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ON HISTORICAL AND THEORETICAL ORIGINS OF THE PROPORTIONALITY PRINCIPLE

- A contribution towards a prospective comprehensive debate on proportionality -

1. Conceptual aspects of proportionality in general

During the second half of the XXth century, the proportionality principle gradually emerged as an omnipresent and important instrument of judicial interpretation, in all sorts of contexts. In legal and political science, the term proportionality had traditionally been linked with quite different concepts, such as the proportional as opposed to the majoritarian electoral model.

The core meaning of proportionality[1], developed mainly in mathematics and aesthetics, provides the basics of the concept of proportionality as a political and juridical principle as well. Proportionality is an attribute, a characteristic of a part with respect to the other parts or to the whole. It always involves a *relation* between two or more variables. This relation can be of convenience, logic or measure (Delpérée, 503).

Proportionality is a long-standing doctrine of criminal and, to a certain extent, public international law. In the former, the proportionality of a sanction to the gravity of the wrong comitted represents one of the pillars of modern criminal justice. In international law, the response of a state to illicit acts or to the breach of contractual obligations by another state must be proportionate to the initial unlawful act. Even though they are closely related concepts, a line is drawn, however subtle, between necessity and proportionality (d"Amato, at 8, 216 and 236). In both areas, proportionality is conceived as a *proper* relationship between an act and the reaction triggered thereby.

The principle of proportionality as a legal standard, enforceable by the courts in the process of review of state action, is associated with German law at the turn of XXth century. The Prussian administrative courts used the principle as a criterion for determining the validity of police measures, checking whether discretionary powers were exercised in a manner excessively restrictive to the freedom of the private citizen. At the same time, French administrative courts, although without using expressly the term proportionality, employed a similar technique of control of administrative action, in a narrowly defined type of cases involving rights and liberties of citizens. British courts reviewed administrative

[1] Proportion: 1.harmonious relation of parts to each other or to the whole (balance, symmetry); 2.proper or equal share; 3.the relation of a part to another or to the whole with respect to magnitude, quantity or degree (ratio) and 4.size, dimension. *Webster,s Dictionary (10th ed.), 1993, 936.*

decisions for gross, outrageous errors via the common law developed notion of unreasonableness.

Since 1960"s the proportionality principle has been playing an interesting role in constitutional and administrative law in Europe. The European Court of Justice and the Strasbourg Court of Human Rights began to develop the principle as a criterion for assessment of public authorities acts, especially those affecting human rights. Besides European law influences, several other factors contributed to the rapid penetration of the principle in some legal systems. Constitutional review became more a rule than an exception in post-war Europe. It has been considered very important and elaborated in detail in countries that have experienced totalitarian or authoritarian regimes, such as Germany, Italy and Spain. The rise of the rights agenda during the sixties also led to the search of methods of effective and principled implementation of constitutional guarantees of rights and liberties of the individual. The decline of the liberal and the emergence of a welfare, regulatory state that began to interfere with many spheres of social life raised the awareness of the need for controlling the ever expanding discretionary administrative powers.

2. Historical and theoretical background of the proportionality principle

Proportion, conceived as a perfect balance between the parts themselves or in relation to the whole, had been, of course, an aesthetic ideal and a category in mathematics long before it entered into the vocabulary of politics, ethics or law. Beyond doubt, perfect balance itself is an open-ended concept which varies according to the initial standpoint of the analysis. As a principle of law, proportionality has been researched primarily on phenomenological level (situations it applies on and the content given by the courts) and in regard to the consequences that it may produce on mutual relationships between the three branches of government. Except for occasional and literary one sentence references to Aristotle and liberalism,[2] theoretical underpinnings of proportionality as legal category remain surprisingly ignored. The initial theoretical framework is actually very broad and goes as far as the basic problems of political and legal philosophy. The first set of problems relates to the ends of public power, its limits and appropriate control mechanisms. The second reflects the tensions inherent in modern law`s effort to pursue simultaneously values such as justice, common good, liberty and equality. We shall refer to some major intellectual influences that the proportionality principle can be traced back to.

[2] Two main schools of thought have shaped the historical development of the principle since its inception – the principle of retributive and distributive justice on one hand and, on the other, the notion of liberal state that encompasses the requirement that the law must serve a defined, rational and useful purpose. Schwartze, 678-9. The same author mentions also the contribution of Ihering and his analysis of the "result element which is inherent in law".

