# Chapter 10
# The Contextual Nature of Proportionality and Its Relation with the Intensity of Judicial Review

**Jorge Silva Sampaio**

## 10.1 Introduction

The principle of proportionality is perhaps the most successful constitutional principle, given the unanimity of its use.[1] It is even designated as the "key and method of Constitutional Law dogma".[2] All this is reflected today in the existence of a "firm consensus" about its "indispensable role in constitutional rights reasoning".[3]

Besides being a structuring principle of law, it is a "methodological tool" of undeniable importance.[4] Moreover, it has established itself as a reference in the case law of the higher courts and, as the main structuring method of balancing, one can say that it is, nowadays, the most important judicial instrument, placing itself at the "centre of the modern Court's work".[5] Proportionality is so important that, often, the very use of other principles such as *equality*[6] or *legitimate expectations*[7] even requires its assistance.

[1]For a global overview about the use of the principle, among many others see Sweet and Mathews (2008: 73 ff).
[2]See Ossenbühl (1996: 40).
[3]See Klatt and Moritz (2012a, b: 1).
[4]See Barak (2012: 131).
[5]See Klatt and Meister (2012a, b: 2).
[6]The principle of equality has been often used in conjunction with the principle of proportionality, in which it is intended to gauge the disproportionality of a measure's inequality. Regarding this topic, among others, see Michael (2011: 153 ff).
[7]About the links between these two principles, among others, see Novais (2011: 182 ff).

J.S. Sampaio (✉)
Faculdade de Direito da Universidade de Lisboa,
Alameda da Universidade, 1649-014 Lisbon, Portugal
e-mail: jsilvasampaio@gmail.com



L.P. Coutinho et al. (eds.), *Judicial Activism*,
Ius Gentium: Comparative Perspectives on Law and Justice 44,
DOI 10.1007/978-3-319-18549-1_10

This principle "serves different and varied functions", and its meaning may "vary depending on the role that it intends to fulfil". Thus, this concept varies depending on the area of law in which it is used (Criminal, Constitutional, Administrative, or International Law).[8] This massive use obviously means that proportionality is at the centre of *judicial activism*,[9] and it is therefore important to understand how it relates with judicial review and whether its use can be a cause for judicial activism.[10]

Notwithstanding all this, even today there are many questions related to it. In addition to many other criticisms,[11] the very *legitimacy* of the principle has been called into question, with the same being still accepted by some authors with caution. For example, some consider that the *expansive force* of fundamental rights has gone too far, advocating that one should invest in another interpretative model in which the principle of proportionality and, consequently, the Constitutional Court itself would lose some importance.[12,13]

From another perspective, even if many uphold the principle of proportionality and often claim that its "structured approach is the most suitable", providing "concrete content" and allowing for "adequate protection" to constitutional rights,[14] and also playing a "disciplining and rationalising effect on judicial decision-making",[15] some authors such as Tsakyrakis have more recently argued that by

[8]See Barak (2012: 146).

[9]About this concept, on the present book, see for example the chapters of Massimo La Torre, Lawrence Alexander, Steven D. Smith, Gonçalo de Almeida Ribeiro, Miguel Nogueira de Brito, Luís Pereira Coutinho or Maria Benedita Urbano. Besides these studies, see also, for example, Kmiec (2004: 1463 ff), Dickson (2007).

[10]In this paper I will generally refer to the concept of judicial activism in situations in which courts *illegitimately* enter the political 'powers' functions (i.e., I will use a merely *formal* concept). The main issue here is precisely to know in which situations this activism actually happens. If one considers that some activism is admissible, then the question is to define the limit between admissible and non-admissible judicial activism. However this question will not be addressed in this paper.

[11]Specifically, in the first place, although there is huge consensus on the principle of proportionality, the truth is that even the terminology to use is still debated—"principle of proportionality", "principle of prohibition of the excess", etc.—and, moreover, its scope does not stop growing. See Lerche (2001: 351).

[12]Among others, see Böckenförde (2003: 165 ff), Papier (2005: 81 ff). For a list of several criticisms of the principle, see Barak (2012: 481 ff).

[13]In any case, even the biggest critics of proportionality do not intend to discontinue the principle's use, but only to decrease its impact by reducing its practical use. See Ossenbühl (1986: 34).

[14]See Barak (2012: 131–132).

[15]See Klatt and Moritz (2012a, b: 8).

allowing restrictions on fundamental rights in the light of public interests, proportionality has allowed a real "assault on fundamental rights".[16, 17]

However not everyone is so sceptical and critical of the concept. Given its universal use, authors like Beatty consider proportionality to be a constitutional principle that deserves universal acceptance, which is demonstrable by its adoption by a large number of jurisdictions. The author considers the generalization of the principle as proof of its universalist potential as a "neutral principle", undervaluing its possible political effects.[18] Although I agree with the advantages and inevitability of the principle, I would not go that far. Taking note of the positions defending a *universal* role and structure of proportionality,[19] I will argue instead that the structure and content of the principle is *influenced* on the one hand, by the *cultural context* (cultural, social and historical background) and, on the other hand, by the *legal context* (i.e., one cannot try to (re)construct this principle without taking into account its respective sources of law).

## 10.2 The Contextual Nature of Proportionality

### *10.2.1 General Aspects*

First of all, it is important to note that jurisprudence and legal literature usually present proportionality's basic content as containing the following three tests: (i) rational connection (is the adopted governmental means rationally related to stated policy objectives?); (ii) necessity (is the adopted governmental means the least-restrictive one?); and (iii) proportionality in its strict sense (are the benefits of the adopted governmental means superior to the costs incurred by the infringement of the fundamental right?).[20,21]

---

[16]See Tsakyrakys (2012: 468 ff).

[17]The biggest problem of these theses is that they seem to forget the discussion about the *narrow* and *wide* thesis of fundamental rights' scope. About this theories, see Alexy (2010: 196 ff), Müller (1990: 40 ff). Answering some of the criticisms made of the principle, see Möller (2012: 709 ff), Klatt and Meister (2012a, b: 687 ff).

[18]See Beatty (2004: 159 ff).

[19]See, for example, Möller (2014: 31 ff).

[20]In general, see for example Schlink (2012: 722 ff), Clérico (2009: 39 ff), Bernal Pulido (2007: 692 ff). Sometimes authors also include in proportionality's content a previous test called "proper purpose" or "legitimate ends". See Barak (2012: 245 ff), Schlink (2012: 722), Klatt and Moritz (2012a, b: 8 ff). However this test seems to fit better when integrating a more general framework for the control of limitations on fundamental rights, in order to be also used in combination with other principles such as equality or human dignity.

[21]Regarding the American case, balancing is a three-tiered scrutiny framework with variable intensity of review: (i) strict scrutiny test (which requires "compelling state interests"); (ii) intermediate scrutiny test (which requires "important state interests"); and (iii) rational basis scrutiny test (which merely requires "legitimate state interests"). About American balancing see for

In second place, assuming its importance, one must ask why isn't proportionality used by everyone and why is it used in different ways in similar situations. For example, why is proportionality truly essential to judicial review in the majority of European countries, such as Germany, Portugal, Italy, Spain, while in other countries, such as the United States or Australia, the principle is barely used?

This question can be connected to the problem of *legitimacy* of constitutional review. Some believe this is a tired out discussion, not worth revisiting.[22] Others, perhaps wishing to evade it, consider that the answer simply depends on circumstances (constitutional, political, social, etc.) that are specific to each country; accordingly, it will be for each Constitution to outline its role and ultimately its legitimacy, nothing further being necessary or even possible.[23] More recently, though, the *counter-majoritarian difficulty* has been reiterated—the present book is proof of that—with new and violent ways to challenge it flourishing.[24,25] But is this difficulty similar everywhere?

