASS:2009:298348.2009103. In this sense, the *acte clair* theory can be compared to the German *Solange* case law. See Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford Studies in European Law (Oxford; New York: OUP, 2002), 143, who compares the two.

[1992] Matthias Guyomar, "Conclusions sur CE Ass., 9 février 2007, *Société Arcelor Atlantique et Lorraine et autres*," Rec. 55, cited in Marceau Long et al., *Les grands arrêts de la jurisprudence administrative*, 21st ed. (Paris: Dalloz, 2017) n. 109.4.

[1993] Ibid.

[1994] Matthias Guyomar, "Conclusions sur CE Ass., 30 octobre 2009, *Dame Perreux*," Rec. 407, cited in Long et al., *Les grands arrêts de la jurisprudence administrative* n. 111.10.

[1995] Decision no. 2013-314P QPC, 4 April 2013, *M. Jeremy F*, ECLI:FR:CC:2013:2013.314P.QPC.

constitutional obligation of Parliament, it has also referred to constitutional provisions "*inherent to the French constitutional identity*" that could exceptionally impede this transposition.[1996] In the same vein, in *Arcelor*, the Council of State reserved for itself the possibility to examine the compatibility of a domestic measure implementing precise and unconditional provisions of an EU directive with the Constitution, in case EU law does not effectively protect domestic constitutional rules and principles.[1997] In order to assure itself of the sufficient protection of domestic constitutional values in the European context, the Council of State proceeds to an extensive review of ECJ case law. In this way, a fundamental distinction in French legal thought is slowly blurred: the distinction between the scope of legal rules and the way they are applied in practice. The pragmatist reasoning of French courts reveals that, while the process of translation between domestic and European legal orders continues, domestic lawyers become increasingly aware of the possibility of normative conflict between the EU and the domestic legal orders. This awareness has always underpinned the pragmatist common law tradition.

3. Ce truc machin culturel: the objection of English courts to the EU law principle of proportionality

EU hyper-Rationalism v the common law. Just like in the context of the ECHR, EU legal concepts and proportionality in England have served the UK's compliance with its European obligations. English judges have taken their integration function seriously, while they have contained this function within the scope of the ECA 1972. As we have seen, analytical positivism has long expressed English lawyers' aversion for the rationalism that characterises French legal thought. In the dualist English tradition, it is reference to parliamentary sovereignty that has ensured the formal coherence of the law applied by English courts and has eliminated conflicts between domestic and EU law.

Aversion for rationalism has affected English lawyers' perception of the EU legal order. Martin Loughlin observes that:

> [t]he EU is a governmental entity entirely foreign to the English temperament. The EU is what Germans call a *Rechtsgemeinschaft*, a community of law. Lacking all those elements – shared history and culture, and common language – that infuse the traditional idea of constitutional ordering, the EU binds member states solely through the medium of formal law. Lacking the military or fiscal resources of nation-states, its primary medium of domination is that of legal rule-making. The EU has propagated a new species: 'Eurolegalism', marked by strictly defined, purposive rules to regulate governmental action and relying heavily on

[1996] Decision no. 2006-540 DC, 27 July 2006, *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*, ECLI:FR:CC:2006:2006.540.DC, cons. 19.

[1997] See *Société Arcelor Atlantique et Lorraine et autres*, cited above.

> formal, judicial oversight and enforcement mechanisms. As a legal construct, the EU is in fact an expression of hyper-Rationalism that runs directly counter to the traditions of British constitutional practice.[1998]

We saw that proportionality re-frames large fields of public action by reference to the goal of the common market and functions as a principle of economic integration. In this sense, it is an exemplary feature of European hyper-rationalism and its application by English courts, even when limited within the scope of the ECA, has sometimes entered into conflict with the most fundamental assumptions of the common law tradition.

Framing the prohibition of Sunday trading as a hindrance to trade. The Sunday Trading litigation illustrates this very well.[1999] The Shops Act 1950 prohibited the selling of most products on Sunday. The violation of this act by many private companies raised a substantial amount of litigation before English courts. B&Q, a nationwide chain of do-it-yourself shops, had repeatedly transgressed this prohibition. From the early '80s, the City Council of the Stoke-on-Trent had brought civil proceedings against the company to enforce the prohibition, since criminal fines had proved ineffective.[2000] From 1988, Arthur Hugh Vaughan QC, B&Q's barrister, invoked EC legislation in support of his clients. In many cases, he argued that the prohibition of Sunday trading was an unjustified restriction of trade, since some of B&Q's products were coming from other EC member states. The Sunday traders sought a preliminary reference to the ECJ, which regardless of its substantive outcome served their short-term interests by delaying the granting of interlocutory injunctions. They obtained such a preliminary reference in the proceedings before the Cwrmbran Magistrates' Court.

Until then, the case did not much concern proportionality. The main issue was whether the prohibition of Sunday trading constituted a restriction of trade that triggered the application of article 30 TEC (now article 36 TFEU).[2001] In the well-known *Torfaen* case, the Court of Justice declared that rules such as the one contained in the main proceedings constituted an indirect restriction of trade and fell within the scope of article 30 TEC.[2002] However, in the court's view, such restrictions could be justified since they "*reflect[ed] certain political and economic choices in so far as their purpose [was] to ensure that working and non-working hours [were] so arranged as to accord with national or regional socio-cultural characteristics*".[2003] The court left this matter to the member states to decide. Further, it was necessary to examine the necessity of the measures, or in the words of

---

[1998] Martin Loughlin, *The British Constitution : A Very Short Introduction*, Very Short Introductions (Oxford: OUP, 2013), 79.

[1999] See the interesting history of the Sunday trading litigation in Hans Micklitz, *The Politics of Judicial Co-operation in the EU: Sunday Trading, Equal Treatment and Good Faith* (Cambridge: CUP, 2005), 43 f.

[2000] *Stoke-On-Trent City Council -v- B & Q (Retail) Ltd* [1984] 1 AC 754 (HL, 17 May 1984).

[2001] See the cases analyzed by Micklitz, The Politics of Judicial Co-operation in the EU, 47 f.

[2002] See ECJ, C-145/88, 23 November 1989, *Torfaen Borough Council v B. & Q. Plc.* [1990] 2 Q.B. 19, cited above. For another preliminary reference, see *Rochdale Borough Council v Anders* [1988] 3 All ER 490 (HC, Queen's Bench Division, 23 May 1988).

[2003] See *Torfaen,* cited above, para 14.

the ECJ, whether "*the restrictive effect of such measures on the free movement of goods exceed[ed] the effects intrinsic to trade rules*".[2004] The Luxembourg judges, in a dictum that became famous in English law, declared that this question was "*a question of fact to be determined by the national court*".[2005] While the court did not use proportionality terminology, its response was understood by domestic lawyers as an invitation to English judges to perform proportionality review on the matter.[2006]

The *Stoke-on-Trent* affair. Meanwhile, new proceedings had been brought before the High Court by the City Councils of Stoke-on-Trent and Norwich, where B&Q had raised the defence based on article 30.[2007] Hoffmann J, in the High Court, started his opinion by asking: "*Who is to decide whether shops should be allowed to open on Sundays? Is it to be Parliament or this court?*"[2008] The judge acknowledged that the EEC Treaty had the status of supreme law in the UK. By entering into the Community, the Parliament had proceeded to "*a high act of social and economic policy, by which the partial surrender of sovereignty was seen as more than compensated by the advantages of membership*".[2009] In this way, the judge accepted that by virtue of the ECA 1972, in the scope of application of the EC Treaties, policy objectives were to be defined by EC law, even when sensitive social or cultural matters were at stake. Hoffmann J stressed that "*[i]t is the function of the European Court of Justice in Luxembourg to interpret the Treaty and for the national court to apply it*".[2010] In this field, English courts were *les juges communautaires de droit commun* and were to apply ECJ case law. He further acknowledged that in its interpretation of EC Treaties, the ECJ had tried "*to tread a careful line which permits both boldness in advancing the objects of the community and sensitivity to the domestic interests of member states.*"[2011] Contrary to the rationalism and the search for substantive coherence that was observed in the opinions of his French colleagues, the English judge made a clear distinction between the objectives of the Community and the domestic interests of member states, and seemed well aware of the conflict that sometimes exists between them.

Still, on the particular issue of Sunday trading, Hoffmann J refused to conform to the ECJ precepts. In his view, applying the *Torfaen* decision would irritate a long-established power relationships between national institutions. In his words,

> [i]n applying the Treaty as interpreted by the European Court, the national court has to be aware of another division of powers: not between European and national jurisdiction, but between legislature and judiciary. The fact that the European Court has said that a particular question is one for decision by the national court does not endow that court with quasi-

---

[2004] Ibid, para 15.

[2005] Ibid, para 16.

[2006] Indeed, the expression "exceeds the effects intrinsic to trade rules" was employed as synonymous to proportionality in article 3 of the Commission Directive 50/70/EEC and in the observations of the Commission before the ECJ.

[2007] *Stoke-on-Trent & Norwich* [1991] Ch. 48 (HC, Chancery Division, 18 July 1990).

[2008] Ibid, at 55.

[2009] Ibid, at 56.

[2010] Ibid.

[2011] Ibid.

> legislative powers. It must confine itself within the area of judicial intervention required by the Treaty and not trespass on questions which are for democratic decision in Parliament.[2012]

The European integration mission that Parliament had ascribed to judges through the ECA 1972 now entered into conflict with Parliament's own sovereignty in setting policy goals. In the reasoning that followed, Hoffmann J further illustrated this point.

Proportionality irritating fundamental common law assumptions. Examining the justification of the prohibition of Sunday trading, Hoffmann J first considered its aim. The ECJ had stated in *Torfaen* that the measures pursued a legitimate aim "*in so far as their purpose [was] to ensure that working and non-working hours [were] so arranged as to accord with national or regional socio-cultural characteristics*".[2013] The High Court judge stated that though the immediate purpose of legislation was not universally shared by the members of Parliament, its general aim was "*to maintain what they regarded as the traditional English Sunday*".[2014] In order to reach this conclusion, the judge took into account the legislative history of the measure, certain judicial statements on the matter, as well as the *Hansard*, despite his doubts as to whether this was permissible. Proportionality analysis, by demanding the identification of a unitary legislative purpose, irritated the common law analytical method and the idealisation of the parliamentary process that underpinned it. Concerning the other proportionality prongs, Sunday traders argued that less damaging, alternative solutions were available, like exempting do-it-yourself companies from the prohibition. They also adduced evidence that the measures were disproportionate, since their cost was very important compared to the minimal benefits that they entailed.[2015] Hoffmann J referred to the proportionality *stricto sensu* and necessity prongs, underscoring the uncertainty that characterised their distinctiveness in European case law. As we have seen, structural rigour was a major asset of common law judicial opinions, which the English judge now had to forsake.

However, this was not the only way that the application proportionality irritated common law methods and assumptions. An important question arose concerning the burden of proof. The company claimed that, according to ECJ case law, the burden of proof for the justification of the obstacles to trade fell on the local authorities. The local authorities, on the contrary, claimed that the necessity of the restrictions was not a question of fact.[2016] Thus, they did not adduce any factual evidence. If Hoffmann J was to follow the ECJ in its application of proportionality, the local authorities' case was bound to fail. Indeed the Luxembourg judges had clearly stated that the necessity and proportionality of the measures was "*a question of fact to be determined by the national court*".[2017] English courts were asked for much more than the application of a legal rule

---

[2012] Ibid.
[2013] See *Torfaen*, cited above, para 14.
[2014] See *Stoke-on-Trent & Norwich*, cited above, 66.
[2015] Ibid, 55.
[2016] Ibid, 64.
[2017] *Torfaen,* para 16.

or head of review. They were asked to consider the applicability of legislation to concrete cases as a matter of fact and to disapply domestic legislation whenever its restrictive effect on free movement exceeded "*the effects intrinsic to trade rules*".[2018] By transforming the effects of domestic rules to conditions for their application, the ECJ had performed a fusion of substance and form that was foreign to the common law. English courts were required to change their whole perception of law and of their own role. They were called to enforce the will of Parliament only in so far as this did not excessively compromise the common market project.

What is more, Sunday traders advocated a high standard of proof, equivalent to that required in criminal proceedings (since the matter was a criminal one in the first place).[2019] As we have seen, common lawyers do not share the epistemological optimism of their Continental colleagues. While in their application of proportionality Luxembourg judges express faith in expert evaluations and have high expectations as to the possibilities of fact-determination, common lawyers are more doubtful in this respect. Hoffmann J regretted the "*troupe of experts [who had] toured the country*", giving their views on the effects of the measures and leading to contradictory judicial decisions.[2020] In his view, the requirement of factual evidence should be reduced to one of judicial notice, that is, to facts that are so well-known that their establishment does not require evidence; their knowledge is a matter of common-sense. Judicial notice, he claimed, would lead to uniform answers as to factual questions and could be settled by way of precedent. Legal certainty, a quality so precious to the common law, would thus prevail.[2021]

Ultimately, proportionality required the judge to proceed to the balancing of competing interests. Hoffmann J considered that this was not the function of the High Court, especially in a matter as socially sensitive as Sunday trading. This and similar matters are political issues, for which Parliament should take decisions through the democratic process. To render such matters legal was contrary to the economy of the common law. Previously in his judgement, Hoffmann J had criticised the Luxembourg court for not showing caution on this issue. Contrary to the Advocate General's advice each time, in *Cinétèque* and *Torfaen* the ECJ had rendered the prohibition of Sunday trading justiciable. It had done so by declaring that national measures entered the scope of article 30.[2022] The function of proportionality as a principle of economic integration, including more and more fields in its scope and thus inserting them into the construction of the common market, was contrary to English judges' instrumental vision of law as a patchwork of fragmented commandments serving disjointed practical purposes.

[2018] Ibid.
[2019] *Stoke-on-Trent & Norwich,* cited above, at 53-4.
[2020] Ibid, 65-6.
[2021] Ibid.
[2022] Ibid, 59 f.

Hoffmann J's refusal to apply proportionality. With the famous following dicta, Hoffmann J finally refused to apply the ECJ decision and discharged local authorities of the burden of proof:

> By far the most important question in this case concerns the function of the court in applying the proportionality tests. (…) The question is one on which strong and differing views may be held and which has been the subject of frequent parliamentary debate. Is the court to apply its own opinion of the importance of ensuring that shop workers do not have to work on Sundays and weigh that against its opinion of the importance of selling more Dutch bulbs or Italian furniture? If the legislature has declined to adopt any modification of the existing exceptions, is the court to say that modifications should nevertheless be introduced because in its opinion they would not detract from the legislative object and would mean that the Act was less of a hindrance to community trade?
>
> In my judgment it is not my function to carry out the balancing exercise or to form my own view on whether the legislative objective could be achieved by other means. These questions involve compromises between competing interests which in a democratic society must be resolved by the legislature. The duty of the court is only to inquire whether the compromise adopted by the United Kingdom Parliament, so far as it affects community trade, is one which a reasonable legislature could have reached. The function of the court is to review the acts of the legislature but not to substitute its own policies or values.
>
> This is not an abdication of judicial responsibility. The primacy of the democratic process is far more important than the question of whether our Sunday trading laws could or could not be improved.[2023]

Instead of applying *Torfaen*, the judge referred to similar cases from Commonwealth countries, where the courts are familiar with judicial review of legislation, like Canada, the US and Australia. Following their example, he applied a "*rational basis*" test.[2024] Contrary to the impact-based test applied by the ECJ, examination of the rational basis of legislation focuses on the state of mind of the primary decision-maker, the reasonableness or the plausibility of her assessments as to the appropriateness or the necessity of the contested measures. In this respect, the company suggested that broad exceptions to the Sunday trading prohibition rendered the legislation incoherent and betrayed a discriminatory purpose. Hoffmann J rejected these claims. He held that exceptions to Sunday trading provided for by the law were not furthering illegitimate legislative purposes but were necessary concessions, given

[2023] Ibid, 69.
[2024] Ibid, 69-71.

that the public interest aim of the relevant legislation was impossible to fully achieve in practice: some stores *had to* be open on Sunday.[2025] In Hoffmann J's words,

> the history of the Sunday trading law shows that the existing exceptions are regarded by Parliament as the limits of what is necessary to achieve the legislative object. Of course there are illogicalities in Schedule 5 and opinions may differ about whether it draws the line in the right place. On the other hand, illogical compromise tends to be a British "socio-cultural characteristic," to adopt the language of the European Court of Justice. That may also explain why Sunday trading is permitted in Scotland but not in England and Wales. In my judgment Parliament was entitled to decide that the present restrictions were necessary to attain the objects of the Act and that different restrictions would be inadequate, even though they might have less effect on Community trade.[2026]

Hoffmann J thus refused to apply proportionality as an efficiency test. He did not examine whether the contested measures were actually *the most* adequate or necessary means to achieve the aim. Rather, he contented himself with ascertaining that Parliament "*was entitled to decide*" that they were.

What impeded the application of proportionality as an efficiency test was common law pragmatism, the tendency for "*illogical compromise*" that Hoffmann J identified as a "*British 'socio-cultural characteristic'*". It is this pragmatism, the economy of the common law in matters of substance and policy that leaves space for politics and reasonable disagreement. In contrast, the application of proportionality by the ECJ is characterised by a faith in the possibility to resolve the most contentious social matters through rational decision-making and fact-finding. In this case, Hoffmann J pointed out what is often neglected by the Luxembourg court: proportionality is not a neutral and objective test. The evaluation of the facts and their legal characterisation largely depends upon the value-scale adopted by the decision-maker. Sensitive socio-political matters are not questions of rational and objective legal knowledge produced through proportionality.

Engaging in a transnational judicial dialogue. Hoffmann J must have been furious. First, he reproved the ECJ for submitting measures on sensitive matters like Sunday trading and protection of the film industry to a proportionality test. Then, he did not apply a proper proportionality analysis as he had been invited to by the European court. Instead, he followed Commonwealth courts in applying a "rational basis" test and in deferring to the balancing performed by Parliament, but also to Parliament's judgment as to the extent that the prohibition was necessary. Finally, the judge left open the door for a complete resignation from the judicial duty to review the Euro-compatibility of national legislation, with the aphorism "*illogical compromise tends to be a British "socio-cultural characteristic'*"'. Was this part of a dialogue or a proper

[2025] Ibid, 66-8.
[2026] Ibid, 72.

threat by Hoffmann J, a judge "well known for his lively decisions and willingness to break with convention"?[2027]

In any case the message was well-heard in Luxembourg. The judge's decision was appealed before the House of Lords. In the meantime, the Court of Justice had issued two important decisions in similar French cases, *Conforama* and *Marchandise*.[2028] In these decisions, the Luxembourg court had changed its position from the *Torfaen* case and had itself assessed the issue of proportionality, finding in favour of the national authorities. This had caused uncertainty as to the application of proportionality in this field.[2029] The parties disagreed on the interpretation of the European case law before the House of Lords. The English court referred the relevant questions to the ECJ,[2030] which stated that in the *Conforama* and *Marchandise* cases it considered that it had all necessary information in order to assess the proportionality of such measures itself, and to help national courts to reach uniform decisions. The court observed that "*such an assessment [could not] be allowed to vary according to the findings of fact made by individual courts in particular cases*".[2031] It thus declared that Sunday trading restrictions were not prohibited by article 30. The House of Lords subsequently applied the judgment.[2032]

The response from Luxembourg resolved the situation on Sunday trading, but it still left questions about the application of proportionality unanswered. The issue provoked contradictory decisions and confusion in national case law. The European court was aware of this and tried to give some guidance as to the application of the principle in EC market freedoms. Interestingly, this provided us with one of the rare occasions where the ECJ employed a language of weighing and balancing in this field of case law. For once, in the 1992 *Stoke-on-Trent* case, national value-scales were authoritatively recognised: in the words of the court, "*[a]ppraising the proportionality of national rules which pursue a legitimate aim under Community law involves weighing the national interest in attaining that aim against the Community interest in ensuring the free movement of goods.*"[2033] Hence, it is not the application of proportionality that allowed English courts to enter into a dialogue with their European counterparts. Rather, it is English courts' *reasoned refusal* to follow European proportionality case law that led the ECJ to explicitly acknowledge normative pluralism in the EU. In her account on the making of the European rule of law, Karen Alter also observes that what has allowed domestic courts

[2027] *Wikipedia, The Free Encyclopedia*, s.v. "Lennie Hoffmann, Baron Hoffmann," (accessed May 16, 2018), http://en.wikipedia.org/wiki/Leonard_Hoffmann,_Baron_Hoffmann.

[2028] ECJ, C-312/89, 28 February 1991, *Union Départementale des Syndicats C.G.T. de l'Aisne v SIDEF Conforama*, ECLI:EU:C:1991:93; C-332/89, 28 February 1991, *André Marchandise, Jean-Marie Chapuis and SA Trafitex*, ECLI:EU:C:1991:94.

[2029] See *Kirklees Borough Council v Wickes Building Supplies Ltd; Mendip District Council v B & Q plc* [1991] 4 All ER 240 (CA, Civil Division, 30 April 1991).

[2030] ECJ, C-169/91, 16 December 1992, *Council of the City of Stoke-on-Trent and Norwich City Council v B & Q plc*, ECLI:EU:C:1992:519.

[2031] Ibid, para 14.

[2032] See *Stoke-on-Trent & Norwich (No. 2)* [1993] 2 W.L.R. 730 (HL, 31 March 1993).

[2033] See the ECJ *Stoke-on-Trent & Norwich* decision, C-169/91, cited above, para 15.

to influence the process of European integration, has been their willingness to oppose domestic law to the effective application of European law.[2034]

Undermining common law analytical rigour. In subsequent domestic case law, proportionality continued to lack the conceptual clarity that characterised the application of other heads of review. English judges have sometimes followed ECJ jurisprudence, while sometimes they have opted for an unstructured rational basis test.[2035] In *Sinclair Collis*, while the Court of Appeal conceptually distinguished EU law and ECHR proportionality, it concluded that in the concrete case at hand, the two tests overlapped sufficiently so as to make it "*unnecessary to take time with (…) comparisons*".[2036] The operation of European law in the domestic sphere has undermined the analytical rigour of common law judicial opinions and introduced cracks in the doctrine of precedent. This can also be observed in the application of Strasbourg decisions. We have seen that English courts under the HRA are obliged to take into account Strasbourg case law. However, in *Horncastle* Lord Phillips stated:

> The requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course.[2037]

While English judges take European law seriously, the pragmatic common law tradition allows them to depart from the case law of supranational courts whenever it is incompatible with fundamental features of the domestic legal culture. English judges decide by *reference* to European case law and not by means of its *translation* in the domestic sphere. Quite to the contrary, the scientific aesthetics of law and judicial reasoning in Greece has deprived domestic courts of any possibility of resisting the integration dynamic of proportionality.

4. Engineering constitutional change: proportionality and Greek constitutional goals

The impossibility of framing domestic constitutional particularities. Greek public lawyers, like their French colleagues, assimilate the domestic principle of

---

[2034] Alter, *Establishing the Supremacy of European Law*, 60–63.

[2035] *R v International Stock Exchange of the UK and the Republic of Ireland Ltd, ex parte Else* [1993] B.C.C. 11 (CA, Civil Division, 16 October 1992). Similarly, *Customs and Excise Commissioners v Peninsular and Oriental Steam Navigation Co* [1992] STC 809 (HC, Divisional Court, 30 September 1992).

[2036] *R v Secretary of State for Health, ex parte Sinclair Collis* [2012] QB 394 (CA, Civil Division, 17 June 2011), para 54.

[2037] *R v Horncastle & Others* [2009] UKSC 14 (SC, 9 December 2009), para 11. In the same vein, see *Pinnock*, cited above, para 48.

proportionality with the version applied by the ECJ. However, at least since the end of the '90s, this has led to an EU law-conforming interpretation of domestic law rather than the inverse. As we saw in Chapter 3, proportionality in the field of EU law has been applied by translating ECJ case law and has sometimes led to intrusive scrutiny of public policy measures, regardless of traditional institutional constraints. Further, the analysis in Chapter 6 has shown that this feature has not been specific to proportionality and that translation has played a crucial role in Greek legal theory more generally. Since the 2000s in particular, mainstream scholarship has even perceived the ECJ version of proportionality as scientifically correct and has criticised its deviant application in domestic judicial practice. The perception of proportionality as a kind of European science led the Council of State to raise the question of the proportionality of certain constitutional provisions before the ECJ in *Michaniki*. Contrary to the English case, domestic lawyers and judges did not pose the domestic Constitution and the traditional distribution of competences against the full effect of proportionality and other EU law provisions. The ECJ's response in *Michaniki* even led the Greek Council of State to overrule its settled case law as to the meaning of article 14(9) of the Constitution. In other words, the supreme administrative court deferred to the ECJ's determination of the "true meaning" of the domestic Constitution.

Constitutional change through supranational or international law is not new in the Greek context. The determination of the content of domestic constitutional values and requirements outside the borders of the domestic legal order is provided for in article 28(3) of the Constitution, which allows for limitations on the exercise of national sovereignty insofar as they are dictated by an important national interest. As Yannis Drossos has pointed out, by separating the holder of national sovereignty from the holder of the national interest, this provision blurs the constitutional limits between Greece and the supranational organisations of which it is a member.[2038] Even before 2001, mainstream scholarship generally agreed on the tacit constitutional reform function of this provision in the context of European integration.[2039] In *Michaniki*, this function was assumed by proportionality itself, which transcended the limits of the domestic Constitution as a principle shared between domestic and EU law.

However, at least in *Michaniki* coherence was only sought at the level of aesthetics and came at a cost for the coherence of the domestic constitutional discourse. Rather than a corollary of rationalist tendencies, assimilation was the result of the classicist tastes of Greek public lawyers. By establishing coherence between the domestic Constitution and the EU Treaties at the level of aesthetics, proportionality represented

[2038] Yannis Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]* (Athens; Komotini: Αντ. Ν. Σάκκουλας, 1996), 649 f.

[2039] On this matter, see Lina Papadopoulou, "Η συνταγματική οικοδόμηση της Ευρώπης από τη σκοπιά του ελληνικού Συντάγματος [The Constitutional Construction of Europe from the Point of View of the Greek Constitution]," in *Η προοπτική ενός Συντάγματος για την Ευρώπη*, ed. Lina Papadopoulou and Antonis Manitakis (Athens: Σάκκουλα, 2003), 176. The author cites Julia Iliopoulou-Stragga, *Ελληνικό συνταγματικό δίκαιο και ευρωπαϊκή ενοποίηση [Greek Constitutional Law and European Integration]* (Athens: Αντ. Ν. Σάκκουλας, 1996), 37.

the domestic society as a modern, European one. In contrast to what is the case in France, the importance of aesthetics in the Greek context makes it so that constitutional identity is a concept that is difficult to invoke in Greek legal discourse. Constantinos Yannakopoulos explains that in Greece, "it is generally impossible – if not explicitly denied – to determine national particularities in order to solidly take them into account in the framework of determination and implementation of specific state policies".[2040]

Besides, an eventual conflict between European and domestic constitutional values has traditionally been difficult to conceive of in Greek legal thought. Article 28(3) sets limits on the concession of national sovereignty. For example, it states that such concessions should respect human rights and democratic government. However, Yannis Drossos observes that in the minds of Greek lawyers, fundamental rights and democracy refer to the political philosophy of international organisations and are values that these organisations are deemed to respect *by definition*.[2041] Concerning the EU, this feature is explicit in the interpretative clause added to article 28 in 2001. As Evaggelos Venizelos put it in 2006, "in any case [the Greeks] politically equate the European Union to democracy, the State of Law, the feeling of growth".[2042] Normative conflicts between domestic and European law are typically neglected by domestic legal actors. This is exemplified in the application of proportionality in *Michaniki*. Focusing on facts and consequences, proportionality distracted attention from possible normative conflicts that underpinned its application. The resonance between EU and domestic legal orders, both promoting transparency, democracy and competition, did not allow for the matter to be analysed as a normative difference. Neglect of normative issues, both by national and by EU institutions, was also evident in the fact that the constitutional basis of the domestic provisions had no impact on the Council of State's preliminary reference or the ECJ judgment.

Unveiling the normative conflict in *Michaniki*. Nonetheless, there was a normative conflict and it can be illustrated through a reading of the Council of State's preliminary reference to the ECJ. In fact, in decision 3670/2006, the Council of State Plenum called on the ECJ to deviate from an unsparing application of proportionality. The domestic court made it clear that, in its view, if the ECJ found that the domestic measures were not proportionate, the Directive would be incompatible with general European law principles, such as democratic government, media pluralism, transparency and free competition. This is because, Article 14(9) was enacted in order to protect those principles, "*in view of the situation configured in Greek reality*".[2043] Moreover, the Council argued that in case of incompatibility of the domestic constitutional

[2040] Constantinos Yannakopoulos, *Η επίδραση του δικαίου της Ευρωπαϊκής Ένωσης στον δικαστικό έλεγχο της συνταγματικότητας των νόμων [The Influence of EU Law on Judicial Review of the Constitutionality of Legislation]* (Athens; Thessaloniki: Σάκκουλα, 2013), 375.

[2041] Drossos, *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]*, 652.

[2042] Evaggelos Venizelos, "Η σχέση Συντάγματος και Ευρωπαϊκής Ολοκλήρωσης [The Relationship between the Constitution and European Integration]" (Discussion on the reform of article 28 of the Constitution, Hellenic Parliament, October 25, 2006), http://www.evenizelos.gr/parliament/constitutionalreview2008/220-2009-03-25-21-53-15.html.

[2043] StE (Pl.) 3670/2006 *ΕΔΔΔ* 2009, 461, para 31.

provision with the European Directive, the Directive might violate the principle of subsidiarity. In the court's words, this principle applies in the areas which are not subject to the exclusive competence of EU law, and mandates the Community:

> not to impede member-states from taking measures in pursuit of goals that are simultaneously goals of the Community legal order, and in cases where due to local conditions this is appropriate, to provide them with the discretion to act in principle first (…).[2044]

The question of the discretion left to the domestic authorities (the Constituent Assembly in this case) for the pursuit of constitutional goals was at the core of the conflict between domestic and European legal orders. Yannakopoulos observes that the 2001 reform had instituted transparency as a primary goal of the domestic Constitution. Exceptionally, the Constitution had functioned in domestic judicial reasoning as a "constitution of goals", justifying and even *imposing* restrictions on constitutional freedoms, among them European market freedoms, for its effective realisation.[2045] As we saw, in its preliminary reference decision the Council stated that prevention of corruption entailed the legislator's obligation to "*institute sanctions that will be sufficiently deterrent*" in case of breach of the article 14(9) prohibitions.[2046] In the judges' view, the application of proportionality in this case "*would void [article 14(9)] of its content or would reverse its clear formulation and its equally clear goals.*"[2047] What is more, the Greek court perceived domestic constitutional goals as goals of the European legal order too. Due to their shared *nom propre,* domestic and European legal concepts were understood to share the same structure and function in judicial reasoning. Therefore, the domestic court considered that the ECJ should not set limits on the pursuit of common domestic and European goals through the application of proportionality as an efficiency principle.

In its response however, the ECJ refused to depart from its case law and pronounced on the limits that EC law sets on domestic policies, even when they are decided at a constitutional level. The Luxembourg court observed that the objectives of equal treatment and transparency pursued by the measures were legitimate and constituted the basis of Community directives on the matter.[2048] It further admitted that "*[e]ach Member State is best placed to identify, in the light of historical, legal, economic or social considerations specific to it (…), situations propitious to conduct*" which is liable to undermine these objectives.[2049] The ECJ stressed that "*Community law does not seek to call into question the assessment of a Member State, in the light of the specific context of that Member State*", as to

---

[2044] Ibid.

[2045] Yannakopoulos, "Μεταξύ συνταγματικών σκοπών και συνταγματικών ορίων: η διαλεκτική εξέλιξη της συνταγματικής πραγματικότητας στην εθνική και στην κοινοτική έννομη τάξη [Between Constitutional Goals and Constitutional Limits: The Dialectical Evolution of Constitutional Reality in the National and the Community Legal Orders]," 737.

[2046] StE (Pl.) 3670/2006, cited above, para 14.

[2047] Ibid.

[2048] ECJ, C-213/07, 16 December 2008, *Michaniki*, ECLI:EU:C:2008:731, point 55.

[2049] Ibid, para 56.

the existence of a risk of corruption and the need to confront it.[2050] Put briefly, domestic choices as to the level of protection of domestic constitutional values could be accommodated by EC law. Still, in the court's view this did not exclude the application of proportionality. The ECJ declared article 14(9) to be contrary to EC law. In its view, by excluding a whole category of enterprises from the public contract sector, the domestic provisions went beyond what was necessary to eliminate the risk of corruption.[2051]

As we saw in Section 1 of this Chapter, value-laden differences between domestic and European legal orders, when recognised by Luxembourg, engage the application of the margin of appreciation doctrine. In this context, proportionality functions as an intent-based test, concerned with the coherence of domestic measures with respect to their goal. However, this reasoning was not followed in *Michaniki*, where proportionality functioned as an efficiency principle. This is because the "specific context" invoked by the Greek authorities did not imply any value-laden difference between the domestic and the European legal orders. Only the acknowledgment of such a difference would allow domestic authorities to implement legislation according to their own value-scale. Instead, in the ECJ ruling the normative conflict between domestic and EU law was silenced. The pursuit of public interest goals, no matter how important in the particular circumstances, did not escape the dynamic of economic integration. Inserted into the proportionality framework, the implementation of domestic policies was re-framed as an *obstacle* to free trade and competition and was constrained through the application of proportionality.

The Council of State applied the ECJ decision through an impressive overruling of its previous interpretation of the domestic Constitution. While the aesthetic coherence between constitutional and European provisions was established through the application of the principle of proportionality, "*a principle both of the Greek legal order* (…)*, as well as of the Community [legal order]*",[2052] the internal coherence of the domestic Constitution was damaged. As we saw, in order to produce its impressive *revirement*, the Council had to reformulate the goals pursued by the domestic Constitution so as to minimise their restrictive effect. In the last "major shareholder" decision, the constitutional goal of transparency that article 14(9) pursued was reformulated to a concrete objective: in the court's words, the provision aimed "*only to prevent (…) the concrete illegitimate influence that can be exercised on the procedure of public contracts, with an intention to obtain the award of the contract*".[2053] The application of proportionality thus led

[2050] Ibid*,* para 57.

[2051] Ibid*,* paras 62-63. Interestingly, in margin of appreciation cases, the court requires from domestic authorities to *justify* exceptions to the application of the domestic measures. This kind of reasoning is the inverse from the one observed here, where the court sanctioned the too broad application of legislation. On this issue, see Réveillère, *Le juge et le travail des concepts juridiques*, 425 f.

[2052] StE (Pl.) 3470/2011, *E⊥⊥⊥* 2012, 199, para 9; 3741/2011, para 13.

[2053] StE (Pl.) 3471/2011, para 13.

to a "self-denying transformation" of the domestic Constitution to the profit of European integration.[2054]

In *Michaniki,* not only did proportionality displace local knowledge and local representations of the Greek polity; at a normative level, it weakened the effective realisation of domestic constitutional goals. In other words, proportionality undermined the *effet utile* of the domestic Constitution, to the profit of EU market freedoms.[2055] Yannakopoulos shows that Greek courts have often opted for a liberal interpretation of the Constitution, to the detriment of domestic constitutional values and goals. In some cases, the enforcement of individual, and especially economic freedoms has limited the discretion of public authorities considerably.[2056] In Chapter 3, we saw that the application of proportionality as an objective test of efficiency and rationalisation has contributed to this evolution. In this context, the Government must *prove* that legislative interferences with economic freedoms are efficient in order for the Council to accept their constitutional legitimacy. It is thus not surprising that proportionality has not fulfilled the expectations that Greek scholars attached to it for the realisation of the social state principle.[2057] The failure of proportionality in this respect became even more evident in the context of the economic crisis.

The decision on the first MoU. In decision 668/2012, for the first time the Council was confronted with austerity measures adopted in application of the economic adjustment programme that Greece had agreed with its institutional creditors.[2058] The measures were concretely agreed at a staff level, between the representatives of the Greek Government, the ECB, the IMF and the Commission. They were specified in an English language document, the so-called MoU, which was annexed to law 3845/2010.[2059] Domestic legislation implementing austerity policies imposed severe cuts on wages and allowances in the public sector, as well as on pensions. The constitutionality of the cuts was contested by several trade unions and professional associations in a case that attracted media attention. Among the main arguments of the claimants was the violation of the principle of proportionality.

While the claimants invoked a great number of constitutional and international rights, proportionality functioned as a self-standing principle, drawn from article 25(1) of the Constitution. As such, it concerned the means-ends of legislation. First of all,

---

[2054] Roger Cotterrell, "Is It so Bad to Be Different? Comparative Law and the Appreciation of Diversity," in *Comparative Law: A Handbook*, ed. Esin Örücü and David Nelken (Oxford; Portland, Or: Hart, 2007), 136.

[2055] See, in this sense, Yannakopoulos, "Μεταξύ συνταγματικών σκοπών και συνταγματικών ορίων: η διαλεκτική εξέλιξη της συνταγματικής πραγματικότητας στην εθνική και στην κοινοτική έννομη τάξη [Between Constitutional Goals and Constitutional Limits: The Dialectical Evolution of Constitutional Reality in the National and the Community Legal Orders]."

[2056] Ibid.

[2057] Giorgos Katrougkalos, "Αρχή της αναλογικότητας και κοινωνικά δικαιώματα [The Principle of Proportionality and Social Rights]," *ΔτΑΤΕΣ IV*, 2006, 141.

[2058] StE (Pl.) 668/2012 *NoB* 2012, 384. On this case, see among others Theodora Antoniou, "Η απόφαση της Ολομελείας του Συμβουλίου της Επικρατείας για το Μνημόνιο – Μια ευρωπαϊκή υπόθεση χωρίς ευρωπαϊκή προσέγγιση [The Council of State Plenum Decision on the Memorandum - A European Affair without a European Approach]," *ToΣ*, 2012, 197.

[2059] Law n. 3845/2010 of 6 May 2010, Government Gazette A 65.

trade unions and associations claimed that the measures enacted with law 3845/2010 were not narrowly tailored to their goal. They pointed out that since austerity aimed to confront the crisis, it should have a temporary character. The Council rejected this claim. It repeatedly stressed that the measures were "*part of a broader programme for the Greek economy, comprising financial adjustment and structural reforms*".[2060] Hence, "*cumulatively applied,*" the measures did not only aim to respond to the country's immediate financial needs, but also pursued the more general goal of "*consolidation of public finances* (…) *so as to become viable after the three-year period at which the measures initially aimed*".[2061] Similarly, the Council rejected claims as to the existence of less onerous means that would be more efficient in pursuing the legislative aims. According to the judges, such claims were unfounded and inoperative, since the legislative objective of financial consolidation was also pursued through "*other economic, financial and structural measures, the cumulative and coordinated application of which, according to legislative appraisal, will lead the Country to overcome the crisis and to improve its financial numbers so as to be sustainable*".[2062]

The plaintiffs clearly pressed for the application of proportionality as an efficiency test. However, the holistic view of the legislative policy in question that the Council adopted did not allow for the contestation of particular factual assessments. When the plaintiffs contested the concrete adequacy of the measures with respect to their goal, the Council retorted that the cuts "*primarily aim[ed] to limit general government expenses and thus to contribute to the reduction of the Country's financial deficit*".[2063] In this respect, the trade unions and professional associations contested the factual basis of the measures, since the total number of public servants was not yet known nor was the measures' concrete financial impact. The Council of State however, insisted on its deferent stance. It stated that by their nature, the measures directly contributed to the reduction of public expenses. Thus, "*in view of the circumstances that, according to the legislator, existed at the time of [their] enactment*",[2064] they were not inappropriate, let alone manifestly inappropriate, for pursing their aims. Nor could the measures be considered unnecessary, "*given that the appreciation of the legislator (…) is subject only to a marginal judicial review*".[2065] The court, departing from its application of proportionality in economic and professional freedom cases, refused to require concrete evidence as to the efficiency of austerity policies. It concluded that the contested legislation had "*struck a balance*" between general interest requirements, as they were assessed by the Parliament, and the property rights of the claimants. In this respect, the judges also took into account the existence of specific provisions for vulnerable groups.

Making sense of the application of proportionality in the *First MoU* decision. In contrast to *Michaniki*, proportionality was not applied as a European scientific method. It did not function as an objective test concerned with evidence and data. The court was restricted to a check of the coherence of the domestic measures,

[2060] StE (Pl.) 668/2012, cited above, para 35.
[2061] Ibid.
[2062] Ibid.
[2063] Ibid.
[2064] Ibid.
[2065] Ibid.

which were viewed as part of a broader legislative policy. As to the impact of the legislative restrictions, the Council contented itself with the observation that the domestic authorities had struck a balance between the public interest and individual rights. The type of review that proportionality entailed resembled the test that the ECJ performs in margin of appreciation cases.[2066] While from the point of view of judicial politics, judicial restraint in this case might seem reasonable, how can we make sense of the application of proportionality from a domestic constitutional viewpoint?

