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Introduction

1.1 The Aim of This Book

The proportionality test has become the dominant legal tool for addressing cases regarding the limitation of human rights.[1] It is the default test for adjudicating human rights disputes in jurisdictions from all five continents, both national and international, and in civil and common law legal traditions.[2] Proportionality is referred to as 'the received approach to human rights law' (Webber), '*the* central concept in contemporary constitutional rights law' (Möller), a 'near universal' legal test (Gardbaum), a 'staple of adjudication on fundamental rights in international and domestic courts' (Verdirame), 'the main engine of human rights law and constitutional rights adjudication' (Finnis), and 'unquestionably the dominant mode of resolving public law disputes in the world today' (Schneiderman).[3]

[1] In what follows I generally speak of 'human rights' to refer to both constitutional rights and human rights, as is the usage in the United Kingdom and elsewhere. I am aware that both these terms ('human rights' and 'constitutional rights') often, but not always, refer to different legal regimes. Nevertheless, these differences are of little relevance in the analysis and critique of proportionality I offer in this book. My argument bears on the use of the proportionality test in both constitutional and human rights law.

[2] On the spectacular spread of proportionality on a global scale, see Aharon Barak's comprehensive study in his *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012) [hereinafter *Proportionality*], Chapter 7 B)–L).

[3] This is noted by Webber in Grégoire Webber, 'On the Loss of Rights' in Grant Huscroft, Bradley Miller, and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014) 123. See Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge 2009) 55 [hereinafter *Negotiable Constitution*]; Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012) 13 [hereinafter *Global Model*]; Stephen Gardbaum, 'Proportionality and Democratic Constitutionalism' in Grant Huscroft, Bradley Miller, and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014) 260, 261, cited in Webber (n 3) 'On the Loss of Rights' 123; Guglielmo Verdirame, 'Rescuing Human Rights from Proportionality' in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 341; John Finnis, 'Judicial Power: Past, Present, and Future' (a lecture in Gray's Inn Hall, 20 October 2015), available at

It can be said with no exaggeration that we live in an 'age of proportionality'[4]

Proportionality is the new orthodoxy in human rights law. It is also, I believe, a deeply flawed test for deciding human rights cases. Human rights adjudication can do better. There is a need for a general critique of the proportionality test. To provide this critique is the main aim of this book. The study of proportionality in this book is normative, rather than descriptive or doctrinal. The book focuses on proportionality, and addresses the question of balancing as the final and most characteristic part of the proportionality test.

There are different ways of understanding the proportionality test. The main conceptions of the proportionality test fall into two groups: one adopts what I call a 'maximisation account of proportionality', and the other an account of 'proportionality as unconstrained moral reasoning'. I argue that as interpreted by any of these accounts, the proportionality test is unsuited for human rights adjudication. I will argue that the proportionality test is *either* insensitive to important moral considerations related to human rights and their limitations; *or* it can accommodate the relevant moral considerations, but at the price of leaving the judge undirected, unaided by the law. I will further argue that lack of legal direction is a deficiency in legal adjudication, which has important negative effects. These arguments ground a more ambitious claim: that there can be no understanding of proportionality that escapes objections of the kind offered here, and that there can be no single method for deciding whether an interference with a human right (or even with a set of human rights) is substantively justified. In the last chapter, I outline an alternative understanding of human rights and their limitation. As a whole the book offers a comprehensive critique of the proportionality test that I believe has been absent from the literature so far. Given the current dominance of proportionality reasoning in human rights law, this mostly critical enterprise seems to me justified.

Though the main aim of this book is critical, in developing my argument against proportionality I sustain a number of positive claims. In the first part of this book I revisit some commonly discussed issues in the proportionality debate: whether proportionality captures the special force

http://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future/ accessed 20 January 2016; David Schneiderman, 'Proportionality and Constitutional Culture (book review)' (2015) 13 Int'l J Const L 769, 769.

[4] To borrow from the title of an important recent article on the topic: Vicky C Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 Yale LJ 3094.

rights are taken to have, and whether balancing requires commensurating the incommensurable. These are established questions, yet I have found that there was need in both cases to clarify what is the precise scope and force of the objections. To do this, it was necessary to develop my own account of incommensurability, and to offer a positive characterisation of rights reasoning for the purposes of the proportionality debate. A more recent account of the proportionality test, reviewed in the second part of the book, provides me with the opportunity to address new arguments and develop new objections. The account of rights reasoning that I offer in Chapter 5 and particularly the account of legally directed adjudication I present in Chapter 7 are the basis for the alternative to proportionality reasoning that I sketch in the last part of this book.