Assuming the existence of this controversy in the USA and in Europe, the truth is that the "American constitutional adjudication has been attacked much more vehemently for being unduly political than the European counterpart"; the "expansive judicial interpretation of the constitution has fostered far greater criticism in the United States than in Europe, as evinced by the famed 'countermajoritarian' difficulty".[26]

This may be largely explained by the fact that "the selection of a particular model of judicial review often reflects a society's specific political, historical, and social heritage". Additionally, from the moment "a legal system has opted to recognise judicial review, and such review is [especially] exercised in accordance with the rules of proportionality, the contours of that institution can no longer be shaped by arguments relating to the preliminary issue of whether judicial review should be recognised by that system in the first place", because that entails a "reflection of the people's will".[27,28]

---

(Footnote 21 continued)
example Cohen-Eliya and Porat (2013), Bomhoff (2013). It is important to note that European courts sometimes use a similar three-tiered scrutiny framework for *each* proportionality test according to the different cases. See for example Clérico (2009: 31). That said, one can argue that the American balancing is very similar to the European rational connection test, just varying the scrutiny's intensity depending on the concrete case. Finally, recently arguing that the American balancing, as used by the jurisprudence, can be constructed to involve a kind of proportionality test, although using another terminology, see Yowell (2014: 87 ff).

[22]See Canotilho (2003: 84).

[23]See Schlink (1998: 378).

[24]See Bayón (2006: 214).

[25]In this sense, with important criticisms of the legitimacy of judicial review and even proposing its removal, see Waldron (2006: 1346 ff) and (1999).

[26]See Rosenfeld (2005: 199).

[27]See Barak (2012: 382–383).

[28]However, this does not necessarily mean that the "initial question" cannot be asked again, just as has been happening recently [for example, see the several studies discussing possible changes to

As Möller stresses, "[t]he question of which specific conception of test [of proportionality] is preferable is largely unexplored and only rarely even identified as a problem; it is therefore unresolved and there exists a considerable diversity in the approaches of the courts".[29] Not diminishing the importance of this issue, I believe however there is a previous question to be asked: as the specific content of the proportionality principle influences the court's margin of judicial review, is it really possible and desirable to defend a universal model of the principle, potentially applicable in every legal system?

Moreover, even if the principle of proportionality is not expressly referred to in all legal systems, as previously mentioned, the principle is used in almost all those legal systems. For example, in the Portuguese Constitution there are several particular references to the principle[30]: among other, article 18(2) states that restrictions to fundamental rights must be "*necessary*". This could mean that in Portugal the control of fundamental rights restrictions concerning proportionality is performed only with recourse to the rule of necessity. However, proportionality is predominantly understood in legal literature and jurisprudence as a three-prong principle (involving commands of suitability, necessity and proportionality in its narrow sense).[31] The question concerns then the basic content of the principle of proportionality, considering that in most cases there are no legal references to it; in other cases there are only references to specific rules of proportionality; and there are even cases where Constitutions do refer to the principle but they do not explain what its content is.

The answer to these questions, in my opinion, must rely on the cultural and legal context surrounding the principle.[32] In this regard, I will argue that the proportionality rules can differ from one legal system to another. More specifically, firstly, I understand that the *cultural context* is decisive to explain the degree in which the legitimacy of judicial review is discussed, the same being true about the use of

(Footnote 28 continued)
the Portuguese and Brazilian Constitutional Justice in Morais and Ramos (2012)]. The reopening of supposedly resolved issues has to do with the proper functioning of democracy.

[29]See Möller (2014: 33).

[30]See Articles 18(2), 19(4) and (8), 28(2), 30(5), 65(4), 168(2) and (3), 189(5), 266(2), 267(3), 270, 272, 272(2), and 282(4), all from the Portuguese Constitution.

[31]See, among others, Canas (1994: 591 ff), Canotilho (2007: 266 ff). However, one may ask if the constitutional legislator wanted to establish some differences in the content and structure of the principle depending on the situations in which it is applied—i.e., wanted to create different principles of proportionality for different cases. More recently, Novais (2003: 765 ff) talks about a fourth test of proportionality called *reasonability* which is different from proportionality in its strict sense, and according to which one must evaluate the reasonability of a measure's consequences for the affected people (and, contrary to what happens with proportionality in its strict sense, in this case one does not consider the proportionality of the measure itself).

[32]More generally, the importance of context can be found immediately in terms of language: without a proper contextual framework sometimes one cannot even understand what others mean.

proportionality. Secondly, I believe that the *legal context* is also crucial for the justification of a typical European proportionality content allowing for a strong judicial review.

### *10.2.2 Cultural Context*

To make my point, I will start with the comparison between the cultural contexts standing behind European proportionality,[33] on the one side, and American balancing, on the other.[34]

First of all, it is important to note that "despite important analytical similarities, legal, political and philosophical culture in America and [Europe] bring about quite a different understanding and role for balancing and proportionality within their respective cultures". One first significant difference concerns the fact that German proportionality emerged in *administrative law* (and not in private law) and, as part of an attempt to control "executive power", it was "considered as a limit imposed on the administrative restrictions of individual freedoms"[35]; whereas balancing appeared in *private law* and "was developed to serve the exact opposite purpose: as a check on what was considered the Supreme Court's overzealous rights protection during Lochner era". Furthermore, "proportionality evolved in the framework of the formalistic and doctrinal jurisprudence of the Prussian administrative courts (…), unlike balancing which was a prominent aspect of the Progressivists' anti formalism revolution".[36]

In Germany,[37] an ambitious project is laid down in its constitution: "to bring about a profound transformation of German consciousness and attitudes so that the values upon which human rights are founded would become acknowledged and internalised in German society"; and "[t]his goal could only be realised by according the state a non-neutral stance in society".[38] It is precisely within this context that the German theories of *objective* and *positive* dimensions of fundamental rights emerged, the same involving public duties of protection, guarantee and promotion of fundamental rights.[39] Regarding the specific duty of protection, and differently from the USA, according to the German Constitutional Court—with the same happening generally in other European countries—"the individual whose

[33]Especially in countries of continental Europe such as Germany, Portugal, Spain, Italy or even France.

[34]In this section I will follow some of the main ideas of Cohen-Eliya and Porat (2013)

[35]See Canotilho (2007: 266).

[36]See Cohen-Eliya and Porat (2013: 4–6).

[37]But also in other European countries affected by dictatorships in the last century, such as Portugal, Spain or Italy.

[38]See Cohen-Eliya and Porat (2013: 45).

[39]See, for example, Sampaio (2015: 246 ff).

constitutionally protected interest may be infringed upon by third parties has a claim against the state if the existing laws do not protect him or her sufficiently". Therefore, if the legislature does not act to protect the individual right, it "not only violates objective constitutional law but an individual right of the citizen as well".[40,41] This obviously presents a problem of *separation of powers*; however separation of powers alone cannot justify a lack of respect for constitutional directives.[42] On his side, Michelman argues that "American constitutional law does not deny or exclude the state's protective function or duty", and the differences lie in the fact "that the professional constitutional cultures entertain somewhat different ideas regarding limits on the appropriate role of the judiciary, and of adjudication, in the implementation of a political principle that both cultures nurture".[43]

In addition, European "political theory emphasises that a person is embedded in a community with shared values that expresses solidarity towards all of its members and holds an "organic" conception of the state and its relationship with the individual". The European countries are more or less "'democratic social' version[s] of the interventionist state", which partially explains their enormous interest in the concept of *human dignity*.[44,45] In the USA a vision of essentially *negative freedom* dominates. As in a typical liberal state, "American governments have largely abandoned the project of redistributing wealth, showing little commitment to social welfare states of the European type".[46] Furthermore, unlike what happened in most European countries, "American political culture did not have to adjust or change its course following the Second World War". The American aversion to government intervention and emphasis on popular democracy were even reinforced after the war. Additionally, "[t]he American political culture is founded on the values of liberty, personal responsibility", and "[t]hese values shaped the system of

[40]See Grimm (2005: 153).

[41]The state is not only prohibited to violate fundamental rights with its actions (*Übermassverbot*—principle of excess prohibition), but it is also prohibited to protect and promote insufficiently fundamental rights (*Untermassverbot*—principle of deficit prohibition). About the *Untermassverbot*, see for example Störring (2009), Alexy (2010: 278 ff), Novais (2010: 307 ff). And this aspect is extremely important: as Grimm (2005: 138) argues, it reveals the existence of a different institutional relationship between the legislature and the judiciary.