The wording of the decision shows that what led the court to defer to legislative assessments was the importance it accorded to the legislative aim. The Council dedicated a long part of its reasoning to the economic and political developments that had led to the activation of the support mechanism for the Greek economy.[2067] Even though, at the stage of the identification of the aim, the court did not explicitly use the term emergency, it talked about an "*acute financial crisis*" and the need for its "*immediate*" confrontation, a "*long period of economic depression*" or even a "*crucial financial situation*".[2068] It is revealing that the word "economic" was used more than 200 times in the decision, the word "financial" more than 140. Clearly, legal doctrine was invaded by economics and finance. Later in its reasoning, the court actually referred to the existence of a financial emergency.[2069]

Nonetheless, it was not only the emergency that justified the application of proportionality as a manifest error test. Interestingly, for once EU law pointed in the direction of judicial restraint as well. While the rights invoked by the claimants were not among EU market freedoms, the objective pursued by the domestic legislator was perceived as an EU goal. According to the court, facing the crisis and consolidating public finances,

> are generally compelling public interest reasons and at the same time goals that are commonly shared among Eurozone member states and entrenched in European Union legislation, in view of the obligation of fiscal discipline and of ensuring the stability of the Eurozone as a whole.[2070]

Thus, in the judicial assessment of the public interest pursued by Parliament, the Council of State took into account the common interest of Eurozone member states. Once again, EU law played an important role in the determination of domestic constitutional goals and policies. The coincidence between domestic and EU goals made the Council adopt a holistic view of legislation and simply check the coherence of the domestic measures.

This reading is reinforced by the Council's reasoning concerning the nature of the MoU itself. The claimants argued that this document was an international convention

[2066] See *supra*, Section 1 of this Chapter.
[2067] StE (Pl.) 668/2012, cited above, paras 19-24.
[2068] Ibid, para 35.
[2069] Ibid.
[2070] Ibid.

that had been introduced into the domestic legal sphere in an irregular manner. The Council, on the contrary, considered the MoU to contain the political programme of the Greek government and not an international agreement, "*despite the fact that it [was] a product of cooperation between Greek authorities, the European Commission, the European Central Bank and the International Monetary Fund (…) and despite the obligations that Greece assumed vis-à-vis the rest of the Eurozone member states with the subsequent Loan Facility Agreement*".[2071]

Under the circumstances of economic crisis, thus, Greek lawyers' tendency to search for the value-laden content of the domestic Constitution abroad acquired a new dynamic. Before, under the influence of EU law, the effective application of constitutional limits, most notably negative freedoms of an economic nature, absorbed constitutional goals like transparency or social rights. This led courts to review public interventions more intrusively, to the benefit of market integration. In the context of economic adjustment, in contrast, European goals have *reinforced* domestic financial goals. Domestic constitutional limits have thus been considerably weakened. In the *First MoU* decision, the Council repeatedly stressed that its proportionality scrutiny was only "marginal".[2072] The court was only concerned with the plausibility of public authorities' assessments. Nor did the principles of equality and human dignity, solemnly announced by the court, lead to an impact-based review of the contested measures.[2073] Moreover, the Council rejected the claimants' allegations concerning the violation of their constitutional and Convention rights, since they had not specifically claimed that their "*decent way of life*" was at stake.[2074] The Strasbourg court rewarded this solution. It affirmed that appeal to the Convention in such cases was "*manifestly ill-founded*", insofar as the measures did not place the affected individuals "*at risk of having insufficient means to live*".[2075] In the context of an economic emergency, the improvement of the economic situation of the country has been sought at all costs. Domestic constitutional values and European rights have been reduced to a minimum requirement for decent living.

As we saw in Chapter 6, something that long preserved the normativity of the domestic Constitution was its apparent coherence with European law and the underlying representation of the Greek polity as modern and European. In a species of sympathetic magic, by translating European legal rules in the domestic sphere, Greek lawyers purported to modernise Greek society. The Eurozone crisis abruptly exposed this representation as illusionary. Since then, modernisation of the Greek society and the corollary compliance with EU law precepts has required a species of constitutional magic that is not so sympathetic. In fact, it has questioned the normativity of the domestic Constitution as a whole. In the implementation of the Economic Adjustment Programmes, defiance of constitutional limits became more

[2071] Ibid, para 28.
[2072] Ibid, paras 34, 35 and 38.
[2073] Ibid, paras 37 f.
[2074] Ibid, para 35.
[2075] ECtHR, *Koufaki and ADEDY v Greece*, 7 May 2013, nos. 57665/12 and 57657/12, para 46.

apparent in the circumvention of precise and unconditional constitutional rules and procedures.[2076]

In this context, the Council of State has assumed a function of justifying constitutional deviance. In the *First MoU* decision, while proportionality was pronounced as a manifest error test, it led to a kind of reasoning that was very different from its traditional application as a self-evident standard. Indeed, it entailed extensive justification of the austerity measures introduced with law 3845/2010. The court, as a partner of policy-making authorities, felt the need to reply to the plaintiffs' unconstitutionality arguments *one by one*. It forced domestic policies into constitutional categories, changing well-established interpretations of domestic constitutional concepts like the public interest.[2077] Partnership between the government and the Council of State in the implementation of economic adjustment was also manifested at an institutional level, with the appointment of the President of the Council as interim Prime Minister in 2012.

Domestic scholars have strived to account for this new constitutional situation, when they have not simply denounced it. However, in their accounts too, there is little space left for constitutional limits. In a comment on the 668/2012 decision, Xenophon Contiades and Alkmene Fotiadou argued:

> In order for a theory of social rights to be convincing, it must prove applicable independently of the changing economic and political circumstances. If the approaches that defend that social rights incorporate a stable and untouchable core of protection (…) prove inapplicable in practice, this is not due to the changing reality but to these approaches themselves.[2078]

In this new kind of constitutionalism then, the Constitution is normative only in so far as it is applicable in practice. Instead of being interpreted, the Constitution is *observed*.[2079] Due to its pragmatic and consequentialist connotations, proportionality becomes t*he only* possible theoretical structure through which to make sense of domestic constitutional practice.[2080] As we saw, its promoters argue that it is *the only*

[2076] Afroditi Ioanna Marketou, "Economic Energy and the Loss of Faith in the Greek Constitution: How Does a Constitution Function When It Is Dying," *Cambridge Journal of International and Comparative Law* 4 (2015): 289.

[2077] See Iakovos Mathioudakis, "Μετασχηματισμοί του ταμειακού συμφέροντος του δημοσίου σε περίοδο έντονης οικονομικής κρίσης [Transformations of the Cash Interest of the State in a Period of Intense Economic Crisis]," *Εφ⊥⊥*, no. 4 (2011): 478.

[2078] Xenophon Contiades and Alkmene Fotiadou, "Κοινωνικά δικαιώματα, αναλογικότητα και δημοσιονομική κρίση, θεωρητικές επισημάνσεις επ' ευκαιρία της ΟλΣΕ 668/2012 [Social Rights, Proportionality and Financial Crisis, Theoretical Remarks on the Occasion of StE (Pl.) 668/2012]," *⊿τΑ*, no. 53 (2012): 29.

[2079] See in this sense Constantinos Yannakopoulos, "Το ελληνικό Σύνταγμα και η επιφύλαξη του εφικτού της προστασίας των κοινωνικών δικαιωμάτων [The Greek Constitution and the Feasibility Clause of Social Rights Protection]," *Εφ⊥⊥* 4 (2015): 417.

[2080] See Contiades and Fotiadou, "Κοινωνικά δικαιώματα, αναλογικότητα και δημοσιονομική κρίση, θεωρητικές επισημάνσεις επ' ευκαιρία της ΟλΣΕ 668/2012 [Social Rights, Proportionality and Financial Crisis, Theoretical Remarks on the Occasion of StE (Pl.) 668/2012]," 29.

way for adjudicating fundamental rights.[2081] Rather than the establishment of fundamental rights as principles, the recent hegemony of proportionality in Greek constitutional discourse expresses the intrusion of considerations from other disciplines (most notably economics and finance) in the definition of domestic constitutional values.

***

In the ECJ market freedoms case law, proportionality acquires a function of economic integration. It proceeds through the objectivisation of national goals and the factualisation of the values that compete in the case at hand. In this way, it establishes a common denominator for assessing the effectiveness of domestic policy measures and eliminates disparities between member states in their pursuit. In other words, the function of proportionality is to re-frame and evaluate national policies according to the common market rationale. The application of proportionality ensures the *effet utile* of EU market freedoms and is imposed as an obligation on domestic courts in this field. However, the function that proportionality assumes in Luxembourg case law is nuanced once the test is inserted into local discursive contexts. The "success" or "failure" of proportionality in its integration mission is connected to the cultural particularities of domestic judicial review systems. Different local perceptions and applications of EU law proportionality in different contexts express differences in the way local legal actors perceive the construction of the common market and the project of EU integration itself.

In France, the search for coherence between domestic and EU law long led to an interpretation of proportionality and of EU law more generally in the light of domestic law. EU law concepts were inaccurately translated into domestic ones and their dynamic was absorbed by the structures of the Council of State's judicial review. Proportionality in the field of EU law led to a kind of rationalisation that the French Council of State rejected, in so far as it did not accommodate the advancement of domestic policy goals. This compromised the *effet utile* of EU market freedoms considerably. Lately however, the Council of State has changed its stance and has accepted its role of *juge communautaire de droit commun*, ensuring the effective application of EU law in the domestic sphere. The operation of translation has been inverted and the domestic constitutional order is now projected on to EU law norms and concepts. While these concepts are in principle interpreted by the ECJ, domestic courts reserve for themselves the possibility to invoke domestic particularities through newly invented notions, most notably the notion of constitutional identity. The explicit acknowledgment of the possibility of normative conflict between domestic and European law introduces elements of pragmatism into French courts' case law.

In contrast to the rationalist search for substantive coherence that characterises French legal thought, English legal discourse has long been dominated by analytical

[2081] See *supra*, Part I, Chapter 3.2.i.

formalism. In this context, ECJ proportionality has been perceived as a head of review that was long contained within the scope of the ECA. English lawyers are aware of the normative conflicts that might arise between domestic and EU law and perceive the ECJ application of proportionality as a tool for finding compromise between domestic goals and European legal objectives. Still, by mandating the application of legal rules only insofar as they are efficient, ECJ proportionality produces a fusion between substance and form which irritates fundamental common law assumptions. When sensitive social matters like Sunday trading are at stake, proportionality even irritates the traditional distribution of competences between the judiciary and Parliament. Hence, English judges have occasionally objected to its rigorous application and to the *effet utile* of EU market freedoms. From the '90s, proportionality has introduced some cracks into the English analytical tradition. The Sunday trading litigation in particular was at the source of a fruitful dialogue between English and European judges. At the issue of this dialogue, the ECJ explicitly acknowledged normative pluralism in the EU, even in the field of EU market freedoms.

In Greece, like in France, domestic lawyers have sought substantive coherence between domestic and EU law. Still, this has not been so much the result of rationalist tendencies in Greek legal thought but rather of a classicist taste shared by local legal and political elites. Coherence between domestic and EU law has been sought at the level of aesthetics and sometimes came at a cost for the internal coherence of the domestic constitutional order. Proportionality, as a principle shared between domestic and EU law, has had a crucial role in this process and has operated as a market integration principle. It has ensured the effective application of EU market freedoms, while it has undermined the realisation of domestic constitutional goals. In a species of sympathetic magic, the application of proportionality as an EU law principle has seemed to realise domestic policy goals, by rendering them in the form of impacts and effects. The actual pursuit of these goals has subsequently appeared superfluous to domestic lawyers. The Greek polity was represented as a modern and European one, at least in the minds of lawyers. While in the context of the economic crisis the structure of proportionality reasoning changed considerably, its application in some cases still expresses the determination of domestic constitutional values by EU law.

CHAPTER 9
Disintegration

Local disintegration tendencies. European integration is in crisis. Challenges and constraints connected to the rise of Euroscepticism are sometimes manifested in the practice of European institutions themselves, both in the context of the EU and of the Convention. The analysis and interpretation of such manifestations preoccupy European integration specialists.[2082] However, this is not the focus of this Chapter. European case law will be presented here only in so far as it is relevant to the understanding of domestic cases. What will be analysed instead is the way disintegration tendencies are expressed in the use of proportionality language by domestic courts.

Paradoxically, disintegration seems to be a transnational tendency. In France, disintegration tendencies have been expressed in derogations from the application of regional treaties. Most importantly, in the context of the recent state of emergency, the French Government made repeated use of article 15 ECHR to derogate from the Convention. In the UK, Euroscepticism is almost a tradition and has often been translated in opt-out clauses from, or reservations to further European integration. The Labour constitutional reform of which the HRA was a part has been fiercely criticised by legal and political actors for trading off parliamentary sovereignty and for rendering English courts subservient to Strasbourg. The Conservatives have repeatedly declared their desire to replace the HRA with a British Bill of Rights.[2083] However, since 2010 the priority of the British Government has certainly been disintegration from the EU. In response to the introduction of the Lisbon Treaty in the domestic sphere, the EU Act 2011 required that any future transfer of competences to the EU be approved by referendum. In early 2017, following the Brexit referendum, the UK triggered the application of article 50 TEU. The EU (Withdrawal) Bill is currently being examined by the Parliament and contains the repeal of the ECA 1972, while it provides for certain pieces of retained EU law. In Greece Euroscepticism has been rising, to the point that the 2015 referendum concerning conditionality under the economic adjustment programmes was interpreted by many as a dilemma as to the future European orientation of the country. For the moment however, Greek Eurosceptic tendencies have not been concretised in legal or constitutional change.

[2082] See, for example, Bruno De Witte, Andrea Ott, and Ellen Vos, *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Cheltenham: Edward Elgar Publishing, 2017); Daniel Thym, "When Union Citizens Turn into Illegal Migrants: The Dano Case," *European Law Review* 40, no. 2 (2015): 249.

[2083] Conservative Party, "Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Human Rights Laws," (accessed May 15, 2018), https://s3.amazonaws.com/s3.documentcloud.org/documents/1308198/protecting-human-rights-in-the-uk.pdf.

Proportionality in a context of normative conflict. While one cannot say that proportionality itself has borne the dynamics of disintegration, relevant tendencies are expressed in its use and sometimes considerably affect its form and function. The analysis in this Chapter in no way pretends to be exhaustive nor does it purport to predict future developments in European integration. Rather, it offers a particular reading of domestic proportionality cases that have provoked much discussion among local legal actors. I argue that what is new about these cases is not so much the use or the evolution of proportionality itself, which follows already existing local patterns in the perception of both proportionality and European integration. Rather, it is the particular context of disintegration in which proportionality operates. This context accentuates the conflicts between domestic and European law and affects the application of proportionality.

In France, disintegration proceeds through the application of proportionality itself. As a corrective exception, disproportionality no longer solely imposes the integration of foreigners into French society. In *Gonzalez-Gomez,* it also allows for the voluntary disintegration of European citizens, by exempting them from restrictions defined in republican legislation. This strange function of proportionality is in continuity with the reasoning of the ECtHR in *SAS* **(Section 1)**. In England, disintegration is expressed in the abandonment of proportionality as a head of review. However, this does not entail the abandonment of the rationalist methodology that proportionality entails. English judges replace proportionality with domestic concepts and methods. In this way, they affirm to themselves the powers that Parliament had conceded to European supranational courts **(Section 2)**. In Greece, disintegration is expressed in the affirmation of the autonomy of domestic constitutional values by Greek supreme courts. This introduces a kind of dualism between domestic and European law. Greek courts affirm to themselves the power to define and enforce constitutional goals and limits. While judges assume a new role as guarantors of the Constitution, for once proportionality might prove a formidable weapon **(Section 3)**.

1. Proportionality and social disintegration: bounding the normativity of French republican legislation

French exceptionalism in the field of fundamental rights. Chapter 7 has shown that even after its connection to the Convention, proportionality in French public law has been perceived as an objective general principle and has assumed no radical function in judicial reasoning. In most cases, ordinary courts have not even found it necessary to change the traditional concepts and structures of judicial review in order to comply with Strasbourg precepts. Hence, in the review of the Convention-compatibility of domestic measures, proportionality terminology has only been used residually, as a patch. It has taken the form of an exception, as the negative standard of *dis*proportionality indicates. It has generally applied on a case by case basis, mostly against administrative acts. In this way, it has expressed the idea that the violation of the Convention can only be perceived as an *effet pervers* of French legislation, resulting

from its application in concrete circumstances rather than from the rationality that underpins it as a whole. In the review of legislation, proportionality and the application of European rights has preserved its character of republican inculcation, in which domestic judges naturally affirm that the value-laden choices of parliamentary majorities are legitimate.

In *SAS v France*, analysed in Chapter 5, the ECtHR criticised the French republican reinvention of fundamental rights.[2084] The European court reluctantly accepted the compatibility of the *burqa* ban with the Convention. Having rejected the Government's arguments based on sex equality and human dignity, it accepted the legitimacy of the domestic measures by appealing to the respect for the minimum requirements of life in society.[2085] The Strasbourg court considered the only plausible justification for the *burqa* ban to be a majoritarian perception of social interaction. For once, it did not impose the reformulation of domestic policy goals in Convention terms: it underscored that the public interest aim invoked by the French authorities did "*not expressly correspond to any of the legitimate aims*" provided for by the Convention. Instead, the Strasbourg judges proceeded to this reformulation themselves. They linked the minimum requirements of life in society to the protection of the rights of others.[2086] They declared that the preservation of these minimum requirements falls within the powers of the state. Thus, the judges were "*able to accept that a State may find it essential to give particular weight in this connection to the interaction between individuals and may consider this to be adversely affected by the fact that some conceal their faces in public places*".[2087] This left open the possibility of justifying the domestic measures in principle.

That being said, the court did not readily accept the French republican perception of life in society as compatible with fundamental rights. The Strasbourg court underscored that,

> [a]lthough individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position (…).[2088]

Finally, the *burqa* ban was accommodated by the Convention as an instance of French exceptionalism. In this respect, the judges underscored that "*a large number of actors, both international and national, in the field of fundamental rights protection have found a blanket ban to be disproportionate*".[2089] Further, they claimed to be "*very concerned*" by certain

[2084] ECtHR, *SAS v France*, 1 July 2014, no. 43835/11. On this case, see *supra*, Part II, Chapter 4(5).
[2085] *SAS v France*, para 117.
[2086] Ibid, para 121.
[2087] Ibid, para 141.
[2088] Ibid, para 128.
[2089] Ibid, para 147.

Islamophobic remarks that marked the debate on the adoption of the law on the *burqa*.[2090] In the court's view,

> a State which enters into a legislative process of this kind takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance, when it has a duty, on the contrary, to promote tolerance.[2091]

In this respect, though the court stressed that the main goal of legislation was the prohibition of a practice of certain Muslim women, the fact that it was finally expressed in neutral terms was important.[2092] After a long consideration of the impact of the ban on the women affected by it, the European court accepted that the prohibition to wear the *burqa* in public spaces was a "*choice of society*", on which democratically elected state authorities enjoy a wide margin of appreciation.[2093] The lack of established consensus on the matter among the contracting states also pointed in this direction.[2094] The judges finally held that the French law "*can be regarded*" as proportionate and necessary in a democratic society.[2095]

In the ECtHR's view, at least for the moment, the Convention did not require the abandonment of the French understanding of fundamental rights. However, the *SAS* decision made clear that this understanding would not always be found compatible with the Convention. The European conception of rights increasingly forces French lawyers to accept normative pluralism and to abandon their belief in the universal nature of republican values. It forces them to become aware of "cognitive limitations connected to national parochialism" in the field of human rights.[2096] This upsets traditional legal categories and distinctions and contests the most fundamental assumptions of rationalist French legal thought. As French lawyers become conscious of the possibility of conflict between objective republican values and European rights, proportionality acquires a radical dynamic in French law. However, it does not lead to a "culture of justification".

The *Gonzalez-Gomez* case. Recently it appears that domestic courts have proceeded to a revolutionary application of the Convention and especially of proportionality. In the field of public law, this is exemplified by the *Gonzalez-Gomez* case, decided by the Council of State Plenum in 2016.[2097] Mrs Gonzalez-Gomez wished

---

[2090] Ibid, para 149.
[2091] Ibid.
[2092] Ibid, para 151.
[2093] Ibid, para 153; para 154.
[2094] Ibid, para 156.
[2095] Ibid, para 157.
[2096] Mattias Kumm, "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State," in *Ruling the World?: Constitutionalism, International Law, and Global Governance*, ed. Jeffrey Dunoff and Joel Trachtman (Cambridge; New York: CUP, 2009), 307.
[2097] CE (Pl.) ord., 31 May 2016, *Gonzalez-Gomez*, no 396848, ECLI:FR:CEASS:2016:396848.20160531. Concerning recent *Cour de cassation* case law that has provoked relevant debates, see Cass. civ. 1, 4 December 2013, no. 12-26066, Bull. 2013, no. 234. On this issue, see Louis Dutheillet de Lamothe and Guillaume Odinet, "Contrôle de conventionnalité : in concreto veritas ?," *AJDA*, 2016,

to export to Spain the gametes of her deceased husband, in order to perform posthumous insemination. The French hospital refused. Contrary to what is the case in Spain, French legislation prohibits posthumous insemination, as well as "the exportation of gametes stored in France for a use that would go against the bioethics principles of the French legislation".[2098] The claimant challenged the refusal and applied to the administrative courts for an interlocutory injunction under the *référé libertés* procedure. She claimed that the refusal to export her deceased husband's gametes constituted a violation of her right to private and family life under the ECHR. Her application being rejected in first instance, Mrs Gonzalez-Gomez appealed before the Council of State. Until then, the court had hesitated to proceed to a Convention-compatibility review of legislation in the *référé-libertés* procedure, since its view was that an ultimate incompatibility could not be manifest and thus could not ground interim relief. In *Gonzalez-Gomez,* however, the court agreed to scrutinise the manifest incompatibility of domestic law with the Convention.[2099]

As to the substance of the case, the Council explicitly divided its analysis in two steps. First, it examined *in abstracto* the compatibility of the domestic legislation with the Convention as a whole. In its view, "*regarding those bioethical matters, the margin of appreciation granted by the Convention to the states is wide*" and the domestic law, both concerning posthumous insemination and the exportation of gametes for this purpose, fell within this margin.[2100] Therefore, viewed abstractly, French legislation was not considered disproportionate *per se*. Still, the judges did not content themselves with the in principle affirmation of legitimacy; they went on to ascertain *in concreto* that "*the implementation of the law does not lead, in the particular situation of the applicant, to an excessive infringement [in the original: une ingérence disproportionnée] of the rights guaranteed by the Convention*".[2101] Contrary to the traditional formalist assumptions of French legal thought, the application of legislation in concrete cases was perceived as a question of law that could affect its compatibility with the Convention. This was so even though the legislation in question was legitimate *per se* and did not allow for administrative discretion. What is more, in the concrete case of Mrs Gonzalez-Gomez, judicial review led to the disapplication of the French law. The Council decided that, "*in the light of all the particular circumstances*", the application of the French law to Mrs Gonzalez-Gomez "*jeopardises (…) in a manifestly excessive way the claimant's right to respect for her private and family*

1398, esp. "Le contrôle in concreto avant la décision *Gonzalez Gomez*." Note that in most of the cases mentioned by the authors, the *Cour de cassation* does not use proportionality language. See, however, Cass. civ. 3, 17 December 2015, no. 14-22095, Bull. 2016, no. 841, where the court annuls a Court of Appeal decision for not having reviewed *in concreto* the proportionality of legislation that interferes with the claimants' rights under article 8 ECHR.

[2098] Source of translation: *Gonzalez-Gomez,* press release in English, (accessed May 15, 2015), http://english.conseil-etat.fr/Activities/Press-releases/Posthumous-Insemination.

[2099] Dutheillet de Lamothe and Odinet, "Contrôle de conventionnalité : in concreto veritas ?"

[2100] See *Gonzalez-Gomez,* press release in English, cited above, para 2.

[2101] Ibid, para 1. The translation of the term "*disproportionnée*" into "*excessive*" on the official Council of State website shows that French lawyers care little about linguistic structures and perceive proportionality as synonymous and interchangeable with other standards.

life".[2102] The court thus enjoined the French hospital to ensure the transfer of Mr Gomez' gametes to a Spanish hospital.

A revolutionary application of proportionality? The decision is perceived as a revolutionary application of proportionality, an instance of "subjectivisation" of the law, or even a change of paradigm in French judicial review.[2103] Proportionality, appreciated on a case-by-case basis, allows the judge to substitute her own view as to which solution would be just in the circumstances of each case, for that of the legislator. Public lawyers and judges do not know how to interpret the Council of State's attitude.[2104] Scholars usually explain the decision as inspired by the Council's indulgence of a sentiment of equity or by an implicit will to conform to the European freedom of movement. In any case, the solution adopted by the *juge des référés* was certainly not manifest, as the code of administrative justice requires for granting interim injunctions. Proportionality seems to acquire a radical function in French public law, to the detriment of this law's most fundamental formal features, such as equality or the separation of powers. The transcendence of traditional formalities is expressed in the direct style of the *Gonzalez-Gomez* decision, which departs from the Council's long-established habit of reasoning in one phrase composed by *considérants*.[2105] *Gonzalez-Gomez* gave the chance to the Council to participate in the ongoing transnational dialogue on proportionality between prestigious courts. A press release of the decision in English is available on the official *Conseil d'Etat* website.[2106]

However, close attention to judicial reasoning shows that the function of proportionality in the *Gomez-Gonzalez* case is not new.[2107] As is typically the case in the Council of State's reasoning, proportionality was applied as an exception to the in principle conventionality of legislation. As such, it operated according to the concrete circumstances of the case. The *in abstracto* proportionality of the law was not contested. Nor were the republican value-choices that the law embodied contested in principle. It is in the concrete review of conventionality that proportionality entered into play. It simply eliminated the *effets pervers* of a law that was considered too general. The *rapporteur public* Aurélie Bretonneau referred to "an absolute prohibition", which is "deprived of nuances".[2108] Proportionality's function was once again corrective of the "Cartesian paradigm, which relies on the belief in the legislator's capacity to anticipate all situations".[2109] *Gonzalez-Gomez* is not the first time that proportionality introduced a

---

[2102] Ibid, para 2.

[2103] Pierre Delvolvé, "Droits subjectifs contre interdit législatif," *RFDA*, 2016, 754.

[2104] See Édouard Crépey, "Conclusions sur CE, 28 décembre 2017, *M. Molenat*, No. 396571," ECLI:FR:CECHR:2017:396571.20171228. The *Rapporteur public* admits that he is unable to understand the reasoning underlying *Gonzalez-Gomez*.

[2105] Pascale Deumier, "Contrôle concret de conventionnalité : l'esprit et la méthode," *RTD Civ.*, 2016, 578.

[2106] See *Gonzalez-Gomez*, press release in English, (accessed May 15, 2015), http://english.conseil-etat.fr/Activities/Press-releases/Posthumous-Insemination.

[2107] Crépey, "Conclusions sur CE, 28 décembre 2017, *M. Molenat*, No. 396571."

[2108] Aurélie Bretonneau, "Conclusions sur CE Ass., 31 mai 2016, *Gonzalez-Gomez*," *RFDA*, 2016, 740, cited by Delvolvé, "Droits subjectifs contre interdit législatif," n. 8.

[2109] Deumier, "Contrôle concret de conventionnalité : l'esprit et la méthode."

condition for defeating domestic legislation.[2110] Only, it is the first time that this was so explicit. Besides, despite its direct style, the Council's decision remains laconic and is still very far from the "European style of decision-*dissertation*".[2111] If it was not a radical application of proportionality, what led the administrative judges to the revolutionary *Gomez-Gonzalez* decision?

Proportionality and the limits of republican inculcation. As was often observed in the analysis of Greek case law, judicial "activism" in this case proceeded through the judicial construction of the legislative goal. According to the Council, while formulated in abstract terms, in reality the prohibition on the export of gametes sought to impede any circumvention of the law on the prohibition of *post-mortem* insemination.[2112] This allowed for Mrs Gonzalez-Gomez to be exempted from the prohibition. Indeed, the Council of State noted that,

> the current situation of [Mrs Gonzalez-Gomez] results from the illness and the sudden deterioration of [Mr Gomez's] health condition, which prevented the spouses to carry out their carefully considered plan to have a child, and in particular, to also deposit some gametes in Spain, where posthumous insemination is allowed. In these circumstances, [Mrs Gonzalez-Gomez], who came back to Spain to live there without the intention to bypass the French law, now faces a situation in which the exportation of the gametes stored in France is the only way for her to exercise her right under Spanish law.[2113]

By excluding Mrs Gonzalez-Gomez from the scope of the prohibition, proportionality functioned as a method of teleological interpretation. It excluded from the scope of legislation a case that was not covered by its goal, as this goal was judicially constructed. Bretonneau explained that the judges could have arrived at the same solution by using the classical technique of *réserve d'interprétation*.[2114]

Still, what is not clear is why the particular case of Mrs Gonzalez-Gomez was not covered by the goal of French legislation. Clearly, she wished to export the gametes to Spain in order to perform a posthumous insemination, a process that, just as clearly, is precluded by French law. French scholars observe that, paradoxically, the Council of State treated French law as if it were not French. It put aside its application and applied Spanish law to Mrs Gonzalez-Gomez, while she was still in France. Moreover, it did so in contravention of the notion of public order, as it is commonly understood in

---

[2110] See *supra*, Chapter 7(2).

[2111] See Deumier, "Contrôle concret de conventionnalité : l'esprit et la méthode." In his comment on the decision, Delvolvé observes that, until then, proportionality was not applied against legislation itself, but only against its application by administrative authorities in the exercise of their discretion. See Delvolvé, "Droits subjectifs contre interdit législatif," n 6 f. While, as we saw, this is largely true, since the Strasbourg *Association Ekin* decision, there have been other cases in which proportionality functioned as a corrective patch, applied directly to legislation. See *supra*, Chapter 7(2).

[2112] *Gonzalez-Gomez*, cited above, para 8. See Crépey, "Conclusions sur CE, 28 décembre 2017, *M. Molenat*, No. 396571," making the same remark.

[2113] See the press release in English, cited above, para 2.

[2114] Bretonneau, "Conclusions sur CE Ass., 31 mai 2016, *Gonzalez-Gomez*."

private international law.[2115] As for the Council of State judges, they justified this solution in the following terms:

> Mrs Gonzalez-Gomez's establishment in Spain is not per se a result of her seeking the application of provisions that are more favourable to the realisation of her project than French law, but [is a result of her seeking] the accomplishment of this project in the country where her family (…) resides.[2116]

Therefore, what rendered the application of French legislation in this case disproportionate was the fact that Mrs Gonzalez-Gomez returned to Spain in good faith. What was decisive for the court was the fact that Mrs Gonzalez-Gomez "*came back to Spain to live there*".[2117] Many factual elements pointed in this direction. The applicant's Spanish nationality, the fact that she joined her family in Spain and the fact that she had carefully planned with her husband a posthumous insemination in this country. This impeded the application of proportionality as an instance of republican inculcation. In other words, the disapplication of the law in the case of Mrs Gonzalez-Gomez did not contest French "republican unity".

Strangely, the Council of State's reasoning is consistent with the ECtHR solution in *SAS v France*. Indeed, in this last decision the Strasbourg judges accepted that in the absence of consensus among the contracting parties, the Convention can accommodate restrictions on fundamental rights corresponding to majoritarian "choices of society". However, such restrictions were framed as an exception to the European rights paradigm. They were accepted as expressions of a particular domestic vision of social integration, through application of the margin of appreciation doctrine. Indeed, the margin of appreciation leaves space for normative pluralism within the scope of the Convention. At the same time, the European court also set limits on such restrictions. It declared that they are acceptable only in so far as they can be regarded as necessary for the preservation of the minimum requirements of living together. It is precisely this condition that was missing in in *Gonzalez-Gomez*. Imposing republican value choices on Mrs Gonzalez-Gomez was not justified since she simply *did not wish to integrate* into French society. Hence, she did not have to conform to majoritarian value choices. Republican legislation was defeated; it was put aside and Spanish law applied. Interestingly, this particularity deprives the *Gonzalez-Gomez* decision of its normativity in the French context. Indeed, for the first time the Council of State underscored the *in concreto* character of its review. Arguably, this limits the possibilities for applying the *Gonzalez-Gomez* case law in future circumstances.[2118]

Gonzalez-Gomez is indeed a revolutionary case. Until this, the formalism and rationalism that are pervasive in French legal thought had made it difficult to accommodate the existence of alternative worldviews and moral choices.

[2115] Delvolvé, "Droits subjectifs contre interdit législatif," n. 9 f.
[2116] *Gonzalez-Gomez*, cited above, para 11.
[2117] See the press release in English, cited above.
[2118] Delvolvé, "Droits subjectifs contre interdit législatif," n. 8 and n. 14.

Proportionality resembled an instance of republican inculcation, a self-evident affirmation of legitimacy against which no counter-arguments were possible. It expressed a particularly French perception of social integration as assimilation.[2119] The ECHR however, progressively necessitates that French lawyers become aware of the particularity of their republican perception of rights, to become aware of the pluralism in the perception and prioritisation of fundamental rights in Europe. French judges' effort to accommodate normative pluralism contests the rationalist foundations of French public law. In *Gonzalez-Gomez*, the Council of State recognised the existence of alternative choices in the field of *post-mortem* insemination, which are equally acceptable to the Convention and the European paradigm of rights. However, to do so the court was obliged to introduce an exception to French republican legality. It excluded a case from the scope of French law even though it occurred within the French territory and was judged by French courts. What defined the legitimate limits of the normativity of republican legislation was not the rules of private international law, nor any legal rules whatsoever. Instead, it was proportionality as a fundamental rights principle, which, in a context of normative pluralism, also allows for social *dis*integration.

While the recognition of normative pluralism runs contrary to the most fundamental assumptions of French republican legality, it traditionally underpins English analytical formalism. In the current context of disintegration, the affirmation anew of the boundaries separating English and European law has been expressed in English judges' return to the common law heads and concepts of judicial review.

2. A noisy silence: an English public law without proportionality

Claiming relevance for the common law in rights adjudication. While in England, proportionality has never been a common law head of review, we saw that it tends to become an overarching judicial reasoning method.[2120] Two recent cases marked a significant evolution in this respect.

Kennedy concerned access to information.[2121] Mr Kennedy, a journalist at *The Times*, asked for disclosure of information under the Freedom of Information Act (FOIA) concerning "The Mariam Appeal", a political campaign conducted by a British MP for the treatment of Iraqi children with leukaemia. Mr Kennedy thought that the relevant reports by the Charity Commission, the public authority charged with inquiring into the matter, did not sufficiently address issues associated with by the campaign, especially those relating to Mr Kennedy's own findings as to the use of campaign monies. The Charity Commission refused disclosure, claiming that the information that it held was exempt from disclosure under section 32 of the FOIA. This section provides for an absolute exemption, when information is held by a public authority for the purposes of an inquiry or arbitration. Mr Kennedy appealed the refusal, claiming

[2119] See *supra*, Part II, Chapter 4(5).
[2120] See *supra,* Chapters 5(5) and (6) and 7(3).
[2121] *Kennedy v The Charity Commission* [2014] UKSC 20 (SC, 26 March 2014).

that section 32 ceases to apply after the end of the inquiry in question. Alternatively, he advanced that section 32 should be read down in conformity with article 10 ECHR or be declared incompatible with the Convention. The case arrived before the Supreme Court, which dismissed Mr Kennedy's claims. The judges found that section 32 continues to apply after the end of the inquiry and that it should not be read down, since other common law statutes provide sufficient protection to the applicant's rights.

In a series of long paragraphs, Lord Mance reproved the applicant for directly appealing to the Convention, while common law statutes and instruments other than section 32 FOIA might provide for an obligation on the part of the Charity Commission to disclose or at least to balance the competing interests at stake. In Lord Mance's view, before examining the compatibility of section 32 with article 10, the judges must consider the "*development of common law discretions, to meet Convention requirements and subject to control by judicial review*".[2122] He considered this to be a "*fruitful feature*" of UK jurisprudence, illustrated in other cases, some of which were welcomed by Strasbourg.[2123] In a quite didactic tone, Lord Mance stated:

> the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene. As Toulson LJ also said in the *Guardian News and Media* case, para 88: "The development of the common law did not come to an end on the passing of the Human Rights Act 1998. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition".[2124]

Lord Mance considered that the Charities Act as a general scheme applied to exempt information under the FOIA. In his view, this Act could be read in a way that put Mr Kennedy in no less favourable position than article 10 ECHR. Lord Mance claimed the relevance of the common law in rights adjudication, even in the post-HRA era.

Proportionality, irrationality and the contextual approach to judicial review. The judge went on to specify this point, providing guidance for lower courts when dealing with appeals against public authorities' refusals to disclose information. Having identified the interests at stake, he contended that either on the basis of common law statutes or of article 10, "*the real issue will be whether the public interests in disclosure are outweighed by public or private interests mirroring those identified in article 10(2)*".[2125] In this respect, the judge stressed that the Convention only mandated balancing the competing interests at stake and did not necessarily impose a substantive solution favourable to Mr Kennedy's viewpoint.[2126] He concluded that article 10 ECHR adds nothing to the Charities Act, read in light of the "*common law presumption in favour of*

[2122] Ibid, para 38.
[2123] Ibid. The judge referred to *Doherty*, *Kay*, and *Pinnock* cited above.
[2124] Ibid, para 46.
[2125] Ibid, para 45.
[2126] Ibid, para 50.

openness in a context such as the present".[2127] As to the standard of review that applied in this case, Lord Mance stated:

> Again, I find it difficult to think that there would be any significant difference in the nature or outcome of a court's scrutiny of any decision by the Commission to withhold disclosure of information (…), whether such scrutiny be based solely on the Charity Commission's objectives, functions and duties under the Charities Act or whether it can also be based on article 10, read in the width that Mr Coppel invites. The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle. The nature of judicial review in every case depends upon the context.[2128]

In support of this claim, Lord Mance referred to common law cases of anxious scrutiny and to deferent applications of proportionality under the HRA. The judge clearly argued for a contextual approach to judicial review and he cited the relevant English literature in this respect, most notably Paul Craig and Stanley Alexander De Smith. In his view, despite structural differences between common law and European review, the two tests invite the judges to take the same factors into account. When a common law right or a constitutional principle is at stake, like in the present case, judicial scrutiny should be more searching. The subject matter will also be important: the judges will be more willing to inquire into issues that are "*properly within the province of the court*".[2129] Concerning the standard of review in Mr Kennedy's case, the judge concluded:

> If, as here, the information is of genuine public interest and is requested for important journalistic purposes, the Charity Commission must show some persuasive countervailing considerations to outweigh the strong prima facie case that the information should be disclosed. In any proceedings for judicial review of a refusal by the Charity Commission to give effect to such a request, it would be necessary for the court to place itself so far as possible in the same position as the Charity Commission, including perhaps by inspecting the material sought. Only in that way could it undertake any review to ascertain whether the relevant interests had been properly balanced. The interests involved and the balancing exercise would be of a nature with which the court is familiar and accustomed to evaluate and undertake. The Charity Commission's own evaluation would have weight, as it would under article 10. But the Charity Commission's objectives, functions and duties under the Charities Act and the nature and importance of the interests involved limit the scope of the

[2127] Ibid, para 40, paras 43-56, esp. para 47.

[2128] Ibid, para 51.

[2129] Ibid, paras 51-55, esp. para 53, citing *IBA Health Ltd v Office of Fair Trading* [2004] EWCA Civ 142 (CA, Civil Division, 19 February 2004), para 92, *per* Carnwath LJ.

> response open to the Charity Commission in respect of any particular request.[2130]

The difference between common law and European grounds in this case was minimal, almost non-existent. The judge recognised the court's power in certain cases to inspect the material whose disclosure is sought. While not all judges agreed with Lord Mance's opinion, many of them expressed similar views as to the relationship between irrationality and proportionality.[2131] In his judgement, Lord Toulson also argued for the possibility of domestic courts exercising substantive review under the common law irrationality head.[2132]

English judges' turn to methods. The assimilation of *Wednesbury* and proportionality review has been noticed and welcomed by English public lawyers as a further step away from analytical formalism and towards an embrace of the contextual method. As Mark Elliott remarked in his comment on *Kennedy*, Lord Mance's approach:

> places less emphasis than we are accustomed to placing upon formal, doctrinal questions, such as whether the test should be one of reasonableness or proportionality. Instead, it calls for a more nuanced analysis that takes account both of the importance of the value threatened by the impugned decision as well as the constitutional and institutional constraints that may operate to limit the legitimate nature and intensity of judicial scrutiny.[2133]

In other words, following pressures in this respect by scholars, English judges progressively departed from the formalist focus on heads of review and turned to reasoning methods, employed according to the context that surrounds the case that they have to decide.

This tendency became more explicit in *Pham*, which concerned the Home Secretary's decision to deprive individuals of British citizenship.[2134] Mr Pham, born in Vietnam, had acquired British citizenship while keeping his Vietnamese nationality. In 2011, he was accused of having participated in terrorist activities in Yemen. The Home Secretary thus decided to strip him of his British citizenship and to deport him to Vietnam. However, the Vietnamese Government denied Mr Pham's Vietnamese nationality. Mr Pham thus challenged the Home Secretary's decision on the ground that it would render him stateless. The Supreme Court considered that the Vietnamese

---

[2130] *Kennedy,* cited above, para 56.