An important part of this book is dialectical: it engages closely with ideas of other scholars. This follows from the overall aim of the book, which is to offer a general critique of proportionality as applied in human rights adjudication. The most fruitful and fair way to criticise an idea is to engage with it *as it is presented by its most sophisticated proponents*, as opposed to a version of the same idea that a critic could construe only to then demolish it. The same applies to the proportionality test, particularly if one considers the sophistication and influence of some of the more prominent scholarly accounts of proportionality. Courts, by contrast, do not typically argue openly in favour of proportionality.

A further reason for the dialectical nature of this work is that my aim is not proportionality as applied in a particular case or in a particular jurisdiction, but proportionality in general, as a way of thinking about limitations of human rights. Defenders of proportionality often claim that some purported deficiency in the use of proportionality in human rights is not a deficiency of proportionality as such, but of a certain case or line of cases, and thus that the critic has misinterpreted the proportionality test.[5] Here my aim is to establish that proportionality as such is flawed, and not only that it has been on occasions misapplied. Thus I level my critique at general accounts of proportionality, rather than at specific cases where proportionality is applied. And, to avoid the charge of misinterpretation, I have attempted to present the arguments in favour of proportionality as closely as possible to the writings where those arguments are made. I allude to specific legal cases as a way of illustrating more general claims.

[5] See Madhav Khosla, 'Proportionality: An Assault on Human Rights?: A Reply' (2010) 8 Int'l J Const L 298, 302; and Kai Möller, 'Proportionality: Challenging the Critics' (2012) 10 3 Int'l J Const L 709, 710–11 [hereinafter *Challenging Critics*].

I do believe (see Chapters 2 and 6) that the main accounts of proportionality provide an insightful general articulation of the legal practice of proportionality, such that the most illuminating way of evaluating the practice in general is to engage with those academic accounts that undertake the task of displaying its underlying logic and making the case for it. This book criticises a way of thinking about human rights and their limitations that is entailed in a specific legal test – the proportionality test – and which can be seen at work in judicial decisions around the world. It will be thus useful to start by fixing ideas on what is meant here by the proportionality test.

1.2 The Proportionality Test in Human Rights Adjudication

Proportionality features in some way or another in several areas of law.[6] What concerns us here is a specific legal test used for evaluating so-called interferences with human rights. On proportionality analysis, human rights interferences are addressed through a two-step inquiry. First, it is established whether a particular measure affects a human right. At this stage the right is commonly defined generously, and thus it is often found or at least assumed that there has been an interference with a human right.[7] The second step is concerned with whether this 'interference' with a

[6] For example, in intellectual property law (see Robert P Merges, *Justifying Intellectual Property* (Harvard University Press 2011); Justine Pila, 'Pluralism, Principles and Proportionality in Intellectual Property' (2014) 34 OJLS 181); criminal law (see Morris J Fish, 'An Eye for an Eye: Proportionality as a Moral Principle of Punishment' (2008) 28 OJLS 57); land law (see Christopher J St Jeanos, 'Dolan v. Tigard and the Rough Proportionality Test: Roughly Speaking, Why Isn't a Nexus Enough?' (1995) 63 Fordham LR 1883); investor-state arbitration (see Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (Oxford University Press 2015) and Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge University Press 2015)); labour law (see Pnina Alon-Shenker and Guy Davidov, 'Applying the Principle of Proportionality in Employment and Labour Law Contexts' (2013) 59 McGill LJ 375); procedural law (Jonah B Gelbach and Bruce H Kobayashi, 'The Law and Economics of Proportionality in Discovery' Georgia LR (forthcoming, available in http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551520## accessed 28 January 2016); law of war (Jens David Ohlin, 'The Doctrine of Legitimate Defense' (2015) 91 Int'l L Stud 119; Robert D Sloane, 'Puzzles of Proportion and the "Reasonable Military Commander": Reflections on the Law, Ethics, and Geopolitics of Proportionality' (2015) 6 Harvard National Security Journal 299); and tax law (Joao Dacio Rolim, 'Proportionality and Fair Taxation' (2015) 43 Intertax 405).

[7] Tsakirakis speaks of 'definitional generosity' in this regard, particularly with respect to the European Court of Human Rights (ECtHR). Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 Int'l J Const L 468, 481. It has been noted that 'in Canada the court typically adopts a generous view of the scope of what is protected by the

human right is justified. The proportionality test is said to provide a framework for analysing this second question. It works as a test composed of the following four parts:

a. Legitimate aim: the measure interfering with the right has to have an objective of sufficient importance;
b. Suitability: the measure interfering with the right has to be rationally connected to the legitimate aim;
c. Necessity: the measure should impair as little as possible the right in question;
d. Proportionality *stricto sensu*: there must be a proportionality between the *effects* of the measures which are responsible for limiting the right, and the objective which has been identified as of sufficient importance.