[42]See Grimm (2005: 153).

[43]See Michelman (2005: 127).

[44]See Bognetti (2005: 92).

[45]For example, the German Constitution expressly establishes the existence of a social state—see Article 20(1), and Article 28(1)—and the Portuguese Constitution, although not expressly referring to a social state, in addition to establishing an extensive catalogue of social rights, states in Article 2 that the Portuguese Republic is a democratic state based on the rule of law with a view "to achieving economic, social and cultural democracy and deepening participatory democracy", and establishes several economic, social and cultural state tasks [see Article 9(d) and Article 81(a) and (b)]. About the Social State in Germany, see, amongst others, Heinig (2011: 1887 ff), and in Portugal, see Novais (2011: 291 ff), Sampaio (2015: 145 ff).

[46]See Whitman (2005: 108).

government in the USA as based on strong faith in the potential of the individual and a deep-rooted wariness of government".[47]

In Europe, the Constitutional Court "is viewed as a political organ that is an integral part of the state and shares in the task of elaborating and shaping social values and norms". Therefore, in this context, as Grimm says, "there is no pre-established difference between courts and legislatures regarding the particular contribution of each and that which an interpreter has to enforce, regardless of what the constitution says". And for this reason "constitutional courts inevitably cross the line between law and politics".[48,49] Consequently, in Europe there is a "flexible conception of the majority of European Constitutional Courts as operating between the lines of politics and law"[50]; in consequence, a flexible conception of separation of powers prevails.[51] On the contrary, "American constitutionalism seeks to set limits on judicial power" and to stress the differences between the judicial role and the political role.[52]

After the Second World War, the German Constitution was designed by assigning a key role to fundamental rights, with the state being given the lead role to "give effect to the "new" humanistic values enshrined therein".[53] Meanwhile, in America, "the preference for state neutrality and a minimal role for the state shaped a narrowly construed Constitution, one that is generally hostile to the realisation of 'values' by the government". The noted "difference in constitutional design has implications regarding the centrality or marginality of proportionality and balancing in their constitutional systems"[54] and also on the judicial review system it should be added. The above-mentioned protective function derived from fundamental rights is

[47]See Cohen-Eliya and Porat (2013: 46 and 53).

[48]See Grimm apud Kommers (1997: 44).

[49]Of course this idea can be rather exaggerated. However, the truth is that Constitutional Courts are clearly established in constitutions as different institutions with different functions (even if these functions intersect and their boundaries are blurred) but at the same level of importance of the legislatures. One can disagree, but this is what is enshrined in the constitutions.

[50]Even if it was essential, it does not seem to be possible to separate completely these two concepts, given that "law is politics and politics is (Constitutional) law". As Zamboni (2008: 5–6) puts it, this happens "because the political organisational form of the nations state is characterised, in part, by the fact that the law (…) is a tool available to Parliaments and Governments (…) in order to effectuate programs within a certain community".

[51]It is important to note that there is an aspect that escapes the initial setup of this principle by Montesquieu: the constitutional legislator included in the constitution the existence of a Constitutional Court, which is responsible, in particular, for the review of normative acts' constitutionality. I.e., the constitutional justice was tasked with policing compliance with the constitution by other branches of the state, and is thus "a proper and specific power of the state, yet it has not been endowed with coercive means to give effect to their sentences, but one must trust in respect of it by the legislator and by other courts". See Hohmann-Dennhardt (2011: 3–4).

[52]See Cohen-Eliya and Porat (2013: 47–55).

[53]The same happened in other European countries such as Portugal, Spain and Italy after the end of their dictatorial regimes. In Portugal, see for example Miranda and Cortês (2010: 83).

[54]See Cohen-Eliya and Porat (2013: 55).

common in countries that experienced authoritarian regimes or dictatorships, and they share some constitutional characteristics with Germany that do not exist in the American system.[55]

Furthermore, in European countries, "the expansive nature of constitutional rights created a structural need for proportionality in its intrinsic sense; in the USA, the narrower scope of constitutional rights allows for a bounded type of balancing".[56] It is important to note here that under what some have named *new constitutionalism* (or *neo-constitutionalism*)[57] it is possible to identify a general European trend towards the use of the theory of fundamental *rights as principles.*[58] This theory means that constitutional rights have a large scope and therefore clash more often, contrarily to what happens in the USA, where fundamental rights have a restricted scope and are much more rigid, rule-like norms (such as the "rights as shields" of Schauer). Apparently, this may suggest that in Europe one can find more judicial activism compared with the USA or, at least, more *judicial activity.*[59]

As seen here, there are great differences between the typical European constitutional system and the American one. And it appears that proportionality as a judicial tool used to supervise the state's activity is a doctrine that fits better the European context of a social democratic state (allowing the control of violations on both negative and positive rights), than the American type of liberal state.[60] In short, a correct understanding of judicial review, separation of powers and proportionality are strongly influenced by the cultural context or, in other words, by the "constitutional tradition" of each country.[61] This explains why European countries, which were affected by dictatorships, look at constitutional justice as an essential component of separation of powers, even though the necessity of protecting fundamental rights may lead to clashes amongst them.

[55]See Grimm (2005: 154).

[56]See Cohen-Eliya and Porat (2013: 60). Alexy (2010: 66 ff) even argues that the foundation of proportionality is the nature of fundamental rights.

[57]For a general approach to neo-constitutionalism, among many others, see Sampaio (2015: 313 ff), Prieto Sanchís (2013: 23 ff), García Figueroa (2009), Carbonell (2007).

[58]This does not mean that there are no criticisms to this theory. Criticizing the so called *principle's theory*, among others, see Schlink (1976), Habermas (1998), Poscher (2003), Šušnjar (2010).

[59]Nevertheless, the problem is not as different in each system as it might seem, because American courts will have to previously define interpretively what the protected scope of fundamental rights is, and this interpretative task can also entail judicial activism (or at least a dubious increase in judicial activity), due to its subjectivity.

[60]In a similar way, although with different arguments, see Evans and Stone (2007), Mullender (2000: 503).

[61]Referring only to separation of powers, see Saunders (2001: 132).

### *10.2.3 Legal Context*

#### 10.2.3.1 General Aspects

The different cultural context between America and continental Europe is a decisive reason explaining the differences between the use of proportionality in Europe and the use of balancing in the USA as well as the different understanding about judicial activism.

However, in my opinion, the difference in the construction of the principle of proportionality is somewhat also explained by different cultural contexts, but its foundation is the respective *legal context*, which is the key element. One can also say that the cultural context is the basis of the main architecture of each legal system. But once a legal system is created, its *concretisation* will also be influenced by the main features of that legal architecture.

First of all, as I previously mentioned, the basic content of proportionality lies in the tests of (i) rational connection, (ii) necessity, and (iii) proportionality in its strict sense. And this specific configuration of the principle allows for a detailed and really strict judicial review by constitutional courts. As already stressed, the first issue here is to determine why the use of proportionality as a strong judicial review parameter causes much less intense discussion in Europe, although it is also criticised, than in America where the anti-majoritarian nature of the judicial review has been strongly debated.[62] The answer seems to be both the different cultural and legal context.

A second question arises: how do we know what the basic content of the principle of proportionality is when, in most cases, Constitutions do not even mention it explicitly? Within this context, the first problem to address is the discussion around the use of principles unspecified by Constitutions as judicial review parameters. This problem can be solved, I believe, by using the concept of *implicit principles*[63]—principles by definition "non-explicitly formulated in some constitutional or legal provision" and thus created or "constructed" by interpreters".[64] No problem derives from the inclusion in the "constitutionality block" of implicit principles, provided that they are concretised or revealed from other explicitly enshrined constitutional principles. And this is a work to be pursued by jurisprudence and legal literature.[65,66]

---

[62]More recently, influenced by scholars as Waldron, authors have again discussed the role of constitutional courts, although in less extreme ways. See for example Linares (2008).

[63]Concerning the subject of implicit principles, among others, see Barak (2012: 53 ff), Reimer (2001: 205 ff, and 397 ff).

[64]See Guastini (2001: 138).