[2131] See, however, Lord Carnwath expressing doubts as to the similarity of the practical outcomes between proportionality and irrationality at para 267.

[2132] Ibid, para 132.

[2133] Mark Elliott, "Common-Law Constitutionalism and Proportionality in the Supreme Court: *Kennedy v The Charity Commission*," *Public Law for Everyone* (blog), March 31, 2014, https://publiclawforeveryone.com/2014/03/31/common-law-constitutionalism-and-proportionality-in-the-supreme-court-kennedy-v-the-charity-commission/.

[2134] *Pham v Secretary of State for the Home Department* [2015] UKSC 19 (SC, 25 March 2015).

Government's decision to deprive Mr Pham of his Vietnamese nationality was apparently arbitrary. Therefore, the prohibition of article 1(1) of the 1954 Convention relating to the Status of Stateless Persons did not apply in this case. The applicant however, also argued that the Home Secretary's decision deprived him of his European citizenship and did not pass the proportionality test. The judges expressed doubts as to whether EU law applied in this case. However, they all considered that it might be unnecessary to resolve this issue, since European review and common law review led to the same substantive outcome.

In *Pham,* many Supreme Court Justices went further than *Kennedy* to explicitly consider the application of proportionality as a domestic concept. Lord Mance, citing *Kennedy*, Craig and German doctrine on the matter, explicitly referred to the availability of "*the tool of proportionality*" in domestic cases concerning deprivation of citizenship.[2135] In Lord Mance's opinion, proportionality is not necessarily more intrusive than irrationality, only more structured. Thus, it can legitimately be used by judges in common law judicial review, since it implies no expansion of judicial powers. Lord Reed went even further and cited *Hook*, *Leech* and *Daly* as cases where proportionality review had already been applied in substance in the common law. In this judge's view, what distinguished *Hook* from the other two cases was the fact that in *Leech* and *Daly*, domestic statutes had been construed against the background of the common law principle of legality, so as to be in conformity with the Convention. The principle of legality requires that public interferences with individual rights be the least onerous possible to achieve their legitimate aim. Following this principle of statutory construction, English judges had affirmed their power to proceed to a substantive review of the justifications advanced by the primary decision-makers for infringing common law rights.[2136] Lord Reed concluded that,

> [o]ne can infer from these cases that, where Parliament authorises significant interferences with important legal rights, the courts may interpret the legislation as requiring that any such interference should be no greater than is objectively established to be necessary to achieve the legitimate aim of the interference: in substance, a requirement of proportionality.[2137]

Put briefly, Lord Reed held that the common law principle of legality prompted the application of proportionality as a judicial method. This is very similar to the teleological interpretation that, as we have seen, Greek courts have long applied in the application of the Convention. Here, it is the principle of legality that functions as a *passerelle* for the "interpretative osmosis" of common law and Convention rules and

---

[2135] *Pham*, cited above, para 98.

[2136] For an analysis of the different opinions expressed by the Supreme Court Justices on the matter, see Mark Elliott, "Proportionality and Contextualism in Common-Law Review: The Supreme Court's Judgment in *Pham*," *Public Law for Everyone* (blog), April 17, 2015, https://publiclawforeveryone.com/2015/04/17/proportionality-and-contextualism-in-common-law-review-the-supreme-courts-judgment-in-pham/.

[2137] *Pham*, cited above, para 119.

methods. Lord Reed considered that this reasoning should be applied in Mr Pham's case too, since it concerned the status of fundamental importance that is citizenship.

Lord Reed's dicta on proportionality mark an important shift from the common law's analytical focus on clear-cut grounds of review to a new kind of judicial justification, based on methods of reasoning and underpinning principles. The judge considered that proportionality had been applied in substance in cases where judges had explicitly declined to use the proportionality head of review. Indeed, legal methods are not necessary explicit. They underpin legal reasoning just as the scientific method of physics underpins experiments of physicists. Hence, methods can also be *presumed* in public authorities' decisions. As we saw, reconstructing the reasoning of the primary decision-maker as a correct instance of legal reasoning is a common practice of Greek and French courts, when they defer to the reviewed authorities' appreciations. Interestingly, in his opinion in *Kennedy*, Lord Sumption proceeded to a similar kind of reasoning:

> In its letter of 4 July 2007, the Commission showed that it was well aware of the "public interest… for transparency of the decisions and reasons for them, so as to promote public confidence in charities." But it considered at that time that its dependence on the co-operation of third parties in carrying out its inquiry meant that that particular public interest was outweighed by the competing public interest in its being able to discover the relevant facts. The importance of encouraging voluntary co-operation with an inquiry by those possessing relevant information is a recognised public interest which may be highly relevant to the question whether it should be further disclosed (…).[2138]

English public law and disintegration. English scholars are rather enthusiastic about the development of common law methods towards the establishment of a rationalist public law system. In the words of Mark Elliott,

> Sensibly deployed, [the contextual] approach is capable of forming the foundation of a mature, nuanced and sophisticated body of substantive-review doctrine — one that is the servant of principle, rather than a Procrustean bed based on bald categorisation, and one that reflects the full complexity of this area of the law in normative, institutional and constitutional terms.[2139]

The author also identifies the risks that contextualism entails, namely judicial overreach and unprincipled – thus unpredictable – judicial reasoning. However, what has largely been neglected in the relevant debate is the fact that the development of the common law towards contextual review often implies a contestation of the effective application of European law in the domestic sphere. Indeed, the development of the irrationality

[2138] Ibid, para 159.
[2139] Mark Elliott, "Proportionality and Contextualism in Common-Law Review."

standard, even when it is in proportionality terms, is often preceded by English judges *declining* to use the European head of proportionality itself and thus to apply European law. This is so even in cases where European courts have invited domestic judges to perform such a review. Therefore, while *Kennedy* and *Pham* exemplify the maturity and sophistication of the newly-constructed English public law, they also exemplify English judges' scepticism towards European case law. They illustrate disintegration tendencies more generally observed in the English context. In an extra-judicial speech, Lady Hale pointed to the possibility that the development of common law methods is a response to the "rising tide of anti-European sentiment".[2140]

Neglecting the dynamic interpretation of the Convention in Strasbourg case law. In *Kennedy*, the majority of the Supreme Court Justices refused to apply the Convention. As we saw, one of the reasons was that it did not put the applicant in a more favourable situation than common law statutes, which he had not invoked and which, according to the judges, applied to his case. Another reason was given by Lord Mance in a long obiter: according to the judge, article 10 ECHR did not encompass a right to access to information in cases like the one at hand.[2141] Concerning the interpretation of the Convention on this point, the Charity Commission invoked the original meaning of article 10 as encompassing the freedom, and not the obligation, to express and receive information. Mr Kennedy, on the contrary, contended that Strasbourg case law had evolved towards the recognition of a positive obligation to disclose information. In his words, "*Strasbourg case law has taken a direction of travel, towards a destination which should now be regarded as reached*".[2142]

After a thorough consideration of Strasbourg case law on the matter, Lord Mance rejected Mr Kennedy's argument. In this respect he accorded weight to a previous Supreme Court case where relevant Strasbourg case law had been considered.[2143] While in early Grand Chamber cases the European court had denied a right to access information under the Convention, in a series of later Section cases it had conferred such a right, especially where disclosure of information was requested by "social watchdogs", like the press or NGOs. Due to the contradictory statements in Strasbourg decisions, Lord Mance finally concluded that the present state of Strasbourg case law was "*unsatisfactory*" and thus insufficient to establish a positive obligation for the Charity Commission to disclose information.[2144]

In passing, Lord Mance did not miss the opportunity to criticise the ambiguity of Strasbourg jurisprudence. He pointed out that,

> [t]he Strasbourg jurisprudence is neither clear nor easy to reconcile (…) In the present case, Strasbourg has spoken on a number of occasions to

[2140] Brenda Hale, "UK Court Rulings Show Move Away from European to Common Law," *The Guardian*, August 15, 2014.
[2141] *Kennedy*, cited above, paras 57 f.
[2142] Ibid, para 58.
[2143] *Sugar v BBC* [2012] 1 WLR 439 (SC, 15 February 2012).
[2144] *Kennedy*, cited above, para 94.

> apparently different effects. Further, a number of these occasions are Grand Chamber decisions, which do contain apparently clear-cut statements of principle. But they are surrounded by individual section decisions, which appear to suggest that at least some members of the Court disagree with and wish to move on from the Grand Chamber statements of principle. If that is a correct reading, then it may be unfortunate that the relevant sections did not prefer to release the matter before them to a Grand Chamber. It is not helpful for national courts seeking to take into account the jurisprudence of the European Court of Human Rights to have different section decisions pointing in directions inconsistent with Grand Chamber authority without clear explanation."[2145]

Lord Mance clearly found that Strasbourg judges had much to learn from their common law colleagues. This was also obvious in the revival of the Whig narrative in his dicta:

> the Convention rights represent a threshold protection; and, especially in view of the contribution which common lawyers made to the Convention's inception, they may be expected, at least generally even if not always, to reflect and to find their homologue in the common or domestic statute law. (…) Greater focus in domestic litigation on the domestic legal position might also have the incidental benefit that less time was taken in domestic courts seeking to interpret and reconcile different judgments (often only given by individual sections of the European Court of Human Rights) in a way which that Court itself, not being bound by any doctrine of precedent, would not itself undertake.[2146]

However, as Clayton QC (lawyering for the applicants in *Kennedy*) pointed out, Lord Mance's criticism of Strasbourg case law seems to neglect the methods of this court, and especially the rules governing the distribution of cases among its chambers.[2147] Most importantly, it seems to neglect one of the major features of Strasbourg jurisprudence itself, which has been at the source of its integration function: dynamic interpretation.[2148] Indeed, Strasbourg reasoning techniques are very different from the common law techniques of precedent, distinguishing and overruling. This was pointed out by Lord Wilson in his dissenting opinion. In this judge's view, "*the wider approach*" lately adopted by the ECtHR as to the scope of article 10 "*is not in conflict with the "basic"* (…) *approach*" adopted in early decisions; "*it is a dynamic extension of it*".[2149] Lord Mance's negligence of this particularity of Strasbourg reasoning echoes

[2145] Ibid, para 59.

[2146] Ibid, para 46.

[2147] Richard Clayton, "The Curious Case of *Kennedy v Charity Commission*," *UK Constitutional Law Association* (blog), April 18, 2014, https://ukconstitutionallaw.org/2014/04/18/richard-clayton-the-curious-case-of-kennedy-v-charity-commission/.

[2148] For a more recent example where Lord Mance explicitly criticises Strasbourg's dynamic extension of the scope of Convention rights, see *Commissioner of Police of the Metropolis v DSD and Another* [2018] UKSC 11 (SC, 21 February 2018), para 142.

[2149] *Kennedy*, cited above, para 188.

traditional and stereotypical common law criticisms of continental judicial decision-making.[2150] His "inaccurate translation" of Strasbourg methods and techniques in common law terms can be compared to the French practice of *acte clair*, which long deprived European case law of its effectiveness in the French sphere.

In a Grand Chamber decision, the Strasbourg court responded to Lord Mance's remarks. It pointed out that while legal certainty is important in the interpretation of international conventions, in the application of human rights standards the evolving practice of domestic authorities and international bodies will also be relevant. Concerning the right to have access to information, such evolutions pointed in the direction of "*a clarification*" of early Strasbourg case law, so as to encompass such a right for social watchdogs.[2151]

Affirming parliamentary sovereignty against the ECJ. In *Kennedy*, while Lord Mance criticised Strasbourg case law, he still held that English judges "*have to do [their] best to understand the underlying principles*" of Strasbourg decisions and to follow them.[2152] This was not the case in *Pham*, where the Supreme Court Justices entered in direct conflict with ECJ case law in the field of EU citizenship.

Examining Mr Pham's EU law argument, Lord Carnwath observed that no cross-border element triggered the application of EU law in this case. Counsel for the applicant relied on the ECJ decision in *Rottmann*, which required no such element even though the Advocate General had referred to cross-border movement in his opinion.[2153] In response, Lord Carnwath considered the *G1* case, which was decided by the Court of Appeal in 2012 and dealt with a situation similar to the case at hand.[2154] In his leading judgment in *G1*, Laws LJ had found difficulties with the reasoning in the *Rottmann* case. In his view, the granting of national citizenship was not within EU law competences and the general principles of international law impose a restrictive interpretation of international obligations. Laws LJ had thus objected that there was no basis for mandating English courts to take EU law into account in purely domestic citizenship cases, as the ECJ had asked in *Rottmann*. Nor was there any basis, according to the Court of Appeal judge, for European judicial review in this respect. Laws LJ considered EU citizenship to be "*wholly parasitic*" upon national citizenship.[2155] In his view, a "*generalised aspiration to the enjoyment of a 'fundamental status' [could] surely carry the matter no further*".[2156] Lord Carnwath and the rest of the Supreme Court Justices agreed with Laws LJ's observations in *G1*. The Supreme Court held that the difficulties to

---

[2150] For this criticism and alternative methods of reasoning with previous decisions, see Jan Komárek, "Reasoning with Previous Decisions: Beyond the Doctrine of Precedence," *The American Journal of Comparative Law* 61, no. 1 (2013): 149.

[2151] ECtHR, *Magyar Helsinki Bizottság v Hungary*, 8 November 2016, no. 18030/11, esp. para 150 f.

[2152] *Kennedy*, cited above, para 60.

[2153] ECJ, C-135/08, 2 March 2010, *Rottmann*, ECLI:EU:C:2010:104. See also the opinion by the Advocate General Miguel Poiares Maduro, ECLI:EU:C:2009:588.

[2154] *G1 v Secretary of State for the Home Department* [2012] EWCA Civ 867 (CA, Civil Division, 4 July 2012).

[2155] *G1*, cited above, paras 37 f., esp. para 39. Cited by Lord Carnwath in *Pham*, paras 50 f.

[2156] *G1*, cited above, para 39.

which the Court of Appeal judge had referred to had not been sufficiently addressed by the European court. In a similar vein, Lord Carnwath rejected the applicants' arguments based on the ECJ *Zambrano* decision, pointing out that "*the scope of Zambrano remains a matter of controversy in domestic case-law*".[2157]

Hence, in *Pham* English judges once again required the conceptual clarity of a common law analytical approach from a supranational court. They explicitly expressed their disenchantment with the aspirations that underpinned the expansive and dynamic interpretative techniques of the ECJ. However, contestation of ECJ case law in this case went further than Lord Mance's opinion in *Kennedy*. In his judgment in *G1*, Laws LJ had also framed the matter in terms of EU law competences and constitutional identity. In his words,

> [t]he conditions on which national citizenship is conferred, withheld or revoked are integral to the identity of the nation State. They touch the constitution; for they identify the constitution's participants. If it appeared that the Court of Justice had sought to be the judge of any procedural conditions governing such matters, so that its ruling was to apply in a case with no cross-border element, then in my judgment a question would arise whether the European Communities Act 1972 or any successor statute had conferred any authority on the Court of Justice to exercise such a jurisdiction.[2158]

In *Pham*, Lord Carnwath cited Laws LJ's dicta with approval and considered this to be "*an issue which would need to be considered, in the Court of Appeal or this court, before it would become appropriate to consider a reference to the European court*".[2159] Lord Mance also cited Laws LJ and recalled that the UK applied a dualist approach to international obligations. He stressed that despite the spectacular evolution of EU law, Parliament remained sovereign in the UK. Domestic constitutional arrangements resulted in certain "*jurisdictional limits*" for the ECJ that were set at the level of European Treaties.[2160] English judges, in contrast to their Greek colleagues in *Michaniki,* refused to delegate the definition of domestic constitutional limits to the ECJ. They stressed that the will of Parliament calibrates the scope of European law in the domestic sphere. They opposed the purposive interpretation of the ECA 1972 and of posterior statutes, based on the original intent of the legislator, to the ECJ's teleological reasoning.

Paradoxically however, parliamentary sovereignty was voided of substantive content in this case. Indeed, English judges did not consider it necessary to resolve the problem of the limits between EU law and the domestic constitution in the case of Mr Pham. In their view, when a status as fundamental as national citizenship is at stake, proportionality and domestic standards of substantive review lead to similar methods

---

[2157] *Pham*, cited above, para 55. See ECJ, C-34/09, 8 March 2011 *Ruiz Zambrano*, ECLI:EU:C:2011:124.

[2158] *G1*, para 43, cited in *Pham*, para 54.

[2159] *Pham*, para 58.

[2160] Ibid, para 80.

of reasoning and substantive outcomes. Contrary to common law dualism and pragmatism, English judges now deny the existence of substantive conflict between the domestic and the European legal order. The cases in which proportionality and irrationality will lead to different intensities of review and to different outcomes are very rare, so rare that one could almost say that they do not exist. In *Pham*, Lord Carnwath contested the "*practical effect*" of EU citizenship for the applicant's rights, compared to domestic or Convention law, while he specified that this was a factual question for the competent administrative authority to resolve.[2161] Rationalism expands in English public law and increasingly constrains democratic decision-making. Nothing is less sure than the reinstatement of parliamentary sovereignty once Brexit is definitive, or if the HRA is ever repealed. Indeed while English judges will no longer be bound by European decisions, the rationalist principles of public law are by now well established in domestic jurisprudence and will continue to constrain domestic authorities, the British Parliament included, whether the UK is part of the EU and the Convention or not.[2162]

The promotion of proportionality in the English sphere was never mainly about European integration in the first place, but about the construction of a domestic public law.[2163] Thus, it is not surprising that, while proportionality as a method is appropriated by English lawyers, its application as a European head of review is progressively marginalised. This undermines the *effet utile* EU citizenship. In fact, since the common law and EU law lead to the same kind of judicial review and to the same substantive outcomes, delimiting the jurisdiction of the ECJ becomes a matter of identity and nationalism. In *Pham*, Lord Mance held that no EU treaty provision provided EU law with the competence to review the withdrawal of national citizenship. In passing, he also noted that "*Europe has not yet reached a situation where it is axiomatic that there is constitutional identity between the Union and its Members*".[2164] It seems that disintegration in the UK is not so much about democratic government but about national identity. By appealing to parliamentary sovereignty, English judges actually affirm *their own* power to define the limits set on Parliament by the legal constitution. Lately, a similar evolution is observed in Greek case law.

3. Affirming the autonomy of Greek constitutional law: new possibilities for proportionality

Normative conflict and the fragmentation of proportionality. While in England proportionality language until recently remained external to common law structures, in Greece it has always been part of a constitutional civilisation that domestic lawyers take as a model. In Chapter 6, we saw that proportionality and its

[2161] *Pham*, para 61.

[2162] See Conor Gearty, "The Tories' Proposal for a British Bill of Rights Is Incoherent, but They Don't Care," *The Guardian*, 3 October 2014.

[2163] See *supra*, Part II, Chapter 5.

[2164] Ibid, para 77.

fundamental rights baggage, initially perceived as a transplant, were progressively appropriated by domestic lawyers and were institutionalised in the domestic Constitution. The 2001 reform even established the European perception of proportionality as a type of knowledge deemed scientific in domestic legal discourse. In this context, disintegration has not been translated into a refusal by domestic courts to use proportionality language since it is perceived as equally domestic and European. Rather, disintegration has proceeded through the affirmation of the autonomy of domestic constitutional concepts, among them proportionality.

Chapters 3, 6 and 8 have shown that the European version of proportionality has been pervasive in Greek law. This has been a corollary of the incapacity to frame domestic constitutional particularities. Mainstream Greek public lawyers have found it difficult to conceive of the possibility of normative conflict between domestic and European law. Since the mid-2000s however, domestic scholarship became increasingly aware of this possibility. Scholars started to affirm the shift between domestic and European meanings of proportionality and to justify domestic divergence by appealing to different, or even opposing goals of the Greek Constitution and the European Community. Sarantis Orfanoudakis and Vassiliki Kokota, for example, have argued that in the domestic constitutional context, proportionality serves the protection of fundamental rights and thus "maintains and accentuates its *substantive* aspect, which consists in striking a proportion between conflicting constitutional rights".[2165] On the contrary, in the view of these authors, in the context of European law proportionality is applied in various domains as a principle of efficiency for the establishment of the common market. Therefore, in EU law cases it functions "*instrumentally – procedurally*", as a principle for the division of competences between national and community law-making authorities.[2166] Akritas Kaidatzis also pointed out the divergence between Greek courts and the ECJ in the application of proportionality in the field of professional freedom and attributed it to the different goals pursued by the EU and the domestic constitutional orders.[2167] The study of domestic judicial practice and its systematisation according to domestic constitutional values is quite new in Greek scholarship, traditionally suspicious towards domestic judges and obsessed with foreign doctrinal and jurisprudential developments.

The acknowledgment of a conflict between domestic and European values produced conceptual fragmentation of proportionality. Greek public lawyers have progressively understood proportionality as a test leading to different kinds of reasoning according to whether it applies in domestic or European law. This tendency

[2165] Sarantis Orfanoudakis and Vassiliki Kokota, "Η εφαρμογή της αρχής της αναλογικότητας στην ελληνική και την κοινοτική έννομη τάξη: συγκλίσεις και αποκλίσεις [The Application of the Principle of Proportionality in the Greek and the Community Legal Order: Convergences and Divergences]," *ΕΕΕυρ*, 2007, 719–20 (emphasis in the original).

[2166] Ibid (emphasis in the original).

[2167] Akritas Kaidatzis, "Παρατηρήσεις σχετικά με τις ΣτΕ (Ολ.) 1991/2005 και ΔΕΚ C-140/2003, 21.4.2005 *Επιτροπή Κατά Ελλάδας* [Comment on StE (Pl.) 1991/2005 and ECJ C-140/03, 21 April 2005, Commission v Greece]," *ΤοΣ*, 2006, 181.

has also been expressed in judicial practice, where it has been translated into a form of dualism in domestic courts' reasoning.

The *Idryma Typou* litigation concerned administrative sanctions imposed on important media shareholders for violation of journalistic ethics by the TV channel whose shares they hold. The Council of State, applying a minimal proportionality review in the form of a manifest error test, had declared the relevant legislation compatible with economic freedom. Still, it had sent a preliminary reference to the ECJ concerning the compatibility of domestic rules with EU directives on limited liability companies. The European court found domestic law to be compatible with the directives in question. Nonetheless, it declared national rules as contrary to the general principle of proportionality, even though no question had been raised by the domestic court in this respect. In the view of the Luxembourg judges, even in the absence of a cross-border element, national rules fell within the scope of EU law since they discouraged investment in the media sector, and thus constituted an obstacle to the free movement of capital. When called to apply the European decision to the facts of the case before it, the Council of State denied the relevance of EU law and of the response given by the ECJ.[2168] The supreme administrative court entered into a similar conflict with the ECtHR concerning the application of the principle of *ne bis in idem* and proportionality in the field of administrative sanctions for customs law offences.[2169]

It would certainly be "eulogistic" to apply the metaphor of dialogue of judges to these instances of explicit disagreement between domestic and supranational courts.[2170] Still, the consciousness of normative conflict between domestic and European law increasingly forces Greek judges to enter into a process of transnational communication with their European colleagues.

The "special payrolls" case and the affirmation of social rights. In the above cases, while the Council of State applied the principle of proportionality as a domestic constitutional norm, it explicitly refused to take European case law on the matter into account. In this way, the conceptual integrity of proportionality was compromised to the benefit of the autonomy of domestic constitutional concepts and of the coherence of domestic constitutional case law. The supreme administrative court's willingness to affirm the autonomy of domestic constitutional discourse was firmly expressed in decisions related to the Euro crisis. In 2012, in application of the second MoU and the Medium Term Budgetary Objective, an austerity package imposed important cuts on the salaries and pensions of members of the army, the police and the security services. The aggrieved individuals were subject to "special payrolls" («*ειδικά μισθολόγια*»), that is, special remuneration statuses reserved for certain public officials whose services are

[2168] See StE (Pl.) 3031/2008 *Ε⊥⊥⊥* 2009, 71; ECJ, C-81/09, 21 October 2010, *Idrima Tipou AE*, ECLI:EU:C:2010:622, esp. paras 65 f.; StE (Pl.) 1617/2012 *Ε⊥⊥⊥* 2012, 632.

[2169] See StE 2067/2011, *NoB* 2011, 1952; ECtHR, *Kapetanios and others v Greece*, 30 April 2015, nos. 3453/12, 42941/12, and 9028/13; StE (Pl.) 1741/2015, *NoB* 2015, 1065.

[2170] Muir-Watt and Tusseau, 'Repenser Le Dévoilement de L'idéologie Juridique : Une Approche Fictionnelle de La Gouvernance Globale', 198.

deemed important for the functioning of the state. The cuts were retroactively imposed for a period of three months; the amounts already paid were to be automatically deduced from future salaries and pensions. Trade unions of the military and security forces questioned the constitutionality of the measures, claiming their constitutional rights had been violated. The case was examined by the Council of State Plenum.

The court started by referring to the constitutional and legal status of the police, security and army forces. After a survey of the relevant provisions, it concluded that the missions of these forces were to uphold national defence, public order and state security. According to the court, these missions "*are public par excellence, manifestations of sovereignty*" and constitute competences that "*are inseparable from the core of state authority*".[2171] The Council stressed that, for the accomplishment of their constitutional mandate, the armed and security forces follow a military organisation which implies special dangers for their members. Further, members of the army, the police and security services are subject to a "special authoritative status" (*ειδική κυριαρχική σχέση*), which implies important limitations on their fundamental rights.[2172] As a compensation, law has provided "*over time*" for special remuneration to the members of the armed forces, which allows them to exercise their function without hindrance and eliminates the danger of corruption. The court declared that the "*principle of special remuneration*" of the members of the armed forces constitutes an "*obligation indirectly resulting from the (…) Constitution*".[2173] This obligation is "*an additional institutional guarantee*" and "*ensures the effective accomplishment of [these forces'] mission, by strengthening the morale of their members*".[2174] What is more, the Council of State proclaimed that not only was special remuneration a guarantee, "*but also a right of the military personnel*".[2175] Significantly, for the first time the Council of State accorded concrete normative status to a social right.

However, the court went on to specify that this right does not guarantee a *certain* amount of remuneration. Parliament can impose cuts on the revenues of armed and military forces personnel in the context of economic policy, insofar as this is necessary. The court described in the following words the reasoning to which the legislator should proceed:

> a cut on the military personnel's income of such a nature or extent so as to entail a reversal of the payment status valid until then, cannot be imposed without preliminary appraisal of its fiscal benefit in relation to the negative impact that it may have on the operation of the armed forces. [Also, it cannot be imposed, without previous appraisal of] whether the cut is necessary or could be replaced by less restrictive measures with an equivalent effect.[2176]

[2171] StE (Pl.) 2192/2014 *ΤΝΠ⊔ΣΑ*, paras 7 f, esp. para 11.
[2172] Ibid, para 11.
[2173] Ibid, para 12.
[2174] Ibid.
[2175] Ibid.
[2176] Ibid.

The reasoning described by the Council is akin to proportionality analysis: a strict necessity test consisting of a calculation of the costs and benefits of the contested measures. However, the principle was not pronounced or applied at this stage. In an obiter dictum, the court acknowledged that the obligation to proceed to an appraisal of the costs and benefits of legislation "*applies, in principle, for every important reduction on the income of a certain category of public servants or officials*".[2177] In this way, the Council explicitly attributed constitutional status, albeit a relative one, to the social *acquis* of a large category of public employees.

The Council went on to stress that in the case of the armed forces, the relevant legislative obligation "*becomes more demanding*", since, "*apart from the normal criteria,*" Parliament must also take into account "*the special conditions of exercise and the dangerous character of their profession, as well as the requirement of exclusive devotion to this profession*".[2178] Hence, the revenues of the members of the armed forces "*must be sufficient for their decent way of life and commensurate to the importance of their mission*".[2179] The judges enumerated a number of concrete criteria that the legislator should consider, such as the grade of the concerned official or the special responsibilities resulting from her duties. In the end of this long set of normative considerations, the court pronounced that its competence was to exercise only "*a marginal review*" of the legislative measures, limited to the scrutiny of whether the legislator took into account the above criteria and "*no other, manifestly inappropriate ones*".[2180] The manifest inappropriateness standard announced by the court echoes the traditional version of proportionality in Greek constitutional law. However, like in the *First MoU* decision, in this case proportionality entailed a very extensive judicial reasoning that had nothing to do with its traditional application as a self-evident standard.

The application of proportionality in the "special payrolls" case. The Council of State analysed the goal of the contested measures in a series of long *considérants*. It referred to the second MoU provisions, to their implementation through domestic legislation, as well as to the 2012/211/EU Council Decision concerning special payroll wages.[2181] Following the *First MoU* decision on this point, it stressed that the measures "*were enacted by the Greek Parliament in sovereignty*" and thus excluded the relevance of international or supranational provisions.[2182] The Council concluded that the legislator, having in mind the persisting economic recession and the ineffectiveness of tax compliance and structural reform policies, decided to impose cuts on the revenues of employees subject to the special payrolls in order to face the prolonged economic and financial crisis.[2183] The particular economic conjuncture in which the court made its decision affected judicial reasoning. The Council underscored that in times of prolonged economic depression, Parliament can enact legislation that burdens

[2177] Ibid.
[2178] Ibid.
[2179] Ibid.
[2180] Ibid.
[2181] Ibid, paras 13-14.
[2182] Ibid, para 17.
[2183] Ibid.

specific social groups in pursuance of the fiscal interests of the state. However, when doing so it should respect the principles of proportionality, equality and human dignity.

The Council of State's reasoning was very akin to the *First MoU* decision, to which the court repeatedly referred. However, proportionality review in this case was much more intensive. The court stressed that the constitutional duty of solidarity resulting from article 24(5) of the Constitution imposes the even allocation of public burdens, so as to avoid a manifestly disproportionate burdening of a particular social group.[2184] It went on to examine the *concrete criteria* that Parliament took into account, as they appeared in the preliminary works of the relevant legislation. In the court's words,

> [e]ven though each one of the "special" payrolls concerned a different category of officials and servants, with clearly distinguished duties and mission, the legislator treated them collectively as a unitary economic number, calculated cumulatively, which should be reduced by 10 percent in the context of the policy of reducing the financial deficit and the public debt. From these elements, (…) it furthermore results that the legislator, (…) when determining the amount of the cuts imposed on each payroll and on each grade within this payroll, took exclusively the revenues accorded until then into account and calculated them in numbers. (…) In application of this purely mathematical criterion, the legislator determined cuts on the revenues of the military personnel of the armed forces and security bodies, (…) which provide an incentive for the evermore effective accomplishment of their mission and counterbalance the special conditions under which they exercise their duties.[2185]

The court thus observed that the legislator had imposed the contested cuts by taking only numbers into account, while it had neglected the constitutional importance of the privileged payment of the members of the armed forces and security services. Contrary to the *First MoU* decision, proportionality was not free-standing but connected to other constitutional principles. Therefore, the scrutiny that it entailed did not only consider the legislative intentions, but also the impact of the measures in question. The court calculated the cumulative effect of austerity policies implemented since 2010 on the net income of the plaintiffs in detail.[2186]

The Council of State Plenum concluded unanimously that the legislative measures failed even the minimal review that entered within its competence. The effects of austerity policies on the specific social group represented by the claimants rendered the cuts "*profoundly disproportionate and unequal*".[2187] This is even more so due to the fact that the state had been unable to promote other structural and tax reforms and that this was one of the factors that had led to the adoption of new austerity measures. While the impact of the measures played an important role, the court mainly criticised

[2184] Ibid, para 19.
[2185] Ibid.
[2186] Ibid, paras 15-16 and para 20.
[2187] Ibid, para 21.

the state of mind of the legislator. It carefully considered the wording of the law and the relevant preliminary documents to conclude that the lawmakers had "*relied exclusively upon a purely mathematical, thus profoundly inappropriate, criterion, namely the average reduction of public spending on payments*", without taking into account the special status of the armed forces officers and the importance of their function.[2188] The judges also criticised the absence of "*special assessments*" as to the impact of the cuts on the functioning of the armed forces or as to the efficiency of the measures.[2189] Indeed, they did not accept a study adduced by the administration in this respect, since it had not been effected in view of the concrete financial strategy examined in the case at hand. Finally, the court condemned the absence of concrete examination of "*whether the income of the armed forces and security personnel is sufficient for facing the cost of a decent way of living and commensurate to their mission*".[2190]

Preserving the normativity of the domestic Constitution. In the "special payrolls" case, contrary to what had been the case in the *First MoU* decision, the rights of the claimants did not solely require the minimum standard of a decent way of life. Instead they required special assessments and planning for legislative policy-making.[2191] For once, the Council did not hesitate to affirm domestic constitutional goals and obligations against the public interest invoked by the Parliament. Even though the legislator still referred to exceptional economic circumstances, in the court's view, "*the fiscal interest of the state was no longer peremptory*".[2192] Appealing to the Constitution, the court thus affirmed its own power to participate to the setting of policy-making goals.

Interestingly, the judicial affirmation of domestic constitutional goals also proceeded through the excision of EU law from domestic constitutional law. The contested measures in the "special payrolls" case, like the measures in the *First MoU* decision, were characterised by an ambiguity as to their origin. While austerity was imposed as a domestic policy in the implementation of the Medium Term Budgetary Objective, it clearly resulted from the second MoU and thus from an agreement between Greek governmental officials and the troika. What is more, the measures were also in line with an EU Council decision, which in the context of budgetary discipline procedures, had reiterated the MoU obligations and had required important cuts on

---

[2188] Ibid.

[2189] Ibid.

[2190] Ibid.

[2191] In this respect, the Council's reasoning is akin to the one followed in environmental protection cases, especially during the '90s. Constantinos Yannakopoulos observes that in this case law, the Council also imposed rational planning and fact-finding obligations on the political branches of government. See Constantinos Yannakopoulos, "Τα δικαιώματα στη νομολογία του Συμβουλίου της Επικρατείας [Rights in the Council of State Case Law]," in *Τα δικαιώματα στην Ελλάδα 1953-2003*, ed. Michalis Tsapogas and Dimitris Christopoulos (Athens: Kastanioti, 2004), 448 f.; "Μεταξύ συνταγματικών σκοπών και συνταγματικών ορίων: η διαλεκτική εξέλιξη της συνταγματικής πραγματικότητας στην εθνική και στην κοινοτική έννομη τάξη [Between Constitutional Goals and Constitutional Limits: The Dialectical Evolution of Constitutional Reality in the National and the Community Legal Orders]," *Εφ⊥⊥*, no. 5 (2008): 736 f.; "Το ελληνικό Σύνταγμα και η επιφύλαξη του εφικτού της προστασίας των κοινωνικών δικαιωμάτων [The Greek Constitution and the Feasibility Clause of Social Rights Protection]," *Εφ⊥⊥* 4 (2015): fn. 5.

[2192] StE (Pl.) 2192/2014, cited above, para 21.

the wages of military and armed forces.[2193] This time however, the Council of State clearly distinguished EU law requirements from the compelling public interest of the state and from domestic constitutional values. In its words, "*in the exercise of financial policy in the context of the international obligations of the Country, the national legislator is not exempted from compliance with* (…) *constitutional rules and principles*".[2194] In the *First MoU* decision, the Council of State had defined domestic constitutional goals by referring to the common interest of Eurozone member states. In contrast, in this case domestic constitutional rules and principles were clearly separated from EU requirements of fiscal discipline, which were even characterised as "*international*" obligations.

This kind of reasoning was followed in subsequent decisions concerning the special payroll of the public university personnel and private employees' pensions.[2195] Adopting the Council's line of reasoning, the Court of Audit also declared as unconstitutional the cuts imposed on the wages of judges.[2196] In recent case law concerning economic adjustment measures, domestic courts have required "*a special, thorough and well-documented study*", which will allow them to scrutinise the appropriateness and necessity of the measures and to censure any "*prohibited violation of the core of the constitutional right to social security*".[2197] In this way, they have preserved the autonomy of domestic constitutional law vis-à-vis both the economic rationality of the executive and EU law.

Claiming the relevance of constitutional law in economic policy decisions has led domestic courts, and especially the Council of State, to also claim an important role as a constitutional political actor. Decisions annulling austerity measures have been touted in domestic and international media. In domestic scholarship there is increasing talk about "hard" or "great" cases in constitutional adjudication.[2198] The fiscal impacts of the Council's decisions were even explicitly mentioned in the Euro Summit Statement of 12 July 2015, where the Council of State was referred to as a "Constitutional Court".[2199] The Council of State increasingly adapts its formalist reasoning to its new role. In decision 4741/2014, the Plenum proceeded to "*a balancing between the public interest relating to the acute financial crisis and the commonly known cash difficulty of the Greek state*" and for the first time affirmed its power to report the effects of its decision over time.[2200] Consequentialist balancing is certainly new in the Council of State's reasoning and offers new possibilities for the evolution of proportionality in Greek judicial practice.

[2193] Cf. Decision 2011/734/EU, 12 July 2011, OJ L 296, 15.11.2011, 38, and its amendments.

[2194] StE (Pl.) 2192/2014, para 21.

[2195] See StE (Pl.) 4741/2014 *ΕΔΔΔ* 2015, 170 and StE (Pl.) 2287/2015 *APM* 2015, 1371 respectively.

[2196] ES (Pl.) 4327/2014 *APM* 2015, 1194

[2197] StE (Pl.) 2287/2015, cited above, esp. para 24.

[2198] Panagiotis Mantzoufas and Anastasios Pavlopoulos, "Η μεγάλη απόφαση για τις τηλεοπτικές άδειες και η μεγαλύτερη δοκιμασία της ερμηνείας του Συντάγματος [The Great Case Concerning TV Licences and the Greater Challenge of Constitutional Interpretation]," *ΣΥΝΗΓΟΡΟΣ*, 2017, 22.

[2199] See the Euro Summit Statement 12 July 2015 (SN 4070/15), (accessed May 15, 2018), https://www.consilium.europa.eu/media/20353/20150712-eurosummit-statement-greece.pdf, p. 1.

[2200] See 4347/2014, cited above.

***

The latest applications of proportionality in France, England and Greece express disintegration tendencies that are apparent in other fields of legal and political discourse. Once again however, the transformations of proportionality in this context of disintegration are not uniform. They follow particular local patterns and largely depend on the local meaning of proportionality and on the local perception of European integration.

In the rationalist French context, the affirmation of republican values has long been perceived as by definition compatible with European rights. The ECtHR case law however, exposed this perception as wrong. In *SAS*, while the Strasbourg court accepted French majoritarian value choices, it underscored that they operated at the margin of the European rights paradigm. It thus reluctantly declared that French exceptionalism could be regarded as proportionate, but only insofar as it was perceived as necessary for preserving the minimum requirements of life in society. Under the influence of European case law, French lawyers and judges became increasingly aware of the normative pluralism in the field of European rights and of the particularity of their republican reinvention of those rights. In this context, European law and proportionality acquire a radical dynamic. Conformity with the Convention and accommodation of normative pluralism proceeds through the contestation of the traditional assumptions of republican legality. In Convention cases, proportionality becomes a new condition for the normativity of French legislation, replacing the traditional criteria of legality and equality. French law applies only insofar as it is proportionate, that is only insofar as its application is necessary for the preservation of the minimum requirements of living together.

In the English context, disintegration has proceeded through the abandonment of the "Eurospeak" of proportionality for the sake of common law concepts, most notably irrationality. The expectations of the spread of proportionality have been fulfilled; English public law is on the road to rationalisation. But proportionality itself, as a head of review, is not English at all. By developing common law concepts and standards in light of rationalist human rights principles, domestic judges are preparing themselves for the "ebb" of European rights in the domestic sphere. Nothing is less sure than the reinstatement of parliamentary sovereignty after Brexit or the repeal of the HRA. However, what is already sure is that English judges oppose national constitutional identity to the effective application of European law. In what resembles the English counterpart of the French *acte clair* doctrine, English judges require from supranational courts the analytical rigour and techniques of common law courts. In this way, they deprive European case law of one of the most important factors of its integrationist dynamic: teleology. This recent tendency of English judges is also apparent in opinions that revive the Whig historical account of the common law human rights protection, or that appeal to the principle of parliamentary sovereignty to delimit the competences of EU law. Following a practice well-known to their Continental colleagues, English judges deny normative conflicts between European and domestic law to affirm their own role as fundamental rights protectors.

In Greece, disintegration has not implied abandoning proportionality and fundamental rights language, since this idiom has been perceived as an achievement of domestic constitutional civilisation. Instead, it has proceeded through the affirmation of the autonomy of the domestic Constitution. Before, the Constitution was normative insofar as it was compatible with European law, albeit only at the level of aesthetics. Now, the Constitution applies even in direct and explicit conflict with European law. European law becomes an "international obligation of the country", which is applicable in the domestic sphere, only insofar as it is compatible with the domestic Constitution. The content of domestic constitutional norms ceases to be determined by European case law. Scholars increasingly study domestic judicial practice and systematise it according to domestic constitutional values. In the intersection between the domestic and the EU legal order, Greek courts and especially the Council of State, acquire a new policy-making role. They are no longer partners of the Government in the realisation of legislative aims. They now acquire a mission as guarantors of the Constitution and affirm their power to co-define policy goals and criteria. This opens up new possibilities for the application of proportionality as a structure for consequentialist balancing in Greek judicial practice.