This formulation of the proportionality test is that of the well-known Canadian *Oakes* test,[8] which influenced the adoption of a similar version of the test by UK courts.[9] In some jurisdictions the first prong requires that the measure pursue a 'legitimate aim' (rather than an objective of 'sufficient importance'), and sometimes this aim needs to be one of those mentioned in a (usually broadly formulated) limitation clause.[10] Even in Canada this part of the test commonly requires no more than that the aim be legitimate.[11] In some formulations of the proportionality test, the first

right'. Jackson (n 4) 3111. Sometimes courts entertain doubts as to whether the interests or actions of the applicants are protected by a human right, and nevertheless decide on the assumption that they do. See for example *R (S) v Chief Constable of South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196 [31]–[32]; *Laskey v United Kingdom* (App nos 21627/93, 21826/93, 21974/93) (1997) 24 EHRR 39 [36].

[8] See *R v Oakes* [1986] 1 SCR 103 [69]–[70].

[9] See *Bank Mellat v HM Treasury* [2013] UKSC 39, [73]–[74] (Lord Reed), referring to Oakes as 'the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning'; and Timothy Endicott, Administrative Law (3rd edn, Oxford University Press 2015) 96–7.

[10] This is how the Inter-American Court of Human Rights and its European counterpart formulate the first subtest. See, for example, *Kimel v Argentina* C No 177 (2008) (IACtHR) [58], [68]–[71]; *Mémoli v Argentina* C No 265 (2013) (IACtHR) [126], [130], [138]; *Handyside v United Kingdom* (1979–80) 1 EHRR 737 [43], [45]–[46]; *Smith and Grady v United Kingdom* (App nos 33985/96 and 33986/96) (2000) 29 EHRR 49 [74]; *S and Marper v United Kingdom* (App nos 30562/04 and 30566/04) (2009) 48 EHRR 1169 [100].

[11] See Jackson (n 4) 3112 n 81; Sujit Choudhry, 'So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter's Section 1' (2006) 34 Sup Ct LR 501, 509–10; PW Hogg, *Constitutional Law of Canada* (5th edn, Thomson Carswell 2007) 132, quoted in *Proportionality* 283.

two subtests are consolidated into one requiring that 'the means used [are] appropriate [. . .] to the achievement of a legitimate end'.[12]

The necessity subtest in its strictest form is understood to require that the measure be compared with alternative potential measures that would have realised the same aim to the same extent.[13] It has been noted that often the available alternatives that would be less burdensome on the human rights at stake are also less effective in achieving the legitimate aim sought by the measure under review, or they can involve greater costs for other rights or public goods.[14] In choosing a less restrictive alternative, some degree of realisation of the legitimate aim or of some other right or public good would be lost. The question then is whether achieving that additional degree of realisation of the legitimate aim or of some other right or public good justifies the increased burden on the human rights affected by the measure under review. Thus, the necessity subtest sometimes collapses into the last subtest of proportionality, the balancing requirement.[15]

Balancing or 'proportionality stricto sensu' is the last part of the proportionality test. It is often seen as the most important and characteristic part of the test.[16] As formulated above, the test is notoriously vague. It requires that the effects of the limitation of a human right are 'proportional' to the achievement of a legitimate aim.[17] In a number of cases the European Court of Human Rights (ECtHR) requires that the state 'strikes a fair

[12] Donald P Kommers and Russel A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke University Press 2012) 67, attributing this formulation to German jurisprudence.

[13] The most common illustration of this test is provided by the Israeli *Beit Sourik* case. *Beit Surik Village Council v Government of Israel*, HCJ 2056/04 [2004] IsrSC 58(5) 807. The case concerned the building of a fence for the purposes of protecting the population from attacks in the context of the Israeli–Palestinian conflict. With regard to the necessity subtest, the question was 'whether among the various routes which would achieve the objective of the separation fence, is the chosen one the least injurious'. Ibid [44], translation from the official Israeli Judicial Authority website http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf accessed 12 January 2016. In assessing less injurious alternatives, the court sought to determine whether such alternatives would have satisfied 'the security objective of the security fence to the same extent as the route set out by the military commander'. Ibid [58].

[14] *Global Model* 194–5; *Bank Mellat* [20].

[15] *Global Model* 195.

[16] See *Proportionality* 340; Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012) 6; Finnis (n 3); Richard Ekins, 'Legislating Proportionately' in Grant Huscroft, Bradley Miller, and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014) 343.