[65]In conclusion, the Constitution, like any other text, is not only explicit language but also "the spaces which structures fill and whose patterns structures define" (Tribe)—the "*visible Constitution*" is always accompanied by the "*invisible Constitution*". See Barak (2012: 55).

[66]For example, in the German constitutional system, the principle of proportionality is not explicitly enshrined in the Constitution, but jurisprudence and doctrine usually find the principle in the wider Rule of Law principle (*Rechtstaat*). See, among others, Hesse (1999: 148 ff). In Portugal,

Notwithstanding the aforementioned, there is still an unresolved issue: how are such implicit rules to be "created"? Are there any limits to their construction? First of all, it is important to mention that implicit principles are not created by interpretation (in its narrow sense), but through "integration into Law by the interpreters", which can be done in different ways: sometimes legal practitioners obtain them from single rules, others from more or less large groups of rules and still others from the legal system as a whole.[67] In any case, this is a "rhetorical-persuasive process, with a degree of persuasiveness dependent once again on initial legal data (the principles to be implemented, their possible formulation, the possible existence of precedents, etc.), on cultural factors and on material valuations—involving in particular an adequacy judgement that is 'instrumental' to the implicit principle with a certain configuration, serving that judgement as an adequate implementation and development of the initial principle".[68]

The principle of proportionality is usually inferred from the principle of the Rule of Law.[69] Even when the principle is explicitly mentioned in Constitutions, the truth is that the construction of its content still reflects the idea of the Rule of Law. This process of construction of rules is of course *discretionary* in high degree—, especially when rules are inferred from very general principles or from the legal system as a whole—, that leading some to argue that the court is acting as legislator and thus violating the principle of separation of powers. However, one can argue that is not the case, since the judge is only assuming "the principle as implicit in the language of corresponding sources".[70] Nevertheless, it is clear that this admittedly discretionary process must have limits and some of them correspond precisely to the *legal characteristics* of each legal system.

It thus becomes clear why the principle of proportionality is also determined by the *legal context*: even if its construction involves some discretion, limits are to be found in the structure of corresponding legal systems. And this not only explains the differences between European proportionality and American balancing, but can even *require* the existence of some differences. Regarding the legal context, the most important features are related to: (i) the type of Constitution; and (ii) the judicial review system. That said, let us analyse the main features of the European constitutional system (here mainly represented by the German and Portuguese cases) and the American constitutional system.

(Footnote 66 continued)
there is no explicit constitutional reference to the principle of protection of legitimate expectations, but the Portuguese jurisprudence and doctrine also find this principle in the wider Rule of Law principle. See, for example, Novais (2011: 261 ff).

[67]See Guastini (2001: 138).

[68]See Pino (2010: 71).

[69]Amongst others, see Bernal Pulido (2007: 606 ff), Barak (2012: 226 ff). For other foundations of the principle, see Bernal Pulido (2007: 599 ff), Barak (2012: 211 ff).

[70]See Guastini (2001: 138).

#### 10.2.3.2 Differences Between European and American Rule of Law

Regarding the European constitutional legal system, one must begin by stressing that the importance given to Constitutions was such that it created a significant phenomenon of "*constitutionalisation of the legal system*",[71] which is the process and result of the transformation of the law caused by the Constitution.[72] Therefore, the "supremacy of the Constitution" is a decisive characteristic of the European material *Rechtstaat* and means that the legislature is bound and subordinate to the Constitution.[73]

In this context, because it is so impressive, it is relevant to mention the seven main features of typical European Rule of Law[74,75]: (i) the existence of an entrenched written Constitution, resistant to ordinary legislation and difficult to amend; (ii) the existence of a judicial guarantee of the Constitution with inherent review of legislation[76]; (iii) the endowment of the Constitution with a special binding force, with the same being considered as true law and not as a mere programmatic statement; (iv) the *over-interpretation* of the Constitution, in which courts and doctrine widely use logical arguments, analogy and constitutional principles—requiring the use of balancing[77]—, therefore extending and intensifying the presence of the Constitution in the legal system, to the point of encompassing the whole law,[78] and interfering in the solution of all controversies[79]; (v) the *direct application* of constitutional norms—the Constitution regulates not only the relations between the powers of state and between state and citizens, but all

[71]About this concept, see Favoreu (1998: 184 ff).

[72]Constitucionalization is a "process", not an "all or nothing" quality. Therefore, it is possible to talk about different degrees or intensities according to each constitution. There are examples of merely nominal and semantic constitutions, of constitutions without judicial guarantees (or merely with political guarantees), and the post-war (and dictatorships) constitutions that seem to be the cases with the most complete processes of constitutionalisation. See Prieto-Sanchís (2009: 115).

[73]See Heun (2011: 39).

[74]It is clear that the American and British concept of *Rule of Law* is materially different of the German concept of *Rechtstaat*.

[75]See Guastini (2006: 49 ff).

[76]With several possibilities existing at this level. On this, see Sweet (2013: 823 ff).

[77]Among many others, see Prieto Sanchís (2009: 175 ff). It is however important to stress that this specific balancing in the sense of principle theory is different from more general types of balancing, such as the American one that was already mentioned. See Šušnjar (2010: 69–70).

[78]The constitution radiates throughout the legal system, and includes all its branches. See Jarass (2006: 649).

[79]See for example Guastini (2006: 50). Due to its particular structure, constitutional principles allow an enormous expansion of the constitution's scope of influence—Alexy even speaks of the "constitution's omnipresence" (*Allgegenwart der Verfassung*). And the greater the scope of the constitution, the smaller the margin for discretion for the legislator [see Prieto Sanchís (2013: 33)]. Additionally, there is also an "extension of protection" of fundamental rights, since the expansion of its scope of protection, due to its principled nature, involves "the extension of the courts' decision powers". See Sieckmann (2011: 58).

social relations,[80] with a phenomenon of "*elimination of constitutional barriers*" occurring[81]; (vi) interpretation in accordance with the Constitution, that involving in the limit for the Constitutional Court to step outside its role as a *negative legislator*, issuing *interpretative rulings* or *manipulative rulings*; and (vii) the influence of the Constitution on political relations—constitutional principles, strongly moralised and politicised, intervene in political argumentation, regulating relations between the branches of government and also allowing courts to supervise political argumentation by establishing legal standards according to the Constitution.

Moreover, it must be stressed that the *supremacy* of the Constitution is assisted by the guarantee of a special body—the Constitutional Court (called the "guardian of the Constitution"). Any statute that violates the Constitution is unconstitutional and void, and "the unconstitutionality is enforceable by the Constitutional Court which has comprehensive competences to declare a statute unconstitutional".[82] This court appears as a constitutional body that "aims to guarantee the 'constitutional functioning of the State', i.e. the correct and normal development of the 'political process'".[83,84]

Consequently, it can be concluded that the role of this special court and its authority can be explained precisely "by legal reasons such as its constitutional position and the scope of its jurisdiction", and by cultural reasons (such as historical ones) like "the emphasis on the rule of law" "and the self-evident acceptance of judicial guardianship of it shows some distrust of the political process and a corresponding faith in the work of courts" (which can be explained by the previous authoritarian regimes).[85] Additionally, it is important to point out that, given all the Constitutional Court's functions and especially its judicial review function, this

[80]Today, there is little doubt about this direct application. What is being discussed is the extent of this application, especially with regard to the regulation of relations between private individuals. See Prieto Sanchís (2013: 27).

[81]It becomes possible to access the Constitution, regardless the mediation of the legislator, *directly* and *permanently*, as it is difficult to find a legal problem that lacks at least some constitutional relevance, see Prieto Sanchís (2009: 114).

[82]See Heun (2011: 39).

[83]See Costa (2007: 98). The existence of a constitutionalised legal system, as mentioned, involves major consequences for the "balance of forces between the state powers", namely the shift of the role of the legislature to the judiciary, especially the Constitutional Court. See García Figueroa (2003: 167). And due to this Alexy also talks of an "omnipotence of Courts" (*Omnipotenz der Gerichte*).