The analysis in this Chapter makes no pretension to either exhaustiveness or to scientific correctness. The cases studied have been chosen due to the fact that local legal actors perceive them as important, sometimes even revolutionary. However, the particular reading of these cases presented here is only one among various possible readings. Other cases might express different, even exactly opposing tendencies that coexist in domestic contexts. This should not be seen as a weakness of the analysis in this Chapter, but rather as an illustration of the contested and malleable content of law, legal culture and proportionality itself, which allows integration and disintegration to coexist in different settings.[2201]

[2201] On this, Ian Ward, "Identity and Difference: The European Union and Postmodernism," in *New Legal Dynamics of European Union*, ed. Gillian More and Jo Shaw (New York: Clarendon Press, 1995), 15.

Comparative conclusions
Proportionality, rationalism, and normative pluralism

Proportionality expressing local visions of European integration. European integration has relied on the idea of integration through law. Using domestic constitutional traditions as sources of inspiration, European courts have engaged different processes of integration according to the particular goals of supranational legal orders. Proportionality and the language of rights have played a major role in these processes. In Strasbourg case law, integration has consisted in the establishment of Convention rights as decision-making standards for domestic public authorities. Proportionality has been used as a principle of acculturation and has sanctioned the indifference of domestic authorities towards common European constitutional values. In contrast, the kind of integration triggered by Luxembourg case law has traditionally focused on facts. It has consisted in the construction of a common market through the effective enforcement of EU market freedoms, sometimes to the detriment of other domestic values. In ECJ proportionality case law, domestic policy goals are typically objectivised and factualised, they are transformed into observable effects. This allows the ECJ to reframe them as parts of the common market rationale.

European integration projects in turn have been perceived differently by domestic lawyers according to the particularly local understanding of proportionality, to local narratives about law and rights and to well-established local perceptions of legal knowledge itself. Uncovering standard features in the way the integration dynamics of proportionality operate in domestic legal orders allows us to discern more general patterns in the way local actors perceive the different projects of European integration. It also sheds light on local tendencies of disintegration and closure towards Europe.

Rationalism and the denial of normative conflicts. In the rationalist French and Greek public law tradition, law represents a kind of objective, even scientific knowledge that is obtained through the use of legal methods. The values that law conveys are perceived as part of a civilisation that claims objectivity and universal application. The use the term "civilisation" instead of "culture" in this context is indicative of this idealist perception of legal knowledge. Legal rules are organised in a system and drawn from universal principles that inspire the whole of the legal order. Supranational legal orders are perceived as ensuring the same values as domestic law by definition. Since these values are rational and universal, they cannot differ among legal orders. European rights and proportionality are typically perceived as equally domestic. Their reception has not required the intervention of legislative texts but has proceeded through translation of European concepts to corresponding domestic ones. Thus, it has not even been noticed by domestic lawyers. In France, the European rights civilisation is deemed to have been achieved since the French Revolution and expressed in the rights of the *DDHC*. In Greece, in contrast, while the legal civilisation professed by supranational courts is also perceived as domestic, it is not achieved. Rather, as the protection of fundamental rights becomes an important goal for

domestic law, the European rights civilisation is perceived as the *telos* of the Greek legal order, what it should ideally be.

In this context, condemnations by supranational jurisdictions, rather than resulting from a value-laden difference between domestic and European law are claimed to result from different substantive solutions in *concrete cases*. Establishing substantive coherence between domestic and European law is a stake attached to the application of the law and especially to judicial review. Typically, the institutional-procedural aspects of proportionality are neglected by domestic lawyers, who have also found it difficult to grasp the function of the margin of appreciation. Indeed, the normative pluralism that underpins this concept is difficult to understand and to frame for Continental lawyers. So too are domestic constitutional particularities. Proportionality is not perceived as a remedy institutionalised for the violation of European rights but as an objective liberal principle that is naturally presumed in legislative intentions. Its adjudication consists in a means-ends test, ensuring the realisation of the "true meaning" of legislation. Thus, proportionality is inconsistently used in judicial practice and its integration dynamic is constrained.

The deployment of proportionality's dynamic is mainly a matter of aesthetics and depends on the possibility of presenting domestic constitutional values as equally European. In this respect, local narratives concerning the protection of rights are important. In France, the motherland of human rights, the application of proportionality and European rights often takes the form of republican inculcation. It does not contest legislative value choices in principle but only affirms their legitimacy as if it were self-evident. The use of proportionality language does not change much judicial reasoning and mainly has a function of "signalisation".[2202] In Greece, on the contrary, domestic constitutional values and goals have been traditionally defined in Europe. Therefore, as a teleological method, proportionality engineers important legal and constitutional change. It produces the interpretation of the domestic legal order in the light of European law. In *Michaniki*, proportionality even provoked a "self-denying transformation" of the Greek Constitution.[2203]

In contrast to what is observed in France and in Greece, the rationalism that underpins proportionality and the European integration projects has been difficult to accommodate in the context of English law. The analysis of this difficulty has been one of the major objects of this PhD. Here only some remarks concerning European integration are appropriate. In the pragmatist and instrumentalist common law tradition, European rights and proportionality have been incorporated into the domestic legal sphere as remedies, serving the UK's compliance with its international obligations. Paradoxically, this has made English judges take their integration function

[2202] Margit Cohn, "Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom," *American Journal of Comparative Law* 58 (2010): 588, citing Assaf Likhovski.

[2203] Roger Cotterrell, "Is It so Bad to Be Different? Comparative Law and the Appreciation of Diversity," in *Comparative Law: A Handbook*, ed. Esin Örücü and David Nelken (Oxford; Portland, Or: Hart, 2007), 136.

seriously. English courts have generally decided by reference to European case law. They have assumed their function as *juges de droit commun du droit européen* and they have imposed Convention rights on domestic authorities as part of a culture. English judges hold that Convention rights must be taken into account even in margin of appreciation cases, albeit according to the domestic constitutional division of competences. Proportionality as a head for substantive review has irritated certain fundamental assumptions of the common law, which is traditionally based on the separation between substance and form. When European courts have insufficiently taken domestic constitutional particularities into account, English judges have proceeded to a reasoned refusal to apply their decisions and have thus initiated a fruitful transnational judicial dialogue. Therefore, what gives domestic courts the possibility to communicate with their European counterparts and to influence European integration is not so much the application of proportionality, but the explicit and reasoned disagreement with European precepts.

Pragmatism and the accommodation of normative pluralism. Hence, legal culture provides legal actors with more or less effective tools for influencing the construction of Europe. Contrary to their rationalist Continental colleagues, English lawyers are aware of the possibility of conflict between domestic and European values. Traditionally such conflicts have been managed through dualism and analytical formalism. English judges have long constrained the integration function of proportionality and of substantive rights within the scope of the European Treaties and of the Convention. They have perceived the rationality that underlies these texts as particular and have insistently objected to its pretensions to universality. Common law pragmatism, the "illogical compromise" that characterises it, or the particularly English "muddling through", has allowed domestic judges to legally frame normative conflicts between domestic and European law, thus recalling to their Continental colleagues the imperfect character of European integration.

However, as the rationalist "baggage" of proportionality spills over into English public law, the framing of normative conflicts becomes increasingly difficult. In recent cases, English judges deny the substantive differences between common law and European rights protection. The application of proportionality is progressively abandoned for that of common law principles and heads of review perceived as equivalent, like the principle of legality and the *Wednesbury* standard. The main stake attached to the proportionality transplant has been the construction of an *English* public law. Thus, its accomplishment does not necessarily proceed through the application of proportionality as a *European* head of review. As the common law progressively acquires a rationalist public law system, the quest for parliamentary sovereignty is slowly transformed into a quest for national sovereignty, which is to be safeguarded by judges and the legal constitution. Dissonances between domestic and European law reappear "in new disguises" in which they are barely discernible.[2204]

[2204] Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 1998), 18, http://papers.ssrn.com/abstract=876950.

English judges oppose common law methods, like purposive interpretation and reasoning by precedent to supranational courts' dynamic and teleological reasoning. This undermines the dynamic of European integration in the domestic sphere.

In an inverse trajectory, Continental lawyers' increasing awareness of the possibility of normative conflict between domestic and European law has introduced elements of pragmatism in their rationalist legal cultures. Pragmatism gives the possibility to French and Greek courts to legally frame normative conflicts and to enter the "global community of judges" who communicate through their judicial decisions. In France, this evolution is manifested in the explicit affirmation of domestic constitutional particularities that could compromise the *effet utile* of EU law most notably through the notion of constitutional identity. French judges have ceased to axiomatically affirm the coincidence between supranational and domestic values. Instead, before translating domestic concepts into European concepts, they proceed to extensive analyses of ECJ case law to ascertain the effective protection of domestic constitutional values in the EU legal sphere. Thus, the traditional distinction between legal rules and their application is progressively blurred. This becomes even more apparent in the context of the Convention. As *Gonzalez-Gomez* illustrates, the ECtHR forces French lawyers to recognise the exceptional character of their republican perception of fundamental rights, and to acknowledge normative pluralism in Europe. French judges' effort to accommodate alternative worldviews progressively deconstructs the binary distinctions of domestic law and renders proportionality the ultimate criterion of the normativity of republican legislation.

In Greece, the Euro crisis has exposed the modernisation aesthetics of the domestic Constitution as illusionary. The collapse of the aesthetic coherence between the domestic polity and Europe provokes a constitutional crisis with existential dimensions. The normativity of domestic constitutional limits is minimised before the pursuit of common European and domestic financial goals. Faced with this situation, judges abandon their previously deferent stance and affirm the autonomy of domestic constitutional concepts and their own power to define domestic constitutional goals. In doing so, they enter in direct and explicit conflict with Parliament and with supranational courts. The affirmation of the dualism of Greek and European law is connected to the newly affirmed role of judges as important constitutional political actors. Quite paradoxically, the detachment of proportionality from European integration in the minds of Greek legal actors opens the way to its actual transplantation as a structure for consequentialist balancing in Greek law.

CONCLUSION

The study of difference in the use of proportionality is crucial to understanding its spread and its effects. Throughout this thesis, I have attempted to render the differences in the use of proportionality in France, England and Greece less enigmatic by placing them within their own context. To do so, I have approached law and proportionality as instances of language that make sense within a particular legal culture. My purpose has been to identify and interpret the local versions of proportionality, and the way they evolve over time. Hence I have attempted to construct a coherent discourse around the emergence and evolution of proportionality in different contexts that makes sense of its peculiar characteristics. Put briefly, I have attempted to unravel the local meanings of proportionality by reconstructing the expectations that legal actors have attached to it each time. Local meanings of proportionality unveil local paths of cultural change under pressure from external influence. Hence, their examination proves insightful as to the possibility of convergence between legal systems and as to the past and future of European integration.

Local versions of proportionality. Attention to French, English and Greek judicial practice reveals that, even when received in different contexts, proportionality is not always used as a pronged framework for balancing constitutional rights nor does it necessarily have a standardising effect upon legal cultures, as the mainstream literature on the matter seems to assume. In its early version as the *bilan* in the French Council of State case law, proportionality was not directly connected to rights. In its version as the *contrôle de proportionnalité*, it is a theory that serves the systematisation of judicial practice, but is not explicitly used by judges as such. In England, proportionality has long corresponded to a European head of review which has been parasitic upon common law remedies and procedures. It has served the adjudication of substantive European standards rather than of domestic constitutional rights. Divergence is observed even when there is explicit appeal to the Alexyan model. In Greece, although legal actors have always perceived proportionality as a three-pronged principle coming from Germany, in judicial practice proportionality has led to a review of legislation for manifest errors. Proportionality has had a more important role in Greek administrative law, where it has corresponded to a requirement of equity imposed on administrative action and reviewed through the justification of administrative decisions. Therefore, attention to the use of proportionality in different settings exposes the dominant rhetoric of convergence as too simplistic.

This is not to say that external influence is not present in the local construction and evolution of proportionality. It is already apparent in the use of the transnational idiom of proportionality itself, which before the '70s did not exist as a legal language

in the contexts studied. Indeed, contrary to the belief of certain proportionality theorists and of local legal actors themselves, proportionality is neither natural nor inherent in legal argumentation. In Greece, proportionality even corresponds to an entirely new term in Greek language, *αναλογικότητα,* which distinguishes it from the almost homonymous language of analogy used since Aristotle. As a new idiom, proportionality provokes discursive and cultural change. In all the contexts studied it emerged as a transfer and was promoted by certain personalities with the purpose of provoking precisely such change. Further, in different settings proportionality has occasionally taken the form of a pronged framework for rights-based adjudication.

Notwithstanding this, the evolution or migration of legal concepts does not only depend on the motivations of individual actors nor on the influences that they are subject to. The way proportionality will affect legal culture escapes proportionality theorists themselves, as well as the legal actors who introduce it into their local discursive context. Local concepts, distinctions and taboos affect the version of proportionality that legal actors will adopt. Hence, proportionality is understood as a method of review in France, as a head of review in England and as an overarching principle in Greece. It is constrained by the taboo of *opportunité* in France and in Greece, while its spread was long hindered by the taboo of merits review in England. "New dissonances" appear in the use of the common idiom of proportionality, and express the particular logic of the discourses in which it operates.

Proportionality, formalism and exceptionalism. The peculiar discursive structures that affect proportionality are themselves related to peculiar ways in which law is locally conceived of and practiced. Thus, local versions of proportionality unveil the local visions of law that underpin them and the different ways in which legal actors preserve law's autonomy from moral, political, economic or other theories and ideologies. In other words, proportionality expresses different kinds of formalism found in different contexts. In England analytical formalism excludes the consideration of substantive values in judicial review. In this way, the common law avoids judicial policy-making and safeguards parliamentary sovereignty. Quite differently, formalism takes the form of "dogmatism" in Continental systems. Judges defer to the substantive value choices embodied in legislation and content themselves with affirming these choices as if they were scientific truths. While in England judges as referees impose rules "of manner and form" on *a priori* equal parties, in France and Greece, judges as scientists seek the "general will" expressed in legislation. In England, myth is external to judicial review, which rather resembles a game. In contrast, judicial review in Continental systems is closer to a ritual, in which the interests of the parties are diluted in the pursuit of the general interest. This is expressed in the role of balancing itself. While balancing is absent in English judicial review, in Continental systems it is a ritual that serves the reconstruction of legislative intentions in a constitutionally legitimate way.

Cultural features lead to different kinds of resistance to the Alexyan model. Proportionality was long explicitly rejected as a common law head of review, while in

France and Greece it has long been appropriated and reinvented by legal actors as a formalist method of review that does not contest the intentions of public authorities. Difference in the practice of proportionality reveals new types of exceptionalism in the global model of constitutional rights, which does not necessarily involve explicit refusal to apply proportionality. Moreover, the study of the way French, English and Greek lawyers resist the application of the global model of proportionality shows that the success of this model does not have much to do with its merits at a moral or philosophical level. Rather, it has to do with local reasoning patterns and habits, local perceptions of law and courts, and local "binding arrangements" between law and other discourses. Rights cannot be optimisation requirements in France and Greece because the judge only imposes *limits* on the exercise of public power. Similarly, for a long time proportionality could not be judicial balancing in England because "by their upbringing and experience" judges were deemed "ill-qualified" to perform it.

Interestingly, resistance to the global model reminds us that until some decades ago, constitutional democracies around the world were converging towards another model of constitutional adjudication, one of liberal neutrality and freedom rather than one of fundamental rights as principles. Indeed, the formalist version of proportionality that one finds in Continental legal systems is akin to the way it was originally conceived of in Prussian administrative law and to the way it was initially applied in post-war German constitutional law.

Proportionality and local knowledge. Different versions of proportionality are not simply deviant or deficient applications of an ideal model. They express local imagination, myths, rituals and representations. Their examination unravels the different ways in which legal actors view the world from within the law. For instance, the English "economy" on substantive principles and on far-reaching legal theories is related to the Whig historians' account of the evolution of the common law and the idealisation of the political process that underpins it. In contrast, the rationalism that permeates Continental legal thought is inherited from the nationalist revolutions of previous centuries and from the rupture with past authoritarian regimes.

Different local narratives determine the ways in which legal knowledge is locally produced. They shape local "legal formants" and set local criteria for evaluating legal arguments, according to which different versions of proportionality will succeed or fail to capture local legal imagination. For instance, proportionality as an arithmetic equation succeeded in providing a French theory of judicial balancing but initially failed to do so in England. This is because, in contrast to their optimistic civil law colleagues, common lawyers are doubtful as to the possibility of resolving moral-legal issues on the basis of facts and numbers. While in France law is perceived as a kind of rational and scientific knowledge, in England law represents an ensemble of fragmented commandments. In the common law, coherent legal knowledge is not obtained through theoretical constructions, but by reference to Parliament's will. As for Greek lawyers, they have their own original way for establishing coherence among legal fragments: through the translation of foreign theories and debates.

In this thesis, my purpose has been to connect comparative law to developments in intellectual history and cultural anthropology and to stress that the evolution and spread of legal concepts like proportionality is not the product of the evolution of a universal legal science. Legal knowledge and meaning are locally constructed. In the different settings studied, legal actors have attached different expectations to the spread of proportionality and have accentuated different aspects in its use. The local genealogies of proportionality reveal its peculiar semantic baggage. In France, proportionality emerged as a requirement of financial prudence. It has corresponded to a scientific legal theory coming from other disciplines and has been expected to make policy choices accessible to legal knowledge and to judicial review. In England, proportionality has corresponded to a Continental, and most notably French theory. As such, initially it was rejected by judges but promoted by anti-Diceyan scholars and lawyers, who aspired to rationalise the bits and pieces of the common law around standards of substantive justice. Finally, Greek legal theory has always conceived of proportionality as a transplant. Its transfer from Germany and Europe has been expected to modernise the Greek polity.

Proportionality expresses local paths of cultural change, local ways of expanding the reach of law and negotiating its autonomy with regard to other discourses. The reasons for its spread differ across jurisdictions. It has not always been about the optimisation of fundamental rights nor about social integration of minorities. While the themes of modernisation, rationalisation and Europe have offered a common background to the spread of proportionality, these terms themselves are understood very differently in different settings. The cultural study of law seeks difference in meaning that can hide behind the similarity of legal terms and rules.

The effects of proportionality. Albeit not universal, meaning and culture are public. They are found in the particularities that local legal actors perceive as common-sensical. The spread of proportionality has not only been about promoting the interests of a particular class or establishing "juristocracy". Individual motives of legal actors when promoting proportionality are neutralised by the publicity of the language and culture in which these actors express themselves. Hence, the effects of proportionality should be sought in the cultural change that it provokes.

In all the contexts studied, proportionality expresses a belief in the possibility of law as a kind of rational knowledge, whose reach transcends the interpretation of formal legal texts. Proportionality tends to rationalise policy-making through appeal to community values, most notably human rights. It idealises the judge as an institution that is able to decide in the general interest and requires important institutional changes in the systems where it spreads. Hence, at the level of legal discourse, the "doctrinal imperialism" of proportionality renders useless pre-existing formalist distinctions that have traditionally served to delimit judicial competence: *contenu* v *motifs* of administrative acts in France, *review* v *appeal* in England, *if* v *how* of public discretion in Greece.

Proportionality certainly provokes convergence among legal systems. As judges increasingly become policy-makers, they are inclined to use the proportionality framework for its standardising and pedagogic characteristics. Thus the first signs of legal analysis emerge in Continental systems. Still, it is in the common law that proportionality has acquired its most radical force. By connecting law to policy-making, proportionality leads to the development of normative legal scholarship. While in France and Greece normative scholarship has traditionally been the work of the *doctrine*, in England, the new kind of rational legal knowledge that proportionality conveys has represented a rupture with the Diceyan orthodoxy. In this context, proportionality has been a revolutionary tool in the hands of common lawyers, who have used it to build a system of public law based on human rights values, in the model of Continental systems. During the last two decades, proportionality has borne a culture of fundamental rights and justification in English judicial review. Its spread and evolution in this context is an exemplary case of cultural transformation.

That being said, proportionality has not always been accompanied by its fundamental rights baggage. Nor has its spread always produced a "race to the top" in the field of fundamental rights protection. In France and Greece in particular, while it has been promoted as a fundamental rights principle, its application in practice has not involved value-laden justifications. In this context, proportionality has rather assumed a symbolic or even aesthetic function: it has represented law and adjudication as a rational, scientific enterprise. Thus, it has enhanced a pre-existing tendency towards "administratization" of law. Its spread as a modern, rational method of legal reasoning expresses Continental lawyers' increasing reliance on facts and expertise when dealing with contentious socio-political matters.

The effects of proportionality provoke varying reactions among legal actors. The failure of proportionality to bring about modernisation and to ensure fundamental rights protection in Greece was not noticed by Greek lawyers. In this context, the meaning of proportionality as part of a desired European civilisation was until recently hegemonic. The use of proportionality language in official legal texts has enjoyed a value in itself, since it has represented the Greek society as modern and European. However, in different settings the use of proportionality is not always uniform and uncontested. Asymmetries and debates among legal actors reveal tensions among different legal ideologies within the same culture and provide insights as to the potential evolution of proportionality. For instance, while the use of proportionality in French case law excites judges themselves, it provokes increasing suspicion among scholars. That is because the current context of terrorism, polarisation, and state of emergency has rendered French lawyers less optimistic about the possibility of objective, "scientific" solutions to fundamental rights conflicts. In England, the debate about the spill-over of proportionality upon domestic public law reflects a struggle about the fundamentals of the English constitution. This debate expresses a long-existing tension in English law, between substantive justice and parliamentary sovereignty. As the rationalism that underpins proportionality expands in the common

law, the quest for democratic decision-making that parliamentary sovereignty has long embodied is reformulated in terms of deference.

Proportionality and European integration. The use and evolution of proportionality makes sense within particular cultural contexts. However, this context is not unchangeable nor immune to external influence. Unravelling the local meanings of proportionality is impossible without taking European integration into account. The idea of integration through law is at the core of the European enterprise. The ECJ and the ECtHR have inscribed into proportionality the peculiar logic of European legal orders. In their case law the language of proportionality and rights has acquired a particular dynamic, different from the one it has in German constitutionalism and connected to the supranational goals that these courts promote. When received in domestic spheres, proportionality carries with it European cultural baggage.

Still, the way proportionality deploys its integration dynamics varies across jurisdictions and across time. Although its application is a legal obligation for domestic courts, judicial practice in the field is not uniform. Even in the scope of European law, proportionality is affected by local discursive patterns and structures. French lawyers and judges have interpreted proportionality as synonymous with pre-existing methods of review and have deprived it of its radical potential. In diametrical opposition, proportionality in England has corresponded to a special remedy for the violation of substantive European rights. English judges have taken its integration dynamic seriously, while they have tried to contain it within the scope of European law. In Greek legal theory, proportionality has been understood as a legal scientific method that transcends legal texts and even the Constitution. As is typical in this context, domestic lawyers have sought the correct conceptual content of proportionality in Europe.

The practice on proportionality in the field of European law reveals itself as an instance of "systematically distorted communication". Differences in this practice express more general patterns of cultural change: French insularity, English dualism and Greek eclecticism. They also express local ways of responding to the pressure for European integration. The rationalism that permeates Continental legal systems has necessitated that judges establish substantive coherence in the law that they apply. Hence, courts have typically denied the existence of normative conflicts between domestic and European law. The application of European case law and of proportionality in particular has proceeded through the translation of European legal concepts into pre-existing domestic ones. In contrast, pragmatism and instrumentalism has allowed common lawyers to explicitly articulate the differences between English and European legal orders and their underlying values. Proportionality has served the UK's compliance with its international obligations. When these obligations have entered into conflict with fundamental assumptions of the common law, English judges have abandoned their analytical rigour and have proceeded to a reasoned refusal to apply proportionality. As the Sunday trading litigation shows, it is pragmatism (and

not proportionality) that has given English courts access to "the global community of judges" engaging in transnational communication.

Convergence, divergence and disintegration. Once again, in the context of European integration proportionality provokes cultural change and convergence among legal systems. This is more obvious in the English case. Proportionality rationalises English judicial review and brings with it Continental doctrinal baggage. New terms like discretion, manifest error and variable intensity of review emerge, and express a new tendency towards myth and idealisation in English legal thought. In contrast, in the rationalist Continental systems, the transformative effect of proportionality has been a matter of aesthetics and has ultimately depended on local narratives of European integration. In France, the motherland of human rights, proportionality is applied as a corrective patch, it effects minor adjustments to domestic judicial review to keep up with the evolution of European rights. When used in judicial decisions, proportionality mainly assumes a function of "signalisation". Hence, it has had no significant role in the adaptation of French law to European standards, which usually takes place through legislative reform or judicial interpretation. Quite differently, in Greece proportionality has functioned as a method of teleological interpretation and has sometimes led to a "self-denying transformation" of the domestic Constitution. That is because Greek lawyers see Europe as a model and its system of rights protection as a civilisation to which they aspire. Hence, in this context convergence has taken the form of "interpretive osmosis" between the domestic and the European constitution.

Under the surface of convergence however, dissonances reappear. As rationalism expands in English public law, domestic judges abandon the Euro-speak of proportionality for common law heads of review, most notably *Wednesbury* unreasonableness. While this expresses the evolution of the common law, at the same time it reveals local tendencies towards disintegration from Europe. English judges increasingly juxtapose common law methods, like anxious scrutiny, purposive interpretation and precedent, against the dynamic and teleological reasoning of supranational courts. By doing so, they affirm to themselves the powers that Parliament had conceded to European institutions. The quest for parliamentary sovereignty is slowly transformed into a quest for national sovereignty under the legal constitution.

In Greece dissonances are the result of the shock of the Euro crisis, which has exposed the aesthetic coherence between the domestic and the European constitution as illusionary. Greek lawyers progressively acknowledge the existence of value-laden conflicts between domestic and European law. Consciousness of normative conflict is translated into dualism in judicial practice. Greek courts increasingly deny the relevance of European law in domestic constitutional adjudication and turn to the traditional version of proportionality as a manifest error test. Greek scholars increasingly distinguish between the domestic and the European application of the principle. Contrary to the traditional obsession with foreign doctrinal developments, they justify

the deviant domestic judicial practice by appealing to domestic constitutional values. Thus the traditionally unitary concept of proportionality is fragmented.

It seems that disintegration pushes Continental lawyers to abandon their previous commitment to rationalism and modernisation and to search for pragmatic solutions, which are more sensitive to local socio-political context. This is even more apparent in the French context. French courts progressively affirm domestic constitutional particularities and ensure the effective protection of domestic values in the *application* of legal rules. Moreover, pragmatism and normative conflict challenge the traditional French republican perception of rights and contest certain fundamental assumptions of domestic legal thought. As courts strive to accommodate normative pluralism, the application of proportionality in concrete cases goes so far as to contest the normativity of republican legislation. Paradoxically, for the first time in France, European integration acquires a radical dynamic in a context of disintegration.

As a discourse, the cultural interpretation of law "can only be more or less persuasive and can never be "true"".[2205] Its findings "will always be provisional, partial and contested".[2206] Still, cultural comparative law is a worthy enterprise. By enhancing the understanding of other cultures it can point to new ways of providing legal solutions that are more responsive to cultural sensibilities. Most importantly, by unravelling seemingly remote worldviews and mentalities, cultural comparative law gives lawyers the opportunity to reflect upon their own, and to re-weave them in a way that respects alterity and tolerates difference.

[2205] Pierre Legrand, "Public Law, Europeanisation and Convergence," in *Convergence and Divergence in European Public Law*, ed. Paul Beaumont, Carole Lyons, and Neil Walker (Oxford; Portland, Or.: Hart, 2002), 245.

[2206] Roger Cotterrell, "Is It so Bad to Be Different? Comparative Law and the Appreciation of Diversity," in *Comparative Law: A Handbook*, ed. Esin Örücü and David Nelken (Oxford; Portland, Or: Hart, 2007), 149.

BIBLIOGRAPHY

BOOKS AND THESES

Alexy, Robert. *A Theory of Constitutional Rights*. Translated by Julian Rivers. Oxford; New York: OUP, 2002.

———. *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*. Translated by Ruth Adler and Neil McCormick. 2nd ed. Oxford; New York: Clarendon Press; OUP, 2010.

———. *Theorie Der Grundrechte*. Baden-Baden: Nomos, 1985.

Alivizatos, Nicos. *Les institutions politiques de la Grèce à travers les crises: 1922-1974*. Paris: LGDJ, 1979.

———. *Ο αβέβαιος εκσυγχρονισμός και η θολή συνταγματική αναθεώρηση [Uncertain Modernization and Vague Constitutional Reform]*. Athens: Πόλις, 2001.

Allan, Trevor. *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*. Oxford: Clarendon Press, 1993.

———. *The Sovereignty of Law: Freedom, Constitution, and Common Law*. Oxford: OUP, 2013.

Allison, John. *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law*. Oxford; New York: OUP, 1996.

———. *The English Historical Constitution: Continuity, Change and European Effects*. Cambridge: CUP, 2007.

Alston, Philip, ed. *The EU and Human Rights*. Oxford: OUP, 1999.

Alter, Karen. *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*. Oxford Studies in European Law. Oxford; New York: OUP, 2002.

Andriantsimbazovina, Joël. *L'autorité des décisions de justice constitutionnelles et européennes sur le juge administratif français*. Paris: LGDJ, 1998.

Androulakis, Nikolaos. *Θεμελιώδεις έννοιαι της ποινικής δίκης [Fundamental Notions of Criminal Procedure]*. Vol. A. Athens: Σάκκουλα, 1972.

Antoniou, Theodora. *Η ισότητα εντός και διά του νόμου [Equality In and Through the Law]*. Athens; Komotini: Αντ. Ν. Σάκκουλας, 1998.

Arai-Takahashi, Yutaka. *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*. Antwerp; Oxford: Intersentia, 2002.

Arnaoutoglou, Fili. *Η πρότυπη ή πιλοτική δίκη ενώπιον του Συμβουλίου της Επικρατείας [The Pilot Procedure before the Council of State]*. Athens: Νομική Βιβλιοθήκη, 2012.

Atiyah, Patrick. *Pragmatism and Theory in English Law*. London: Sweet & Maxwell, 1987.

Auby, Jean-Marie, and Rolland Drago. *Traité de contentieux administratif*. 2nd ed. Vol. II. Paris: LGDJ, 1975.

Audren, Frédéric, and Jean-Louis Halpérin. *La culture juridique française: entre mythes et réalités: XIXe-XXe siècles*. Paris: CNRS, 2013.

Austin, John. *How to Do Things with Words*. 2nd ed. Oxford: Clarendon Press, 1975.

Barak, Aharon. *Proportionality: Constitutional Rights and Their Limitations*. Cambridge Studies in Constitutional Law. Cambridge: CUP, 2012.

Beatson, Jack, ed. *Constitutional Reform in the United Kingdom: Practice and Principles*. Oxford: Hart, 1998.

Beatty, David. *The Ultimate Rule of Law*. Oxford; New York: OUP, 2004.

Beis, Kostas. *Το ελληνικό έλλειμμα κράτους δικαίου [The Greek rule of law deficit]*. Athens: Eunomia, 1998.

Bernal Pulido, Carlos. *El principio de proporcionalidad y los derechos fundamentales*. 3rd ed. Madrid: Centro de Estudios Políticos y Constitucionales, 2007.

Bienvenu, Jean-Jacques. *L'interprétation juridictionnelle des actes administratifs et des lois: sa nature et sa fonction dans l'élaboration du droit administratif*. Vol. II. Paris II: thèse, 1979.

Birkinshaw, Patrick. *European Public Law*. London: Butterworths, 2003.

Blanquer, Jean-Michel. *Les méthodes du juge constitutionnel*. Paris: LGDJ, 2000.

Bogdanor, Vernon. *The New British Constitution*. Oxford: Hart, 2009.

Bomhoff, Jacco. *Balancing Constitutional Rights. The Origins and Meanings of Postwar Legal Discourse*. Cambridge Studies in Constitutional Law. Cambridge: CUP, 2013.

Brady, Alan. *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach*. Cambridge: CUP, 2012.

Breyer, Stephen. *Making Our Democracy Work: A Judge's View*. New York: Knopf, 2010.

Brunet, Pierre. *Vouloir pour la nation: le concept de représentation dans la théorie de l'état*. Rouen: Publications de l'Université de Rouen, 2004.

Carbonnier, Jean. *Droit et passion du droit sous la Ve République*. Paris: LGDJ, 2008.

Carré de Malberg, Raymond. *La loi, expression de la volonté générale : étude sur le concept de la loi dans la Constitution de 1875*. Paris: Sirey, 1931.

Cassin, René, Marcel Waline, Prosper Weil, Long Marceau, and Guy Braibant. *Les grands arrêts de la jurisprudence administrative*. 1st ed. Paris: Sirey, 1956.

Chalmers, Damian, Gareth Davies, and Giorgio Monti. *European Union Law : Text and Materials*. 3rd ed. New York: CUP, 2014.

Champeil-Desplats, Véronique. *Méthodologies du droit et des sciences du droit*. Paris: Dalloz, 2016.

Chevallier, Jacques, and Danièle Loschak. *Science administrative*. Paris: LGDJ, 1978.

Choudhry, Sujit, ed. *The Migration of Constitutional Ideas*. Cambridge: CUP, 2006.

Christoffersen, Jonas. *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*. International Studies in Human Rights. Leiden; Boston: Martinus Nijhoff Publishers, 2009.

Chryssogonos, Kostas. *Η ενσωμάτωση της Ευρωπαϊκής Σύμβασης των Δικαιωμάτων του Ανθρώπου στην εθνική έννομη τάξη [The Incorporation of the European Convention on Human Rights into the National Legal Order]*. Athens; Komotini: Αντ. Ν. Σάκκουλας, 2001.

———. *Μια βεβαιωτική αναθεώρηση. Η αναθεώρηση των διατάξεων του Συντάγματος για τα ατομικά και κοινωνικά δικαιώματα [A Confirmatory Amendment. The Amendment of the Constitutional Provisions on Individual and Social Rights]*. Athens: Αντ. Ν. Σάκκουλας, 2000.

Chryssogonos, Kostas, and Evaggelos Venizelos. *Το πρόβλημα της συνταγματικής δικαιοσύνης στην Ελλάδα [The Problem of Constitutional Justice in Greece]*. Athens; Komotini: Σάκκουλα, 2006.

Clapham, Andrew. *Human Rights in the Private Sphere*. Oxford Monographs in International Law. Oxford; New York: Clarendon Press; OUP, 1993.

Cohen-Eliya, Moshe, and Iddo Porat. *Proportionality and Constitutional Culture*. Cambridge Studies in Constitutional Law. Cambridge: CUP, 2013.

Contiades, Xenophon. *Ο νέος συνταγματισμός και τα θεμελιώδη δικαιώματα μετά την αναθεώρηση του 2001 [The New Constitutionalism and Fundamental Rights after the 2001 Reform]*. Athens; Komotini: Αντ. Ν. Σάκκουλας, 2002.

Craig, Paul. *Administrative Law*. 2nd ed. London: Sweet & Maxwell, 1989.

———. *Administrative Law*. 3rd ed. London: Sweet & Maxwell, 1994.

———. *Administrative Law*. 8th ed. London: Sweet & Maxwell, 2016.

———. *EU Administrative Law*. 2nd ed. Collected Courses of the Academy of European Law. Oxford; New York: OUP, 2012.

Dagtoglou, Prodromos. *Γενικό Διοικητικό Δίκαιο [General Administrative Law]*. 4th ed. Athens; Komotini: Αντ. Σάκκουλας, 2004.

———. *Ευρωπαϊκό Κοινοτικό Δίκαιο [European Community Law]*. 2nd ed. Athens: Αντ. Σάκκουλας, 1985.

Dagtoglou, Prodromos. *Συνταγματικό Δίκαιο. Ατομικά Δικαιώματα [Constitutional Law. Individual Rights]*. Athens; Komotini: Αντ. Ν. Σάκκουλας, 1991.

———. *Συνταγματικό Δίκαιο. Ατομικά Δικαιώματα [Constitutional Law. Individual Rights]*. 2nd rev ed. Vol. A'. Athens; Komotini: Αντ. Ν. Σάκκουλας, 2005.

———. *Συνταγματικό Δίκαιο. Ατομικά Δικαιώματα [Constitutional Law. Individual Rights]*. 4th ed. Vol. A'. Athens; Komotini: Αντ. Ν. Σάκκουλας, 2012.

Dalakouras, Theocharis. *Η αρχή της αναλογικότητας και τα μέτρα δικονομικού καταναγκασμού [The Principle of Proportionality and Coercive Measures in Criminal Proceedings]*. Thessaloniki: Σάκκουλα, 1993.

Dawson, John Philip. *The Oracles of the Law*. Westport, Conn: Greenwood Press, 1978.

De Búrca, Gráinne, Bruno De Witte, and Larissa Ogertschnig. *Social Rights in Europe*. New York: OUP, 2005.

De Smith, Stanley Alexander. *Constitutional and Administrative Law*. London: Penguin Books, 1971.

———. *Judicial Review of Administrative Action*. New York: Oceana Publications, 1959.

De Smith, Stanley Alexander, Harry Woolf, Jeffrey Jowell, and Andrew Le Sueur. *Judicial Review of Administrative Action*. 5th ed. London: Sweet & Maxwell, 1995.

De Witte, Bruno, Andrea Ott, and Ellen Vos. *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law*. Cheltenham: Edward Elgar Publishing, 2017.

Dekleris, Michail. *Ο δωδεκαδελτος του περιβαλλοντος. Εγκόλπιο βιώσιμου αναπτύξεως [The Twelve Tables of the Environment. A Handbook of Sustainable Growth]*. Athens; Komotini: Αντ. Ν. Σάκκουλας, 1996.

Denning, Alfred. *Freedom under the Law*. London: Stevens and Sons, 1949.

Di Manno, Thierry. *Le juge constitutionnel et la technique des décisions « interprétatives » en France et en Italie*. Paris: Economica, 1999.

Dicey, Albert Venn. *Introduction to the Study of the Law of the Constitution*. 9th ed. London: Macmillan and Co, 1939.

Dimitropoulos, Andreas. *Τα αμυντικά δικαιώματα του ανθρώπου και η μεταβολή της έννομης τάξης [Negative Human Rights and the Transformation of the Legal Order]*. Athens; Komotini: Αντ. Ν. Σάκκουλας, 1981.

Drossos, Yannis. *Δοκίμιο ελληνικής συνταγματικής θεωρίας [Essay on Greek Constitutional Theory]*. Athens; Komotini: Αντ. Ν. Σάκκουλας, 1996.

Dubouis, Louis. *La théorie de l'abus de droit et la jurisprudence administrative*. Paris: LGDJ, 1962.

Duclerq, Jean-Baptiste. *Les mutations du contrôle de proportionnalité dans la jurisprudence du Conseil constitutionnel*. Paris: LGDJ, 2015.

Dworkin, Ronald. *Law's Empire*. Fontana Master Guides. London: Fontana, 1986.

———. *Taking Rights Seriously*. New impression, with a reply to critics. London: Duckworth, 1978.

Favoreu, Louis, *Droit des libertés fondamentales*. 2e éd. Précis. Paris: Dalloz, 2001.

Favoreu, Louis, and Loïc Philip. *Les grandes décisions du Conseil constitutionnel*. Paris: Dalloz-Sirey, 1975.

Favoreu, Louis, Loïc Philip, Patrick Gaïa, Richard Ghevontian, and André Roux. *Les grandes décisions du Conseil constitutionnel*. 18th ed. Paris: Dalloz, 2016.

Ferreres Comella, Víctor. *Constitutional Courts and Democratic Values : A European Perspective*. New Haven: Yale University Press, 2009.

Flogaitis, Spyridon. *Administrative Law et Droit administratif*. Paris: Pichon et Durand-Auzias, 1986.

Forowicz, Magdalena. *The Reception of International Law in the European Court of Human Rights*. International Courts and Tribunals Series. Oxford: OUP, 2010.

Forsthoff, Ernst. *Der Staat der Industriegesellschaft: dargestellt am Beispiel der Bundesrepublik Deutschland*. 2nd ed. München: Beck, 1971.

Foucault, Michel. *L'archéologie du savoir*. Paris: Gallimard, 1969.

Foulquier, Norbert. *Les droits publics subjectifs des administrés: émergence d'un concept en droit administratif français du XIXe au XXe siècle*. Paris: Dalloz, 2003.

Gaudemet, Yves. *Droit administratif*. Paris: LGDJ; Lextenso, 2015.

Gearty, Conor. *Civil Liberties*. Clarendon Law Series. Oxford; New York: OUP, 2007.

Geertz, Clifford. *The Interpretation of Cultures: Selected Essays*. New York: Basic Books, 2000.

Gény, François. *Méthodes d'interprétation et sources en droit privé positif*. Paris: LGDJ, 1919.

Gerapetritis, George. *Proportionality in Administrative Law: Judicial Review in France, Greece, England and in the European Community*. Athens: Σάκκουλα, 1997.

———. *Σύνταγμα και Βουλή. Αυτονομία και ανέλεγκτο των εσωτερικών του σώματος [Constitution and Parliament. Autonomy and the Exemption of the Interna Corporis Affairs from Judicial Review]*. Athens: Νομική Βιβλιοθήκη, 2012.

Girard, Didier. *La France devant la Cour européenne des droits de l'Homme: contribution à l'analyse du comportement étatique devant une juridiction internationale*. Logiques juridiques. Paris: L'Harmattan, 2015.