2.1.Aristotle: distributive justice and the measure as a main ethical principle

Distributive justice is equality as a proportion, a geometrical one. According to Aristotle, justice is always a proportion, a relationship that includes at least two persons and two things. Distributive justice means allocations of goods or honors in proportion to a certain value, i.e. according to the "merit and the dignity" of the recipient[3]. This principle is then translated in the well known definition of non-discrimination – equal treatment for equals and different treatment for different people. The main problem, in antic Greece as much as today, remains the value, the characteristic in proportion to which the benefits are allocated i.e. the criterion for equality requiring equal treatment. In Aristotle`s time, the three main views on the merits that justify different treatment were the personal freedom for democracy, wealth for the proponents of oligarchy and birth, skills and personal worth in general for aristocrats. In modern terms, the allocation of benefits according to certain merits should be coupled by allocation of burdens on the basis of some previously determined, objective criterion as well. Distributive justice, from the same modern perspective, is more of a public sphere concept[4], although the *polis* itself knew little, if anything, about such a distinction.

The Aristotle`s *Nicomachean Ethics* provides us with valuable insights on his moral philosophy that also revolves around the *sense of a measure or adequate proportion* as the fundamental ethical principle. Aristotle builds upon the old helenic ideals of harmony, balance and *kalos meros*, regarded as cosmic, social and human nature. The main virtue in both personal life and social organization is *moderation*, situated by Aristotle somewhere in the middle between the excessive and insufficient. The right measure is to be determined by the human reason, under the condition of the agent`s freedom in the making of a decision. The proper attitude, which is always the avoidance of the extremes is the essential prerequisite of a human life in accordance with moral virtue.

2.2. *Rationality and fairness in medieval thought*

In the high Middle Ages and later, during the Renaissance and Reformation, the two main schools of thought on the nature and purpose of law began to take clear shapes. The first school derived the source of human obligation to the law from the God`s will, independent from any compliance with nature or any other objective reason. God`s will was binding simply because it was his will. From

[3] Distributive justice is "that which is exercised in the distribution of honor, wealth and some other divisible assets of the community, which may be allotted among its members in equal and unequal shares". Aristotel, *Nikomahova etika*, V, 11,12, Beograd, 1958.

[4] It relates to the relationship between the individual and the public power and the manner in which that public power regulates the relationships among individuals themselves.

here to the secular positivism where the state`s will is the law regardless of the content of the later had been only but a small step.

The natural law strand, associated primarily with St.Thomas Aquinas linked human (state) law with the law of God and nature. The purpose of such law is common good and human law has the quality of law only in so far as it proceeds according to right reason. The validity of the law is intrinsically linked with its quality of being just. In Aquinas words, law is nothing else but "rational ordering of things which concern common good, promulgated by whomever is in charge with the care of community" (St.Thomas Aquinas, 1a 2ae 90:4). In so far as law deviates from reason it is called an unjust law and has the quality of not law but of violence (*Id*, 1a 2ae 93:3). Aquinas sets forth three principles or tests of justice of laws and therefore, the validity thereof. Just laws are to be appraised according to their object (whether they are directed towards common welfare), their author, that is, are they within the powers of those who enacted them and with respect to their form, when the burdens they impose on citizens are distributed in such proportions as to promote the common welfare. On the contrary, unjust laws are those aimed not at common good, but to the ruler`s own "cupidity and vainglory", laws that exceed the powers vested in the ruler and, finally, laws, that, although they are directed towards common welfare, *distribute the burdens in an inequitable manner throughout the community* (emphasis added) (*Id*, 1a 2ae 96:4).

While most of the XVI century Europe saw the law in imperative terms of prohibition and command, the presence of the traditional requirements for valid law in sense of conformity with God and nature was still felt. Relying directly on St.Thomas Aquinas, an Englishman, Christopher St.German states the criteria for legislative justice in the following terms:

> A human law is called just, by the standard of its end, its author and its form (*ex fine, ex authore* and *ex forma*). Its end when it is designated for common good. Its author: when it does not exceed the powers of him who enacts it. Its form when its burdens are laid upon the subjects in due proportion, with the common good in view. And if its burdens are laid upon the people in an unfair, even if its purpose be the common good, it does not bind him in conscience[5].

The XVII century Glorious Revolution in England finally did mark the beginning of the modern age and the birth of a new legal and political theory. The fundamental categories that these theories had been built upon were democratic basis of political authority, the fundamental and inalienable rights of man and the rule of law principle.