[84]In addition, the jurisdiction of Constitutional Courts also extends to electoral disputes, banning of undemocratic political parties, impeachment cases of elected officials, and so on. Therefore, as Sweet notes, Constitutional Courts "are given functions that would be viewed as too 'political', or constitutionally important to confer to ordinary courts". And "[p]artly for this reason, CCs are loath to develop formal deference doctrines, such as the 'political question' doctrine of the US Supreme Court, which would signal abdication of their duties". See Sweet (2013: 822–823).

[85]See Koopmans (2003: 69).

organ also "contributes, at its level and in its way, to the formation of the state's "political will" and participates in its upper management".[86]

In summary, in continental Europe, the Rule of Law can be characterised by the binding and *radiant* strength of a material and axiological Constitution that seeps into the entire legal system. And the Constitution is protected by a special court that can assess laws made by political entities. In other words, the European Rule of Law presupposes (very) *strong courts* and *strong rights.*[87]

Let us compare this strong Rule of Law with the American case.[88] First of all, it must be stressed that the United States also has a formal and material Constitution serving as a constraint to the power of Congress and enshrining a considerable group of fundamental rights, more specifically of civil liberties. But there are at least three relevant differences. Firstly, it is possible to find "a much broader consensus regarding the contours of fundamental rights" in continental Europe than in the United States. A good example is the attitude towards the death penalty. In Europe there is solid consensus against the death penalty (its abolition was often initiated 'from above' and, in several cases, was a pre-condition for admission into entities such as the Council of Europe or the European Union).[89] Contrarily, "the death penalty remains a highly divisive issue within the United States and within the Supreme Court".[90] Secondly, the American Constitution does not enshrine *social rights* (as the Portuguese does) and does not mention the existence of a *social state* (as the German does).[91] Thirdly, related to the latter aspect, unlike the European case in which extensive positive duties of *protection* and *promotion* falling on the state stem from fundamental rights[92,93]—that involve the possibility of violation of

[86]See Costa (2007: 103).

[87]For the concepts of "weak" and "strong courts" and "weak" and "strong rights", see Tushnet (2008).

[88]In the British case the differences are even bigger due to its parliamentary model. In fact, "[t]he British doctrine of the sovereignty of Parliament embodied" the rule according to which "by issuing a statute, an Act of Parliament, the legislative bodies had the final say. No court was entitled to question the legality of a statute; and every law-making body in the country was subject to it". See Koopmans (2003: 15). And due to this, the legal context is much more decisive when comparing the British case with the typical European one. In addition to the United Kingdom, the legal context is also more important to sustain differences in the use of proportionality in other cases such as Canada and New Zealand, in which the respective legal system establishes weak judicial review systems. See Tushnet (2011: 321 ff).

[89]For example, the death penalty was abolished in Portugal in 1867.

[90]See Rosenfeld (2005: 237).

[91]And it seems clear that a "different degree of commitment to social-democratic norms among different political systems" can be found, as for example in the American and the European systems. See Krieger (2005: 192), Michelman (2005: 170), Tushnet (2003: 88).

[92]About the concept of positive duties, among others, see Fredman (2008: 65 ff).

[93]And even if the social rights involve amazingly "policentric questions" [about this concept, see King (2012: 189 ff)], one can find several decisions of the Portuguese and German Constitutional Courts related to social rights. Among others, see Portuguese Constitutional Court's rulings nos. 353/2012, 5th July; 187/2013, 5th April; 413/2014, 30th May. And for the German Constitutional

the Constitution also when the state fails to act—, in the American case the relevance assigned to these duties is diminished if not null (that being explained by the emphasis given by the Constitution to the extent of negative liberties[94]), the judicial review of these duties being inadmissible in any case.[95]

It is important to mention that in the United States judicial review also exists, and its creation seems to be related to the "scepticism against uncontrolled parliamentary supremacy as known from the British constitutional system".[96] Paradoxically, one may add, "[w]hile constitutional review has been entrenched longer in the United States, it is more firmly grounded in" continental Europe.[97] There are several reasons for that. Firstly, as mentioned, in continental Europe judicial review is performed by a *special body*—the Constitutional Court—whereas in the American case judicial review is pursued by the Supreme Court. Institutional differences between the two kinds of institutions should be pointed out, such as the specialization of a Constitutional Court in constitutional matters[98] and those concerning the appointment of judges.[99]

Beyond these aspects, there is a great difference in comparison with the European systems: the American Constitution does not specify in detail the role and the jurisdiction of the Supreme Court.[100] Therefore, there is "no clear textual basis holding that the Supreme Court is invested with a power of judicial review as the ultimate authority over constitutionality of federal and state law". And "this vagueness has led to an ongoing debate over judicial review".[101] Conversely, in the European case the role and jurisdiction of the Constitutional Court is clear and widely described in the Constitution: usually, it is the Constitution that designates Constitutional Courts as authoritative interpreters of the higher law, that establishes enforceable rights, and that explains how will function the interaction between that courts and the other branches of government and the citizenry.[102] In sum, it is the

(Footnote 93 continued)
Court see, for example, the rulings BVerfG, 1 BvL 1/09 (2010); BVerfGE 103, 242 (*Pflegeversicherung* III) (2001).

[94]See Rosenfeld (2005: 212).

[95]See Michelman (2005: 177), Grimm (2005: 137 ff).

[96]See Pirker (2013: 138).

[97]See Rosenfeld (2005: 202).

[98]See Heun (2011: 170). Regarding the argument of *expertise*, see for example Ferreres Comella (2001: 269–270).

[99]For example in Germany and Portugal, appointments require a two-thirds majority vote in parliament, which obviously "cannot be achieved without a consensus among the major political parties". In contrast, in the American case the "appointment of a president's nominee requires a simple majority vote in the Senate". See Rosenfeld (2005: 235).

[100]Alex Stone Sweet (2013: 822) refers precisely that "[c]ompared with the major alternative, however, the specialised CC has a powerful advantage, in that the framers can more easily tailor the details of jurisdiction to specific purposes".

[101]See Pirker (2013: 138).

[102]As Sweet mentions, "[t]he legitimacy resources that flow from explicit constitutional arrangements are enormously important". See Sweet (2013: 828).

lack of a clear constitutional mandate as the authoritative constitutional adjudicator that leads critics to attack the US Supreme Court as being essentially political.[103]

But these are not the only existing differences. In fact, in the American case, judicial review is limited to concrete review (and thus a posteriori). On the contrary, in the European case the possibilities of judicial review are broad: for example in the Portuguese case there is abstract and concrete review, there is prior and a posteriori review, and there is also the possibility of a state omissions review; in the German case there is the possibility of concrete and abstract review and of constitutional complaints. This short description immediately reveals a huge difference regarding the scope of jurisdiction and powers between the American and the European cases. But if we recall the concept of *abstract review* as well as some decisions constitutionally assigned to European Constitutional Courts, we notice that the magnitude of the differences between both systems is even greater.[104] All these differences explain the fact that the legitimacy of the American constitutional adjudicator is much more fragile and contested than that of the European constitutional judges.[105]

In conclusion, it can be said that "[i]n the context of a broad consensus regarding an expanded constitutional sphere, the increased scope of constitutional adjudication may become widely accepted as legitimate".[106] And due to all the above, it is now clear that there are important institutional differences between the American constitutional system and the European one, i.e., the legal context between these two systems is very different, that having a decisive influence in the construction of the proportionality principle in each constitutional system.

---

[103]See Rosenfeld (2005: 203).

[104]Abstract review can be defined as a "constitutional process for review and decision with generally binding force (with force of law) of the formal and material validity of a legal rule" [see Canotilho (2007: 1005)]. This means that Constitutional Courts may declare the unconstitutionality of a legal rule in abstract, regardless of a concrete case. In addition to all these types of review, the Constitution, either explicitly or implicitly, permits also several types of "manipulative sentences" which evidence its power.