Goldenberg, Léo. *Le Conseil d'État, juge du fait*. Paris: Dalloz, 1932.

Griffith, John. *The Politics of the Judiciary*. 2nd ed. Fontana Originals. London: Fontana, 1981.

Habermas, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Studies in Contemporary German Social Thought. Cambridge, MA: MIT Press, 1996.

Harlow, Carol. *Administrative Liability: A Comparative Study of French and English Law*. PhD, The London School of Economics and Political Science (LSE), 1979.

———. *Law and Administration*. Law in Context. London: Weidenfeld and Nicolson, 1984.

Hart, Herbert. *Essays in Jurisprudence and Philosophy*. Oxford; New York: Clarendon Press; OUP, 1983.

———. *The Concept of Law*. Oxford: OUP, 1961.

Hauriou, Maurice. *Précis élémentaire de droit constitutionnel*. 2nd ed. Paris: Sirey, 1930.

Hewart, Gordon. *The New Despotism*. Westport, Conn: Greenwood Press, 1945.

Hickman, Tom. *Public Law after the Human Rights Act*. Oxford: Hart, 2010.

Hirschl, Ran. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, MA; London: Harvard University Press, 2004.

Hunt, Murray. *Using Human Rights Law in English Courts*. Oxford: Hart, 1997.

Huscroft, Grant, Bradley Miller, and Grégoire Webber, eds. *Proportionality and the Rule of Law: Rights, Justification, Reasoning*. New York: CUP, 2014.

Ignatieff, Michael. *American Exceptionalism and Human Rights*. Princeton, NJ: Princeton University Press, 2005.

Iliopoulou-Stragga, Julia. *Ελληνικό συνταγματικό δίκαιο και ευρωπαϊκή ενοποίηση [Greek Constitutional Law and European Integration]*. Athens; Komotini: Αντ. Ν. Σάκκουλας, 1996.

Kalligas, Pavlos. *Η εξάντλησις των κομμάτων, ήτοι ηθικά γεγονότα της κοινωνίας μας [The effeteness of political parties, namely moral issues of our society]*. Athens, 1842.

Kamtsidou, Ifigeneia. *Η επιφύλαξη υπέρ του νόμου [The Clause of Legislative Competence]*. Athens; Thessaloniki: Σάκκουλα, 2001.

Karamanof, Maria. *Βιώσιμο κράτος και δημόσια κτήση. Τα όρια των ιδιωτικοποιήσεων [Sustainable State and Public Property. The Limits of Privatization]*. Athens: Κυριακίδης Π., 2011.

Karr, Alphonse. *Plus ça change et plus c'est la même chose : notes de voyage*. Nice: A. Gilletta, 1871.

Kavanagh, Aileen. *Constitutional Review under the UK Human Rights Act*. Cambridge: CUP, 2009.

Keller, Helen, and Alec Stone Sweet. *A Europe of Rights: The Impact of the ECHR on National Legal Systems*. Oxford: OUP, 2008.

Klatt, Matthias, and Moritz Meister. *The Constitutional Structure of Proportionality*. Oxford: OUP, 2012.

Kommers, Donald. *The Constitutional Jurisprudence of the Federal Republic of Germany*. 3rd ed, Revised and expanded. Durham, NC: Duke University Press, 2012.

Kontogiorga-Theocharopoulou, Dimitra. *Η αρχή της αναλογικότητας στο εσωτερικό δημόσιο δίκαιο [The Principle of Proportionality in Domestic Public Law]*. Thessaloniki: Σάκκουλα, 1989.

Laferrière, Édouard. *Traité de la juridiction administrative et des recours contentieux*. Vol. 2. Paris: Berger-Levrault et Cie, 1887.

Lambert, Édouard. *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis : L'expérience américaine du contrôle judiciare de la constitutionnalité des lois*. Paris: Giard, 1921.

Lasser, Mitchel. *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*. Oxford Studies in European Law. Oxford; New York: OUP, 2004.

———. *Judicial Transformations: The Rights Revolution in the Courts of Europe*. Oxford; New York: OUP, 2009.

Latour, Bruno. *La fabrique du droit : une ethnographie du Conseil d'État*. Paris: La Découverte, 2002.

Leckey, Robert. *Bills of Rights in the Common Law*. Cambridge: CUP, 2015.

Lévi-Strauss, Claude. *The Savage Mind*. Chicago: University of Chicago Press, 1966.

Long, Marceau, Prosper Weil, Guy Braibant, Pierre Delvolvé, and Bruno Genevois. *Les grands arrêts de la jurisprudence administrative*. 21st ed. Paris: Dalloz, 2017.

Loughlin, Martin. *Public Law and Political Theory*. Oxford; New York: Clarendon Press; OUP, 1992.

———. *The British Constitution : A Very Short Introduction*. Very Short Introductions. Oxford: OUP, 2013.

Machaw, Jerry. *Due Process in the Administrative State*. New Haven: Yale University Press, 1985.

Manessis, Aristovoulos. *Deux États nés en 1830: ressemblances et dissemblances constitutionnelles entre la Belgique et la Grèce*. Bruxelles: Maison Ferdinand Larcier, 1959.

———. *Αι εγγυήσεις τηρήσεως του Συντάγματος [The Normative Guarantees of the Constitution]*. Vol. I. Thessaloniki: Το νομικόν, 1956.

———. *Συνταγματικά Δικαιώματα [Constitutional Rights]*. Vol. A. Thessaloniki: Σάκκουλα, 1978.

———. *Συνταγματικά Δικαιώματα [Constitutional Rights]*. 2nd ed. Vol. A. Thessaloniki: Σάκκουλα, 1982.

Manitakis, Antonis. *Ελληνικό Συνταγματικό Δίκαιο [Greek Constitutional Law]*. Vol. I. Thessaloniki: Σάκκουλα, 2004.

Manitakis, Antonis. *Κράτος δικαίου και δικαστικός έλεγχος της συνταγματικότητας [The Ideal of a State Ruled by Law and Judicial Review of Constitutionality]*. Thessaloniki: Σάκκουλα, 1994.

———. *Το συνταγματικό δικαστήριο σε ένα σύστημα παρεμπίπτοντος ελέγχου της συνταγματικότητας των νόμων [The Constitutional Court in a System of Incidental Judicial Review of the Constitutionality of Legislation]*. Athens; Thessaloniki: Σάκκουλα, 2008.

Marzal Yetano, Antonio. *La dynamique du principe de proportionnalité: essai dans le contexte des libertés de circulation du droit de l'Union européenne*. Clermont-Ferrand: Institut universitaire Varenne, 2013.

Mathieu, Bertrand, and Michel Verpeaux. *Contentieux constitutionnel des droits fondamentaux*. Manuels. Paris: LGDJ, 2002.

Meunier, Jacques. *Les pouvoirs du Conseil constitutionnel. Essai d'analyse stratégique*. Paris; Bruxelles: LGDJ; Bruylant, 1994.

Micklitz, Hans. *The Politics of Judicial Co-operation in the EU: Sunday Trading, Equal Treatment and Good Faith*. Cambridge: CUP, 2005.

Molfessis, Nicolas. *Le Conseil constitutionnel et le droit privé*. Paris: LGDJ, 1997.

Möller, Kai. *The Global Model of Constitutional Rights*. Oxford Constitutional Theory. Oxford: OUP, 2012.

Montesquieu. *De l'esprit des lois*. Vol. Book I. Paris: Flammarion, 1979.

Nozick, Robert. *Anarchy, State, and Utopia*. Oxford: Blackwell, 1974.

Orfanoudakis, Sarantis. *Η αρχή της αναλογικότητας στην ελληνική έννομη τάξη : από τη νομολογιακή εφαρμογή της στη συνταγματική της καθιέρωση [The Principle of Proportionality in the Greek Legal Order: From Its Judicial Application to Its Constitutional Consecration]*. Thessaloniki: Σάκκουλα, 2003.

Papatolias, Apostolos. *Συνταγματικές επιχειρηματολογίες για την συνταγματική αναθεώρηση [Constitutional Argumentation on the Constitutional Reform]*. Athens: Αντ. Ν. Σάκκουλας, 1999.

Pararas, Petros. *Συνταγματικός πολιτισμός και Δικαιώματα του Ανθρώπου [Constitutional Civilsation and Human Rights]*. Athens; Komotini: Αντ. Ν. Σάκκουλας, 2011.

———. *Το κεκτημένου του ευρωπαϊκού συνταγματικού πολιτισμού [The Acquis of the European Constitutional Civilisation]*. Athens: Αντ. Ν. Σάκκουλας, 2001.

Pardini, Jean-Jacques. *Le juge constitutionnel et le « fait » en Italie et en France*. Aix-en-Provence: Presses universitaires d'Aix-Marseille, 2001.

Philippe, Xavier. *Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative françaises*. Paris: Économica, 1990.

Pirker, Benedikt. *Proportionality Analysis and Models of Judicial Review: A Theoretical and Comparative Study*. European Administrative Law Series. Groningen: Europa Law Pub, 2013.

Plessix, Benoît. *Droit administratif général*. Paris: LexisNexis, 2016.

Putnam, Hilary. *The Collapse of the Fact/Value Dichotomy and Other Essays*. Cambridge, MA; London: Harvard University Press, 2002.

Qvortrup, Mads, ed. *The British Constitution: Continuity and Change: A Festschrift for Vernon Bogdanor*. Oxford: Hart, 2013.

Raikos, Athanasios. *Παραδόσεις Συνταγματικού Δικαίου. Θεμελιώδη Δικαιώματα [Constitutional Law Lessons. Fundamental Rights]*. Vol. B. Athens: Σάκκουλα, 1983.

———. *Συνταγματικό Δίκαιο. Θεμελιώδη Δικαιώματα [Constitutional Law. Fundamental Rights]*. 3rd ed. Vol. 2. Athens: Αντ. Ν. Σάκκουλας, 2008.

Ranchordás, Sofia, and Boudewijn Willem Nicolaas de Waard. *The Judge and the Proportionate Use of Discretion: A Comparative Study*. Abington: Routledge, 2015.

Réveillère, Vincent. *Le juge et le travail des concepts juridiques : le cas de la citoyenneté de l'Union européenne*. PhD, European University Institute, 2017.

Rials, Stéphane. *Le juge administratif français et la technique du standard (essai sur le traitement juridictionnel de l'idée de normalité)*. Paris: LGDJ, 1980.

Rousseau, Dominique. *Droit du contentieux constitutionnel*. 6th ed. Paris: Montchrestien, 2001.

———. *Droit du contentieux constitutionnel*. 9th ed. Paris: Montchrestien, 2010.

———. *Droit du contentieux constitutionnel*. 11th ed. Paris: Montchrestien, 2016.

Rousseau, Dominique, and Julien Bonnet. *L'essentiel de la QPC: mécanisme et mode d'emploi, commentaires des principales décisions*. Paris: Gualino; Lextenso, 2011.

Saripolos, Nikolaos I. *Πραγματεία του Συνταγματικού Δικαίου [Treatise of Constitutional Law]*. 1st ed. Athens, 1851.

Schwarze, Jürgen. *European Administrative Law*. Luxembourg; London: Office for Official Publications of the European Communities; Sweet & Maxwell, 1992.

Simantiras, Konstantinos. *Γενικές αρχές αστικού δικαίου [General Principles of Civil Law]*. 4th ed. Athens: Αντ. Σάκκουλας, 1990.

Scarman, Leslie. *English Law: The New Dimension*. Hamlyn Lecture Series. London: Stevens Publishing, 1975.

Skinner, Quentin. *Visions of Politics*. Cambridge: CUP, 2002.

Sotirelis, Giorgos. *Σύνταγμα και δημοκρατία στην εποχή της παγκοσμιοποίησης [Constitution and Democracy in the Age of Globalization]*. Athens: Αντ. Ν. Σάκκουλας, 2000.

Spiliotopoulos, Epaminondas. *Droit administratif hellénique*. 2nd ed. Athènes; Bruxelles: Sakkoula; Bruylant, 2004.

Stassinopoulos, Michail. *Δίκαιον των διοικητικών πράξεων [Law of Administrative Acts]*. [χ.ε.], 1951.

Stone Sweet, Alec. *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*. New York: OUP, 1992.

Sudre, Frédéric. *Droit européen et international des droits de l'Homme*. 13th ed. Paris: PUF, 2016.

———. *La Convention européenne des droits de l'Homme*. 6th ed. Paris: PUF, 2004.

Sullivan, Thomas, and Richard Frase. *Proportionality Principles in American Law: Controlling Excessive Government Actions*. Oxford; New York: OUP, 2009.

Tridimas, Takis. *The General Principles of EC Law*. Oxford EC Law Library. Oxford; New York: OUP, 1999.

Troper, Michel. *La séparation des pouvoirs et l'histoire constitutionnelle française*. Paris: LGDJ, 1973.

———. *Pour une théorie juridique de l'État*. Leviathan. Paris: PUF, 1994.

Tsapogas, Michalis, and Dimitris Christopoulos, eds. *Τα δικαιώματα στην Ελλάδα. Από το τέλος του εμφυλίου στο τέλος της μεταπολίτευσης [Rights in the Greece 1953-2003. From the End of the Civil War to the End of Metapolitefsi]*. Athens: Καστανιώτης, 2004.

Tsatsos, Dimitrios. *Συνταγματικό Δίκαιο [Constitutional Law]*. Vol. Γ', Θεμελιώδη Δικαιώματα [Fundamental Rights]. Athens: Αντ. Ν. Σάκκουλας, 1988.

———. *Συνταγματικό Δίκαιο [Constitutional Law]*. 4th ed. Vol. Α', Θεωρητικό Θεμέλιο [Theoretical Undepinnings]. Athens: Αντ. Ν. Σάκκουλας, 1994.

Turpin, Colin. *British Government and the Constitution: Text, Cases and Material*. 4th ed. Cambridge: CUP, 1999.

Urbina Molfino, Francisco Javier. *A Critique of Proportionality and Balancing*. Cambridge; New York: CUP, 2017.

Van Dijk, Pieter, and Yutaka Arai. *Theory and Practice of the European Convention on Human Rights*. 4th ed. Antwerp: Intersentia, 2006.

Van Drooghenbroeck, Sébastien. *La proportionnalité dans le droit de la Convention européenne des droits de l'homme: prendre l'idée simple au sérieux*. Bruxelles: Publications Fac St Louis, 2001.

Vanneste, Frédéric. *General International Law before Human Rights Courts: Assessing the Specialty Claims of Human Rights Law*. Antwerp: Intersentia, 2009.

Vegleris, Phédon. *Η Σύμβαση των Δικαιωμάτων του Ανθρώπου και το Σύνταγμα [The European Convention on Human Rights and the Constitution]*. Athens: Σάκκουλας, 1977.

Venizelos, Evaggelos. *Το αναθεωρητικό κεκτημένο. Το συνταγματικό φαινόμενο στον 21ο αιώνα και η εισφορά της αναθεώρησης του 2001 [The Amendment's Achievement. The Constitutional*

Phenomenon in the 21st Century and the Contribution of the 2001Amendment]. Athens: Αντ. Ν. Σάκκουλας, 2002.

Venizelos, Evaggelos. *Το γενικό συμφέρον και οι περιορισμοί των συνταγματικών δικαιωμάτων [The General Interest and Limitations on Constitutional Rights]*. Thessaloniki: Παρατηρητής, 1990.

———. *Το σχέδιο της αναθεώρησης του Συντάγματος [The Draft of the Constitutional Amendment]*. Athens: Αντ. Ν. Σάκκουλας, 2000.

Vedel, Georges. *Les bases constitutionnelles du droit administratif*. Paris: Économica, 1986.

Wade, William. *Administrative Law*. 9th ed. Oxford; New York: OUP, 2004.

Wade, William, and Christopher Forsyth. *Administrative Law*. Oxford; New York: Clarendon Press; OUP, 1961.

———. *Administrative Law*. 5th ed. Oxford; New York: Clarendon Press; OUP, 1982.

———. *Administrative Law*. 6th ed. Oxford; New York: Clarendon Press; OUP, 1988.

Watson, Alan. *Legal Transplants: An Approach to Comparative Law*. 2nd ed. Athens, Ga: University of Georgia Press, 1974.

Webber, Grégoire. *The Negotiable Constitution: On the Limitation of Rights*. Cambridge; New York: CUP, 2009.

Xynopoulos, Georges. *Le contrôle de proportionnalité dans le contentieux de la constitutionnalité et de la légalité en France, en Allemagne et en Angleterre.* Paris: LGDJ, 1993.

Yannakopoulos, Constantinos. *Η επίδραση του δικαίου της Ευρωπαϊκής Ένωσης στον δικαστικό έλεγχο της συνταγματικότητας των νόμων [The Influence of EU Law on Judicial Review of the Constitutionality of Legislation]*. Athens; Thessaloniki: Σάκκουλα, 2013.

Zander, Michael. *A Bill of Rights?* London: Rose in association with the British Institute of Human Rights, 1979.

Zweigert, Konrad, and Hein Kötz. *An Introduction to Comparative Law*. Amsterdam; New York: North-Holland Pub., 1977.

ARTICLES, BOOK CHAPTERS, AND COMMENTS

Abraham, Ronny. 'Conclusions sur CE Ass., 19 avril 1991, *Belgacem* et *Babas'*. *RFDA*, 1991, 497.

Akrivopoulou, Christina. 'Βιβλιοπαρουσίαση: Πέτρος Ι. Παραράς, Συνταγματικός πολιτισμός και Δικαιώματα του Ανθρώπου [Book Review: Petros I. Pararas, Constitutional Civilization and Human Rights]'. *Constitutionalism.gr* (blog), 29 November 2012. http://www.constitutionalism.gr/site/2436-biblioparoysiasi-petros-i-pararas-syntagmatikos-po/.

———. 'Ο πολιτικός δικαστής αντιμέτωπος με την αναλογικότητα κατά τον αναιρετικό έλεγχο της εύλογης χρηματικής αποζημίωσης [Civil Law Courts Faced with Proportionality in the Review of the Legality of Reasonable Indemnity]'. In *Τόμος τιμητικός Πέτρου Ι. Παραρά*, 30. Athens: Αντ. Ν. Σάκκουλας, 2012.

Aleinikoff, Alexander. 'Constitutional Law in the Age of Balancing'. *Yale Law Journal* 96, no. 5 (1987): 943.

Alexy, Robert. 'Balancing, Constitutional Review, and Representation'. *International Journal of Constitutional Law* 3, no. 4 (2005): 572.

———. 'Constitutional Rights, Balancing and Rationality'. *Ratio Juris* 16, no. 2 (2003): 131.

———. 'On Balancing and Subsumption. A Structural Comparison'. *Ratio Juris* 16, no. 4 (2003): 433.

———. 'On the Concept and the Nature of Law'. *Ratio Juris* 21, no. 3 (2008): 281.

Alivizatos, Nicos. 'Μεταξύ ακτιβισμού και αυτοσυγκράτησης [Between Activism and Self-restraint]'. *ΔτΑ* 19 (2003): 697.

———. 'Συνολική αποτίμηση του αναθεωρητικού εγχειρήματος [Overall Evaluation of the Reform]'. In *Το Νέο Σύνταγμα*, edited by Dimitrios Tsatsos, Evaggelos Venizelos, and Xenophon Contiades, 437. Athens; Komotini: Αντ. Ν. Σάκκουλας, 2001.

Allan, Trevor. 'Human Rights and Judicial Review: A Critique of "Due Deference"'. *CLJ* 65, no.3 (2006): 671.

———. 'Pragmatism and Theory in Public Law'. *LQR* 104 (1988): 422.

Androulakis, Nikolaos. 'Τα όρια της ανακριτικής δράσεως και η «αρχή της αναγκαιότητας» [The Limits of Inquisitory Action and the "Principle of Necessity"]', 1975, 1.

———. 'Το «κράτος των δικαστών» - ένα ανύπαρκτο σκιάχτρο; [The "government of judges" - an inexistent scarecrow?]'. *NoB* 33 (1985): 1505.

Anthopoulos, Charalampos. 'Όψεις της συνταγματικής δημοκρατίας στο παράδειγμα του άρθρου 25 παρ. 1 του Συντάγματος [Aspects of Constitutional Democracy in the Example of Article 25 par. 1 of the Constitution]'. In *Το νέο Σύνταγμα*, edited by

Dimitrios Tsatsos, Evaggelos Venizelos, and Xenophon Contiades, 153. Athens; Komotini: Αντ. Ν. Σάκκουλας, 2001.

Anthopoulos, Charalampos. Το ασυμβίβαστο των ιδιοκτητών μέσων ενημέρωσης πριν και μετά το νέο άρθρο 14 παρ. 9 του Συντάγματος [The Incompatibility Concerning Media Owners before and after the New Article 14 par. 9 of the Constitution]'. In *Πέντε χρόνια μετά τη συνταγματική αναθεώρηση του 2001*, edited by Xenophon Contiades, I: 313. Athens; Komotini: Αντ. Ν. Σάκκουλας, 2006.

Antoniou, Theodora. 'Η απόφαση της Ολομελείας του Συμβουλίου της Επικρατείας για το Μνημόνιο – Μια ευρωπαϊκή υπόθεση χωρίς ευρωπαϊκή προσέγγιση [The Council of State Plenum Decision on the Memorandum - A European Affair without a European Approach]'. *ΤοΣ*, 2012, 197.

Atias, Christian, and Didier Linotte. 'Le mythe de l'adaptation du droit au fait'. *Recueil Dalloz*, chronique XXXIV (1977): 251.

Auby, Jean-Marie. 'Le contrôle judictionnel du degré de gravité d'une sanction disciplinaire, note sous CE, 9 juin 1978, *Lebon'. RDP*, 1979, 227.

Balkin, Jack. 'Nested Oppositions'. *Yale Law Faculty Scholarship Series*, no. 281 (1990). http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1280&context=fss_papers.

———. 'The Crystalline Structure of Legal Thought'. *Rutgers Law Review* 39 (1986): 1.

———. 'The Hohfeldian Approach to Law and Semiotics'. *U. Miami L. Rev*, no. 44 (1990): 1119.

———. 'The Promise of Legal Semiotics'. *Texas Law Review* 69 (1991): 1831.

Barber, Nick. 'The Afterlife of Parliamentary Sovereignty'. *International Journal of Constitutional Law* 9, no. 1 (2011): 144.

Baudouin, M. 'Conclusions sur CE Ass., 23 janvier 1970, *Epoux Neel*', *Rec.* 44.

Beis, Kostas. 'Η αρχή της αναλογικότητας [The Principle of Proportionality]'. *ΔιΦ* 30, no. Δ (1999): 467.

Bell, John. 'The Expansion of Judicial Review over Discretionary Powers in France'. *PL*, 1986, 99.

Bienvenu, Jean-Jacques. 'Note sous Décision n° 85-192 DC'. *AJDA*, 1985, 485.

Bingham, Tom. 'The European Convention on Human Rights: Time to Incorporate'. In *The Business of Judging Selected Essays and Speeches*, 131. Oxford: OUP, 2000.

———. '"There Is a World Elsewhere": The Changing Perspectives of English Law'. *ICLQ* 41 (1992): 513.

Boas, Franz. 'Introduction'. In *Traditions of the Thompson River Indians of British Columbia*, by James Alexander Teit. Memoirs of the American Folklore Society. Houghton, Mifflin: Boston : New York, 1898.

Bockel, Alain. 'Contribution à l'étude du pouvoir discrétionnaire de l'administration'. *AJDA*, 1978, 355.

Böckenförde, Ernst Wolfgang. 'Grundrechte als Grundsatznormen. Zur Gegenwärtigen Lage Der Grundrechtsdogmatik'. In *Staat, Verfassung, Demokratie : Studien Zur Verfassungstheorie Und Zum Verfassungsrecht*, 185. Frankfurt am Main: Suhrkamp, 1991.

Bomhoff, Jacco. 'Balancing Constitutional Rights: Introduction'. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 13 November 2013. http://papers.ssrn.com/abstract=2343536.

———. 'Beyond Proportionality: Thinking Comparatively about Constitutional Review and Punitiveness'. In *Proportionality: New Frontiers, New Challenges*, edited by Vicki Jackson and Mark Tushnet, 148. Cambridge; New York: CUP, 2017.

———. 'Comparing Legal Argument'. In *Practice and Theory in Comparative Law*, edited by Maurice Adams and Jacco Bomhoff, 74. Cambridge; New York: CUP, 2012.

———. 'Genealogies of Balancing as Discourse'. *Law & Ethics of Human Rights*, no. 4 (April 2010): 108.

———. 'Perfectionism in European Law'. In *Cambridge Yearbook of European Legal Studies, Vol. 14, 2011-2012*, edited by Catherine Barnard, Markus Gehring, and Iyiola Solanke, 75. Oxford: Hart, 2012.

Bousta, Rhita. 'Contrôle constitutionnel de proportionnalité: la « spécificité » française à l'épreuve des évolutions récentes'. *RFDC*, 2011, 913.

———. 'La spécificité du contrôle constitutionnel français de proportionnalité'. *RIDC*, no. 4 (2007): 859.

Boyron, Sophie. 'Proportionality in English Administrative Law: A Faulty Translation?' *Oxford Journal of Legal Studies* 12, no. 2 (1992): 237.

Braibant, Guy. 'Conclusions sur CE, 18 février 1958, *Société des éditions de la terre de feu*', *Rec.* 114.

———. 'Conclusions sur CE Ass., 28 mai 1971, *Ville Nouvelle Est'. Rev.Adm.*, no. 142 (1971): 422.

———. 'Le principe de proportionnalité'. In *Mélanges offerts à Marcel Waline: le juge et le droit public*, II: 297. Paris: LGDJ, 1974.

Bretonneau, Aurélie. 'Conclusions sur CE Ass., 31 mai 2016, *Gonzalez-Gomez'. RFDA*, 2016, 740.

Brett, Annabel. 'What Is Intellectual History Now?' In *What Is History Now?*, edited by David Cannadine, 113. New York: Palgrave Macmillan, 2002.

Brown, Neville. 'General Principles of Law and the English Legal System'. In *New Perspectives for a Common Law of Europe = Nouvelles perspectives d'un droit commun de l'Europe*, edited by Mauro Cappelletti and Neville Brown, 177. Publications of the European University Institute. Leiden; London: Sijthoff, 1978.

Browne-Wilkinson, Nick. 'The Infiltration of a Bill of Rights'. *PL*, 1992, 397.

Brunet, Pierre. 'Le juge constitutionnel est-il un juge comme les autres? Réflexions méthodologiques sur la justice constitutionnelle'. In *La notion de 'justice constitutionnelle'*, edited by Institut de recherches Carré de Malberg. Paris: Dalloz, 2005.

———. 'Que reste-t-il de la volonté générale? Sur les nouvelles fictions du droit constitutionnel français'. *Pouvoirs*, no. 114 (2005): 5.

Cadiet, Loïc. 'Introduction'. *La Semaine Juridique*. Regards d'universitaires sur la réforme de la Cour de cassation – conférence débat 24 novembre 2015, supplément au no. 1-2 (2016): 10.

Cassia, Paul, and Emmanuelle Saulnier. 'Le Conseil d'État et la Convention européenne des droits de l'Homme'. *AJDA*, 1997, 411.

Champeil-Desplats, Véronique. 'Le Conseil constitutionnel a-t-il une conception des libertés publiques ?' *Jus Politicum*, no. 7 (2012).

Chenot, Bernard. 'Conclusions sur CE, 10 février 1950, *Sieur Gicquel', Rec.* 100.

Chevallier, Jacques. 'Doctrine juridique et science juridique'. *Droit et société*, no. 50 (2002): 103.

Chryssogonos, Kostas, 'Η προστασία των θεμελιωδών δικαιωμάτων στην Ελλάδα πριν και μετά την αναθεώρηση του 2001 [The Protection of Fundamental Rights in Greece before and after the 2001 Reform]'. *ΔΙτΑ* 10 (2001): 529.

———. 'Η χαμένη τιμή της Ελληνικής Δημοκρατίας. Ο μηχανισμός «στήριξης της ελληνικής οικονομίας» από την οπτική της εθνικής κυριαρχίας και της δημοκρατικής αρχής [The Lost Honour of the Hellenic Republic. The "rescue" Mechanism of the Greek Economy from the Point of View of National Sovereignty and of the Principle of Democracy]'. *NoB* 6 (2010): 58.

Clayton, Richard. 'Judicial Deference and Democratic Dialogue: The Legitimacy of Judicial Intervention under the Human Rights Act 1998'. *PL*, 2004, 33.

———. 'The Curious Case of *Kennedy v Charity Commission'*. *UK Constitutional Law Association* (blog), 18 April 2014. https://ukconstitutionallaw.org/2014/04/18/richard-clayton-the-curious-case-of-kennedy-v-charity-commission/.

———. 'Proportionality and the HRA 1998: Implications for Substantive Review'. *JR*, 2002, 124.

Cohen, Morris. 'Law and Scientific Method'. In *Jurisprudence in Action: A Pleader's Anthology*. London: Sweet & Maxwell, 1953.

Cohen-Eliya, Moshe, and Iddo Porat. 'American Balancing and German Proportionality: The Historical Origins'. *International Journal of Constitutional Law* 8, no. 2 (2010): 263.

———. 'The Administrative Origins of Constitutional Rights and Global Constitutionalism'. In *Proportionality: New Frontiers, New Challenges*, edited by Vicki Jackson and Mark Tushnet, 75. Cambridge; New York: CUP, 2017.

Cohn, Margit. 'Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom'. *American Journal of Comparative Law* 58 (2010): 583.

Conseil constitutionnel. 'La proportionnalité dans la jurisprudence constitutionnelle'. Libreville, 2008. http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/Bilan_2008/confV_accpuf_libreville_juillet2008.pdf.

Conseil d'État, '28 mai 1971 - *Ville Nouvelle-Est*'. Accessed 3 December 2017. http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Les-decisions-les-plus-importantes-du-Conseil-d-Etat/28-mai-1971-Ville-Nouvelle-Est.

Contiades, Xenophon, and Alkmene Fotiadou. 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation'. *International Journal of Constitutional Law*, no. 10 (2012): 660.

———. 'Κοινωνικά δικαιώματα, αναλογικότητα και δημοσιονομική κρίση, θεωρητικές επισημάνσεις επ' ευκαιρία της ΟλΣΕ 668/2012 [Social Rights, Proportionality and Financial Crisis, Theoretical Remarks on the Occasion of StE (Pl.) 668/2012]'. *ΔτΑ*, no. 53 (2012): 27.

Corneille, Louis. 'Conclusions sur CE, 10 août 1917, *Baldy*'. *Rec.* 638.

Costa, Jean-Paul. 'Le principe de proportionnalité dans la jurisprudence du Conseil d'État'. *AJDA*, 1988, 434.

Cotterrell, Roger. 'Comparative Law and Legal Culture'. In *The Oxford Handbook of Comparative Law*, edited by Mathias Reimann and Reinhard Zimmermann, 710. Oxford; New York: OUP, 2006.

———. 'Is It so Bad to Be Different? Comparative Law and the Appreciation of Diversity'. In *Comparative Law: A Handbook*, edited by Esin Örücü and David Nelken, 133. Oxford; Portland, Or: Hart, 2007.

Craig, Paul. 'Competing Models of Judicial Review'. *PL*, 1999.

———. 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework.' *PL*, 1997, 467.

———. 'The Nature of Reasonableness Review'. *Current Legal Problems* 66, no. 1 (2013): 131.

———. 'Unreasonableness and Proportionality in UK Law'. In *The Principle of Proportionality in the Laws of Europe*, edited by Evelyn Elllis, 1st ed., 107. London: Bloomsbury Publishing, 1999.

Crépey, Édouard. 'Conclusions sur CE, 28 décembre 2017, *M. Molenat*, No. 396571'. ECLI:FR:CECHR:2017:396571.20171228.

Cruz Villalón, Pedro. Opinion on C-62/14, *Peter Gauweiler and others v Deutscher Bundestag*, delivered on 14 January 2015, ECLI:EU:C:2015:7.

Dagtoglou, Prodromos. 'Δημόσιο συμφέρον και Σύνταγμα [Public Interest and the Constitution]'. *ToΣ*, 1986, 425.

Daly, Paul. 'Proportionality and Rationality: The Debate Goes On'. *Administrative Law Matters* (blog). 17 Ferbuary 2016. http://www.administrativelawmatters.com/blog/2016/02/17/proportionality-and-rationality-the-debate-goes-on/.

Dashwood, Alan. 'The Limits of European Community Powers'. *European Law Review* 21, (1996): 113.

Davies, Gareth. 'Constitutional Disagreement in Europe and the Search for Pluralism'. In *Constitutional Pluralism in the European Union and beyond*, edited by Jan Komárek and Matej Avbelj, 269. Oxford: Hart, 2012.

———. 'Free Movement, the Quality of Life, and the Myth That the Court Balances Interests'. In *Exceptions from EU Free Movement Law. Derogation, Justification and Proportionality*, 218. Modern Studies in European Law. Oxford: Hart, 2016.

Davis, Anne, and JR. Williams. 'Proportionality in English Law'. In *The Judge and the Proportionate Use of Discretion: A Comparative Study*, edited by Sofia Ranchordás and Boudewijn Willem Nicolaas de Waard, 73. Abington: Routledge, 2015.

De Béchillon, Denys. 'De quelques incidences du contrôle de la conventionnalité internationale des lois par le juge ordinaire (malaise dans la Constitution)'. *RDA*, 1998, 225.

———. 'Observations sur le contrôle de proportionnalité'. *La Semaine Juridique*. Regards d'universitaires sur la réforme de la Cour de cassation – conférence débat 24 novembre 2015, supplément au no. 1-2 (2016): 27.

De Búrca, Gráinne. 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 1 September 2013. http://papers.ssrn.com/abstract=2319175.

———. 'Convergence and Divergence in European Public Law: The Case of Human Rights'. In *Convergence and Divergence in European Public Law*, edited by Paul Beaumont, Carole Lyons, and Neil Walker, 131. Oxford; Portland, Or.: Hart, 2002.

———. 'Fundamental Human Rights and the Reach of EC Law'. *Oxford Journal of Legal Studies* 13, no. 3 (1993): 283.

———. 'The Language of Rights and European Integration'. In *New Legal Dynamics of European Union*, edited by Jo Shaw and Gillian More, 29. New York: Clarendon Press, 1995.

De Búrca, Gráinne. 'The Principle of Proportionality and Its Application in EC Law'. *Yearbook of European Law* 13, no. 1 (1993): 105.

De Laubadère, André. 'Le contrôle juridictionnel du pouvoir discrétionnaire dans la jurisprudence récente du Conseil d'État français'. In *Mélanges offerts à Marcel Waline : le juge et le droit public*, 531. Paris: LGDJ, 1974.

De Witte, Floris. 'Sex, Drugs & EU Law: The Recognition of Ethical and Moral Diversity in Europe'. *Common Market Law Review* 50, no. 6 (2013): 1545.

Debré, Jean-Louis. 'Protection des libertés et QPC'. Nantes, 2011. http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/discours_interventions/2011/JLD-Nantes-21102011.pdf.

Delmas-Marty, Mireille. 'De l'état d'urgence au despotisme doux'. *Libération*, 16 July 2017.

Delvolvé, Pierre. 'Droits subjectifs contre interdit législatif'. *RFDA*, 2016, 754.

Denis-Linton, Martine. 'Conclusions sur CE, 10 avril 1992, *Aykan*, *Marzini* et *Minin'*. *RFDA*, 1993, 541.

Deumier, Pascale. 'Contrôle concret de conventionnalité : l'esprit et la méthode'. *RTD Civ.*, 2016, 578.

Doris, Filippos. 'Η αρχή της αναλογικότητας στο πεδίο ρύθμισης των ιδιωτικού δικαίου σχέσεων και ιδιαίτερα στο αστικό δίκαιο [The Principle of Proportionality in the Field of Private Law Relations and Especially in Civil Law]'. In *Τόμος τιμητικός του Συμβουλίου της Επικρατείας - 75 χρόνια*, 229. Thessaloniki: Σάκκουλα, 2004.

Drago, Guillaume. 'La conciliation entre principes constitutionnels'. *D.*, 1991, 265.

Dreyfus, Françoise. 'Les limitations du pouvoir discrétionnaire par l'application du principe de proportionnalité: à propos de trois jugements du Tribunal Administratif de l'O.I.T'. *RDP*, 1974, 691.

Drossos, Yannis. 'Το "Μνημόνιο" ως σημείο στροφής του πολιτεύματος [The "Memorandum" as a Turning Point of the Regime]'. *The Book's Journal* 6 (2011): 41.

Dutheillet de Lamothe, Louis, and Guillaume Odinet. 'Contrôle de conventionnalité : in concreto veritas ?' *AJDA*, 2016, 1398.

Dutheillet de Lamothe, Olivier. 'La Convention européenne et le Conseil constitutionnel'. *RIDC*, no. 2 (2008): 293.

———. Opinion on C-11/70, *Internationale Handelsgesellschaft*, delivered on 2 December 1970, ECLI: ECLI:EU:C:1970:100.

Dworkin, Ronald. 'The Model of Rules'. *University of Chigago Law Review* 35, no. 1 (1967): Article 3.

Dyzenhaus, David, Murray Hunt, and Michael Taggart. 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation'. *Oxford University Commonwealth Law Journal* 1, no. 1 (2001): 5.

Eisenmann, Charles. 'L'esprit des lois et la séparation des pouvoirs'. In *Mélanges Raymond Carré de Malberg*, 165. Paris: Duchemin, 1933.

Elliott, Mark. 'A Tangled Constitutional Web: The Black-Spider Memos and the British Constitution's Relational Architecture'. *PL*, 2015, 539.

———. 'Common-Law Constitutionalism and Proportionality in the Supreme Court: *Kennedy v The Charity Commission'*. *Public Law for Everyone* (blog), 31 March 2014. https://publiclawforeveryone.com/2014/03/31/common-law-constitutionalism-and-proportionality-in-the-supreme-court-kennedy-v-the-charity-commission/.

———. 'Proportionality and Contextualism in Common-Law Review: The Supreme Court's Judgment in *Pham'*. *Public Law for Everyone* (blog), 17 April 2015. https://publiclawforeveryone.com/2015/04/17/proportionality-and-contextualism-in-common-law-review-the-supreme-courts-judgment-in-pham/.

———. 'The Human Rights Act 1998 and the Standard of Substantive Review'. *CLJ* 60, no.2 (2001): 301.

Etoa, Samuel. 'La terminologie des « droits fondamentaux » dans la jurisprudence du Conseil constitutionnel'. *CRDF*, no. 9 (2011): 23.

Fatin-Rouge Stéfanini, Marthe, and Xavier Philippe. 'Jurisprudence du Conseil constitutionnel octobre 2010-mars 2011'. *RFDC*, 2011, 547.

Favoreu, Louis. 'Le principe de constitutionnalité, essai de définition d'après la jurisprudence du Conseil constitutionnel'. In *Mélanges Charles Eisenmann*, 33, 1975.

———. 'Note sous Décision no. 84-181 DC'. *RDP*, 1986, 395.

Fenwick, Helen. 'What's Wrong with s.2 of the Human Rights Act?' *UK Constitutional Law Association* (blog), 9 October 2012. https://ukconstitutionallaw.org/2012/10/09/helen-fenwick-whats-wrong-with-s-2-of-the-human-rights-act/.

Fordham, Michael, and Thomas de la Mare. 'Identifying the Principles of Proportionality'. In *Understanding Human Rights Principles*, edited by Jeffrey Jowell and Jonathan Cooper, 27. Justice Series. Oxford; Portland, Or: Hart, 2001.

Fraisse, Régis. 'Le Conseil constitutionnel exerce un contrôle conditionné, diversifié et modulé de la proportionnalité'. *Les Petites Affiches*, no. 46 (2009): 74.

François, Bastien. 'Une revendication de juridiction. Compétence et justice dans le droit constitutionnel de la Ve République'. *Politix* 3, no. 10–11 (1990): 92.

Friedman, Lawrence, and Gunther Teubner. 'Legal Education and Legal Integration: European Hopes and American Experience'. In *Integration Through Law*, edited by Mauro

Cappelletti, Monica Seccombe, and Joseph Weiler, I: 3 Forces and Potential for a European Identity: 345. Berlin: de Gruyter, 1986.

Fromont, Michel. 'Le principe de proportionnalité'. *AJDA*, no. spécial (1995): 156.

Gale, Matthew. 'The UK's Uncodified Constitution – Parliamentary Sovereignty and the Rise of Common Law Constitutionalism'. November 2017. http://pennjil.com/the-uks-uncodified-constitution-parliamentary-sovereignty-and-the-rise-of-common-law-constitutionalism/.

Garapon, Antoine. 'French Legal Culture and the Shock of "Globalization"'. *Social and Legal Studies* 4, no. Special issue on Legal culture, Diversity and Globalization (1995): 493.

Gardbaum, Stephen. 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' In *Proportionality: New Frontiers, New Challenges*, edited by Vicki Jackson and Mark Tushnet, 221. Cambridge; New York: CUP, 2017.

Gaudemet, Yves. 'Les nouvelles méthodes du juge administratif français'. In *État-loi-administration. Mélanges en l'honneur de Epaminondas Spiliotopoulos*, edited by Petros Pararas, 147. Athènes; Bruxelles: Αντ. Ν. Σάκκουλας; Bruylant, 1998.

