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Some Critical Thoughts on Proportionality

Iddo Porat

1 Introduction

In this paper I wish to raise several critical thoughts on the doctrine of proportionality, which is arguably one of the leading manifestations of the concept of reasonableness in public and constitutional law.

The proportionality doctrine is a central part of a two-stage structure of human rights adjudication (see Weinrib 2006; Law 2005). In the first stage one must establish that a right has been infringed by governmental action. In the second stage the government needs to show that it pursued a legitimate end and that the infringement was proportional. Proportionality itself proceeds in three stages once the governmental end has been shown to be legitimate: first, the means applied must further this end; second, the government must show that it chose the least restrictive means to further that end; third, the benefits of achieving the sought-after objective must be proportionate to the extent of violation of the given right (proportionality in the strict sense. See Rivers 2006).

It is an undisputed fact that proportionality, thus described, has achieved unprecedented scope; this is what professor Stone Sweet has termed the "diffusion of proportionality." The diffusion of proportionality is an amazing phenomenon, both in terms of its scale and in terms of the rapidity and the relative ease by which it has come about. Starting from the 1970's proportionality rapidly migrated from its birthplace, Germany, to the European Court of Human Rights and European Court of Justice, to Canada and to almost every European country, as well as many countries outside Europe. Today, proportionality is an accepted doctrine in Ireland, South Africa, Israel, Australia and New Zealand (see Stone Sweet and Mathews 2008). Proportionality has won the ultimate victory—the victory of language and of discourse—because the legal discourse itself in many legal systems is by now taking place in terms of proportionality. Indeed, proportionality has infiltrated

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so deeply into public life that field commanders are thinking in proportionality terms before they embark on military actions.[1]

That something major has happened with regards to proportionality is therefore indisputable. Nevertheless it would be worth while to ask the following three questions, which I would like to touch upon in this essay.

First, *what exactly has happened?* That is, what are the contours of this phenomenon, its inter-relations with other phenomena, its history, genealogy and meaning? In particular I would like to discuss one point, which has not received much attention to date: what is the relation between (American) balancing and (European) proportionality? That is, what are the analytical and historical differences between the way balancing has developed in American constitutional law, and the way proportionality has developed in German and other constitutional systems?

Secondly, and most controversially is the normative question: *is what happened good or bad?* There are several persuasive arguments in favor of proportionality review in the legal literature. Among others it is argued that proportionality is an inclusive and deliberative methodology, since it takes into consideration all interests in the review and engages in a deliberative weighing and balancing between them, rather than excluding any of them at the outset (see Alexy 2002; Beatty 2004; Kumm 2007) I would like to raise some possible difficulties concerning this argument.

Finally, there is a third, maybe surprising question. It addresses not what has happened, nor whether it is good or bad, but rather *what will happen next?* More specifically it asks whether what has happened is irreversible, and will it last?

I would like to start with this last question and then move on to discuss the other two.

2 What Will Happen Next?

In asking this question I have in mind an analogy from music. We tend to think of musical history as moving in cycles or as being involved in a pendulum movement: from the baroque, more emotional and less structured period, to the classical period with its claim to rationalism and order, back again to the emotional romantic period, and so on. The question is whether one cannot expect a similar pendulum movement in law, and whether we cannot expect therefore the proportionality age to

[1] In Israel, for example, the military regulations concerning the practice of "Targeted Killing" of terrorists, have been shaped according to the Israeli Supreme Court's definitions of proportionality. See HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel (Court ruling that every individual instance of Targeted Killing should be examined in accordance with the principle of proportionality, i.e., whether the anticipated benefit to be gained from achieving the military goal is proportional to the harm which might be caused to innocent civilians in the vicinity of the target). Similarly, the decisions of the military commander in Judea and Samaria regarding the exact route of the security fence were framed by another judicial decision guided by proportionality HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel,* 58(5) P.D. 807.

start turning back to a more rational and conservative period, the way the classical era emerged in music in reaction to the baroque?[2] Are we at the far end of the pendulum movement, and should we now expect that it starts turning back?

American constitutional history is famously described as moving in such pendulant movement from a more formalistic age, during the Langdell and Lochner periods of the late 19th and early 20th century, to a less structured and more pragmatic legal atmosphere, starting with the legal Progressives and Realists and culminating in the liberal Warren Court, and back to formalism with the New Formalism movement that identifies the current Court.

In Israel a similar turn back of the pendulum is happening in these very days, when the minister of justice, a well-known law professor, is initiating a series of legal reforms that are intended to stop, what might be referred to as the age of proportionality.

The fact that America has witnessed several shifts in its history and that Israel is now showing signs of reaction against proportionality gives rise to three further remarks.

First, how can we account for the fact that there has been no reaction to the expansion of proportionality in Europe, and should we expect a similar reaction to proportionality in Europe as well?[3]

Secondly, the very question of what will happen next suggests the possibility that the preponderance of proportionality might change one day. However, such a contention is in tension with those accounts that regard proportionality as a logical necessity (Alexy 2002), or as following logically from the very idea of liberal democracy (Beatty 2004). The type of analysis suggested here therefore casts some doubt on such "logically-based" theories of proportionality.