In a merely descriptive way, even if these decisions may pose some problems, European Constitutional Courts have been using the following decisions: (i) decisions with limiting effects in the strict sense, in which there is a limitation (reduction or mere manipulation) of the normal effects of unconstitutionality that the decision should contain; (ii) decisions with appealing effect, in which the court appeals the government to amend or abolish the rules that will be unconstitutional in the future; (iii) decisions with limiting temporal effects, in which the sanctioning effects of the declaration of unconstitutionality are limited; (iv) interpretive decisions, in which the court will interpret a legal rule according to the constitution, to save it from unconstitutionality; and (v) decisions with additive effects, which consist of positive decisions of unconstitutionality that can result in either a judgment of invalidity or the statement of a rule or a principle, in order to ensure the creation of conditions to guarantee that the violated right achieves compatibility with the constitution. With a comparative analysis of use of these decisions in several countries, see Brewer Carias (2013).

[105]Referring only to the German constitutional judge, see Rosenfeld (2005: 219).

[106]See Rosenfeld (2005: 206).

#### 10.2.3.3 Consequences of the Different Rule of Law's Characteristics on the Structure of Proportionality

The latter conclusion can be clarified by an example. As already mentioned, most authors argue that proportionality requires at least three tests: rational connection, necessity, and proportionality in its narrow sense. Other authors, though, consider that the test of proportionality in the strict sense assigns an excessive margin of judicial review to courts.[107] Thus, this test should be eliminated given its political nature, with the balancing being left to "society".

However, and considering the above, one can't really argue in an *overall way* that the use of proportionality in its narrow sense inevitably leads to a violation of the separation of powers principle and, therefore, to judicial activism: the admissible *intensity* of judicial review will vary according to the cultural and legal context and the particularities of each case. And as a result of the differences between the European and the American Constitutions—and also between the European Constitutional Courts and the American Supreme Court—, the construction and contents of the principle will necessarily vary, in particular in light of the characteristics of the Rule of Law involved. In this sense, the characteristics of the European context, or contexts, will justify a principle of proportionality applied in all its tests, even if that involves strict scrutiny of legislative activity. Contrarily, the different characteristics of the American context will involve a principle of proportionality (or a simple balancing test as it already exists) that is less intrusive, stopping short for example (and at least) of proportionality in its strict sense.[108]

## 10.3 The Influence of the Proportionality's Content on the Intensity of Judicial Review

As I stated, the cultural and legal contexts have a decisive impact on the structure and content of proportionality and, consequently, also in the admissible *margin of judicial review*.[109] Nevertheless, while the connection between the principle of proportionality and the margin of judicial review is clear, one should not confuse these concepts. It is true that the cultural and legal contexts influence both the

[107]Nevertheless one must stress that the margin of judicial review also depends a lot on the concrete intensity of review used in each proportionality test. This means for example that if a court uses a strict scrutiny on the necessity test and a mere evidence scrutiny on the proportionality in its strict sense test, this court will probably be more *intrusive* in the first case.

[108]This does not mean that in theory it is not possible to construct a principle of proportionality in both cases with the traditional three tests, but the specific scrutiny allowed in each case will obviously have to be different. For example Clérico (2009: 38) argues that the principle of proportionality structure is always the same; it is the intensity of scrutiny that changes.

[109]Also connecting the principle of proportionality and the level of intensity of review, see Rivers (2006: 174 ff).

content of proportionality and the margin of judicial review in each legal system, but one cannot forget that the same margin is decisively affected by the contours of each case.[110]

Accepting that in typical European systems, the Constitutional Court has always the power to supervise state action or inaction, two different moments will still be relevant to determine the specific margin of judicial review that is admissible: (i) the first concerning the specific legal and cultural context, (ii) the second—also important—concerning all the particularities of the specific case (which also influences the proportionality's intensity of judicial scrutiny).[111] For example, the margin of judicial review will be wide when the case concerns the negative dimension of fundamental rights or specific negative rights. Inversely, that margin will be extremely small when the case concerns the positive dimension of fundamental rights and the inherent duties of protection and promotion. In the latter, at issue will be the "reservation of material and financial possibilities" (*Vorbehalt des Moglichen*), the political choice of the goods to protect and to promote (obviously related to the *scarcity of goods*), the intensity of restrictions on fundamental rights, the relevance of the public interest being pursued, and so forth.[112,113,114]

That said, the main conclusion to be reached is that, even between legal systems such as the American and the European ones, which have some similarities (due to

[110]Even if, just as Pirker, I understand that the institutional and cultural context have some influence over the margin of judicial review, I am arguing a different idea. Pirker maintains "that there is a pre-balancing exercise (previous to the proportionality balancing itself) undertaken by an adjudicator to assess whether he or she will engage in a full-scale proportionality analysis or rather refrain from it". See Pirker (2013: 71). I am stating that the cultural and legal context influence the *creation* of the principle of proportionality with a certain content.

[111]Therefore, it is not the proportionality *itself* that sets the margin of judicial review as Rivers seems to argue, but both the legal and cultural contexts, firstly, and the particularities of each case, secondly, that set the concrete margin of review that courts have in each case (and also set the intensity of the proportionality's scrutiny). Nevertheless, Rivers' conclusion is not so different from mine: he argues that depending on the specific case there is also a principle of judicial restraint that clashes with the principle of proportionality. And the result of the practical concordance (*praktische Konkordanz*) between these two principles (preserving as much as possible of each of them) will show the specific margin of judicial review. See Rivers (2006: 202 ff). It is not possible to address this question here but, in addition to other issues, even the existence of this *principle of deference* is really problematic if one considers the *normative force* of fundamental rights.

[112]Similarly, see Young (2012: 167 ff), and Sampaio (2015: 427 ff). Stressing the differences between the proportionality analysis regarding positive and negative rights, see Klatt and Moritz (2012a, b: 84 ff).

[113]And as Katharine Young argues this will involve the existence of different types of judicial review with different intensities, namely: (i) "deferential review"; (ii) "conversational review"; (iii) "experimentalist review"; (iv) "managerial review"; and (v) "peremptory review" (in this context, the court may, for example, use different types of manipulative decisions admissible in each legal system). See Young (2012: 385 ff).

[114]One must also remember that proportionality is only one of the judicial review tools that can be used by courts. In fact, there are other tools—other "limits to the limits" on fundamental rights—such as the principles of human dignity, equality or protection of legitimate expectations.

the existence of material and formal Constitutions and the possibility of judicial review), cultural and legal differences will lead to different constructions of proportionality. The same conclusion can, of course, be extended to other legal systems.[115] In continental Europe it will make sense to construct the principle of proportionality with the traditional three-prong structure (and more often with an intense scrutiny on each specific test), while in the United States, due to its specific context, it will make sense to use a more permissive balancing principle or a principle of proportionality without at least the test of proportionality in its narrow sense (and more often with a mere evidence scrutiny on the respective tests). However, this does not mean that courts will always have the same margin of judicial review: in fact they will not. But even in legal systems where it makes sense to have strong courts, the margin of judicial review will be ultimately influenced by the particularities of each case, therefore varying greatly—judicial review is not a static reality. And consequently, a strong *justification* (reasoning) of decisions (more or less intrusive ones) will also be decisive to support the actual positions taken.[116]

## 10.4 Final Remarks

As a good summary to explain the stressed differences between continental Europe and America's cultural and legal context, one can argue that the use of balancing in the context of proportionality in European's constitutional jurisprudence "was possible thanks to, not in spite of, a continued faith in legal formality, simply because balancing was seen as law, not politics or policy", that evidencing the relevance of cultural and legal contexts. Furthermore, the dominant understanding is not only that balancing is acceptable within this constitutional jurisprudence, but that "in fact [it plays] a central role in sustaining a distinctively legalist brand of constitutionalism, helping to garner commitment to and belief in the constitutional legal order". Differently, in the American case, "because of the background scepticism that tends to pervade them, and because of their association of the 'rise of balancing' with a paradigm shift from 'formalism' to 'realism', they often have trouble even seeing the European way of balancing" ("and they certainly have difficulty in believing it"). To the traditional American view, "the substantive has to be policy, legal formality can only realistically exist in the form of doctrinal rules

[115]Regarding the British case, this may explain and even support the reason why British courts normally remove the final stage of proportionality review. However, Rivers (2006: 203) criticises the British courts for being "excessively restrained".