———. 'Méthodes du juge'. In *Dictionnaire de la culture juridique,* edited by Denis Alland and Stéphane Rials. Paris: PUF, 2003.

Gearty, Conor. 'The Tories' Proposal for a British Bill of Rights Is Incoherent, but They Don't Care'. *The Guardian*, 3 October 2014.

Geertz, Clifford. 'Common Sense as a Cultural System'. In *Local Knowledge: Further Essays in Interpretive Anthropology*, 3rd ed., 73. New York: Basic Books, 1983.

———. 'Local Knowledge: Fact and Law in Comparative Perspective'. In *Local Knowledge: Further Essays in Interpretive Anthropology*, 3rd ed., 167. New York: Basic Books, 1983.

Genevois, Bruno. 'L'application du principe de proportionnalité aux amendes fiscales (à propos de la décision du Conseil constitutionnel no. 87-237 DC du 30 décembre 1987)'. *RFDA* 2, no. 4 (1988): 350.

———. 'Le Conseil constitutionnel et la définition des pouvoirs du Conseil supérieur de l'audiovisuel'. *RFDA*, 1989, 215.

———. 'Note sous CE Ass. 20 octobre 1989, *Nicolo'*. *RFDA*, 1989, 832.

Gerapetritis, George. 'Πρόσωπα και προσωπεία του ελέγχου της αναλογικότητας [Faces and Guises of Proportionality Review]'. *ΔτΑΤΕΣ IV*, 2006, 269.

———. 'Στο δρόμο για την θεσμικά ισόροπη παρέμβαση του δικαστή [Towards an Institutionally Balanced Judicial Intervention]'. *ΔτΑ* 25 (2005): 187.

Gerontas, Apostolos. 'Η αρχή της αναλογικότητας και η τριτενέργεια των θεμελιωδών δικαιωμάτων μετά την αναθεώρηση του 2001 [The Principle of Proportionality and the Third Party Effect of Fundamental Rights after the 2001 Reform]'. In *Πέντε χρόνια μετά*

τη συνταγματική αναθεώρηση του 2001, edited by Xenophon Contiades, A: 499. Athens; Komotini: Αντ. Ν. Σάκκουλας, 2006.

Gerontas, Apostolos. 'Η αρχή της αναλογικότητας στο γερμανικό δημόσιο δίκαιο [The Principle of Proportionality in German Public Law]'. *ΤοΣ*, 1983, 20.

Giakoumis, Dionysis. 'Οι αόριστες έννοιες, η διακριτική ευχέρεια του δικαστή ως αόριστη νομική έννοια, η εξειδίκευσή της και η δυνατότητα αναιρετικού ελέγχου υπό το πρίσμα της αρχής της αναλογικότητας [Indeterminate Notions, Judicial Discretion as an Indeterminate Legal Notion, Its Concretisation, and the Possibility of Cassation under the Framework of the Principle of Proportionality]'. *Δίκ* 36 (2005): 48.

Glenn, Patrick. 'Legal Cultures and Legal Traditions'. In *Epistemology and Methodology of Comparative Law: Epistemology and Methodology of Comparative Law*, edited by Mark Van Hoecke, 7. London: Bloomsbury Publishing, 2004.

Goesel-Le Bihan, Valérie. 'Le contrôle de proportionnalité dans la jurisprudence du Conseil constitutionnel : figures récentes'. *RFDC*, 2007, 269.

———. 'Le contrôle de proportionnalité exercé par le Conseil constitutionnel'. *Cahiers du Conseil constitutionnel*, no. 22, Dossier : Le réalisme en droit constitutionnel (2007).

———. 'Le contrôle de proportionnalité exercé par le Conseil constitutionnel, technique de protection des libertés publiques ?' *Jus Politicum* 7 (2012).

———. 'Le contrôle exercé par le Conseil constitutionnel : défense et illustration d'une théorie générale'. *RFDC*, 2001, 67.

———. 'Réflexion iconoclaste sur le contrôle de proportionnalité exercé par le Conseil constitutionnel'. *RFDC*, 1997, 227.

Gogos, Konstantinos. 'Πτυχές του ελέγχου αναλογικότητας στη νομολογία του Συμβουλίου της Επικρατείας [Aspects of Proportionality Review in the Case Law of the Council of State]'. *ΔτΑΤΕΣ III*, 2005, 299.

Graziadei, Michele. 'Comparative Law as the Study of Transplants and Receptions'. In *Oxford Handbook of Comparative Law*, edited by Mathias Reimann and Reinhard Zimmermann, 441. Oxford: OUP, 2006.

———. 'The Functionalist Heritage'. In *Comparative Legal Studies: Traditions and Transitions*, edited by Pierre Legrand and Roderick Munday, 100. Cambridge; New York: CUP, 2003.

Green, Nicholas. 'Proportionality and the Supremacy of Parliament in the UK'. In *The Principle of Proportionality in the Laws of Europe*, edited by Evelyn Elllis, 145. London: Bloomsbury Publishing, 1999.

Griffith, John. 'The Brave New World of Sir John Laws'. *The Modern Law Review* 63, no. 2 (2000): 159.

Grimm, Dieter. 'Proportionality in Canadian and German Constitutional Jurisprudence'. *University of Toronto Law Journal* 57, no. 2 (2007): 383.

Guibal, Michel. 'De la proportionnalité'. *AJDA*, 1978, 477.

Guyomar, Matthias. 'Conclusions sur CE Ass., 9 février 2007, *Société Arcelor Atlantique et Lorraine et autres*', *Rec.* 55.

———. 'Conclusions sur CE Ass., 30 octobre 2009, *Dame Perreux*', *Rec.* 407.

Hain, Michael. 'Guardians of the Constitution – the Constitutional Implications of a Substantive Rule of Law'. *UK Constitutional Law Association* (blog), 12 September 2017. https://ukconstitutionallaw.org/2017/09/12/michal-hain-guardians-of-the-constitution-the-constitutional-implications-of-a-substantive-rule-of-law/.

Hale, Brenda. 'UK Court Rulings Show Move Away from European to Common Law'. *The Guardian*, 15 August 2014.

Harlow, Carol. 'Disposing of Dicey: From Legal Autonomy to Constitutional Discourse?' *Political Studies* 48 (2000): 356.

———. 'Voices of Difference in a Plural Community'. In *Convergence and Divergence in European Public Law*, edited by Paul Beaumont, Carole Lyons, and Neil Walker, 177. Oxford; Portland, Or.: Hart, 2002.

Hiebert, Janet. 'Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?' *International Journal of Constitutional Law* 4, no. 1 (2006): 1.

Hirschl, Ran. 'The Question of Case Selection in Comparative Constitutional Law'. *The American Journal of Comparative Law* 53, no. 1 (2005): 125.

Hoffmann, Leonard. 'The Influence of the European Principle of Proportionality upon UK Law'. In *The Principle of Proportionality in the Laws of Europe*, edited by Evelyn Elllis, 1st ed., 85. London: Bloomsbury Publishing, 1999.

Hogg, Quintin ed., 'Proportionality'. In *Halsbury's Laws of England*. London: Butterworths, 1989.

Hunt, Murray. 'Against Bifurcation'. In *A Simple Common Lawyer: Essays in Honour of Michael Taggart*, edited by David Dyzenhaus, Murray Hunt, and Grant Huscroft, 108. Oxford; Portland, Or: Hart, 2009.

———. 'Sovereignty's Blight: Why Contemporary. Public Law Needs the Concept of "Due Deference"'. In *Public Law in a Multi-Layered Constitution*, edited by Nicholas Bamforth and Peter Leyland, 337. Oxford; Portland, Or: Hart, 2003.

———. 'The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession'. *Journal of Law and Society* 26, no. 1 (1999): 86.

Jackson, Vicki. 'Constitutional Law in an Age of Proportionality'. *Yale Law Journal* 124, no. 8 (2015): 3094.

Jackson, Vicki. 'Proportionality and Equality'. In *Proportionality: New Frontiers, New Challenges*, edited by Vicki Jackson and Mark Tushnet, 148. Cambridge; New York: CUP, 2017.

Jacobs, Francis. Opinion on C-120/94, *Commission v. Greece*, delivered on 6 April 1995, ECLI:EU:C:1995:109.

Jamin, Christophe. 'Juger et motiver. Introduction comparative à la question du contrôle de proportionnalité en matière de droits fondamentaux', 30 March 2015. https://www.courdecassation.fr/cour_cassation_1/reforme_cour_7109/juger_motiver._31563.html.

Jeuland, Emmanuel. 'Réforme de la Cour de cassation. Une approche non utilitariste du contrôle de proportionnalité'. *La Semaine Juridique*. Regards d'universitaires sur la réforme de la Cour de cassation – conférence débat 24 novembre 2015, supplément au no. 1-2 (2016): 20.

Jhering, Rudolf von. 'In the Heaven for Legal Concepts: A Fantasy'. Translated by Charlotte Levy. *Temple Law Quarterly* 58 (1985): 799.

Johannès, Franck. 'Voile islamique : la CEDH ne condamne pas la France mais émet des réserves'. *Le Monde*, 1 July 2014.

Jouanjan, Olivier. 'De la vocation de notre temps pour la science du droit : modèles scientifiques et preuve de la validité des énoncés juridiques'. *Revue européenne des sciences sociales*, no. XLI-128 (2003): 129.

Jowell, Jeffrey. 'Beyond the Rule of Law: Towards Constitutional Judicial Review'. *PL*, 2000, 671.

———. 'Judicial Deference and Human Rights: A Question of Competence'. In *Law and Administration in Europe: Essays in Honour of Carol Harlow*, edited by Paul Craig and Richard Rawlings, 67. Oxford; New York: OUP, 2003.

Jowell, Jeffrey, and Anthony Lester. 'Beyond Wednesbury: Substantive Principles of Administrative Law'. *Commonwealth Law Bulletin* 14 (1988): 858.

———. 'Proportionality: Neither Novel nor Dangerous'. In *New Directions in Judicial Review*, edited by Jeffrey Jowell and Dawn Oliver, 51. Current Legal Problems Series. London: Stevens, 1988.

Kaboğlu, Ibrahim Özden, and Stylianos-Ioannis Koutnatzis. 'The Reception Process in Greece and Turkey'. In *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, edited by Helen Keller and Alec Stone Sweet, 451. Oxford: OUP, 2008.

Kahn, Jean. 'Le pouvoir discrétionnaire du juge administratif'. In *Le Pouvoir discrétionnaire et le juge administratif*, edited by IFSA, 9. Paris: Cujas, 1978.

———. 'Note sous CE Ass., 26 octobre 1973, *Grassin'*. *AJDA*, 1973, 586.

Kahn, Paul. 'Comparative Constitutionalism in a New Key'. *Michigan Law Review* 101 (2004): 2677.

Kahn, Paul. 'The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell'. *Yale Law Journal* 97 (1987): 9.

Kahn-Freund, Otto. 'On Uses and Misuses of Comparative Law'. *The Modern Law Review* 37, no. 1 (1974): 1.

Kaidatzis, Akritas. 'Δικαστικός έλεγχος των μέτρων οικονομικής πολιτικής. νομολογιακές τάσεις και προσαρμογές στο μεταβαλλόμενο οικονομικο-πολιτικό περιβάλλον [Judicial Review of Economic Policy Measures. Jurisprudential Tendencies and Adaptations to the Changing Economic-Political Circumstances]'. *Constitutionalism.gr* (blog), 6 October 2010. http://www.constitutionalism.gr/site/1616-dikastikos-eleghos-twn-metrwn-oikonomikis-politiki/.

———. '«Μεγάλη πολιτική» και ασθενής δικαστικός έλεγχος. Ένα σχόλιο για τις στρατηγικές τήρησης του Συντάγματος στην εποχή του «Μνημονίου» ["Big Policy" and Weak Judicial Review. A Comment on the Strategies for Observing the Constitution in the Age of the "Memorandum"]'. *Constitutionalism.gr* (blog), 21 March 2011. http://www.constitutionalism.gr/site/1964-megali-politiki-kai-astenis-dikastikos-eleghos-ena/.

———. 'Ο έλεγχος της συνταγματικότητας των νόμων στην Ελλάδα, ενόψει της διάκρισης σε συστήματα ισχυρού και ασθενούς τύπου [Judicial Review of the Constitutionality of Legislation in Greece, in view of the Distinction between Strong and Weak Systems]'. *Constitutionalism.gr* (blog), 4 September 2013. http://constitutionalism.gr/site/wp-content/mgdata/pdf/m01kaidatzisjudicialreview.pdf.

———. 'Παρατηρήσεις σχετικά με τις ΣτΕ (Ολ.) 1991/2005 και ΔΕΚ C-140/2003, 21.4.2005 *Επιτροπή Κατά Ελλάδας* [Comment on StE (Pl.) 1991/2005 and ECJ C-140/03, 21 April 2005, *Commission v Greece*]'. *ΤοΣ*, 2006, 181.

Kalflèche, Grégory. 'Le contrôle de proportionnalité exercé par les juridictions administratives'. *Les Petites Affiches*, no. 46 (2009): 46.

Kapsali, Vassiliki. 'Η αρχή της αναλογικότητας στο γαλλικό δημόσιο δίκαιο [The Principle of Proportionality in French Public Law]'. *ΔτΑΤΕΣ IV*, 2006, 309.

Kassimatis, Giorgos. 'Παρατηρήσεις στην ΣτΕ (Ολ.) 58/1977 [Comment on StE (Pl.) 58/1977]'. *ΤοΣ*, 1977, 625.

Katrougkalos, Giorgos. 'Memoranda sunt Servanda? Η συνταγματικότητα του Ν. 3845/2010 και του Μνημονίου για τα μέτρα εφαρμογής των συμφωνιών με το ΔΝΤ, την ΕΕ και την ΕΚΤ [Memoranda Sunt Servanda? The Constitutionality of Law 3845/2010 and of the Memorandum for the Implementation of the Agreements with the IMF, the EU and the ECB]'. *ΕφΔΔ* 2 (2010): 151.

———. 'Αρχή της αναλογικότητας και κοινωνικά δικαιώματα [The Principle of Proportionality and Social Rights]'. *ΔτΑΤΕΣ IV*, 2006, 141.

———. 'Νομική και πολιτική σημασία της αναθεώρησης του άρθρου 25 του Συντάγματος [Legal and Political Significance of the Reform of Article 25 of the Constitution]'. *ΔτΑ* 10 (2001): 457.

Katrougkalos, Giorgos. 'Το "παρασύνταγμα" του Μνημονίου και ο άλλος δρόμος [The "paraconstitution" of the Memorandum and the Alternative Way]'. *NoB*, no. 59 (2011): 231.

Kavanagh, Aileen. 'Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory'. *Oxford Journal of Legal Studies* 34, no. 3 (2014): 443.

Keller, Helen, and Alec Stone Sweet. 'The Reception of the ECHR in National Legal Orders'. In *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, edited by Helen Keller and Alec Stone Sweet, 3. Oxford: OUP, 2008.

———. 'Assessing the Impact of the ECHR on National Legal Orders'. In *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, edited by Helen Keller and Alec Stone Sweet, 675. Oxford: OUP, 2008.

Kennedy, Duncan. 'A Transnational Genealogy of Proportionality in Private Law'. In *The Foundations of European Private Law*, edited by Roger Brownsword, Hans Micklitz, Leone Niglia, and Stephen Weatherill, 185. Oxford; Portland, Or: Hart, 2011.

———. 'American Constitutionalism as Civil Religion: Notes of an Atheist'. *Nova L. Rev.* 19 (1995): 908.

Khosla, Madhav. 'Proportionality: An Assault on Human Rights?: A Reply'. *International Journal of Constitutional Law* 8, no. 2 (2010): 298.

King, Jeff. 'Proportionality: A Halfway House'. *New Zealand Law Review* 2010 (2010): 327.

Kirby, Michael. 'The Struggle for Simplicity: Lord Cooke and Fundamental Rights'. *Commonwealth Law Bulletin* 24 (1998): 496.

Klatt, Matthias, and Moritz Meister. 'Proportionality—a Benefit to Human Rights? Remarks on the I·CON Controversy'. *International Journal of Constitutional Law* 10, no. 3 (2012): 687.

Klug, Francesca, and Helen Wildbore. 'Follow or Lead?: The Human Rights Act and the European Court of Human Rights'. *European Human Rights Law Review* 6 (2010): 621.

Komárek, Jan. 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedence'. *The American Journal of Comparative Law* 61, no. 1 (2013): 149.

Kontogiorga-Theocharopoulou, Dimitra. 'Σημεία εργασίας επί της αρχής της αναλογικότητος [Elements of Study on the Principle of Proportionality]'. In *Σύμμεικτα προς τιμήν Γεωργίου Μ. Παπαχατζή*, 889. Athens: Σάκκουλα, 1989.

Koumpli, Christina. 'Un essai sur la clarification de l'inférence: État de droit - principe de proportionnalité'. Mexico, 8 December 2010.

Kroustallakis, Evaggelos. 'Ελληνική πολιτική δικονομία και κοινοτικό δίκαιο: άμεσες και έμμεσες επιδράσεις [Greek Civil Procedure and Community Law: Direct and Indirect Influences]'. *Δ/Νη*, 1999, 1457.

Krygier, Martin. 'Law as Tradition'. *Law and Philosophy* 5, no. 2 (1986): 237.

Kumm, Mattias. 'Alexy's Theory of Constitutional Rights and the Problem of Judicial Review'. In *Institutionalized Reason: The Jurisprudence of Robert Alexy*, by Matthias Klatt, 201. Oxford; New York: OUP, 2012.

———. 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. A Review Essay on *A Theory of Constitutional Rights*'. *International Journal of Constitutional Law* 2, no. 3 (2004): 574.

———. 'Democracy Is Not Enough: Rights, Proportionality and the Point of Judicial Review'. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 11 March 2009. http://papers.ssrn.com/abstract=1356793.

———. 'Is the Structure of Human Rights Practice Defensible? Three Puzzles and Their Resolution'. In *Proportionality: New Frontiers, New Challenges*, edited by Vicki Jackson and Mark Tushnet, 30. Cambridge; New York: CUP, 2017.

———. 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement'. In *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy*, 131. Oxford: Hart, 2007.

———. 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State'. In *Ruling the World?: Constitutionalism, International Law, and Global Governance*, edited by Jeffrey Dunoff and Joel Trachtman, 258. Cambridge; New York: CUP, 2009.

———. 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review'. *Law and Ethics of Human Rights* 41, no. 2 (2010): 141.

———. 'What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement', New York University Public Law and Legal Theory Working Papers, no. Paper 46 (2006). http://lsr.nellco.org/nyu_plltwp/46.

———. 'Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law'. *German Law Journal* 7, no. 4 (2006): 341.

Kumm, Mattias, and Alec Walen. 'Human Dignity and Proportionality: Deontic Pluralism in Balancing'. In *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, edited by Grant Huscroft, Bradley Miller, and Grégoire Webber, 67. New York: CUP, 2014.

Labetoulle, Daniel, and Pierre Cabanes. 'Note sous CE Ass., 28 mai 1971, *Ville Nouvelle Est*'. *AJDA*, 1971, 404.

Lakin, Stuart. 'The Sovereignty of Law: Freedom, Constitution and Common Law by Professor Trevor Allan: Some Preliminary Thoughts'. *UK Constitutional Law Association* (blog), 4 February 2014. https://ukconstitutionallaw.org/2014/02/04/stuart-lakin-the-sovereignty-of-law-freedom-constitution-and-common-law-by-professor-trevor-allan-some-preliminary-thoughts/.

Lambert Abdelgawad, Elisabeth, and Anne Weber. 'The Reception Process in Greece and Turkey'. In *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, edited by Helen Keller and Alec Stone Sweet, 107. Oxford: OUP, 2008.

Laws, John. 'Is the High Court the Guardian of Fundamental Constitutional Rights?' *Commonwealth Law Bulletin* 18 (1992): 1385.

———. 'Law and Democracy'. *PL*, 1995, 72.

———. 'The Limitations of Human Rights'. *PL*, 1998, 254.

Legrand, Pierre. 'European Legal Systems Are Not Converging'. *International & Comparative Law Quarterly* 45, no. 1 (1996): 52.

———. 'Public Law, Europeanisation and Convergence'. In *Convergence and Divergence in European Public Law*, edited by Paul Beaumont, Carole Lyons, and Neil Walker, 225. Oxford; Portland, Or.: Hart, 2002.

———. 'The Impossibility of Legal Transplants'. *Maastricht Journal of European and Comparative Law* 4 (1997): 111.

———. 'The Same and the Different'. In *Comparative Legal Studies: Traditions and Transitions*, edited by Pierre Legrand and Roderick Munday, 240. Cambridge; New York: CUP, 2003.

Leigh, Ian. 'Taking Rights Proportionately : Judicial Review, the Human Rights Act and Strasbourg'. *PL*, 2002, 265.

Lemasurier, Jeanne. 'Vers un nouveau principe général du droit ? Le principe « bilan-coût-avantages »'. In *Mélanges offerts à Marcel Waline: le juge et le droit public*, II: 551. Paris: LGDJ, 1974.

Letourneur, Maxime. 'Le contrôle de l'erreur manifeste d'appréciation dans la jurisprudence du Conseil d'État'. In *Mélanges Ganshof van Der Meersch*, III: 563. Paris: LGDJ, 1972.

Lévi-Strauss, Claude. 'The Structural Study of Myth'. *The Journal of American Folklore* 68, no. 270 (1955): 428.

Loughlin, Martin. 'Constitutional Law: The Third Order of the Political'. In *Public Law in a Multi-Layered Constitution*, edited by Nicholas Bamforth and Peter Leyland, 27. Oxford: Hart, 2003.

Louvel, Bertrand. 'Réflexions à la Cour de cassation : Contribution à la refondation de la justice'. *La Semaine Juridique*. Regards d'universitaires sur la réforme de la Cour de cassation – conférence débat 24 novembre 2015, supplément au no. 1-2 (2016): 1.

Manessis, Aristovoulos. 'Οι κύριες συνιστώσες του συστήματος θεμελιωδών δικαιωμάτων του Συντάγματος του 1975 [The Main Components of the Fundamental Rights System in the Constitution of 1975]'. In *Συνταγματική θεωρία και πράξη*, II: 529. Athens: Σάκκουλα, 2007.

Manitakis, Antonis. 'Fondement et légitimité du contrôle juridictionnel des lois en Grèce'. *RIDC* 40, no. 1 (1988): 39.

———. 'Η αναγκαιότητα της αναθεώρησης μεταξύ πλειοψηφικού κοινοβουλευτισμού και αναθεωρητικής συναίνεσης [The Need for the Constitutional Reform, between Majoritarian Parliamentarism and Consensus]'. *ΤοΣ*, 2007, 3.

———. 'Η πολυσήμαντη επιστροφή του Κράτους Δικαίου [The Multifaceted Return of the Ideal of a State Ruled by Law]'. In *Όψεις του Κράτους Δικαίου*, edited by Konstantinos Stamatis and Antonis Manitakis, 27. Thessaloniki: Σάκκουλα, 1990.

———. 'Η προτεραιότητα εφαρμογής του κοινοτικού δικαίου έναντι του Συντάγματος, η εναρμονισμένη με το κοινοτικό δίκαιο ερμηνεία του Συντάγματος και η τεχνική της αναλογικότητας [The Primacy of Community Law over the Constitution, the Interpretation of the Constitution in Conformity with Community Law and the Technique of Proportionality]'. Accessed 15 May 2018. http://www.manitakis.gr/i-protereotita-efarmogis-tou-kinotikou-dikeou-enanti-tou-syntagmatos-i-enarmonismeni-me-to-kinotiko-dikeo-erminia-tou-syntagmatos-ke/.

———. 'Η τριτενέργεια, μια περιττή για την ελληνική έννομη τάξη έννοια [Third-Party Effect, A Superfluous Notion for the Greek Legal Order]'. *Χρον ΙΜΔΑ*, 1991, 289.

———. 'Ιστορικά γνωρίσματα και λογικά προαπαιτούμενα του δικαστικού ελέγχου της συνταγματικότητας των νόμων στην Ελλάδα [Historical Traits and Logical Assumptions of Judicial Review of the Constitutionality of Legislation in Greece]'. In *Τιμητικός τόμος του Κ. Μπέη*, 3121. Athens: Αντ. Σάκκουλας, 2003.

———. 'Ο δικαστής υπηρέτης του νόμου ή εγγυητής των συνταγματικών δικαιωμάτων και μεσολαβητής διαφορών [The Judge, Servant of the Law or Guarantor of Constitutional Rights and Mediator in Legal Disputes]'. *NoB* 47, no. 2 (1999): 177.

———. 'Οι (αυτο)δεσμεύσεις του δικαστή από τον παρεμπίπτοντα έλεγχο της (αντι)συνταγματικότητας των νόμων [Judicial (Self-)Restraint Resulting from the Incidental System of Judicial Review of the (Un)constitutionality of Legislation]'. *ΤοΣ*, no. 2 (2006): 403.

———. 'Οι θεσμικές παρενέργειες της «υπόθεσης του βασικού μετόχου» [The Institutional Side-Effects of the "Major Shareholder Affair"]'. Thessaloniki, March 2014. http://www.manitakis.gr/i-thesmikes-parenergies-tis-ypothesis-tou-vasikou-metochou-i-eknomefsi-tou-syntagmatos-ke-i-paragnorisi-ton-adilon-tropopiiseon/.

———. 'Πρόλογος [Preface]'. In *Όψεις του Κράτους Δικαίου*, edited by Konstantinos Stamatis and Antonis Manitakis, 5. Thessaloniki: Σάκκουλα, 1990.

Manolakoglou, Kassiani. 'Η αρχή της αναλογικότητας ως τεχνική του δικαστικού ελέγχου πράξεων διακριτικής ευχέρειας της διοίκησης [The Principle of Proportionality as a Technique for the Judicial Scrutiny of Discretionary Administrative Acts]'. *Constitutionalism.gr* (blog), 22 April 2011. http://constitutionalism.gr/site/wp-content/mgdata/pdf/kassianianalogikotita21042011.pdf.

Mantzoufas, Panagiotis. 'Ασφάλεια και πρόληψη στην εποχή της διακινδύνευσης [Security and Prevention in the Age of Risk]'. In *Τόμος τιμητικός του Συμβουλίου της Επικρατείας - 75 χρόνια*, 55. Thessaloniki: Σάκκουλα, 2004.

Mantzoufas, Panagiotis, and Anastasios Pavlopoulos. 'Η μεγάλη απόφαση για τις τηλεοπτικές άδειες και η μεγαλύτερη δοκιμασία της ερμηνείας του Συντάγματος [The Great Case Concerning TV Licences and the Greater Challenge of Constitutional Interpretation]'. *ΣΥΝΗΓΟΡΟΣ*, 2017, 22.

Marketou, Afroditi Ioanna. 'Economic Energy and the Loss of Faith in the Greek Constitution: How Does a Constitution Function When It Is Dying'. *Cambridge Journal of International and Comparative Law* 4 (2015): 289.

Markus, Jean-Paul. 'Le contrôle de conventionnalité des lois par le Conseil d'État'. *AJDA*, 1999, 99.

Martens, Paul. 'L'irrésistible ascension du principe de proportionnalité'. In *Présence du droit Public et des droits de l'Homme : Mélanges offerts à Jacques Velu*, 49. Bruxelles: Bruylant, 1992.

Mathews, Jud, and Alec Stone Sweet. 'All Things in Proportion? American Rights Doctrine and the Problem of Balancing'. *Emory Law Journal* 60, no. 4 (2011): 799.

Mathioudakis, Iakovos. 'Μετασχηματισμοί του ταμειακού συμφέροντος του δημοσίου σε περίοδο έντονης οικονομικής κρίσης [Transformations of the Cash Interest of the State in a Period of Intense Economic Crisis]'. *Εφ⊥⊥*, no. 4 (2011): 478.

Matscher, Franz. 'Methods of Interpretation of the Convention'. In *The European System for the Protection of Human Rights*, edited by Ronald Macdonald, Franz Matscher, and Herbert Petzold, 63. Dordrecht ; Boston: M. Nijhoff, 1993.

Matthias, Stefanos. 'Το πεδίο λειτουργίας της αρχής της αναλογικότητας [The Scope of the Principle of Proportionality]'. *Ελλ⊥νη* 47, no. 1 (2006): 1.

Maugue, Cristine. 'La QPC : 5 ans déjà, et toujours aucune prescription en vue'. *Nouveaux Cahiers du Conseil constitutionnel*, no. 47 (2015): 11.

Mazeaud, Pierre. '2, rue de Montpensier : un bilan'. *Cahiers du Conseil constitutionnel*, no. 25 (2008): 27.

———. 'Voeux du président du Conseil constitutionnel au président de la République' (Palais de l'Elysée, 3 January 2006), *Cahiers du Conseil constitutionnel*, no. 20 (2006).

———. 'Voeux du président du Conseil constitutionnel au président de la République'. (Palais de l'Elysée, 3 January 2005). https://www.cairn.info/revue-francaise-de-droit-constitutionnel-2005-4-p-879.htm.

McBride, Jeremy. 'Proportionality and the European Convention on Human Rights'. In *The Principle of Proportionality in the Laws of Europe*, edited by Evelyn Ellis, 23. Oxford; Portland, Or: Hart, 1999.

Mead, David. 'Outcomes Aren't All: Defending Process-Based Review of Public Authority Decisions under the Human Rights Act'. *PL*, 2012, 63.

Merland, Guillaume. 'L'intérêt général dans la jurisprudence du Conseil constitutionnel'. In *L'intérêt général, norme constitutionnelle*, edited by Bertrand Mathieu and Michel Verpeaux. Paris: Dalloz, 2007.

Mestre, Achille. 'Note sous CE, 19 mai 1933, *Benjamin'*. *Rec. Sirey* 3 (1934): 1.

Michelman, Frank. 'Proportionality Outside the Courts with Special Reference to Popular and Political Constitutionalism'. In *Proportionality: New Frontiers, New Challenges*, edited by Vicki Jackson and Mark Tushnet, 13. Cambridge; New York: CUP, 2017.

Mitsopoulos, Georgios. '«Τριτενέργεια» και «αναλογικότητα» ως διατάξεις του αναθεωρηθέντος Συντάγματος ["Third Party Effect" and "Proportionality" as Provisions of the Amended Constitution]'. *ΔτΑ* 15 (2002): 641.

Möller, Kai. 'Balancing and the Structure of Constitutional Rights'. *International Journal of Constitutional Law* 5, no. 3 (2007): 453.

———. 'US Constitutional Law, Proportionality, and the Global Model'. In *Proportionality: New Frontiers, New Challenges*, edited by Vicki Jackson and Mark Tushnet, 103. Cambridge; New York: CUP, 2017.

Morisot, Michel. 'Conclusions sur CE Ass., 20 octobre 1972, *Société Sainte-Marie-de-l'Assomption*'. *RDP*, 1973, 843.

Muir-Watt, Horatia. 'Globalization and Comparative Law'. In *The Oxford Handbook of Comparative Law*, edited by Mathias Reimann and Reinhard Zimmermann, 579. Oxford: OUP, 2006.

———. 'La fonction subversive du droit comparé'. *RIDC* 52, no. 3 (2000): 503.

Muir-Watt, Horatia, and Guillaume Tusseau. 'Repenser le dévoilement de l'idéologie juridique : une approche fictionnelle de la gouvernance globale'. In *Traité des rapports entre ordres juridiques*, edited by Baptiste Bonnet, 169. Paris: LGDJ, 2016.

Muzny, Petr. 'Proportionnalité'. In *Dictionnaire des droits de l'homme*, edited by Joël Andriantsimbazovina, Hélène Gaudin, and Jean-Pierre Marguénaud. Paris: PUF, 2008.

Nelken, David. 'Comparatists and Transferability'. In *Comparative Legal Studies: Traditions and Transitions*, edited by Pierre Legrand and Roderick Munday, 437. Cambridge; New York: CUP, 2003.

———. 'Defining and Using the Concept of Legal Culture'. In *Comparative Law: A Handbook*, edited by Esin Örücü and David Nelken, 109. Oxford; Portland, Or: Hart, 2007.

———. 'Disclosing/Invoking Legal Culture: An Introduction'. *Social & Legal Studies* 4 (1995): 435.

Nelken, David. 'Using Legal Culture: Purposes and Problems'. In *Using Legal Culture*, edited by David Nelken, 1. JCL Studies in Comparative Law. London: Wildy, Simmonds & Hill, 2012.

Neuberger, David. 'The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK Experience', Conference at the Supreme Court of Victoria, Melbourne, 8 August 2014. https://www.supremecourt.uk/docs/speech-140808.pdf.

———. 'Proportionate Costs'. Fifteenth Lecture in the Implementation Programme, The Law Society, 29 May 2012. https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/proportionate-costs-fifteenth-lecture-30052012.pdf.

Nikiforos, Dimitris. 'Η αναλογικότητα ως διάμεσος της εθνικής και της ενωσιακής έννομης τάξης [Proportionality as an Intermediary between the Domestic and the EU Legal Order]'. *Constitutionalism.gr* (blog), 17 September 2012. http://www.constitutionalism.gr/site/2403-i-analogikotita-ws-diamesos-tis-etnikis-kai-tis-en/.

Orfanoudakis, Sarantis, and Vassiliki Kokota. 'Η εφαρμογή της αρχής της αναλογικότητας στην ελληνική και την κοινοτική έννομη τάξη: συγκλίσεις και αποκλίσεις [The Application of the Principle of Proportionality in the Greek and the Community Legal Order: Convergences and Divergences]'. *ΕΕΕυρΔ*, 2007, 691.

Pannick, David. 'Principles of Interpretation of Convention Rights under the Human Rights Act and the Discretionary Area of Judgment'. *PL*, 1998, 545.

Papadopoulou, Lina. 'Η συνταγματική οικοδόμηση της Ευρώπης από τη σκοπιά του ελληνικού Συντάγματος [The Constitutional Construction of Europe from the Point of View of the Greek Constitution]'. In *Η προοπτική ενός Συντάγματος για την Ευρώπη*, edited by Lina Papadopoulou and Antonis Manitakis, 147. Athens: Σάκκουλα, 2003.

Papadopoulou, Manouela. 'Η κοινοτική αρχή της αναλογικότητας ενώπιον του εθνικού δικαστή [The EC Principle of Proportionality before National Judges]'. *ΔτΑΤΕΣ IV*, 2006, 279.

Pararas, Petros. 'Κριτικό σημείωμα - Recension X. Contiades (Ed.), Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA'. *ΔτΑ* 55 (2012): 895.

———. 'Παρατηρήσεις υπο την ΣτΕ (Ολ.) 2952/1975 [Comment on StE (Pl.) 2952/1975]'. *ΤοΣ*, 1976, 347.

———. 'Το ευρωπαϊκό δίκαιο των Δικαιωματων του Ανθρώπου [European Human Rights Law]'. *ΔτΑ* 86 (2012): 1131.

———. 'Το νέο Σύνταγμα [The New Constitution]'. *To Βήμα*, 19 January 2003.

Pavlopoulos, Prokopis. 'Δικαστικός έλεγχος της συνταγματικότητας των νόμων ή δικαστικός έλεγχος της νομιμότητας του Συντάγματος; [Judicial Review of the Constitutionality of Legislation or Judicial Review of the Legality of the Constitution?]'. *NoB* 36 (1988): 13.

Perelman, Chaïm. 'Droit, logique et épistémologie'. In *Ethique et droit*, 619. Bruxelles: Éditions de l'Université de Bruxelles, 1990.

Perju, Vlad. 'Proportionality and freedom—An Essay on Method in Constitutional Law'. *Global Constitutionalism* 1, no. 2 (2012): 334.

———. 'Proportionality and Stare Decisis: Proposal for a New Structure'. In *Proportionality: New Frontiers, New Challenges*, edited by Vicki Jackson and Mark Tushnet, 75. Cambridge; New York: CUP, 2017.

Peters, Anne. 'The Merits of Global Constitutionalism'. *Indiana Journal of Global Legal Studies* XVI (2009): 397.

Philippe, Xavier, Ariane Vidal-Naquet, Aurélie Duffy-Meunier, and Olivier Le Bot. 'Les délibérations du Conseil constitutionnel - Année 1984'. *Cahiers du Conseil constitutionnel*, no. 32 (2011).

Phillipson, Gavin. 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act'. *The Modern Law Review* 66, no. 5 (2003): 726.

Poiares Maduro, Miguel. Opinion on C-135/08, *Rottmann,* delivered on 30 September 2009, ECLI:EU:C:2009:588.

Poole, Thomas. 'Of Headscarves and Heresies: The Denbigh High School Case and Public Authority Decision Making under the Human Rights Act'. *PL*, 2005, 685.

———. 'The Reformation of English Administrative Law'. *CLJ* 68, no. 1 (2009): 142.

Poole, Thomas, and Sangeeta Shah. 'The Impact of the Human Rights Act on the House of Lords'. *PL*, 2009, 347.

Pottage, Alain. 'Law after Anthropology: Object and Technique in Roman Law'. *Theory, Culture & Society* 31, no. 2–3 (2014): 147.

Powell, Walter, and Paul DiMaggio. 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields'. In *The New Institutionalism in Organizational Analysis*, edited by Walter Powell and Paul DiMaggio, 63. Chicago: University of Chicago Press, 1991.

Prélot, Pierre-Henri. 'L'actualité de l'arrêt *Benjamin*'. *RFDA*, 2013, 1020.

Prevedourou, Evaggelia. 'Η αρχή της αναλογικότητας στη νομολογία του ΔΕΚ [The Principle of Proportionality in the ECJ Case Law]'. *ΕΕΕυρ⊥*, 1997, 1, 297.

Renesi, Nikoleta. 'Η αρχή της αναλογικότητας στη νομολογία του Ελεγκτικού Συνεδρίου [The Principle of Proportionality in the Case Law of the Court of Audit]'. *⊥ι⊥ικ* 17 (2005): 1401

Reynolds, Stephanie. 'Explaining the Constitutional Drivers behind a Perceived Judicial Preference for Free Movement over Fundamental Rights'. *Common Market Law Review* 53, no. 3 (2016): 643.

Riles, Annelise. 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities'. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 27 June 2004. http://papers.ssrn.com/abstract=558605.

Rivero, Jean. 'Apologie pour les « faiseurs de systèmes »'. *Recueil Dalloz*, 1951, 99.

Rivero, Jean. 'Fin d'un absolutisme'. *Pouvoirs*, no. 13 (1991): 5.

———. 'Note sous Décision no. 80-127 DC'. *AJDA*, 1981, 275.

Rivers, Julian. 'Proportionality and Variable Intensity of Review'. *CLJ* 65, no. 1 (2006): 174.

———. 'Proportionality, Discretion and the Second Law of Balancing'. In *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy*, edited by George Pavlakos, 167. Oxford: Hart, 2007.

Rougevin-Baville, Michel. 'Conclusions sur CE Ass., 18 juillet 1973, *Ville de Limoges*', *Rec.* 572.

Rousseau, Dominique. 'La démocratie continue'. *Le Débat*, no. 96 (1997): 73.

———. 'La question prioritaire de constitutionnalité: un big bang juridictionnel?' *RDP*, 2009, 631.

———. 'Le procès constitutionnel'. *Pouvoirs* 137 – La Question prioritaire de constitutionnalité (2011): 47.

Sacco, Rodolfo. 'Legal Formants: A Dynamic Approach to Comparative Law'. *American Journal of Comparative Law* 39 (1991): 1; 343.

Saint Bonnet, François. 'L'intérêt général dans l'ancien droit constitutionnel'. In *L'intérêt général, norme constitutionnelle*, edited by Bertrand Mathieu and Michel Verpeaux. Paris: LGDJ, 2007.

Sankey, John. 'The Principles and Practice of the Law Today'. University of London, 14 March 1928.

Sauvé, Jean-Marc. 'Le Conseil d'État et l'application de la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales', 2010. http://www.conseil-etat.fr/Actualites/Discours-Interventions/Le-Conseil-d-Etat-et-l-application-de-la-Convention-europeenne-de-sauvegarde-des-droits-de-l-homme-et-des-libertes-fondamentales.

———. 'Le Conseil d'État, une cour suprême administrative', 2014. http://www.conseil-etat.fr/Actualites/Discours-Interventions/Le-Conseil-d-Etat-une-cour-supreme-administrative.

———. 'Le juge administratif, protecteur des libertés', Colloque organisé pour les dix ans de l'Association française pour la recherche en droit administratif, (Université d'Auvergne, juin 2016). http://www.conseil-etat.fr/Actualites/Discours-Interventions/Le-juge-administratif-protecteur-des-libertes.

Sauvé, Jean-Marc. 'Le principe de proportionnalité, protecteur des libertés', (Intervention à l'Institut Portalis, Aix-en-Provence, 2017). http://www.conseil-etat.fr/Actualites/Discours-Interventions/Le-principe-de-proportionnalite-protecteur-des-libertes.

Scarman, Leslie. 'The Development of Administrative Law: Obstacles and Opportunities'. *PL*, 1990, 490.

Schauer, Frederick. 'A Comment on the Structure of Rights'. *Ga. L. Rev.* 27 (1992): 415.

Schauer, Frederick. 'Commensurability and Its Constitutional Consequences'. *Hastings Law Journal* 45 (1994): 785.