2.3. *Locke`s ideas on the governance limited by its ends*

The core of the Lockeian theory, the one that became the intellectual background of modern liberalism and individualism,

[5] Christopher St.German (*c*. 1460-1540), *Doctor and Student*, 4,12 cit. according to Kelly, 184.

relates to its concept of government as a "trust for the public good". This express or tacit trust should be employed for the good of the citizens and the preservation of their property. The government itself is limited by these ends it is created to promote and protect. Within government, the legislative enjoys supreme power, but supremacy can not be equaled with arbitrariness. If the legislature abuses the power or uses it for ends other than public good and protection of natural rights of man, the people retain their right to rescind the original trust[6]. Of course, Locke perceives the sanctions against government for arbitrariness or failure to promote public good in political rather than legal terms, including the right of rebellion against such government. Still, the Lockeian concept of government under the law and for the common good has served as an inspiration for the contemporary substantive theories on the rule of law, arguing about substantive, not only formal limitations on public authority.

2.4. *Proportionality in German legal thought*

While Kant and other liberal thinkers of the early XIX century did make a connection between the *Rechtstaat* and substantive values, such as justice, the prevalent concept of law and state in Germany has been the principle of formal *Rechstaat*. State action should be governed by previously enacted, clear and enforceable rules, regardless of their content. The liberal version, espoused by Robert von Mohl which emphasizes the limitation of public power through guarantees of individual liberties was still present, but significantly overshadowed by the more conservative, formalistic one which is associated with Stahl. The later conceived the law as a means for rational organization of the State and orderly relations with the citizens rather than a means for restraining such power.

Deliberating upon specific administrative law issues, especially the limits of police powers, German authors have discussed necessity and proportionality as early as 1930. Otto Mayer argued for the use of mildest possible means for the maintenance of public order by the police. In the context of proper exercise of public powers, Walter Jelinek has introduced the concept of excess (Ü*bermaβ*), inaptitude (*Ungeeignetheit*), insufficiency (*Unzulanglichkeit*) and noxiousness (*Schädlichkeit*)[7]. Jelinek was also among those who, even during the Weimar Republic, criticized the purely formalistic understanding of the *Rechtstaat*, claiming that "substantive limits on the legislative power did in fact exist" (Nolte, 201).

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[6] One of the ways that the government is dissolved is when: "*The Legislative Acts against the Trust* reposed in them, when they endeavor to invade the Property of the Subject and to make themselves or any part of the Community, Masters or Arbitrary Disposers of the Lives, Liberties or Fortunes of the People". Locke, ch.XIX, § 221.

[7] Oto Mayer, *Deutsches verwaltungsrecht*, 3rd ed.,1925, t.1. p.222; Walter Jelinek, *Verwaltungsrecht*, 3rd ed. 191, p.440), cit. in Fromont, 157.

3. *Human rights protection and proportionality*

The post-World War II rights culture has been the main vehicle for the reemergence of proportionality, now as a legally enforceable standard in the process of the exercise and the control of public power. The experiences from the Nazism, as well as internal factors pushing towards reconstruction of the polity in the direction of a more meaningful democracy, raised the awareness about the need for safeguarding an area of individual autonomy and providing for conditions for human self-realization, embodied in what was later called the first generation of human rights. The UN Universal Declaration of Rights represented a model and a source of inspiration for, at minimum, the then western democracies.

At that time, many high courts confronted similar problems. Firstly, in interpreting and applying constitutional guarantees of rights, in countries where the later were provided for, they found themselves in a need for more elaborate interpretative tools for supplying a precise normative content of solemn and rather general provisions on human life, liberty and dignity. Normally, the reshaping of already existing and the creation of new interpretative methods were largely influenced by the prevalent political philosophy of liberalism. Second, in reviewing government actions, courts also did encounter various lacunae, both in technical and axiological sense, which had to be dealt with.

The *Bundesverfassungsgericht* at the end of the 1950's[8] and the European Court of Justice in the beginning of the 1970's[9], simultaneously with the initial appearance of the principle in their respective case laws, did emphasize the link between proportionality and the human rights protection. In the BVG's words, "this principle, [...] follows from the nature of fundamental rights .. which the state may limit only to the extent necessary for the protection of public interests"[10]. The ECJ has used one general principle of law (proportionality) to give life and meaning to another such principle ("human rights as a part of the general principles of law").[11] The other pan-European Court, the ECHR has established perhaps the closest connection between human rights and necessity/proportionality of restrictions thereupon motivated by considerations of common good, including the coexistence of competing individual rights.