[116]Constitutional judges cannot decide arbitrarily, especially when they intend to oppose to decisions taken by political powers. Therefore, they have to use "rational, constitutionally supported legal reasoning capable of justifying the result of a certain decision based on a balancing". See Novais (2003: 894). Concerning the necessary elements to a judicial decision be justified, among others, see Martínez Zorrilla (2007: 38 ff).

and categories, and any combination between the two can only ever be a pragmatic and unstable paradox".[117]

At this point, the connection between what is being argued and judicial activism becomes clear. The cultural and legal context means that the situations of judicial activism (such as, for example, those involving a violation of separation of powers) can similarly vary from one legal system to another. In other words, the "degree" to which the courts are 'activist' depends a lot on the respective constitutional and institutional context and cultural context.[118]

To conclude: in European countries that have 'strong constitutions' and '(very) strong courts', it is admissible, on the one hand, for the principle of proportionality to be used with its tripartite structure (and more often with an intense scrutiny on each specific test), even if that entails an overall large margin of judicial review—this does not means, however, that there cannot be *concrete* situations of judicial activism regarding the use of proportionality to review legislative measures. Nevertheless, in *general* the use of a strong proportionality principle by courts cannot be equated as judicial activism in the case of European Constitutional Courts, who thus have a much larger margin of judicial review than the American Supreme Court.[119] And this also means the threshold that distinguishes a non-activist judicial action from an activist one is therefore different in continental Europe in comparison to the United States.

**Acknowledgments** I would like to thank Luís Pereira Coutinho and Miguel Nogueira de Brito for their comments on earlier versions of this paper.

## References

ALEXY, Robert. 2010. A Theory of Constitutional Rights. Oxford: OUP.

BARAK, Aharon. 2012. Proportionality – Constitutional rights and their limitations. New York: CUP.

BAYÓN, Juan Carlos. 2006. Derechos, Democracia y Constituición. In CARBONELL, Miguel. Org. 2006. Neoconstitucionalismo(s). 3ª Ed. Madrid: Trotta.

BEATTY, David. 2004. The ultimate rule of law. Oxford: OUP.

[117] See Bomhoff (2013: 235).

[118] Talking only about the constitutional and institutional context in the case of Common Law Supreme Courts, see Dickson (2007: 11–12). With a similar conclusion, Goldsworthy states that the reasons why "judges adopt different approaches to the adjudicative role on constitutional issues include the nature of the legal culture within which judges receive their education, the method for appointing judges, the pool from which they are drawn, the prevailing political culture in the country (and in particular the extent to which that has been affected by the 'rights revolution'), the nature and age of the Constitution and, lastly, the fact that judges somehow manage to find ways of adjusting their constitutions to 'the felt necessities of the time'". See Goldsworthy (2006: 343).

[119] In the American case the situation is reversed, which seems to justify the existence of strong judicial deference and weak judicial review.

BERNAL PULIDO, Carlos. 2003. El princípio de proporcionalidad y los derechos fundamentales. Madrid: CEC.
BREWER-CARÍAS, Allan. 2013. Constitutional Courts as Positive Legislators: A Comparative Law Study. Cambridge: CUP.
BÖCKENFÖRDE, Ernst-Wolfgang. 2003. Schutzbereich, Eingriff, verfassungsimmanente Schranken: Zur Kritik gegenwärtiger Grundrechtsdogmatik. In Der Staat
BOGNETTI, Giovanni. 2005. The concept of human dignity in European and US constitutionalism. In NOLTE, Georg. Ed. European and US Constitutionalism. Cambridge: CUP.
BOMHOFF, Jacco. 2013. Balancing constitutional rights - the origins and meanings of postwar legal discourse. Cambridge: CUP.
CANAS, Vitalino. 1994. Proporcionalidade (princípio). In DJAP. VII. Lisboa.
CANOTILHO, Gomes. 2007. Direito Constitucional e Teoria da Constituição. 7ª Ed. Coimbra: Almedina.
CANOTILHO, Gomes. 2003. Tribunal Constitucional, jurisprudências e políticas públicas. In APDC. Vol. II. Coimbra: Coimbra Editora.
CARBONELL, Miguel. Ed. 2007. Teoría del Neoconstitucionalismo(s). Madrid: Trotta.
CLÉRICO, Laura. 2009. Examen de Proporcionalidad en El Derecho Constitucional. Buenos Aires: Eudeba.
COHEN-ELIYA, Moshe / PORAT, Iddo. 2013. Proportionality and Constitutional Culture. Cambridge: CUP.
COSTA, Cardoso da. 2007. A Jurisdição Constitucional em Portugal. 3ª ed. Coimbra: Almedina.
DICKSON, Bruce. 2007. Judicial Activism in Common Law Supreme Courts. Oxford: OUP.
EVANS, Simon/STONE, Adrienne. 2007. Balancing and Proportionality: A Distinctive Ethic? Draft for discussion at the VII World Congress of the International Association of Constitutional Law. Athens.
FAVOREU, Louis. 1998. La Constitutionnalisation du Droit. In MATHIEU, Bertrand / VERPEAUX, Michel. 1998. La constitutionnalisation des branches du droit. Paris: Economica.
FERRERES COMELLA, Victor. 2011. The rise of specialized constitutional courts. In GINSBURG, Tom / DIXON, Rosalind. Comparative Constitutional Law. Cheltenham: Edward Elgar.
FREDMAN, Sandra. 2008. Human rights transformed — positive rights and positive duties. Oxford: OUP.
GARCÍA FIGUEROA, Alfonso. 2009. Criaturas de la Moralidade – Una aproximación neoconstitucionalista al Derecho a través de los derechos. Madrid: Trotta.
GARCÍA FIGUEROA, Alfonso. 2003. La teoría del Derecho en tiempos del constitucionalismo. In CARBONELL, Miguel. Org. Neoconstitucionalismo(s). Madrid: Trotta.
GOLDSWORTHY, Jeffrey. 2006. Interpreting Constitutions: A Comparative Study. Oxford: OUP.
GRIMM, Dieter. 2005. The protective function of the state. In NOLTE, Georg. Ed. European and US Constitutionalism. Cambridge: CUP.
GUASTINI, Riccardo. 2006. La « constitucionalización » del Ordenamiento Jurídico: el caso italiano. In CARBONELL, Miguel. Org. Neoconstitucionalismo(s). 3ª Ed. Madrid: Trotta.
GUASTINI, Riccardo. 2001. Estudios de Teoría Constitucional. México: Fontanamara.
HABERMAS, Jürgen. 1998. Faktizität und Geltung. Frankfurt: Suhrkamp.
HEINIG, Hans. 2011. The political and the Basic Law's Sozialstaat Principle — Perspectives from Constitutional Law and Theory. In German Law Journal. Vol. II. Issue no. 11.
HESSE, Konrad. 1999. Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland. C.F. Heidelberg: Müller
HEUN, Werner. 2011. The Constitution of Germany — A Contextual Analysis. Oxford: Hart
HOHMANN-DENNHARDT, Christine. 2011. División de poderes, independencia de la justicia y la función del Tribunal Constitucional. In: HOHMANN-DENNHARDT, Christine / SCHOLZ, Rupert/ CRUZ VILLALÓN, Pedro. Orgs. Las Constituciones alemana y española en su aniversario. Madrid: CEPC.