The third remark regards the relationship between the issue of proportionality and all other phenomena that signal a turn of the pendulum and whether it can be dissociated from them or outlive some of them. The following are a few of those added ingredients that comprise together with proportionality what may be termed as the baroque age of judicial power, or what is otherwise termed the "New Constitutionalism" (see Henkin 1993; Ackerman 1997; Hirschl 2004).

The following ingredients represent a standard repertoire of the move towards "New Constitutionalism" that is manifested in one way or the other in all the countries that take part in the "age of proportionality":

1. The stretching and flexing of rules of accessibility to constitutional courts, such as political questions, and standing
2. The vastly important issue of interpretation, and the move towards creative and purposive interpretation.

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[2] Describing proportionality as romantic rather than rational may be disputed by those, such as professor Alexy (2002), that stress the more structured and predictable aspects of proportionality. However, we can also reverse the question and ask whether we are moving from a classical to a romantic period.

[3] Frederich Schauer (2005) seems to argue for such a possibility out of his theory of a move from more standard based to a more rule based systems.

3. The diffusion of different areas of law, and especially the obliteration of the distinction between private law and public law.
4. The relaxing of the rules of precedent, such as, the distinction between Ratio Juris and Obiter Dictum, and majority and minority opinions.
5. The relaxing of the distinction between authoritative and suggestive text, among others by the extensive use of comparative law (either domestic of international) in judicial opinions.
6. The resistance to the idea of finality, and the move towards substantive rather than formal justice.

3 What Exactly has Happened? Balancing and Proportionality

Moving on to the first question that I raised in my introduction, I would like to discuss now some aspects of the relationship between the concepts of balancing and proportionality.

Defenders of proportionality use two arguments for establishing an analytical distinction between balancing and proportionality, and for favoring it over balancing. I will point at their deficiencies and then move on to discuss two further arguments that may establish a real difference.

The first argument is that proportionality is more developed doctrinally and more structured analytically than balancing. Hence, when applied, it results in more certainty and clarity and allows for less judicial discretion with regard to allowing offenses on human rights (Weinrib 2006, 96; Grimm 2007, 395).

The problem with this argument is that it is often based on an unfair comparison, because it compares between balancing on the one hand and all the three tests of proportionality on the other hand.[4] However, only the final test of proportionality, termed in German law proportionality in the strict sense, is analogous to balancing. The first two tests are means-ends tests that do not involve balancing. Moreover, American constitutional law includes very similar tests. Therefore, if one makes the proper comparison between balancing and the third test of proportionality, the claim for doctrinal superiority of proportionality seems to loose ground.

There is, however, another attempt to show a distinction between proportionality and balancing and claim that the former is superior. The argument is that proportionality, even in its strict sense, does not include balancing, since it does not require the comparison between two incommensurable values.

There is a nice example that explains this claim.[5] Consider a dog show, in which there are different contests: the contest for the best Bulldog in the show, best Schnauzer in the show, and so on. However, there is also a final contest for the best dog altogether in that show. Comparing one Schnauzer to another can make sense,

[4] Under some versions of proportionality a fourth test is added—the legitimate and lawful means test.

[5] The example is taken from Chapman (1998, 1492, n. 10).

but how are we to compare Bulldogs and Schnauzers? Proportionality seems to give us an answer: we take the Bulldog that won the Bulldog show, and the Schnauzer that won the Schnauzer show, and ask for each how close he was, in terms of the standards of his own species, to the ideal Bulldog or Schnauzer. Let us say that the Bulldog that won had in him 90% Bulldogness, but the Schnauzer that won had only 50% Shnauzerness. In that case the Bulldog wins, and we don't have to compare between Bulldogs and Schnauzers. Proportionality is said to evaluate each value similarly in its own terms, without the need to compare incommensurable values, and then ask, for each, how close the infringement in the case was to the core of this value. The closer it is to the core, the more protection it should have.

I give this example because I think that it reflects some of the intuitions regarding the superiority of proportionality over balancing. However, for reasons that I will not discuss here because of time constraints, I am very skeptical as to whether this could actually work in real life.

I move therefore to the two differences that I think could be substantiated. The first is a historical difference. I would like to put forward the following historical thesis, which I intend to address at length on another occasion[6]: I believe that balancing in American constitutional law has developed in a very different context than proportionality in German constitutional law (and other law systems as well). To put it in a nutshell, balancing entered into American constitutional law as a means for limiting rights that were given formal but absolute textual anchoring. On the other hand, proportionality entered German constitutional law as a means for promoting, or, more exactly, for introducing rights to a system with no textual support for rights. This I believe is true to some extent in Israel too. Balancing, therefore, came along with an anti-rights baggage, which admittedly changed over the years but retains some of its power to date, while proportionality came with the exact opposite baggage, and although here too we see some changes, it also retains some of its power.