The welfare state in Western Europe might also have been an indirect incentive for the development of concepts such as proportionality. Under the welfare state new economic and social rights gained in importance. On the other hand, the welfare state has often been described as administrative or regulatory state that takes

[8] *Apotheke-Urteil*, 7 BVerfGE 377 (1958).
[9] Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfur-und Vorratsstelle fur getreide and futtermittel*, [1970] ECR 1125.
[10] *Census Act Case*, 65 BVerGE 1 (1983).
[11] "[…] the fundamental rights enshrined in the general principles of Community law and protected by the Court." Case 29/69 *Stauder v City of Ulm, Sozialamt*, [1969] ECR 419.

action in spheres traditionally regarded as insulated from public interference. The expanding state agenda has as a corollary a fast growing power of the administration, defined often solely by the goals and the methods are left at the choice of the administrators. The relationship of the means to the ends and the avoidance of gross incompatibility between them in particular, has thus became an important issue of democratic but also an efficient governance.

At present, the link between human rights protection and the principle of proportionality is very much under scrutiny in countries where some fundamental aspects of the rights protection mechanisms, such as the adoption of a Bill of Rights or the incorporation of the ECHR are still a matter of an ongoing debate. Stressing the difference between the traditional English doctrine of unreasonableness and proportionality, some commentators make a strong argument that "[…] only a doctrine of proportionality can give proper protection of human rights" (Singh, 40). Similarly, the French, whose long-standing political tradition of civil rights is accompanied by a relatively recent constitutional adjudication in this area, often focus on the principle's role as a moderator of public power which should not restrict individual rights more than strictly necessary for the attainment of general interest[12]. The principle of proportionality could sere as a method of protection of fundamental rights in the private law relationships, through the enforcement of the theory of abuse of rights (Van Gerven, 308).

4. An outline of a concept of proportional;ity in political and legal sense

As a political concept, proportionality is undisputedly a part of the liberal-democratic ideal of good governance. The state and the law are human, voluntary and purposeful mechanisms for social control and organization. Legal rules are enacted for the purpose of the achievement of certain socially beneficial ends and should be rationally related to those ends. Both the legislators and the executive should refrain from arbitrary and excessively burdensome actions. Any government action should be both efficient i.e. capable of achieving its purported aim and politically acceptable.

The proportionality as a (general) principle of law, however, is rather novel and complex legal concept. Judicial and academic definitions of proportionality do not differ significantly, still, it may be useful to make such a distinction for analytical purposes. The European Court of Justice and the German *Bundesverfassumgsgericht* began to develop this principle almost simultaneously and, at that time, independently of each other. While the ECJ's case law during the fifties reflected the narrow, criminal law concept of proportionality,[13] later on the Court has applied the principle as a

[12] For ex. Fromont, 165.

[13] "In the application of a generally accepted rule of law, action of the Hight Authority in response to a wrongful act of an enterprise must be proportionate to the gravity of that act". Case 8/55, *Fédération Charbonnière de Belgique v Hight Authority*, [1954 to 1956] ECR 245 p.299.

standard of rational and balanced exercise of powers by the Community institutions. Notwithstanding occasional semantic variations, the ECJ sees the proportionality principle in sense that "citizens may only have imposed on them, for the public interest, obligations which are strictly necessary for those purposes to be attained"[14]. A Community measure must be a necessary and appropriate means for the achievement of the objectives pursued and it also may not be excessively burdensome to the right or freedom at issue[15]. Subsequent decision refined to a certain extent the Community notion of proportionality "…Prohibitory measures [should] be appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question, when there is a choice between several measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued"[16].

According to the *Bundesverfassungsgericht*, the legal act must be an appropriate and the least restrictive means to the achievement of the legitimate state purpose, it also may not impose a burden on a right or a protected interest which is excessive in comparison with the benefit secured by the state objective[17]. The principle follows from the nature of fundamental rights which the state may limit only to the extent necessary for the protection of public interest[18]."The European Convention of Human Rights is among the few constitutive documents that provide for a more or less explicit definition of proportionality – a restrictive measure must be necessary in a democratic society for the achievement of certain specified goals. In the Strasbourg Court view: "The notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that is proportionate to the legitimate end pursued.