[17] See *Oakes* [71]. The same formulation is found in other jurisdictions. See, for example, *Schmidberger Internationale Transporte und Planzüge v Austria* (C-112/00) [2003] ECR I-5659 [81] and [90].

balance between the competing interests' protected by the human right of the applicant, and those of 'the community as a whole'.[18] These formulations are notoriously formal, and provide no guidance as to how to determine when a concrete measure fails to strike the right balance, or to achieve a proportionality between the measure's effects on the affected right and the realisation of the legitimate aim of the measure. It is not, however, uncommon that the balancing subtest is further specified. Thus, in *Oakes*, after formulating the four parts of the test, the court states that the last subtest requires that 'the more severe the deleterious effects of a measure, the more important the objective must be'.[19] Along the same lines, the last part of the test has been formulated thus: 'the benefits of infringing the protected interest must be greater than the loss incurred with regard to the protected interest'.[20] Each of these ways of formulating the balancing test (the first highly abstract; the second more specific, requiring that gains match loses) correspond to and support one of the two main interpretations of proportionality that I explain below: proportionality as unconstrained moral reasoning, and the maximisation account of proportionality.

There is another version of the test that does without the balancing stage, consisting only in the first three parts. Such a version of the test was used in early proportionality cases in the UK.[21] This incomplete version of proportionality needs to be distinguished from versions of proportionality that do not explicitly formulate the balancing stage, but nevertheless apply it. This was the case with some Canadian jurisprudence, in which balancing considerations were assessed in applying the previous subtests.[22] Also, on some versions of the proportionality test the different subtests are not seen as separate and distinct stages in the application of proportionality analysis, but rather as factors to be taken into consideration in a less structured form of balancing reasoning.[23]

[18] See *Hatton v United Kingdom* (2003) 37 EHRR 611 [119], [122]; *S and Marper v United Kingdom* [118]; *Von Hannover v Germany* (2004) 40 EHRR 1 [57].

[19] *Oakes* [71].

[20] Mattias Kumm, 'Who Is Afraid of the Total Constitution?: Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 German LJ 341, 348. Similarly Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge LJ 174, 181; and Steven Greer, '"Balancing" and the European Court of Human Rights: A Contribution to the Habermas–Alexy Debate' (2004) 63 Cambridge LJ, 412, 434; and *Kimel* [83].

[21] Endicott (n 9) 97.

[22] See Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 2 University of Toronto LJ, 383, 394–5.

[23] See Jonas Christoffersen, *Fair Balance: A Study of Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhof 2009) 69–73.

The four-parts formulation of the proportionality test is the most clear in articulating the considerations that the test is generally taken to assess – regardless of whether those considerations are understood as separate stages or as factors in a balancing assessment. Such a version of proportionality, as opposed to those that lack the last balancing part, is also the most defensible one. This is because the force of the affected human right is only assessed at the balancing stage. Before that, the proportionality assessment is only about means–ends rationality.[24] It is clear that some measures can be necessary for the achievement of a legitimate aim, yet still unacceptable in the violation of human rights. Dieter Grimm provides one such example, among many that could be provided: imagine 'a law that allows the police to shoot a person to death if this is the only means of preventing a perpetrator from destroying property'.[25] According to Grimm, this law could satisfy the first three subtests of proportionality, yet still fail the fourth test.[26] The law affects the right to life, and if this right is to be considered at all in assessing this particular measure, the balancing part of the test is needed. Because the four-part version is the most complete, explicit, and defensible formulation of the test, it is best to focus on this formulation for the purposes of a general normative analysis of the proportionality test.

Given the diversity of the jurisdictions where the proportionality test is applied, it is natural that there will be differences in how the test is applied and understood in each jurisdiction. Nevertheless, scholars and practitioners are right in treating the proportionality test as a single legal method that is essentially the same in different jurisdictions. The issues presented to the court are framed in essentially the same way according to the different formulations of the proportionality test. The type of reasoning required of judges and others who use the test is the same: means–ends rationality and balancing reasoning to weigh the interests, values, or

[24] Such a test, though less defensible as a method for assessing human rights limitations, could still serve a valuable and more modest role. For example, in societies where one thinks it is likely that government officials may be ill motivated against a part of the population, judicial review of those measures may be an effective way of controlling the government. Because measures adopted on the basis of animus against a group are likely to impose excessive burdens on them, beyond what would be necessary to achieve a worthwhile aim, or be disconnected to such an aim (which is held only for the purposes of justifying the measure), or have no plausible legitimate aim, a three-stage proportionality test could help filter out these measures without having to go through the difficult process of establishing that the measures were ill motivated.