The second difference relates to constitutional structure and ethos, rather than to constitutional history (see Cohen-Eliya and Porat 2009). There is an important difference in the way the State-individual relationship is framed in Germany and in America. In America the entire constitutional scheme is based upon a deep suspicion of the State and of its power to infringe upon individual rights. Accordingly, the task of the Court is to give strong protection to rights against governmental incursions. Balancing, which allows governmental interests to overcome individual rights, is therefore regarded with great suspicion, and it often comes with an extra-weight for the right in the balance—a thumb on the scales in favor of the right.

In Germany, however, the State-individual relationship is conceived in more harmonious terms, without an inherent suspicion of the state, and without the assumption that its interests would be contrary to those of the individual. The organic conception of the polity, which reflects German constitutional thinking,

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[6] The ideas here are part of the project sponsored by the Canadian government to compare aspects of proportionality and balancing. I developed the ideas regarding the history of American constitutional in Cohen-Eliya and Porat (2008a).

compares the entire political body to a living organ and conceives its different parts—the legislative, executive and judicial—as all taking part in promoting the same goals, values, and rights. The government as well as individuals promote rights, and both can equally also infringe upon rights. Under such a conception, the Court takes part in implementing and imposing the shared values and rights on the entire community, rather than protecting one part of the polity from the other. Proportionality review is therefore not conceived as inherently contrary to rights, the way American balancing is. On the contrary, proportionality is the methodology of the Court for harmonizing the different rights and values in the community. In addition, in the proportionality calculus no special precedence is given to rights and interests held by the individual over those held by the government (see Grimm 2007).

These two interrelated differences: the historical one and the structural one, can, I believe, substantiate a real difference in the way balancing and proportionality are implemented in practice, and in the way they are framed and conceived, despite the fact that analytically they are almost inseparable.

4 Is What Happened Good or Bad? The Question of Proportionality as Deliberative

Moving finally to the normative question—is the spread of proportionality good or bad? I would like to address one major trait of proportionality that is regarded as a normative argument in favor of the spread of proportionality, namely the fact that it (as well as balancing) encourages the inclusion of all rights and interests in the deliberative process of the Court, and does not exclude any interest at the outset. Proportionality, it is argued, is therefore both inclusive and deliberative, and hence it promotes the legitimacy of the Court.[7]

Although there is undoubtedly some truth in it, I would like to mention three difficulties with regard to this claim. First, and most important, proportionality would be truly inclusive of all interests only if it included all interests *substantively* and not only *formally*. By this I mean that the Court would in fact take every interest into account in the balance, rather than adding it in just formally, without actually giving it any consideration or weight.

Looking into case law wherever proportionality is applied, one can easily find many instances in which the Court includes an interest only formally, but not substantively (Porat 2006). When this is the case, proportionality is neither truly deliberative, nor does it induce judicial legitimacy, transparency or accountability.

Of course, one could argue that such instances are simply wrong applications of the proportionality principle. However, there is good reason to believe that, in

[7] Indeed, the court that moves to balancing *stricto senso* is stating, in effect, that each side has some significant constitutional interest on its side, but that the court must, nevertheless, take a decision. The court can then credibly claim that it shares some of the loser's distress in the outcome.

any type of system in which proportionality review is used extensively such formal inclusions would be inevitable, and even inevitably common. The reason is simply that not all interests could and should be given consideration, at all levels and in all contexts. Some interests are simply not important enough; other interests may be important but justly excluded from consideration at some levels of the decision-making process, or in some contexts. However, since the ideology behind proportionality promotes the inclusion of *all* interests in *all* contexts and at *all* levels, it inevitably ends up with many instances of formal rather than substantive inclusion of some interests.[8]

The second problem lies in the fact that proportionality is advocated as a method for *judicial review*, that is, as supplanting the political decision-making process (the political balance). Here, we must not forget the extensive body of literature that shows the deficiencies of judicial decision-making as compared to political decision-making, precisely because of its being less deliberative (Bickel 1970). The Court is limited to the specific case brought before it and to the interests that are involved in that case. It cannot initiate its own processes of decision-making; it is less accessible to all interests and interest-groups in society; it has deficient means of collecting information in order to identify all possible interests and assess their importance, and it is limited in its ability to reach compromises and find less formal solutions to clashes between interests. All these deficiencies raise a serious question as to whether judicial proportionality and balancing can justifiably supervene political decision-making frameworks, because of their being more deliberative.

Finally, the third problem with proportionality as deliberative has to do with the way judges actually deliberate. This point is often neglected, but the fact is that in practically all legal systems the actual manner of deliberation of different judges on the same panel is not made public nor is it regulated in any way. What happens in judicial chambers is kept completely out of the public's eye, and is in fact a black box.[9] As such, it seems much less deliberative than political deliberation which is open to the public, and is often accompanied by public debate, lobbying and the like.

I would like to conclude by thanking again the organizers of this important and stimulating conference, through which we can strive to be more proportional with regard to proportionality (see Jackson 2004).

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[8] For a similar argument using Raz's distinction between first-order and exclusionary reasons, see Porat (2006).

[9] For example, one cannot be certain that the process by which judges arrive at their balance of interests is inclusive and deliberative, rather than a process by which a more senior judge influences the decision of the less senior one, or two judges form a coalition against the third one, and so on.

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Part II
Private, Public and International Law

Part IIa
Reasonableness in Private Law