———. 'Proportionality and the Question of Weight'. In *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, edited by Grant Huscroft, Bradley Miller, and Grégoire Webber, 173. New York: CUP, 2014.

Schlag, Pierre. 'The Aesthetics of American Law'. *Harvard Law Review* 115, no. 4 (2002): 1047.

Schlink, Bernhard. 'Proportionality'. In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and András Sajó, 718. Oxford: OUP, 2012.

Schneiderman, David. 'Proportionality and Constitutional Culture'. *International Journal of Constitutional Law* 13, no. 3 (2015): 769.

Sedley, Stephen. 'The Rocks or the Open Sea: Where Is the Human Rights Act Heading?' *Journal of Law and Society* 32, no. 1 (2005): 3.

———. 'Human Rights: A Twenty-First Century Agenda'. *PL*, 1995, 386.

———. 'The Sound of Silence'. In *Ashes and Sparks*, 64. Cambridge: CUP, 2011.

Seube, Jean-Baptiste. 'Le contrôle de proportionnalité exercé par le juge judiciaire : présentation générale'. *Les Petites Affiches*, no. 46 (2009): 86.

Sirinelli, Jean, and Brunessen Bertrand. 'La proportionnalité'. In *L'influence du droit européen sur les catégories du droit public*, edited by Jean-Bernard Auby, 623. Paris: Dalloz, 2010.

Skouris, Vassilios. 'Η συνταγματική αρχή της αναλογικότητας και οι νομοθετικοί περιορισμοί της επαγγελματικής ελευθερίας [The Constitutional Principle of Proportionality and Legislative Restrictions of Professional Freedom]'. *Ελλάδη* 28 (1987): 773.

———. 'Συνολική αποτίμηση του αναθεωρητικού εγχειρήματος [Overall Evaluation of the Reform]'. In *Το Νέο Σύνταγμα*, edited by Dimitrios Tsatsos, Evaggelos Venizelos, and Xenophon Contiades, 457. Athens; Komotini: Αντ. Ν. Σάκκουλας, 2001.

Spiliotopoulos, Epaminondas. 'Judicial Review of Legislation Acts in Greece'. *Temple Law Quarterly* 56 (1983): 463.

Srirangam, Veena. 'A Difference in Kind – Proportionality and Wednesbury'. *IALS Student Law Review* 4, no. 1 (2016): 46.

Stamatis, Konstantinos. 'Το νόημα του Κράτους Δικαίου στην Ελλάδα, 1952-1967 [The Meaning of the Ideal of a State Ruled by Law in Greece, 1952-1967]'. In *Όψεις του Κράτους Δικαίου*, edited by Konstantinos Stamatis and Antonis Manitakis, 109. Thessaloniki: Σάκκουλα, 1990.

Stavropoulos, Georgios. 'Η επίδραση της ΕΣΔΑ στην ελληνική έννομη τάξη [The Influence of the ECHR on the Greek Legal Order]'. 16ο Πανελλήνιο Συνέδιο της Εταιρίας Δικαστικών Μελετών, 9 December 2017. https://www.constitutionalism.gr/stavropoulos-esda-elliniki-ennomi-taxi/.

Stone Sweet, Alec, and Jud Mathews. 'Proportionality Balancing and Global Constitutionalism'. *Columbia Journal of Transnational Law* 47 (2008): 73.

Stratilatis, Kostas. 'Η συγκεκριμένη στάθμιση των συνταγματικών αξιών κατά τη δικαστική ερμηνεία του συντάγματος [The In Concreto Balancing of Constitutional Values in the Judicial Interpretation of the Constitution]'. *ΤοΣ*, no. 3 (2001): 495.

Tachos, Anastasios. 'Παρατηρήσεις στην ΣτΕ (Ολ.) 2112/1984 [Comment on StE (Pl.) 2112/1984]'. *Αρμ*, 1984, 907.

Taggart, Michael. 'Proportionality, Deference, Wednesbury'. *NZLR*, 2008, 423.

———. 'Reinventing Administrative Law'. In *Public Law in a Multi-Layered Constitution*, edited by Nicholas Bamforth and Peter Leyland, 251. Oxford; Portland, Or: Hart, 2003.

Tassopoulos, Ioannis. 'Η συνταγματική θέση της δικαιοσύνης στο πολιτικό μας σύστημα [The Constitutional Role of Justice in Our Political System]'. In *Το Νέο Σύνταγμα*, edited by Dimitrios Tsatsos, Evaggelos Venizelos, and Xenophon Contiades, 357. Athens; Komotini: Αντ. Ν. Σάκκουλας, 2001.

Taylor, Graham. 'Judicial Review of Improper Purposes and Irrelevant Considerations'. *CLJ* 35, no. 2 (1976): 272.

Teitgen, Francis. 'Le principe de proportionnalité en droit français'. In *Der Grundsatz Der Verhältnismäßigkeit in Europäischen Rechtsordnungen*, edited by Hans Kutscher, Georg Ress, and Francis Teitgen, 53. Heidelberg: Müller, 1985.

Teubner, Gunther. 'Altera Pars Audiatur: Law in the Collision of Discourses'. In *Law, Society and Economy*, edited by Richard Rawlings, 149. Oxford; New York: OUP, 1997.

———. 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences'. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 1998. http://papers.ssrn.com/abstract=876950.

———. 'The Two Faces of Janus: Rethinking Legal Pluralism'. *Cardozo Law Review* 13 (1991/1992): 1443.

Thomas, Yan. 'La langue du droit romain. Problèmes et méthodes'. *Archives de philosophie du droit* 18 (1973): 103.

Thym, Daniel. 'When Union Citizens Turn into Illegal Migrants: The Dano Case'. *European Law Review* 40, no. 2 (2015): 249.

Triantafyllou, Giorgos. 'Η αρχή της αναλογικότητας στην ποινική δίκη [The Principle of Proportionality in the Criminal Process]'. *Ελλ⊥ινη* 31 (1990): 301.

Troper, Michel. 'La motivation des décisions constitutionnelles'. In *La motivation des décisions de justice*, edited by Chaïm Perelman and Paul Foriers, 287. Bruxelles: Bruylant, 1978.

Troper, Michel. 'Who Needs a Third Party Effect Doctrine?' In *The Constitution in Private Relations. Expanding Constitutionalism*, by Sajó András and Uitz Renáta. Utrecht: Eleven International Publishing, 2005.

Tsakyrakis, Stavros. 'Proportionality: An Assault on Human Rights?', New York School Jean Monnet Working Paper Series, no. Paper 9 (2008). www.JeanMonnetProgram.org.

Turpin, Dominique. 'Le traitement des antinomies des droits de l'homme par le Conseil constitutionnel'. *Droits*, no. 2 (1985): 85.

Tushnet, Mark. 'Making Easy Cases Harder'. In *Proportionality: New Frontiers, New Challenges*, edited by Vicki Jackson and Mark Tushnet, 303. Cambridge; New York: CUP, 2017.

Tusseau, Guillaume. 'A Plea for a Hint of Empiricism in Constitutional Theory: A Comment on Cesare Pinelli's Constitutional Reasoning and Political Deliberation'. *German Law Journal* 14, no. 8 (2013): 1183.

Van Hoecke, Mark. 'Deep Level Comparative Law'. In *Epistemology and Methodology of Comparative Law*, edited by Mark van Hoecke. European Academy of Legal Theory Series. Oxford: Hart, 2004.

Vassilakakis, Giorgos. 'Η αρχή της αναλογικότητας. Ο αναιρετικός έλεγχος της εφαρμογής της από τον Άρειο Πάγο επί χρηματικής ικανοποιήσεως λόγω ηθικής βλάβης [The Principle of Proportionality. The Review of Its Application in Cassation by Areios Pagos in the Field of Indemnity for Moral Damage]'. *Νομικά Χρονικά* 50 (2008). http://www.nomikaxronika.gr/article.aspx?issue=50.

Vedel, Georges. 'Excès de pouvoir législatif et excès de pouvoir administratif'. *Cahiers du Conseil constitutionnel*, no. 1–2 (1996/1997).

———. 'Introduction'. In *L'unité du droit: mélanges en hommage à Roland Drago*. Paris: Economica, 1996.

———. 'Le Conseil constitutionnel, gardien du droit positif ou défenseur de la transcendance des droits de l'homme'. *Pouvoirs* 45 (1988): 149.

———. 'Note sous CE, 12 février 1960, *Société Eky'. J.C.P.* II (1960): 11629.

———. 'Réflexions sur les singularités de la procédure devant le Conseil constitutionnel'. In *Nouveaux juges, nouveaux pouvoirs ?: Mélanges en l'honneur de Roger Perrot*, 537. Dalloz, 1995.

Vedel, Georges. 'Réflexions sur quelques apports de la jurisprudence du Conseil d'État à la jurisprudence du Conseil constitutionnel'. In *Mélanges René Chapus*, 647. Paris: LGDJ; Lextenso, 1992.

Vegleris, Phédon. 'La Constitution, la loi et les tribunaux en Grèce'. In *Annales de la Faculté de Droit de Liège*, 437. Liège: Faculté de droit, 1967.

———. 'Τα όρια του ελέγχου της συνταγματικότητας [The Limits on the Review of Constitutionality]'. *ΤοΣ*, 1981, 455.

Vellis, Giorgos. 'Η προσωπική κράτηση μετά το Ν. 2462/1997 [Personal Detention after Law n. 2462/1997]'. *Ελλ⊿νη* 40 (1999): 9.

Venizelos, Evaggelos. 'Ερμηνευτικός σχετικισμός, δικονομικοί καταναγκασμοί, δογματικές αντιφάσεις και πολιτικά διλήμματα στη νομολογία του Συμβουλίου της Επικρατείας για τις σχέσεις εθνικού Συντάγματος και Ευρωπαϊκού Κοινοτικού δικαίου [Hermeneutic Relativism, Procedural Constraints, Doctrinal Inconsistencies and Political Dilemmas in the Council of State Case Law on the Relationship between the National Constitution and European Community Law]'. *Εφ⊿⊿*, no. 1 (2008): 85.

———. 'Η θέση του ΣτΕ στο σύστημα δικαστικού ελέγχου της συνταγματικότητας των νόμων [The Role of the Council of State in the System of Judicial Review of the Constitutionality of Legislation]'. *⊿ίκαιο&Πολιτική*, no. 6 (1983): 9.

———. 'Η νομικοπολιτική σημασία της αναθεώρησης του Συντάγματος [The Legal-Political Significance of the Constitutional Reform]', 2004. https://www.evenizelos.gr/parliament/constitutionalreview2001/694-2009-04-18-18-39-52.html.

———. 'Η σχέση Συντάγματος και Ευρωπαϊκής Ολοκλήρωσης [The Relationship between the Constitution and European Integration]'. Speech in the Committee for the Constitutional Amendment presented at the Discussion on the reform of article 28 of the Constitution, Hellenic Parliament, 25 October 2006. http://www.evenizelos.gr/parliament/constitutionalreview2008/220-2009-03-25-21-53-15.html.

———. 'Οι εγγυήσεις πολυφωνίας και διαφάνειας στα ΜΜΕ κατά το άρθρο 14 παρ. 9. Οι κανόνες ερμηνείας του Συντάγματος και οι σχέσεις Συντάγματος - Κοινοτικού Δικαίου [The Guarantees of Media Pluralism and Transparency according to Article 14 par. 9. The Rules for the Interpretation of the Constitution and the Relations between the Constitution and Community Law]'. *NoB* 53 (2005): 425.

Vigneau, Vincent. 'Libres propos d'un juge sur le contrôle de proportionnalité'. *D.*, 2017, 123.

Voutsakis, Vassilios. 'Η αρχή της αναλογικότητας: από την ερμηνεία στη διάπλαση του δικαίου [The Principle of Proportionality: From Legal Interpretation to Legal Formation]'. In *Όψεις του Κράτους ⊿ικαίου*, edited by Konstantinos Stamatis and Antonis Manitakis, 205. Thessaloniki: Σάκκουλα, 1990.

Voutsakis, Vassilios. 'Η αρχή του Κράτους Δικαίου και οι νέες διατάξεις περί ατομικών και κοινωνικών δικαιωμάτων [The Principle of a State Ruled by Law and the New Provisions on Individual and Social Rights]'. *NoB*, no. 1 (2002): 7.

Vrontakis, Michail. 'Ο δικαστής ως κριτής σταθμίσεων, αξιών και επιλογών του νομοθέτη κατά την πρόκριση των προς θέσπιση ρυθμίσεων [The Judge as a Reviewer of Legislative Weighing, Values and Choices in Legal Norm-Production]'. Aristoteleio University of Thessaloniki, 28 February 2011.

Wachsmann, Patrick. 'Des chameaux et des moustiques. Réflexions critiques sur le Conseil constitutionnel'. In *Billet d'humeur en l'honneur de Danièle Lochak*, edited by Véronique Champeil-Desplats and Nathalie Ferré, 279. Paris: LGDJ, 2007.

Wade, William. 'Sovereignty - Revolution or Evolution?' *LQR* 112 (1996): 568.

———. 'The Basis of Legal Sovereignty'. *CLJ* 13, no. 2 (1955): 172.

Waldron, Jeremy. 'Fake Incommensurability. A Response to Professor Schauer'. *Hastings Law Journal* 45 (1994): 813.

———. 'The Core of the Case against Judicial Review'. *Yale Law Journal* 115 (2005/6): 1346.

Waline, Jean. 'Le rôle du juge administratif dans la détermination de l'utilité publique justifiant l'expropriation'. In *Mélanges offerts à Marcel Waline : le juge et le droit public*, 811. Paris: LGDJ, 1974.

Waline, Marcel. 'Note sous CE Ass., 28 mai 1971, *Ville Nouvelle Est'*. *RDP*, 1972, 454.

Walker, Neil. 'Culture, Democracy and the Convergence of Public Law: Some Scepticisms about Scepticism'. In *Convergence and Divergence in European Public Law*, edited by Paul Beaumont, Carole Lyons, and Neil Walker, 257. Oxford; Portland, Or.: Hart, 2002.

Walters, Mark. 'Dicey on Writing the Law of the Constitution'. *Oxford Journal of Legal Studies* 32, no. 1 (2012): 21.

Ward, Ian. 'Identity and Difference: The European Union and Postmodernism'. In *New Legal Dynamics of European Union*, edited by Jo Shaw and Gillian More, 15. New York: Clarendon Press, 1995.

Warsmann, Jean-Luc. 'Rapport sur la qualité et la simplification du droit', décembre 2008. http://www.uquebec.ca/observgo/fichiers/88022_Droit.pdf.

Webber, Grégoire. 'Proportionality and Absolute Rights'. In *Proportionality: New Frontiers, New Challenges*, edited by Vicki Jackson and Mark Tushnet, 51. Cambridge; New York: CUP, 2017.

Weiler, Joseph. 'Deciphering the Political and Legal DNA of European Integration'. In *Philosophical Foundations of European Union Law*, edited by Julie Dickson and Pavlos Eleftheriadis, 137. Oxford: OUP, 2012.

Whitman, James. 'The Neo-Romantic Turn'. In *Comparative Legal Studies: Traditions and Transitions*, edited by Pierre Legrand and Roderick Munday, 312. Cambridge; New York: CUP, 2003.

Wong, Garreth. 'Towards the Nutcracker Principle, Reconsidering the Objections to Proportionality'. *PL*, 2000, 92.

Woolf, Harry. 'Droit Public - English Style'. *PL*, 1995, 57.

Xynopoulos, Georges. 'Réflexions sur le controle de proportionnalité en Europe continentale et en Grèce'. In *État-loi-administration. Mélanges en l'honneur de Epaminondas Spiliotopoulos*, edited by Petros Pararas, 461. Athènes; Bruxelles: Ant. N. Sakkoulas; Bruylant, 1998.

Yannakopoulos, Constantinos. 'Η μετάλλαξη του υποκειμένου των συνταγματικών δικαιωμάτων [The Transformation of the Subject of Constitutional Rights]'. *Εφ⊿⊿* 2 (2012): 146.

———. 'Μεταξύ εθνικής και ενωσιακής έννομης τάξης: το «Μνημόνιο» ως αναπαραγωγή της κρίσης του κράτους δικαίου [Between National and EU Legal Order: the "Memorandum" Reverberating the Crisis in the Ideal of a State Ruled by Law]'. *Constitutionalism.gr* (blog), 30 January 2011. https://www.constitutionalism.gr/1914-metaxy-etnikis-kai-enwsiakis-ennomis-taxis-to-mnim/.

———. 'Μεταξύ συνταγματικών σκοπών και συνταγματικών ορίων: η διαλεκτική εξέλιξη της συνταγματικής πραγματικότητας στην εθνική και στην κοινοτική έννομη τάξη [Between Constitutional Goals and Constitutional Limits: The Dialectical Evolution of Constitutional Reality in the National and the Community Legal Orders]'. *Εφ⊿⊿*, no. 5 (2008): 733.

———. 'Ο αυτεπάγγελτος έλεγχος (αντι)συνταγματικότητας των νόμων [The Ex Officio Judicial Review of the (Un)constitutionality of Legislation]'. *⊿τΑ* 16 (2002): 1175.

———. 'Τα δικαιώματα στη νομολογία του Συμβουλίου της Επικρατείας [Rights in the Council of State Case Law]'. In *Τα δικαιώματα στην Ελλάδα 1953-2003*, edited by Michalis Tsapogas and Dimitris Christopoulos, 439. Athens: Καστανιώτης, 2004.

———. 'Το ελληνικό Σύνταγμα και η επιφύλαξη του εφικτού της προστασίας των κοινωνικών δικαιωμάτων [The Greek Constitution and the Feasibility Clause of Social Rights Protection]'. *Εφ⊿⊿* 4 (2015): 417.

Yardley, David. 'The Abuse of Powers and Its Control in English Administrative Law'. *The American Journal of Comparative Law* 18, no. 3 (1970): 565.

Zenati-Castaing, Frédéric. 'La juridictionnalisation de la Cour de cassation'. *RTD Civ.*, 2016, 511.

Ziller, Jacques. 'Le principe de proportionnalité'. *AJDA*, no. spécial (1996): 185.

LIST OF CASES AND DECISIONS

FRANCE

Conseil d'État

CE, 4 April 1914, *Gomel*, no. 55125, Rec. 488.

CE, 14 January 1916, *Camino*, no. 59619, Rec. 15.

CE, 19 May 1933, *Benjamin,* nos. 17413 and 17520, Rec. 541.

CE, 6 November 1936, *Arrighi*, no. 41221, Rec. C.E. 966.

CE, 9 juillet 1943, *Tabouret et Laroche*, Rec. 182.

CE (Pl.), 26 October 1945, *Aramu*, no. 77726, Rec. 213.

CE, 11 July 1956, *Amicale des Annamites de Paris*, no. 26638, Rec. 317.

CE, 26 June 1959, *Syndicat général des ingénieurs conseils*, no. 92099, ECLI:FR:CESJS:1959:92099.19590626.

CE, 18 December 1959, *Films Lutétia*, nos. 36385 and 36428, ECLI:FR:CESJS:1959:36385.19591218.

CE, 12 February 1960, *Société Eky*, nos. 46922 and 46923, Rec. 101.

CE, 15 February 1961, *Lagrange*, Rec. 121.

CE, 16 November 1962, *Syndicat intercommunal d'électricité de la Nièvre et autres*, nos. 42202 and 44595, Rec. 612.

CE, 19 June 1964, *Société des pétroles Shell-Berre*, no. 47007, Rec. 344.

CE, 13 October 1967, no. 71629, ECLI:FR:CEORD:1967:71629.19671013.

CE, 12 July 1969, no. 72648, ECLI:FR:CEORD:1969:72648.19690712.

CE (Pl.), 28 May 1971, *Ville Nouvelle Est*, no. 78825, ECLI:FR:CEASS:1971:78825.19710528.

CE (Pl.), 20 October 1972, *Societe civile Sainte-Marie-de-l'Assomption*, no. 78829, ECLI:FR:CEASS:1972:78829.19721020.

CE (Pl.), 18 July 1973, *Ville de Limoges*, no 86275, ECLI:FR:CEASS:1973:86275.19730718.

CE, 18 July 1973, no 83745, ECLI:FR:CESSR:1973:83745.19730718.

CE, 26 October 1973, *Sieur Grassin*, no. 83261, ECLI:FR:CEASS:1973:83261.19731026.

CE, 15 February 1974, *Fédération nationale des syndicats de fonctionnaires de l'agriculture*, nos. 80772 and 80814, ECLI:FR:CESJS:1974:80772.19740215.

CE (Pl.), 22 February 1974, *Adam*, nos. 91848 and 93520, ECLI:FR:CEASS:1974:91848.19740222.

CE, 4 October 1974, no. 86978, ECLI:FR:CESJS:1974:86978.19741004.

CE, 6 July 1977, no. 00267, ECLI:FR:CESSR:1977:00267.19770706.

CE, 28 January 1976, no. 95507, ECLI:FR:CESSR:1993:95507.19930219.

CE (Pl.), 5 May 1976, *Bernette*, nos. 98647 and 98820, ECLI:FR:CEASS:1976:98647.19760505.

CE, 23 June 1976, no. 96285, ECLI:FR:CESSR:1976:96285.19760623.

CE, 6 July 1977, no. 00267, ECLI:FR:CESSR:1977:00267.19770706.

CE, 9 June 1978, *Sieur Lebon*, no. 05911, ECLI:FR:CESJS:1978:05911.19780609.

CE (Pl.), 8 December 1978, *GISTI, CFDT et CGT*, nos. 10097, 10677, and 10679, ECLI:FR:CEASS:1978:10097.19781208 Rec. 493.

CE, 13 February 1981, nos. 14148, 14170, 14171, and 14172, ECLI:FR:CESSR:1981:14148.19810213.

CE, 7 May 1982, no. 17713, ECLI:FR:CESSR:1982:17713.19820507.

CE, 23 October 1986, no. 64900, ECLI:FR:CESSR:1985:64900.19851023.

CE, 17 December 1986, nos. 76115 and 77265, ECLI:FR:CESSR:1986:76115.19861217.

CE, 12 June 1987, no. 75276, ECLI:FR:CESSR:1987:75276.19870612.

CE, 28 January 1987, no. 37945, ECLI:FR:CESSR:1987:37945.19870128.

CE, 21 October 1988, *Syndicat des avocats de France*, no. 70066, ECLI:FR:CESSR:1988:70066.19881021.

CE, 21 October 1988, nos. 72862, 72863, and 73062, ECLI:FR:CESSR:1988:72862.19881021.

CE, 1 March 1989, no. 86306, ECLI:FR:CESSR:1989:86306.19890301.

CE, 13 October 1989, no. 84133, ECLI:FR:CESJS:1989:84133.19891013.

CE (Pl.), 20 October 1989, *Nicolo*, no. 108243, ECLI:FR:CEASS:1989:108243.19891020.

CE (Pl.), 29 June 1990, *GISTI*, no. 78519, ECLI:FR:CEASS:1990:78519.19900629.

CE (Pl.), 29 June 1990, no. 115971, ECLI:FR:CEASS:1990:115971.19900629.

CE, 14 November 1990, no. 100899, ECLI:FR:CESSR:1990:100899.19901114.

CE (Pl.), 19 April 1991, *M. Belgacem*, no. 107470, ECLI:FR:CEASS:1991:107470.19910419.

CE (Pl.), 19 April 1991, *Mme Babas*, no. 117680, ECLI:FR:CEASS:1991:117680.19910419.

CE, 2 October 1991, no 65758, ECLI:FR:CESSR:1991:65758.19911002.

CE, 11 October 1991, no. 125101, ECLI:FR:CEORD:1991:125101.19911011.

CE, 12 July 1993, no. 121337, ECLI:FR:CESSR:1993:121337.19930712.

CE, 6 December 1993, no. 124984, ECLI:FR:CESSR:1993:124984.19931206.

CE, 21 January 1994, no. 120043, ECLI:FR:CESSR:1994:120043.19940121.

CE, 20 October 1995, no. 154868, ECLI:FR:CESSR:1995:154868.19951020.

CE (Pl.), 27 October 1995, *Commune de Morsang-sur-Orge*, no. 136727, ECLI:FR:CEASS:1995:136727.19951027.

CE, 8 December 1995, no. 158676, ECLI:FR:CESSR:1995:158676.19951208.

CE, 15 April 1996, no. 142020, ECLI:FR:CESSR:1996:142020.19960415.

CE, 6 January 1997, no. 162553, ECLI:FR:CESJS:1997:162553.19970106.

CE (Pl.), 8 April 1998, no. 161411 ECLI:FR:CEASS:1998:161411.19980408.

CE, 3 July 1998, no. 158592, ECLI:FR:CESJS:1998:158592.19980703.

CE, 12 March 1999, nos. 181976, 182549, 182572, and 182624, ECLI:FR:CESSR:1999:181976.19990312.

CE, 2 June 1999, no. 207752, ECLI:FR:CESJS:1999:207752.19990602.

CE, 28 July 1999, nos. 202606, 203438, 203487, 203541, and 203589, ECLI:FR:CESSR:1999:202606.19990728.

CE, 29 December 1999, no. 206945, ECLI:FR:CESSR:1999:206945.19991229.

CE, 28 July 2000, nos. 212115 and 212135, ECLI:FR:CESSR:2000:212115.20000728.

CE, 28 February 2001, no. 209419 ECLI:FR:CESSR:2001:209419.20010228.

CE ord., 30 October 2001, no. 238211, ECLI:FR:CESJS:2001:238211.20011030.

CE (Pl.), 30 November 2001, *Diop*, no. 212179, ECLI:FR:CEASS:2001:212179.20011130.

CE, 30 December 2002, *Carminati,* no. 240430, ECLI:FR:CESSR:2002:240430.20021230.

CE, 23 April 2003, no. 206913, ECLI:FR:CESSR:2003:206913.20030423.

CE, 30 July 2003, no. 237649, mentioned in the *Recueil Lebon* tables.

CE, 29 October 2003, no. 260768, ECLI:FR:CEORD:2003:260768.20031029.

CE (Pl.), 11 May 2004, *Assoc. AC ! et autres*, no. 255886, ECLI:FR:CEASS:2004:255886.20040511.

CE, 24 February 2006, no. 250704, ECLI:FR:CESSR:2006:250704.20060224.

CE (Pl.), 27 May 2005, no. 277975, ECLI:FR:CEASS:2005:277975.20050527.

CE ord., 9 November 2005, no. 286321, ECLI:FR:CEORD:2005:286321.20051109.

CE (Pl.), 9 February 2007, *Société Arcelor Atlantique et Lorraine et autres*, no. 287110 ECLI:FR:CEASS:2007:287110.20070208.

CE (Pl.), 30 October 2009, *Dame Perreux*, no. 298348 ECLI:FR:CEASS:2009:298348.2009103.

CE (Pl.), 16 October 2011, *Association pour la promotion de l'image et autres*, no. 317827, ECLI:FR:CEASS:2011:317827.20111026.

CE (Pl.), 21 December 2012, *Société Groupe Canal Plus et autres*, no. 362347, ECLI:FR:CEASS:2012:362347.20121221.

CE (Pl.), 13 November 2013, no. 347704, ECLI:FR:CEASS:2013:347704.20131113.

CE ord., 9 January 2014, *Ministre de l'intérieur c/ Société Les Productions de la Plume et M. Dieudonné M'Bala M'Bala*, no. 374508, ECLI:FR:CEORD:2014:374508.20140109.

CE (Pl.), 30 December 2014, no. 381245, ECLI:FR:CEASS:2014:381245.20141230.

CE ord., 6 February 2015, 6 février 2015, *Commune de Cournon d'Auvergne*, no. 387726, ECLI:FR:CEORD:2015:387726.20150206.

CE, 9 November 2015, *Le Mur* (*Dieudonné*), no. 376107, ECLI:FR:CESSR:2015:376107.20151109.

CE ord., 27 January 2016, *Ligue des droits de l'homme et autres*, no. 396220, ECLI:FR:CEORD:2016:396220.20160127.

CE (Pl.) ord., 31 May 2016, *Gonzalez-Gomez*, no 396848, ECLI:FR:CEASS:2016:396848.20160531.

CE (Pl.), 6 July 2016, no. 398234, ECLI:FR:CEASS:2016:398234.20160706.

CE ord., 26 August 2016, *Ligue des droits de l'homme et autres - association de défense des droits de l'homme collectif contre l'islamophobie en France*, nos. 402742 and 402777, ECLI:FR:CEORD:2016:402742.20160826.

Conseil constitutionnel

Decision no. 71-44 DC, 16 July 1971, *Liberté d'association,* ECLI:FR:CC:1971:71.44.DC.

Decision no. 74-54 DC, 15 January 1975, *Loi relative à l'interruption volontaire de la grossesse (IVG I)*, ECLI:FR:CC:1975:74.54.DC.

Decision no. 79-105 DC, 25 July 1979, *Loi modifiant les dispositions de la loi n° 74-696 du 7 août 1974 relatives à la continuité du service public de la radio et de la télévision en cas de cessation concertée du travail*, ECLI:FR:CC:1979:79.105.DC.

Decision no. 80-127 DC, 20 January 1981, *Loi renforçant la sécurité et protégeant la liberté des personnes*, ECLI:FR:CC:1981:80.127.DC.

Decision no. 82-141 DC, 27 July 1982, *Loi sur la communication audiovisuelle*, ECLI:FR:CC:1982:82.141.DC.

Decision no. 82-155 DC, 30 Decembre 1982, *Loi de finances rectificative pour 1982*, ECLI:FR:CC:1982:82.155.DC.

Decision no. 83-162 DC, 20 July 1983, *Loi relative à la démocratisation du secteur public*, ECLI:FR:CC:1983:83.162.DC.

Décision no. 84-176 DC, 25 July 1984, *Loi modifiant la loi du 29 juillet 1982 sur la communication audiovisuelle et relative à certaines dispositions applicables aux services de communication audiovisuelle soumis à autorisation*, ECLI:FR:CC:1984:84.176.DC.

Decision no. 85-187 DC, 25 January 1985, *Loi relative à l'état d'urgence en Nouvelle-Calédonie et dépendances*, ECLI:FR:CC:1985:85.187.DC.

Decision no. 85-196 DC, 8 August 1985, *Loi sur l'évolution de la Nouvelle-Calédonie*, ECLI:FR:CC:1985:85.196.DC.

Decision no. 85-197 DC, 23 August 1985, *Loi sur l'évolution de la Nouvelle Calédonie*, ECLI:FR:CC:1985:85.197.DC.

Decision no. 86-210 DC, 29 July 1986, *Loi portant réforme du régime juridique de la presse*, ECLI:FR:CC:1986:86.210.DC.

Decision no. 86-215 DC, 3 September 1986, L*oi relative à la lutte contre la criminalité et la délinquance*, ECLI:FR:CC:1986:86.215.DC.

Decision no. 86-216 DC, 3 September 1986, *Loi relative aux conditions d'entrée et de séjour des étrangers en France*, ECLI:FR:CC:1986:86.216.DC.

Decision no. 86-218 DC, 18 November 1986, *Loi relative à la délimitation des circonscriptions pour l'élection des députés* ECLI:FR:CC:1986:86.218.DC.

Decision no. 87-227 DC, 7 July 1987, *Loi modifiant l'organisation administrative et le régime électoral de la ville de Marseille*, ECLI:FR:CC:1987:87.227.DC.

Decision no. 87-237 DC, 30 December 1987, *Loi de finances pour 1988*, ECLI:FR:CC:1987:87.237.DC.

Decision no. 88-248 DC, 17 January 1989, *Loi modifiant la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication*, ECLI:FR:CC:1989:88.248.DC.

Decision no. 89-260 DC, 28 July 1989, *Loi relative à la sécurité et à la transparence du marché financier*, ECLI:FR:CC:1989:89.260.DC.

Decision no. 89-269 DC, 22 January 1990, *Loi portant diverses dispositions relatives à la sécurité sociale et à la santé*, ECLI:FR:CC:1990:89.269.DC.

Decision no. 89-254 DC, 4 July 1989, *Loi modifiant la loi n° 86-912 du 6 août 1986 relative aux modalités d'application des privatisations*, cons. 5, ECLI:FR:CC:1989:89.254.DC.

Decision no. 89-266 DC, 9 January 1990 *Loi modifiant l'ordonnance n° 45-2658 du 2 novembre 1945 relative aux conditions d'entrée et de séjour des étrangers en France*, ECLI:FR:CC:1990:89.266.DC.

Decision no. 90-280 DC, 6 December 1990, *Loi organisant la concomitance des renouvellements des conseils généraux et des conseils régionaux*, ECLI:FR:CC:1990:90.280.DC.

Decision no. 90-284 DC, 16 January 1991, *Loi relative au conseiller du salarié*, ECLI:FR:CC:1991:90.284.DC.

Decision no. 92-308 DC, 9 April 1992, *Traité sur l'Union européenne*, ECLI:FR:CC:1992:92.308.DC.

Decision no. 92-316 DC, 20 January 1993, *Loi relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques*, ECLI:FR:CC:1993:92.316.DC.

Decision no. 93-323 DC, 5 August 1993, *Loi relative aux contrôles et vérifications d'identité*, ECLI:FR:CC:1993:93.323.DC.

Decision no. 93-325 DC, 13 August 1993, *Loi relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France*, ECLI:FR:CC:1993:93.325.DC.

Decision no. 94-343/344 DC, 27 July 1994, *Loi relative au respect du corps humain et loi relative au don et à l'utilisation des éléments et produits du corps humain, à l'assistance médicale à la procréation et au diagnostic prénatal*, ECLI:FR:CC:1994:94.343.DC.

Décision no. 94-345 DC, 29 July 1994, *Loi relative à l'emploi de la langue française*, ECLI:FR:CC:1994:94.345.DC.

Decision no. 94-352 DC, 18 January 1995, *Loi d'orientation et de programmation relative à la sécurité*, ECLI:FR:CC:1995:94.352.DC.

Decision no. 94-359 DC, 19 January 1995, *Loi relative à la diversité de l'habitat*, ECLI:FR:CC:1995:94.359.DC.

Décision no. 97-389 DC, 22 April 1997 *Loi portant diverses dispositions relatives à l'immigration*, ECLI:FR:CC:1997:97.389.DC.

Decision no. 97-395 DC, 30 December 1997, *Loi de finances pour 1998*, ECLI:FR:CC:1997:97.395.DC.

Decision no. 99-411 DC, 16 June 1999, *Loi portant diverses mesures relatives à la sécurité routière et aux infractions sur les agents des exploitants de réseau de transport public de voyageurs*, ECLI:FR:CC:1999:99.411.DC.

Decision no. 99-422 DC, 21 December 1999, *Loi de financement de la sécurité sociale pour 2000*, ECLI:FR:CC:1999:99.422.DC.

Decision no. 2000-433 DC, 27 July 2000, *Loi modifiant la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication*, ECLI:FR:CC:2000:2000.433.DC.

Decision no. 2000-436 DC, 7 December 2000, *Loi relative à la solidarité et au renouvellement urbains*, ECLI:FR:CC:2000:2000.436.DC.

Decision no. 2000-439 DC, 16 January 2001, *Loi relative à l'archéologie préventive,* ECLI:FR:CC:2001:2000.439.DC.

Decision no. 2001-452 DC, 6 December, 2001, *Loi portant mesures urgentes de réformes à caractère économique et financier*, ECLI:FR:CC:2001:2001.452.DC.

Decision no. 2002-464 DC, 22 December 2001, *Loi de finances pour 2003*, ECLI:FR:CC:2002:2002.464.DC.

Decision no. 2004-490 DC, 12 February 2004, *Loi organique portant statut d'autonomie de la Polynésie française*, ECLI:FR:CC:2004:2004.490.DC.

Decision no. 2004-496 DC, 10 June 2004, *Loi pour la confiance dans l'économie numérique*, ECLI:FR:CC:2004:2004.496.DC.

Decision no. 2004-505 DC, 19 November 2004, *Traité établissant une Constitution pour l'Europe*, ECLI:FR:CC:2004:2004.505.DC.

Decision no. 2005-528 DC, 15 December 2005, *Loi de financement de la sécurité sociale pour 2006*, ECLI:FR:CC:2005:2005.528.DC.

Decision no. 2006-540 DC, 27 July 2006, *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information,* ECLI:FR:CC:2006:2006.540.DC.

Decision no. 2007-555 DC, 16 August 2007, *Loi en faveur du travail, de l'emploi et du pouvoir d'achat*, ECLI:FR:CC:2007:2007.555.DC.

Decision no. 2008-562 DC, 21 February 2008, *Loi relative à la rétention de sûreté et à la déclaration d'irresponsabilité pénale pour cause de trouble mental*, ECLI:FR:CC:2008:2008.562.DC.

Decision no. 2008-24 ELEC, 28 May 2008, *Observations du Conseil constitutionnel relatives aux élections législatives des 10 et 17 juin 2007*, ECLI:FR:CC:2008:2008.24.ELEC.

Decision no. 2008-564 DC, 19 June 2008, *OGM*, ECLI:FR:CC:2008:2008.564.DC.

Decision no. 2008-571 DC, 11 December 2008, Lo*i de financement de la sécurité sociale pour 2009*, ECLI:FR:CC:2008:2008.571.DC.

Decision no. 2009-580 DC, 10 June 2009, *Loi favorisant la diffusion et la protection de la création sur internet*, ECLI:FR:CC:2009:2009.580.DC.

Decision no. 2010-2 QPC, 11 June 2010, *Loi dite "anti-Perruche"*, ECLI:FR:CC:2010:2010.2.QPC.

Decision no. 2010-613 DC, 7 October 2010, *Loi interdisant la dissimulation du visage dans l'espace public*, ECLI:FR:CC:2010:2010.613.DC.

Decision no. 2010-71 QPC, 26 November 2010, *Mlle Danielle S. [Hospitalisation sans consentement]*, ECLI:FR:CC:2010:2010.71.QPC.

Decision no. 2012-249 QPC, 16 May 2012, *Société Cryo-Save France [Prélèvement de cellules du sang de cordon ou placentaire ou de cellules du cordon ou du placenta]*, ECLI:FR:CC:2012:2012.249.QPC.

Decision no. 2013-314P QPC, 4 April 2013, *M. Jeremy F.* ECLI:FR:CC:2013:2013.314P.QPC.

Decision no. 2013-318 QPC, 7 June 2013, *M. Mohamed T. [Activité de transport public de personnes à motocyclette ou tricycle à moteur]*, ECLI:FR:CC:2013:2013.318.QPC.

Decision no. 2015-524 QPC, 2 March 2016, *M. Abdel Manane M. K. [Gel administratif des avoirs]*, ECLI:FR:CC:2016:2015.524.QPC.

Decision no. 2015-527 QPC, 22 December 2015 *M. Cédric D. [Assignations à résidence dans le cadre de l'état d'urgence]*, ECLI:FR:CC:2015:2015.527.QPC.

Decision no. 2016-536 QPC, 19 February 2016, *Ligue des droits de l'homme [Perquisitions et saisies administratives dans le cadre de l'état d'urgence]*, ECLI:FR:CC:2016:2016.536.QPC.

Decision no. 2016-591 QPC, 21 October 2016, *Mme Helen S. [Registre public des trusts]*, cons. 3, ECLI:FR:CC:2016:2016.591.QPC.

Decision no. 2016-600 QPC, 2 December 2016, *M. Raïme A. [Perquisitions administratives dans le cadre de l'état d'urgence III]* ¸ ECLI:FR:CC:2016:2016.600.QPC.

Decision no. 2016-611 QPC, 10 February 2017, *M. David P. [Délit de consultation habituelle de sites internet terroristes]*, ECLI:FR:CC:2017:2016.611.QPC.

Decision no. 2016-620 QPC, 30 March 2017, *Société EDI-TV [Taxe sur la publicité diffusée par les chaînes de télévision]*, ECLI:FR:CC:2017:2016.620.QPC.

Decision no. 2017-624 QPC, 16 March 2017, *M. Sofiyan I. [Durée maximale de l'assignation à résidence dans le cadre de l'état d'urgence]*, ECLI:FR:CC:2017:2017.624.QPC.

Cour de cassation

Cass. crim., 11 July 1990, no. 89-86852, unreported.

Cass. crim, 12 March 1991, no. 90-83545, unreported.

Cass. comm., 8 December 1992, nos. 90-20258, 90-20271, 90-20273, 90-20282, 90-20286, 90-20287, 90-20306, 90-20314, 90-20350, 90-20351, and 90-20352, Bull. 1992, no. 404, 283.

Cass. crim., 10 March 1993, no. 91-86197, Bull. crim., 1990, no. 108, 261.

Cass. crim., 18 May 1994, no. 92-86386, Bull. crim., 1994, no. 190, 434.

Cass. civ. 1, 19 December 1995, *Banque africaine de développement*, no. 93-20424, Bull. 1995, no. 470, 326.

Cass. civ. 1, 13 February 1996, no. 93-12750, Bull. 1996, no. 73, 47.

Cass. crim., 19 March 1996, no. 94-81420, Bull. crim., 1996, no. 117, 340.

Cass. civ. 3, 19 June 1996, no. 94-70323, unreported.

Cass. comm., 1 October 1996, no. 94-18845, unreported.

Cass. soc., 11 May 2010, no. 08-45307, Bull. 2010, no. 105.