JARASS, Jans. 2006. Funktionen un Dimensionen der Grundrecht. In MERTEN, Detlef/PAPIER, Hans-Jürgen. Hrsg. Handbuch der Grundrechte. Band II. Heidelberg: Müller.
KING, Jeff. 2012. Judging Social Rights. Cambridge: CUP.
KLATT, Matthias / MORITZ, Meister. 2012a. The Constitutional Structure of Proportionality. Oxford: OUP.
KLATT, Matthias / MORITZ, Meister. 2012b. Proportionality — a benefit to human rights? Remarks on the I•CON controversy. In I•Con. Vol. 10. n.º 3.
KMIEC, Keenan. 2004. The Origin and Current Meanings of Judicial Activism. In California Law Review. 92. Oct.
KOOPMANS, Tim. 2003. Courts and Political Institutions. Cambridge: CUP.
KOMMERS, Donald. 1997. The Constitutional Jurisprudence of the Republic of Germany. 2nd Ed. USA: Duke University Press.
LERCHE, Peter. 2001. Das Bundesverfassungsgericht im Streit und Methode. In BADURA, Peter / DREIER, Horst. Hrsg. Festschrift 50 Jahre Bundesverfassungsgericht. Erster Band. Tübingen: Mohr Siebeck.
LINARES, Sebastián. 2008. La (i)legitimidad democrática del control judicial de las leyes. Madrid: Marcial Pons.
MARTÍNEZ ZORRILLA, David. 2007. Conflictos constitucionales, ponderación e indeterminación normativa. Madrid: Marcial Pons.
MICHAEL, Lothar. 2011. Los derechos de igualdad como princípios iusfundamentales. In SIECKMANN, Jan-Reinhard. Ed. La teoría principialista de los derechos fundamentales — Estudios sobre la teoría de los derechos fundamentales de Robert Alexy. Madrid: Marcial Pons.
MICHELMAN, Frank. 2005. The protective function of the state in the United States and Europe: the constitutional question. In NOLTE Georg. Ed. European and US Constitutionalism. Cambridge: CUP.
MIRANDA, Jorge / CORTÊS, António. 2010. Anotação ao Artigo 1.º. MIRANDA, Jorge / MEDEIROS, Rui. Eds. Constituição Portuguesa Anotada. 2nd ed. Tomo I. Coimbra: Wolters Kluwer/Coimbra Editora.
MÖLLER, Kai. 2014. Constructing the Proportionality Test: An Emerging Global Conversation. In LAZARUS, Liora / MCCRUDDEN, Christopher /BOWLES, Nigel. Eds. 2014. Reasoning Rights – Comparative Judicial Engagement. Oxford: Hart.
MÖLLER, Kai. 2012. Proportionality: Challenging the Critics. In I•Con. Vol. 10. n.º 3.
MORAIS, Carlos Blanco de / RAMOS, Elival da Silva. Coords. 2012. Perspectivas de Reforma da Justiça Constitucional em Portugal e no Brasil. Coimbra: Almedina.
MULLENDER, Richard. 2000. Theorizing the Third Way: Qualified Consequentialism, the Proportionality Principle, and the New Social Democracy. In Journal of Law and Society. 27.
MÜLLER, Friedrich. 1990. Die Positivität der Grundrechte. Fragen einer praktischen Grundrechtsdogmatik. Berlin: Duncker & Humblot.
NOVAIS, Jorge Reis. 2011. Os Princípios Constitucionais Estruturantes da República Portuguesa. 2ª ed. Coimbra: Coimbra Editora.
NOVAIS, Jorge Reis. 2010. Direitos Sociais — Teoria Jurídica dos Direitos Sociais enquanto Direitos Fundamentais. Coimbra: Coimbra Editora.
NOVAIS, Jorge Reis. 2003. As restrições aos direitos fundamentais não expressamente autorizadas pela Constituição. Coimbra: Coimbra Editora.
OSSENBÜHL, Fritz. 1996. Abwägung im Verfassungsrecht. In ERBGUTH, Wilfried. Hrsg. Abwägung im Recht. Köln: Carl Heymanns.
PAPIER, Hans-Jürgen. 2005. Aktuelle grundrechtsdogmatische Entwicklungen in der Rechtsprechung des Bundesverfassungsgerichts. In GRUPP, Klaus / HUFELD, Ulrich. Hrsg. Recht, Kultur, Finanzen. Festschrift für Reinhard Mußgnug zum 70. Geburtstag am 26. Oktober 2005. Heidelberg: C. F. Müller.
PINO, Giorgio. 2010. Diritti e interpretazione — Il ragionamento giuridicio nello Stato costituzionale. Il Mulino, Bologna
PIRKER, Benedikt. 2013. Proportionality Analysis and Models of Judicial Review. Groningen: Europa Law Publishing.

POSCHER, Ralf. 2003. Grundrechte als Abwehrrechte. Tubingen: Mohr Siebeck.
PRIETO SANCHÍS, Luís. 2013. El constitucionalismo de los derechos: Ensayos de filosofía juridical. Madrid: Trotta.
PRIETO SANCHÍS, Luís. 2009. Justicia Constitucional y Derechos Fundamentales. Madrid: Trotta.
RIVERS, Julian. 2006. Proportionality and Variable Intensity of Review. In Cambridge Law Journal. 65(1). March.
ROSENFELD, Michel. 2005. Constitutional adjudication in Europe and the United States: paradoxes and contrasts. In NOLTE, Georg. Ed. European and US Constitutionalism. Cambridge: CUP.
SAMPAIO, Jorge Silva. 2015. O controlo jurisdicional das políticas públicas de direitos sociais. Coimbra: Coimbra Editora.
SAUNDERS, Cheryl. 2001. Dividing powers in the contemporary world. In: APDC. Vol. 1, Coimbra: Coimbra Editora.
SCHLINK, Bernhard. 2012. Proportionality (1). In ROSENFELD, Michel /SAJÓ, András. Eds. The Oxford Handbook of Comparative Constitutional Law. Oxford: OUP.
SCHLINK, Bernhard. 1998. The Dynamics of Constitutional Adjudication. In ROSENFELD, Michel /ARATO, Andrew. Eds. Habermas on Law and Democracy. Berkeley: University of California Press.
SCHLINK, Bernhard. 1976. Abwagung im Verfassungsrecht. Berlin: Duncker & Humblot.
SIECKMANN, Jans-Reinhard. 2011. Problemas de la teoría principialista de los derechos fundamentales. In CLÉRICO, Laura / SIECKMANN, Jans-Reinhard / Oliver-Lalana, Daniel. Coords. Derechos Fundamentales, principios y argumentación — Estudios sobre la teoría jurídica de Robert Alexy. Granada: Comares.
ŠUŠNJAR, D. 2010. Proportionality, Fundamental Rights and Balance of Powers. Leiden: Martinus Nijhoff.
SWEET, Alec Stone. 2013. Constitutional Courts. In ROSENFELD, Michel / SAJÓ, András. Eds. The Oxford Handbook of Comparative Constitutional Law. OUP, Oxford.
SWEET, Alec Stone / MATHEWS, Jud. 2008. Proportionality Balancing and Global Constitutionalism. In Columbia Journal of Transnational Law. n.º 47.
STÖRRING, Lars Peter. 2009. Das Untermaßverbot in der Diskussion: Untersuchung einer umstrittenen Rechtsfigur. Berlin: Duncker & Humblot.
REIMER, Franz. 2001. Verfassungsprinzipien: Ein Normtyp im Grundgesetz. Berlin: Duncker & Humblot.
TSAKYRAKIS, Stavros. 2012. Proportionality: An Assault on Human Rights? In I•Con. Vol. 7. n.º 3.
TUSHNET, Mark. 2003. The Issue of State Action/Horizontal Effect in Comparative Constitutional Law. International Journal of Constitutional Law. 1.
TUSHNET, Mark. 2008. Weak Courts, Strong Rights. Judical Review and Social Welfare Rights incomparative Constitutional Law. Princeton: PUP.
TUSHNET, Mark. 2011. The rise of weak-form judicial review. In GINSBURG, Tom / DIXON, Rosalind. Comparative Constitutional Law. Cheltenham: Edward Elgar.
WALDRON, Jeremy. 2006. The Core of the Case Against Judicial Review. In YJIL. Vol. 115. No. 6.
WALDRON, Jeremy. 1999. Law and Disagreement. OUP, Oxford.
WHITMAN, James. 2005. 'Human dignity' in Europe and the United States: the social foundations. In NOLTE, Georg. Ed. European and US Constitutionalism. Cambridge: CUP.
YOUNG, Katharine. 2012. Constituting Economic and Social Rights. Oxford: OUP.
YOWELL, Paul. 2014. Proportionality in the United States Constitutional Law. In LAZARUS, Liora / MCCRUDDEN, Christopher / BOWLES, Nigel. Eds. 2014. Reasoning Rights — Comparative Judicial Engagement. Oxford: Hart.
ZAMBONI, Mauro. 2008. Law and Politics — A Dilemma for Contemporary Legal Theory. Berlin: Springer.