[25] Grimm (n 22) 396.

[26] Ibid.

principles at stake. And the test performs the same function across different jurisdictions: to determine whether the negative effects of a government measure on human rights interests are acceptable, or whether they are somehow excessive and therefore a violation of human rights.

1.3 Whose Proportionality? Which Balancing?

A first difficulty in analysing the proportionality test is to establish its content. Much discussion about proportionality depends on the language of 'balancing' and 'weighing',[27] but what do these metaphors convey? What makes a measure 'disproportionate'? These questions are not answered explicitly by doctrinal analyses of the proportionality test or by the case law that applies the test. The task of articulating the methodology implied by the proportionality test – its essential characteristics, its justification, and its relation to other legal ideas – has been undertaken by theoretical accounts of proportionality.

In engaging with these accounts, a second difficulty arises. '[A]ny number of different "theories" about how to resolve any existing normative conflict can be operating under the rubric of a proportionality-based test of justified rights limitation.'[28] The doctrinal formulation of the proportionality test (the four-pronged test) is vague enough to allow for different accounts of proportionality – different proposals as to what proportionality is. I identify two main accounts of proportionality.[29] One sees proportionality as a doctrinal tool aimed at maximising the interests, values, or principles at stake in the case. For this account some of the characteristic advantages of proportionality relate to it being largely a technical, structured, and manageable test, and, on some versions, also neutral and fact-dependent. This is the 'maximisation account of proportionality'. The other account sees proportionality as a doctrinal tool that allows judges to engage in open-ended moral reasoning, unconstrained by legal sources. For this account, proportionality has the advantage of allowing for appropriate deliberation on justice and rights. I call this account 'proportionality

[27] See Matthias Jestaedt, 'The Doctrine of Balancing – Its Strengths and Weaknesses' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012) 165.

[28] Denise Réaume, 'Limitations on Constitutional Rights: The Logic of Proportionality' (2009) 2009 Oxford Legal Research Paper Series 1, 3.

[29] The distinction between these two accounts is hinted at, though not explicitly articulated, in Charles-Maxime Panaccio, 'In Defence of Two-Step Balancing and Proportionality in Rights Adjudication' (2011) 24 Can JL & Jur 109, 119, 128 n 62.

as unconstrained moral reasoning'. Each account has its own characteristic understanding of the balancing test. For one account, balancing consists in a commensuration of rights, interest, values or principles; for the other, it means assessing the reasons in favour and against a particular measure. I explain these two accounts of proportionality in Chapters 2 and 6.

These two accounts of proportionality are very different, though they are sometimes confused and treated under the same label. Thus, proportionality can seem at times to be a moving target.[30] But when both accounts are clearly defined, it becomes obvious that they are incompatible. Proportionality cannot be narrow and technical, and at the same time allow for every consideration to be assessed through unconstrained moral reasoning.[31]

There is a need for a general framework for understanding the proportionality debate, and assessing the arguments and counterarguments made against and in favour of proportionality. This general framework has been lacking, and as a consequence, it is not always clear whether defenders and critics of proportionality are discussing the same thing, and properly engaging each other's arguments. This book provides such a framework, and this framework is put to use at the service of my general critique of proportionality. The framework is based on two basic distinctions. The first is the distinction between the two main accounts of proportionality outlined above, which allows us to understand which account of proportionality is at stake when a particular objection to proportionality is discussed.

The second basic distinction is between two different kinds of flaws that can be imputed to proportionality. This is relevant because the two different accounts of proportionality have flaws of different kinds. Generally speaking, legal categories can be analysed from two perspectives. One I call 'moral', and the other 'technical'. The moral perspective is aimed at

[30] 'The criticism that the doctrine of proportionality is too technical, too reductive, or stultifying is met with the reply that in truth it is open to all possible considerations, whereas the criticism that it is too open or empty, unfit for judges, is met with the reply that it disciplines reasoning and is hence suitable for judicial consideration and application.' Ekins (n 16) 345.

[31] Because I engage with proportionality as stated by the theories that defend it, I engage with the two accounts of proportionality addressed in this book (the maximisation account of proportionality and proportionality as unconstrained moral reasoning), and not other potential accounts that might be offered. For example, there is what Julian Rivers calls the 'state-limiting' account of proportionality. See Rivers (n 20) 176–80. But defenders of proportionality do not promote or elaborate on this account. Rivers himself favours a different account (see Chapter 2). I believe that engaging with the two main accounts of proportionality will provide us with the resources for evaluating other potential accounts of the test – but I cannot assess all potential interpretations of the test here.