Cass. crim., 5 March 2013, no. 12-80891, Bull. crim., 2013, no. 54.

Cass. civ. 1, 4 December 2013, no. 12-26066, Bull. 2013, no. 234.

Cass. soc., 17 March 2015, no. 13-27142, Bull. 2015, no. 53.

Cass. civ. 3, 17 December 2015, no. 14-22095, Bull. 2016, no. 841.

Cass. civ. 1, 14 April 2016, no. 14-29981, Bull. 2016.

Cass. civ. 1, 5 July 2017, no. 16-22183, Bull. 2017.

ENGLAND

House of Lords

Ridge v Baldwin [1964] AC 40 (HL, 14 March 1963).

R v Minister of Agriculture and Fisheries, ex parte Padfield [1968] UKHL 1 (HL, 14 February 1968).

Anisminic Ltd v Foreign Compensation Commission [1968] UKHL 6 (HL, 17 December 1968).

Home Office v Dorset Yacht Co Ltd [1970] UKHL 2 (HL, 6 May 1970).

Express Newspapers Ltd v MacShane and another [1980] 1 All ER 65 (HL, 13 December 1979).

Duport Steels LTD vs Sirs [1980] 1 All ER 529 (HL, 3 January 1980).

Attorney General v British Broadcasting Corporation [1980] 3 W.L.R. 109 (HL, 12 June 1980).

Bromley London Borough Council v Greater London Council [1982] All ER 153 (HL, 17 December 1981).

Regina v Goldstein [1983] 1 W.L.R. 151 (HL, 20 January 1983).

Davy v Spelthorne Borough Council [1983] 3 All ER 278 (HL, 13 October 1983).

Customs and Excise Commissioners v Viva Gas Appliances Ltd [1984] 1 All ER 112 (HL, 24 November 1983).

O'Reilly v Mackman [1983] UKHL 1 (HL, 25 November 1983).

Stoke-On-Trent City Council -v- B & Q (Retail) Ltd [1984] 1 AC 754 (HL, 17 May 1984).

Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935 (HL, 22 November 1984).

Bugdaycay v Secretary of State for the Home Department [1986] UKHL 3 (HL, 19 February 1986).

Rainey v Greater Glasgow Health Board [1987] IRLR 26 (HL, 27 November 1986).

Attorney General v Guardian Newspapers Ltd and others; and related appeals [1987] 1 W.L.R. 1248 (interlocutory injunction, HL, 13 August 1987).

Attorney General v Guardian Newspapers Ltd (No 2); Attorney General v The Observer Ltd and Others [1990] 1 AC 109 (HL, 13 October 1988).

R v Secretary of State for the Environment, ex parte London Borough of Hammersmith and Fulham [1991] 1 AC 521 (HL, 4 October 1990).

R v Secretary of State for Transport, ex parte Factortame Ltd [1991] 1 AC 603 (HL, 11 October 1990).

R v Secretary of State for the Home Department, ex parte Brind [1991] 1 A.C. 696 (HL, 7 February 1991).

Stoke-on-Trent & Norwich (No. 2) [1993] 2 W.L.R. 730 (HL, 31 March 1993).

R v Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531 (HL, 24 June 1993).

R v Secretary of State for the Home Department, ex parte Pierson [1998] A.C. 539 (HL, 24 July 1997).

R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd [1998] UKHL 40 (HL, 11 November 1998).

R v Director of Public Prosecutions, ex parte Kebeline and Others [2000] 2 A.C. 326 (HL, 28 October 1999).

R v Secretary of State for the Environment, Transport and the Regions, ex parte Alconbury Developments Ltd and Others [2001] UKHL 23 (HL, 9 May 2001).

Regina v A (No 2) [2002] 1 A.C. 45 (HL, 17 May 2001).

R v Secretary of State for the Home Department, ex parte Daly [2001] UKHL 26 (HL, 23 May 2001).

Regina v Lambert [2002] 2 A.C. 545 (HL, 5 July 2001).

Regina v Shayler [2003] 1 A.C. 247 (HL, 21 March 2002).

R v. British Broadcasting Corporation, ex parte ProLife Alliance [2003] UKHL 23 (HL, 15 May 2003).

Wilson v First County Trust Ltd [2003] UKHL 40 (HL, 10 July 2003).

Campbell v MGN Ltd [2004] UKHL 22 (HL, 6 May 2004).

R v Special Adjudicator, ex parte Ullah [2004] UKHR 26 (HL, 17 June 2004).

Ghaidan v Mendoza [2004] 3 WLR 113 (HL, 21 June 2004).

A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department [2004] UKHL 56 (HL, 16 December 2004).

R v Attorney General, ex parte Jackson and others [2006] 1 A.C. 262 (HL, 13 October 2005).

Kay v Lambeth, [2006] UKHL 10 (HL, 8 March 2006).

R v Headteacher and Governors of Denbigh High School, ex parte Begum [2006] UKHL 15 (HL, 22 March 2006).

R v Chief Constable of Gloucestershire Constabulary, ex parte Laporte [2007] 2 A.C. 105 (HL, 13 November 2006).

Huang v Secretary of State for the Home Department; Kashmiri v Same [2007] 2 A.C. 167(HL, 21 March 2007).

R v Secretary of State for Defence, ex parte Al-Skeini [2008] 1 A.C. 153 (HL, 13 June 2007).

Belfast City Council v Miss Behavin' Ltd [2007] 1 WLR 1420 (HL, 25 April 2007).

R v Secretary of State for Defence, ex parte Al-Skeini [2008] 1 A.C. 153 (HL, 13 June 2007).

R v Attorney General and Another, ex parte Countryside Alliance and others [2007] UKHL 52 (HL, 28 November 2007).

In re P (Adoption: Unmarried Couple) [2009] 1 AC 173 (HL, 18 June 2008).

Doherty and others v Birmingham City Council [2008] UKHL 57 (HL, 30 July 2008).

Supreme Court

R v Horncastle and Others [2009] UKSC 14 (SC, 9 December 2009).

Manchester City Council v Pinnock [2010] UKSC 45 (SC, 3 November 2010).

In re McCaughey [2011] UKSC 20 (SC, 18 May 2011).

Sugar v BBC [2012] 1 WLR 439 (SC, 15 February 2012).

Bank Mellat v Her Majesty's Treasury (No. 2) [2013] UKSC 39 (SC, 19 June 2013).

Kennedy v The Charity Commission [2014] UKSC 20 (SC, 26 March 2014).

R v Ministry of Justice, ex parte Nicklinson and another; R v The Director of Public Prosecutions, ex parte AM; R v The Director of Public Prosecutions, ex parte AM [2014] UKSC 38 (SC, 25 June 2014).

Pham v Secretary of State for the Home Department [2015] UKSC 19 (SC, 25 March 2015).

R v Legal Services Board, ex parte Lumsdon and Others [2015] UKSC 41 (SC, 24 June 2015).

R v Secretary of State for Work and Pensions, ex parte SG and Others [2015] UKSC 16 (SC, 18 March 2015).

Keyu and others v Secretary of State for Foreign and Commonwealth Affairs and another [2015] UKSC 69 (SC, 25 November 2015).

Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60 (SC, 16 November 2016).

R v Secretary of State and another, ex parte MM (Lebanon) and Others [2017] UKSC 10 (SC, 22 February 2017).

R v Lord Chancellor, ex parte UNISON [2017] UKSC 51 (SC, 26 July 2017).

Commissioner of Police of the Metropolis v DSD and Another [2018] UKSC 11 (SC, 21 February 2018).

Privy Council

Elloy de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others [1999] 1 A.C. 69 [Privy Council (Antigua and Barbuda), 30 June 1998].

Thomas v Baptiste [2000] 2 A.C. 1 [Privy Council (Trinidad and Tobago), 17 March 1999].

Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v. The Hon. Vernon J. Symonette M.P. and 7 Others [2000] UKPC 31 [Privy Council (Bahamas), 26 July 2000].

Court of Appeal

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 (CA, Civil Division, 7 November 1947).

R v Northumberland Compensation Appeal Tribunal, ex parte Shaw [1952] 1 K.B. 338 (CA, Civil Division, 19 December 1951).

R. v Barnsley MBC, ex parte Hook [1976] 1 W.L.R. 1052 (CA, Civil Division, 20 February 1976).

R v Slater (Terence Clifford) (1979) 1 Cr App R (S) 349 (CA, Criminal Division, 4 December 1979).

Schering Chemicals Ltd. v Falkman Ltd. and Others [1982] Q.B. 1 (CA, Civil Division, 27 January 1981).

Regina v Goldstein [1982] 1 W.L.R. 804 (CA, Criminal Division, 2 April 1982).

R v Thompson (David William) (1983) 5 Cr App R (S) 303 (CA, Criminal Division, 5 September 1983).

International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd [1986] 1 Ch. 513 (CA, Civil Division, 20 November 1985).

R v Panel on Takeovers and Mergers, ex parte Datafin PLC [1987] QB 815 (CA, Civil Division, 5 December 1986).

R v London Borough of Brent, ex parte Assegai [1987] 151 LG Rev 891 (CA, Civil Division, 11 June 1987).

A Co v K Ltd [1987] 3 All ER 377 (CA, Civil Division, 8 July 1987).

Attorney General v Guardian Newspapers Ltd and others; and related appeals [1987] 1 W.L.R. 1248 (interlocutory injunction, CA, Civil Division, 24 July 1987).

R v The Pharmaceutical Society of Great Britain, ex parte Association of Pharmaceutical Importers [1987] 3 C.M.L.R. 951 (CA, Civil Division, 30 July 1987).

Attorney-General v Guardian Newspapers Ltd. and Others (No. 2); Attorney-General v Observer Ltd. and Others; Attorney-General v Times Newspapers Ltd. and Another [1988] 2 W.L.R. 805 (CA, Civil Division, 10 February 1988).

Roman v Roman, (CA, Civil Division, 1989), unreported.

R v Secretary of State for the Home Department, ex parte Brind [1990] 1 All ER 469 (CA, Civil Division, 6 December 1989).

R v General Medical Council, ex parte Colman [1990] 1 All ER 489 (CA, Civil Division, 6 December 1989).

Kirklees Borough Council v Wickes Building Supplies Ltd; Mendip District Council v B & Q plc [1991] 4 All ER 240 (CA, Civil Division, 30 April 1991).

Derbyshire County Council v Times Newspapers Ltd. and Others [1992] Q.B. 770 (CA, Civil Division, 19 February 1992).

R v International Stock Exchange of the UK and the Republic of Ireland Ltd, ex parte Else [1993] B.C.C. 11 (CA, Civil Division, 16 October 1992).

R v Secretary of State for the Home Department, ex parte Leech [1994] Q.B. 198 (CA, Civil Division, 19 May 1993).

R v Admiralty Board of the Defence Council, ex parte Lustig-Prean; R v Admiralty Board of the Defence Council, ex parte Beckett; R v Secretary of State for Defence, ex parte Smith; R v Ministry of Defence, ex parte Grady [1996] Q.B. 517 (CA, Civil Division, 3 November 1995).

R v Secretary of State for the Home Department and Another, ex parte Hargreaves [1997] 1 W.L.R. 906 (CA, Civil Division, 20 November 1996).

R v Secretary of State for Health, ex parte Eastside Cheese Company (a firm) [1999] 3 C.M.L.R. 123 (CA, Civil Division, 1 July 1999).

R v The Department of Education and Employment, ex parte Begbie [2000] 1 WLR 1115 (CA, Civil Division, 20 August 1999).

B v SSHD [2000] Imm. A. R. 478 (CA, Civil Division, 18 May 2000).

R v Secretary of State for the Home Department, ex parte Mahmood [2001] 1 W.L.R. 840 (CA, Civil Division, 8 December 2000).

R v Secretary Of State for Home Department, ex parte Isiko and Another [2000] EWCA Civ 346 (CA, Civil Division, 20 December 2000).

Poplar Housing & Regeneration Community Association Ltd v Donoghue [2002] Q.B. 48 (CA, Civil Division, 27 April 2001).

International Transport Roth GmbH and others v Secretary of State for the Home Department [2003] Q.B. 728 (CA, Civil Division, 22 February 2002).

Gough and another v Chief Constable of the Derbyshire Constabulary [2002] EWCA Civ 351 (CA, Civil Division, 20 March 2002).

R v Secretary of State for the Home Department, ex parte Q [2004] QB 36 (CA, Civil Division, 18 March 2003).

R v Secretary of State for Defence, ex parte Association of British Civilian Internees: Far East Region [2003] Q.B. 1397 (CA, Civil Division, 3 April 2003).

IBA Health Ltd v Office of Fair Trading [2004] EWCA Civ 142 (CA, Civil Division, 19 February 2004).

R v. Governors of Denbigh High School, *ex parte Begum*, [2005] 1 W.L.R. 3372 (CA, Civil Division, 2 March 2005).

Douglas v Hello! Ltd [2005] EWCA Civ 595 (CA, Civil Division, 18 May 2005).

Nadarajah, Abdi v The Secretary of State for the Home Department [2005] EWCA Civ 1363 (CA, Civil Division, 22 November 2005).

Bank Mellat v Her Majesty's Treasury (No 2) [2011] EWCA Civ 1 (CA, Civil Division, 13 January 2011).

R v Secretary of State for Health, ex parte Sinclair Collis [2012] QB 394 (CA, Civil Division, 17 June 2011).

R v Office of Communications, ex parte ICO Satellite Ltd [2011] EWCA Civ 1121 (CA, Civil Division, 11 October 2011).

G1 v Secretary of State for the Home Department [2012] EWCA Civ 867 (CA, Civil Division, 4 July 2012).

High Court

Malone v Commissioner of Police of the Metropolis (No.2) [1979] 1 Ch 344 (HC, Chancery Division, 28 February 1979).

Customs and Excise Commissioners v ApS Samex (Hanil Synthetic Fiber Industrial Co Ltd, third party) [1983] 1 All ER 1042 (HC, Queen's Bench Division, 14 December 1982).

R v Minister of Agriculture, Fisheries and Food, ex parte Bell Line [1984] 2 C.M.L.R. 502 (HC, Queen's Bench Division, 9 April 1984).

R v Secretary of State for the Home Department, ex parte Benwell [1985] 1 Q.B. 554 (HC, Queen's Bench Division, 24 May 1984).

R. v Intervention Board for Agricultural Produce, ex parte ED&F Man (Sugar) Ltd [1984] 3 C.M.L.R. 633 (HC, Queen's Bench Division, 18 June 1984).

R v Warwick Crown Court, *ex parte Smalley* [1987] 1 W.L.R. 237 (HC, Queen's Bench Division, 10 June 1986).

Attorney General v Guardian Newspapers Ltd and Others, Attorney General v The Observer Ltd. and Others [1989] 2 F.S.R. 3 (interlocutory injunction, HC, Chancery Division, 11 July 1986 – CA, 25 July 1986).

R v Secretary of State for Education, ex parte Schaffter [1987] IRLR 53 (HC, Queen's Bench Division, 1 January 1987).

R v Waltham Forest London Borough, ex parte Waltham Borough Ratepayers Action Group, T*he Times* 31 July 1987 (HC, Queen's Bench, 29 July 1987).

R v Secretary of State for Transport, ex parte Pegasus Holidays (London) Ltd and another [1989] 2 All E.R. 481 (HC, Queen's Bench Division, 7 August 1987).

St Marylebone Property Co Ltd v Tesco Stores Ltd and Others [1988] 27 EG 72 (HC, Chancery Division, 9 October 1987).

Allied Dunbar (Frank Weisinger) Ltd v Frank Weisinger [1988] I.R.L.R. 60 (HC, Queen's Bench Division, 1 January 1988).

R v Minister of Agriculture, Fisheries and Food and another, ex parte Fédération Européenne de la Santé Animale (Fedesa) and others [1988] 3 C.M.L.R. 207 (HC, Queen's Bench Division, 19 February 1988).

Rochdale Borough Council v Anders [1988] 3 All ER 490 (HC, Queen's Bench Division, 23 May 1988).

R v Secretary of State for the Home Department, ex parte Brind and Another, *The Times*, 30 May 1989 (HC, Queen's Bench Division).

R v Bournemouth Crown Court, ex parte Johson and Another (HC, Queen's Bench) CO/1917/89.

WH Smith Do-It-All Ltd v Peterborough City Council [1991] 4 All ER 193 (HC, Queen's Bench Division, 4 June 1990).

Stoke-on-Trent & Norwich [1991] Ch. 48 (HC, Chancery Division, 18 July 1990).

R v Minister of Agriculture, Fisheries and Food, ex parte Roberts [1991] 1 C.M.L.R. 555 (HC, Queen's Bench Division, 11 November 1990).

R v Secretary of State for the Home Department, ex parte Cox, *The Independent*, 8 October 1991.

R v Secretary of State for the Environment, ex parte National and Local Government Officers' Association [1992] 5 Admin.L.R. 785 (HC, Queen's Bench Division, 20 December 1991).

R v International Stock Exchange of the UK and the Republic of Ireland Ltd [1993] B.C.C. 11 (HC, Queen's Bench Division, 20 July 1992).

Customs and Excise Commissioners v Peninsular and Oriental Steam Navigation Co [1992] STC 809 (HC, Divisional Court, 30 September 1992).

R v Eastbourne Magistrates' Court, ex parte Hall, (HC, Queen's Bench) CO/2026/92.

R v Manchester Metropolitan University, ex parte Nolan, (HC, Queen's Bench Division, 15 July 1993), unreported.

R v Chief Constable of Kent and another, ex parte Absalom, (HC, Queen's Bench Division, 6 May 1993), unreported.

R v Highbury Corner Magistrates' Court, ex parte Uchendu, 158 JP 409 (HC, Queen's Bench Division, 12 January 1994).

R v Secretary of State for the Home Department, ex parte Adams [1995] All ER (EC) 177 (HC, Queen's Bench Division, 26 July 1994).

R v Secretary of State for the Home Department, ex parte McQuillan [1995] 4 All ER 400 (HC, Queen's Bench, 9 September 1994).

R v Ministry of Agriculture, Fisheries and Food, ex parte Hamble Fisheries [1995] 1 C.M.L.R. 533 (HC, Queen's Bench Division, 3 November 1994).

R v Ministry of Agriculture, Fisheries and Food and Another, ex parte First City Trading [1997] 1 C.M.L.R. 250 (HC, Queen's Bench Division, 29 November 1996).

R v Lord Chancellor, ex parte Witham [1998] 2 W.L.R. 849 (HC, Queen's Bench Division, 7 March 1997).

Chesterfield Properties Plc v Secretary of State for the Environment [1998] 76 P. & C.R. 117 (HC, Queen's Bench Division, 24 July 1997).

R v Secretary of State for the Home Department, ex parte Arthur H Cox Ltd, [1999] EuLR 677 (HC, Queen's Bench Division, 14 December 1998).

R v Secretary of State for the Home Department, ex parte Samaroo [2000] EWHC Admin 435 (HC, Queen's Bench Division, 20 December 2000).

R. v Secretary of State for Health, ex parte Rose [2003] A.C.D. 6 (HC, Queen's Bench Division, 26 July 2002).

R v The Parole Board for England and Wales, ex parte Wells; *R v The Secretary of State for the Home Department, ex parte Walker* [2007] EWHC 1835 (HC, Queen's Bench Division, 31 July 2007).

R v Secretary of State for Justice, *ex parte Conway* [2017] EWHC 2447 (HC, 5 October 2017).

GREECE

Anotato Eidiko Dikastirio (Supreme Special Court)

AED 36/1990 ⊿/*NH* 1993, 552.

Areios Pagos (Supreme Civil Court)

AP (Pl.) 53/1983 *NOB* 1983, 1370.

AP (Pl.) 1104/1986 *NOB* 1987, 759.

AP 1094/1987 ⊿*EN* 1988, 412.

AP 1067/1996 NOB 1997, 480.

AP (Pl.) 40/1998 *APM* 1999, 46.

AP (Pl.) 13/1999 *Ελλ⊿νη* 1999, 753.

AP (Pl.) 17/1999 ⊿/*NH* 1999, 1288.

AP 445/1999 *EEN* 2000, 534.

AP 451/1999 *NOMOS*.

AP (Pl.) 20/2000 *TNIL⊿ΣA*.

AP 254/2000 *EEMIL⊿* 2000, 712.

AP 1215/2000 *EEMIL⊿* 2002, 369.

AP 1597/2000 ⊿/*NH* 2001, 1304.

AP (Pl.) 14/2001 *ΠOIN⊿/NH* 2001, 832.

AP (Pl.) 15/2001 *ΠOINXP* 2001, 798.

AP (Pl.) 16/2001 *NOB* 2002, 411.

AP (Pl.) 10/2003 *Ελλ⊿νη* 2003, 406.

AP (Pl.) 26/2003 *Ελλ⊿νη* 2003, 1263.

AP 132/2006 *NoB* 2006, 825.

AP 6/2009 *NoB* 2009, 1162.

AP (Pl.) 5/2013 *TNIL⊿ΣA*.

Symvoulio tis Epikrateias (Council of State)

StE (Pl.) 300/36 *ΤΝΠΔΣΑ*.

StE (Pl.) 2952/1975 *ΤοΣ* 1976, 345.

StE (Pl.) 58/1977 *EEN* 1977, 580.

StE (Pl.) 1303/1977 *ΤΝΠΔΣΑ*.

StE 630/1979 *ΤοΣ* 1980, 153.

StE (Pl.) 4036/1979 *APM* 1980, 327.

StE (Pl.) 2112/1984 *ΤοΣ* 1985, 63.

StE 2261/1984 *ΘΕ ΣΤΕ* 110/1984, paras 107; 179-180.

StE 400/1986 *APM* 1987, 430.

StE 3682/1986 *ΘΕ ΣΤΕ* 1986, paras 292 f.

StE 257/1987 *ΘΕ ΣΤΕ* 16/1987, paras 10 f.

StE 1149/1988 *ΤοΣ* 1988, 324

StE 2173/1988 *ΘΕ ΣΤΕ* 11/1988, paras 3-4; 16 f.

StE (Pl.) 2376/1988 *APM* 1989, 1034.

StE 1426/1989 *APM* 1989, 810.

StE 2153/1989 *APM* 1990, 382.

StE 2775/1989 *APXN* 1990, 281.

StE 4050-1/1990 *ΔΔΙΚΗ* 1991, 566.

StE 3705/1992 *ΤΝΠΔΣΑ*.

StE 53/1993 *ΤΝΠΔΣΑ*.

StE 268/1993 *APM* 1993, 180.

StE 392/1993 *ΤοΣ* 1994, 150.

StE (Pl.) 413/1993 *ΔΙ/ΝΗ* 1993, 443.

StE 1540/1994 *ΤΝΠΔΣΑ*.

StE (Pl.) 1821/1995 *ΤοΣ* 1996, 263.

StE (Pl.) 2537/1996 *ΤΝΠΔΣΑ*.

StE 4335/1996 *ΤΝΠΔΣΑ*.

StE (Pl.) 5116/1996 *ΔΔΙΚΗ* 1998, 252.

StE (Pl.) 1918/1998 *NOMOS*.

StE (Pl.) 4027/1998 *ΔΙΦΟΡΝΟΜΟΘ* 1999, 931.

StE (Pl.) 542/1999 *ΤΝΠΔΣΑ*.

StE 2245/1999 *ΔΔΙΙΚΗ* 2000, 458.

StE 3739/1999 *ΝοΒ* 2000, 1323.

StE 1926/2000 *Ελλδνη* 2002, 1191.

StE (Pl.) 1910/2001 *ΑΡΧΝ*/2001, 690.

StE (Pl.) 2281/2001 *ΔΔΙΙΚΗ* 2001, 959.

StE (Pl.) 613/2002 *ΝοΒ* 2002, 1972.

StE 1006/2002 *ΔΕΕ* 2003, 1229.

StE 1065/2002 *Ελλδνη* 2003, 1073.

StE 1624/2002 *ΕΔΚΑ* 2002, 343.

StE 398/2003 *ΤΝΠΔΣΑ*.

StE 1129/2003 *Ελλδνη* 2004, 1202.

StE (Pl.) 1528/2003, *ΝοΒ* 2003, 1346.

StE (Pl.) 990/2004, *ΕΔΚΑ* 2004, 585.

StE 2110/2003 *ΕΔΔΔΙ* 2004, 89.

StE 2820/2004 *ΔΔΙΙΚΗ* 2005, 229.

StE 3242/2004 *ΝοΒ* 2005, 1878.

StE (Pl.) 3665/2005 *ΕΔΚΑ* 2006, 59.

StE 4182/2005 *ΔΔΙΙΚΗ* 2005, 970.

StE (Pl.) 3670/2006 *ΕΔΔΔΙ* 2009, 461.

StE (Pl.) 3177/2007 *ΔΙΦΟΡΝΟΜΟΘ* 2008, 1214.

StE (Pl.) 250/2008 *ΕΔΔΔΙ* 2008, 407.

StE 1501/2008 *ΕΔΚΑ* 2009, 60.

StE (Pl.) 3031/2008 *ΕΔΔΔΙ* 2009, 71.

StE 796/2009 *ΤΝΠΔΣΑ*.

StE 956/2009 *ΤΝΠΔΣΑ*.

StE 1249/2010 *ΝοΒ* 2010, 390.

StE 2067/2011, *NoB* 2011, 1952.

StE (Pl.) 3470-1/2011 *E⊿⊿⊔* 2012, 199.

StE (Pl.) 668/2012 *NoB* 2012, 384.

StE (Pl.) 1617/2012 *E⊿⊔⊿* 2012, 632.

StE (Pl.) 1621/2012 *E⊿⊔⊿* 2012, 2143.

StE (Pl.) 4202/2012 *E⊿⊔⊿* 2013, 505.

StE (Pl.) 460/2013 *E⊿⊔⊿* 2013, 121, 445.

StE (Pl.) 1685/2013 *E⊿⊔⊿* 2013, 391.

StE (Pl.) 2192/2014, *TNΠ⊔ΣA*.

StE (Pl.) 4741/2014 *E⊿⊔⊿* 2015, 170.

StE (Pl.) 1741/2015, *NoB* 2015, 1065.

StE (Pl.) 2287/2015 *APM* 2015, 1371.

Elegktiko Synedrio (Court of Audit)

ES (Pl.) 737/1989 *⊿⊔IKH* 1990, 1458.

ES 28/1994 *⊿EN* 1994, 439.

ES 1376/2002 *APXN* 2003, 593.

ES (Pl.) 4327/2014 *APM* 2015, 1194.

Lower courts

MPrAth 10517/1979 *NOMOS* (Athens Court of First Instance, interlocutory injunction).

EfThess 849/1983 *APM* 1984, 406 (Thessaloniki Court of Appeal).

DPrAth 6056/1987 *E⊔KA* 1988, 58 (Athens Administrative Court of First Instance).

DEfAth 3057/1988 *E⊔KA* 1988, 728 (Athens Administrative Court of Appeal).

DPrThes 18/1989 *E⊔KA* 2000, 44 (Thessaloniki Administrative Court of First Instance).

DEfAth 2313/1989 *⊿ΦOPNOMOΘ* 1989, 914 (Athens Administrative Court of Appeal).

DStrThess 772/1989 *APM* 1989, 1254 (Administrative Military Court of Thessaloniki).

EfAth 5025/1990 *⊿/NH* 1992, 193 (Athens Court of Appeal).

DEfAth 1440/1990 ΔΔΙΚΗ 1990, 1352 (Athens Administrative Court of Appeal).

Anakr Tripoli 12/1991 ΠΟΙΝΧΡ 1991, 932 (Tripoli instruction judge).

MPrAth 458/1991 Ελλδνη 1991, 628 (Athens Court of First Instance).

MPrAth 3308/1992 ΔΕΝ 1993, 594 (Athens Court of First Instance).

MPrAth 3646/1992 ΑΡΜ 1994, 561 (Athens Court of First Instance).

EfAth 1/92 ΕΕΔ 1992, 840 (Athens Court of Appeal).

SymbPlim Mesolongi 2/1992 ΥΠΕΡΑΣΠΙΣΗ 1992, 140 (Mesolongi Correctional Court in Council).

DPrAth 5/1992 ΔΔΙΚΗ 1993, 194 (Athens Administrative Court of First Instance).

DPrAth 5/1993 ΔΔΙΚΗ 1993, 447 (Athens Administrative Court of First Instance).

DStrThess 482/1993 ΑΡΜ 1993, 1166 (Administrative Military Court of Thessaloniki).

DPrThess 921/1995 ΔΔΙΚΗ 1995, 730 (Thessaloniki Administrative Court of First Instance).

DEfAth 219/1996 ΔΦΟΡΝΟΜΟΘ 1997, 891 (Athens Administrative Court of Appeal).

EfAth 6903/1997 ΑΡΜ 1997, 1393 (Athens Court of Appeal).

EfPeir 1410/1997 ΤΝΠΔΣΑ (Piraeus Court of Appeal).

DPrAth 6628/1997 ΕΔΚΑ 1997, 642 (Athens Administrative Court of First Instance).

EfAth 5846/1998 Δ/ΝΗ 1999, 1372 (Athens Court of Appeal).

EfAth 7029/1998, ΔΕΕ 1999, 75 (Athens Court of Appeal).

EfLar 1345/1999, ΔΙΚΟΓΡΑΦΙΑ 2000, 133 (Larissa Court of Appeal).

EfAth 7028/1999 ΔΕΕ 1999, 75 (Athens Court of Appeal).

DPrHer 367/1999 ΔΕΕ 2000, 217 (Herakleion Administrative Court of First Instance).

DEfAth 1/2000 ΔΦΟΡΝΟΜΟΘ 2000, 707 (Athens Administrative Court of Appeal).

EfAth 630/2001 Ελλδνη 2001, 1370 (Athens Court of Appeal).

DPrAth 7287/2001 ΔΔΙΚΗ 2002, 736 (Athens Administrative Court of First Instance).

COURT OF JUSTICE OF THE EUROPEAN UNION

ECJ, C-8/55, 26 November 1956, *Fédération Charbonnière de Belgique c. Haute Autorité de la Communauté européenne du charbon et de l'acier*, ECLI:EU:C:1956:11.

ECJ, C-11/70, 17 December 1970, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114.

ECJ, C-8/74, 11 July 1974, *Dassonville*, ECLI:EU:C:1974:82.

ECJ, C-41-74, 4 December 1974, *Van Duyn*, ECLI:EU:C:1974:133.

ECJ, C-36/75, 28 October 1975, *Rutili v French Minister of the Interior*, ECLI:EU:C:1975:137.

ECJ, C-4/73, *Nold*, 11 January 1977, ECLI:EU:C:1975:114.

ECJ, C-114/76, 5 July 1977, *Bela-Mühle*, ECLI:EU:C:1977:116.

ECJ, C-120/78, 20 February 1979, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42 [*Cassis de Dijon*].

ECJ, C-34/79, 14 December 1979, *Henn and Darby*, ECLI:EU:C:1979:295.

ECJ, C-238/82, 7 February 1984, *Duphar*, ECLI:EU:C:1984:45.

ECJ, C-72/83, 10 July 1984, *Campus Oil*, ECLI:EU:C:1984:256.

ECJ, C-121/85, 11 March 1986, *Conegate*, ECLI:EU:C:1986:114.

ECJ, C-265/87, 11 July 1989, *Hermann Schröder EIS Kraftfutter GmbH & Co KG* v *Hauptzollamt Gronau*, ECLI:EU:C:1989:303.

ECJ, C-5/88, 13 July 1989, *Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, ECLI:EU:C:1989:321.

ECJ, C-68/88, 21 September 1989, *Commission v Greece,* ECLI:EU:C:1989:339.

ECJ, C-145/88, 23 November 1989, *Torfaen Borough Council v. B. & Q. Plc.* [1990] 2 Q.B. 19, ECLI:EU:C:1989:593.

TPI, T-51/89, 10 July 1990, *Tetra Pak Rausing SA*, ECLI:EU:T:1990:41.

ECJ, C-331/88, 13 November 1990, *Fedesa*, ECLI:EU:C:1990:391.

ECJ, C-312/89, 28 February 1991, *Union Départementale des Syndicats C.G.T. de l'Aisne v. SIDEF Conforama*, ECLI:EU:C:1991:93.

ECJ, C-332/89, 28 February 1991, *André Marchandise, Jean-Marie Chapuis and SA Trafitex*, ECLI:EU:C:1991:94.

ECJ, C-260/89, 18 June 1991, *ERT*, ECLI:EU:C:1991:254.

ECJ, Joint Cases 1-90, 176-90, 25 July 1991, *Aragonesa,* ECLI:EU:C:1991:327.

ECJ, C-169/91, 16 December 1992, *Council of the City of Stoke-on-Trent and Norwich City Council v B & Q plc*, ECLI:EU:C:1992:519.

ECJ, C-275/92, 24 March 1994, *Schindler*, ECLI:EU:C:1994:119.

ECJ, C-280/93, 5 October 1994, *Germany v Council [Bananas case],* ECLI:EU:C:1994:367.

ECJ, C-55/94, 30 November 1995, *Gebhard*, ECLI:EU:C:1995:411.

ECJ, C-415/93, 15 December 1995, *Bosman*, ECLI:EU:C:1995:463.

ECJ, C-212/97, 9 March 1999, *Centros*, ECLI:EU:C:1999:126.

ECJ, C-274/99, 6 March 2001, *Connolly v Commission*, ECLI:EU:C:2001:127.

ECJ, C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, 25 October 2001, *Finalarte,* ECLI:EU:C:2001:564.

ECJ, C-208/00, 5 November 2002, *Überseering*, ECLI:EU:C:2002:632.

ECJ, C-100/01, 26 November 2002, *Oteiza Olazabal,* ECLI:EU:C:2002:712.

ECJ, C-491/01, 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*, ECLI:EU:C:2002:741.

ECJ, C-112/00, 12 June 2003, *Schmidberger,* ECLI:EU:C:2003:333.

ECJ, C-243/01, 6 November 2003, *Piergiorgio Gambelli and Others*, ECLI:EU:C:2003:597.

ECJ, C-270/02, 5 February 2004, *Commission v. Italy*, ECLI:EU:C:2004:78.

ECJ, C-442/02, 5 October 2004, *Caixa-Bank France,* ECLI:EU:C:2004:586.

ECJ, C-36/02, 14 October 2004, *Omega*, ECLI:EU:C:2004:614.

ECJ, C-41/02, 2 December 2004, *Commission v. Netherlands*, ECLI:EU:C:2004:762.

ECJ, C-109/04, 17 March 2005, *Kranemann*, ECLI:EU:C:2005:187.

ECJ, C-140/03, 21 April 2005, *Commission v Greece*, ECLI:EU:C:2005:242.

ECJ, C-540/03, 27 June 2006, *European Parliament v Council*, ECLI:EU:C:2006:429.

ECJ, C-244/06, 14 February 2008, *Dynamic Medien*, ECLI:EU:C:2008:85.

ECJ, C-353/06, 14 October 2008, *Grunkin Paul*, ECLI:EU:C:2008:559.

ECJ, C-213/07, 16 December 2008, *Michaniki*, ECLI:EU:C:2008:731.

ECJ, C-438/05, 11 December 2007, *Viking Line*, ECLI:EU:C:2007:772.

ECJ, C-341/05, 18 December 2007, *Laval*, ECLI:EU:C:2007:809.

ECJ, C-171/07 and C-172/07, 19 May 2009, *Apothekerkammer des Saarlandes*, ECLI:EU:C:2007:311.

ECJ, C-42/07, 8 September 2009, *Liga Portuguesa*, ECLI:EU:C:2009:519.

ECJ, C-135/08, 2 March 2010, *Rottmann*, ECLI:EU:C:2010:104.

ECJ, C-570/07 and C-571/07, 1 June 2010, *José Manuel Blanco Pérez,* ECLI:EU:C:2010:300.

ECJ, C-81/09, 21 October 2010, *Idrima Tipou AE*, ECLI:EU:C:2010:622.

ECJ, C-92/09 and C-93/09, 9 November 2010, *Schecke*, ECLI:EU:C:2010:662.

ECJ, C-279/09, 22 December 2010, *DEB Deutsche Energiehandels v Germany*, ECLI:EU:C:2010:811.

ECJ, C-283/11, 22 January 2013, *Sky Österreich GmbH*, ECLI:EU:C:2013:28.

ECJ, C-291/12, 17 October 2013, *Schwarz*, ECLI:EU:C:2013:670.

ECJ, C-639/11, 20 March 2014, *Commission v Poland*, ECLI:EU:C:2014:173.

ECJ, C-293/12, 8 April 2014, *Digital Rights Ireland Ltd*, ECLI:EU:C:2014:238.

ECJ, C-528/13, 29 April 2015, *Léger,* ECLI:EU:C:2015:288.

EUROPEAN COURT OF HUMAN RIGHTS

ECtHR, *Wemhoff v Germany*, 27 June 1968, no. 2122/64.

ECtHR, *Golder v UK*, 21 February 1975, no. 4451/70.

ECtHR, *Handyside v The UK*, 7 December 1976, no. 5493/72.

ECtHR, *Tyrer v UK,* 25 April 1978, no. 5856/72.

ECtHR, *The Sunday Times v The UK,* 26 April 1979, no. 6538/74.

ECtHR, *Marckx v Belgium*, 13 June 1979, no. 6833/74.

ECtHR, *Dudgeon v UK*, 22 October 1981, no. 7525/76.

ECtHR, *Malone v The UK,* 2 August 1984, no. 8691/79.

ECtHR, *X and Y v the Netherlands*, 26 March 1985, no. 8978/80.

ECtHR, *Bozano v France*, 18 December 1986, no. 9990/82.

ECtHR, *Gaskin v UK,* 7 July 1989, no. 10454/83.

ECtHR, *Powell and Rayner v UK*, 21 February 1990, no. 9310/81.

ECtHR, *Darby v Sweden*, 23 October 1990, no. 11581/85.

ECtHR, *Vilvarajah v The UK*, 30 October 1991, nos. 13163/87, 13164/87, 13165/87, 13447/87, and 13448/87.

ECtHR, *Philis v Greece*, 27 August 1991, nos. 12750/87, 13780/88, and 14003/88.

ECtHR, *Observer and Guardian v The UK,* 26 November 1991, no. 13585/88.

ECtHR, *Campbell v The UK*, 25 March 1992, no. 13590/88.

ECtHR, *Open Door and Dublin Well Woman v Ireland*, 29 October 1992, no. 14234/88.

ECtHR, *Kokkinakis v Greece,* 25 May 1993, no. 14307/88.

ECtHR, *Manoussakis and others v Greece*, 26 September 1996, no. 18748/91.

ECtHR, *Hornsby vs. Greece*, 19 March 1997, no. 18357/91.

ECtHR, *Sidiropoulos and Others v Greece*, 10 July 1998, no. 26695/95.

ECtHR, *McLeod v The UK*, 23 September 1998, no. 24755/94.

ECtHR, *Chassagnou v France*, 29 April 1999, nos. 25088/94, 28331/95, and 28443/95.

ECtHR, *Smith & Grady v The UK*, 27 September 1999, nos. 33985/96 and 33986/96 [2000] 29 EHRR 493.

ECtHR, *Kress v France*, 7 June 2001, no. 39594/98.

ECtHR, *Association Ekin v France*, 17 October 2001, no. 39288/98.

ECtHR, *Leyla Şahin v Turkey,* 10 November 2005, no. 44774/98.

ECtHR, *Zielinski, Pradal, Gonzalez and others v France*, 28 October 1999, nos. 24846/94, 34165/96 - 34173/96.

ECtHR, *Maurice v France,* 6 October 2005, no. 11810/03.

ECtHR, *Mamidakis v Greece*, 11 January 2007, no. 35533/04.

ECtHR, *Tourkiki Enosi Xanthis v Greece*, 27 March 2008, no. 26698/05.

ECtHR, *S. and Marper v the United Kingdom*, 4 December 2008, nos. 30562/04 and 30566/04.

ECtHR, *M.S.S. v Belgium and Greece*, 21 January 2011, no. 30696/09.

ECtHR, *Harroudj v France,* 4 October 2012, no. 43631/09.

ECtHR, *Koufaki and ADEDY v Greece*, 7 May 2013, nos. 57665/12 and 57657/12.

ECtHR, *SAS v France*, 1 July 2014, no. 43835/11.

ECtHR, *Kapetanios and others v Greece*, 30 April 2015, nos. 3453/12, 42941/12, and 9028/13.

ECtHR, *Henrioud c. France,* 5 November 2015, no. 21444/11.

ECtHR, *Magyar Helsinki Bizottság v Hungary*, 8 November 2016, no. 18030/11.

GERMAN FEDERAL CONSTITUTIONAL COURT

GFCC, *Southwest State* (1951), 1 BVerfGE 14.

GFCC, (1954), 3 BVerfGE, 383.

GFCC, *Lüth* (1958), 7 BVerfGE 198.

GFCC, *Pharmacy* (1958), 7 BVerfGE 377.

GFCC, (1965), 19 BVerfGE 342.

GFCC, *Mephisto* (1971), 30 BVerfGE 173.

GFCC, *Lebach* (1973), 35 BVerfGE 202.

GFCC, *Abortion I* (1975), 39 BVerfGE 1.

GFCC, *Codetermination* (1979), 50 BVerfGE 290.

GFCC, *Aviation Security Act* (2006), 59 BVerfGE 751.

ANALYTICAL TABLE OF CONTENTS