The input in the definition of proportionality as a principle in law by the academia has been exhausted primarily by the extraction of subprinciples that enter into the generic notion of proportionality. The background idea of proportionality is fairness in general or the protection of rights and/or social efficiency, proportionality being but one particular facet of such broader concepts. The principle of proportionality in legal sense requires there must be reasonable (rational, proper) relationship by the means employed (above all, legal rules) and the ends to be achieved. The principle itself is of a complex structure, composed of three subprinciples or prongs. The measure must be appropriate or suitable means for attaining the goals in sense of being capable of producing the goal. Capability relates mainly to causal connection, but it also encompasses some normative aspects, such as lawfulness of the measure itself. Second, the measure should be the least restrictive alternative, i.e., there must not be any other

[14] Case 11/70, *Internationale Handelgesellshaft v Ein* [1970] ECR 1125 at p.1146.
[15] *Idem.*
[16] Case C-331/88 *R v. Ministry for Agriculture, Fisheries and Food, ex parte FEDESA and others,* [1990] ECR.
[17] *Apotheken-Urteil*, 7 BVerGE 577 (1958).
[18] *Census Act Case.*

means that is capable for the achievement of the objective that restricts a right or interest to a lesser degree. Necessity varies from strict (absolute) necessity to a reasonable effort to identify and choose a relatively moderate means. The last prong, proportionality in the strict sense, presupposes a balance between the benefit from the restriction and the harm inflicted thereby to other legally protected value(s).

The approach to the principle of proportionality has been a very casuistic and at times, a rather perfunctory one. One could argue that the former sometimes contains traces of the common law methodology, even in countries which form the core of the continental tradition such as France or Germany. The attention is directed mainly towards the variations in the content of the principle depending on the area it is applied on, its status and the implications upon the role of judicial review and the relationship between the branches of government. Part of the explanation lies, perhaps, in the fact that proportionality provoked interest among judges, constitutional and administrative lawyers, much less among legislators and scholars in general. Sporadically, efforts are made for distinguishing between types of proportionality, based upon the nature of the variables that ought to be placed in a relationship.

A task remains, first of all, to identify the most important formative intellectual and ideological influences that brought this principle to the top of most of the European courts' agendas. The sources of the proportionality principle are various and we can not confine to the usual cursory remark that "proportionality is an unwritten principle of law". The status is relatively easy to determine, by using the double criterion – the agents applying the principle and type of situations it is applied upon. The next issue is the analysis of the content of the principle, but coupled with an effort to identify the factors that shape the variations thereof and to discern any possible regularities in these variations. According to the content and the overall characteristics, various types of proportionality can be distinguished. One of the dilemmas that has to be answered relates to plausibility, both in terminological and conceptual aspects, of treating the three subprinciples as parts of basically the same principle or their disassociation in separate legal standards.

While suitability and necessity are relatively clear concepts, the proportionality in the strict sense, with the laconic explanations commonly offered thereon, certainly invites further research. Proportionality in general presupposes a certain relationship between several variables. When seen as a principle of law, the issue is about the types of variables that are (should be) placed in a relationship and what constitutes a proper relationship in a given context. After a careful examination of various decisions invoking the principle of proportionality, it is apparent that not always the same categories are to be placed in a certain balance. Sometimes the balance relates to the relationship between public interest and protected right or freedom and in some other cases the courts want to reconcile the exercise of two or more rights. An equilibrium may be required between two or more mutually exclusive or at least competing public interests.

Occasionally, under the proportionality in the strict sense a typical cost benefit analysis is used, in a sense of measuring the purely economic advantages of a rule.

Proportionality is an instrumental, evaluative and variable principle. Proportionality is instrumental, not an independent principle of review on a freestanding value in itself since it refers to a relationship between two or more substantive interests. Any review of the suitability, necessity and proper balance presupposes not only pronouncements on complex factual issue but judgments on the importance of certain societal goals as well. The content of the proportionality principle varies significantly, depending upon factors such as the area of the law, the subject matter and, particularly, the legal system it operates as within.

The proportionality principle is very illustrative for most of the dilemmas and recent developments regarding general principles of law. It has not been endorsed, at least till very recently, by explicit or easily discernible textual support. Its principle proponents were the courts, while wider recognition ensued later. As to the methodology of consecration of the principle, from all the abovementioned ones the effort for translation of an important tenet of social and political philosophy into a legally enforceable standard may be the closest description. Its status varies, depending on the system, from a general public law principle to a principle governing specific areas of administrative law. With respect to the functions, the most important ones are the interpretative and criterion of validity.

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