

Proportionality in Private Law

Edited by
FRANZ BAUER
and BEN KÖHLER

*Studien zum ausländischen
und internationalen Privatrecht*

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Preface

The present volume is the result of a conference held at the Max Planck Institute for Comparative and International Private Law in Hamburg in May 2022. The aim of this conference was to explore the concept of proportionality, which has been a focal point of comparative constitutional law, specifically from the perspective of comparative private law. The contributions do not attempt to provide a comprehensive comparative account but instead look at particular manifestations of proportionality in private law as illustrations of a more general idea. They come from early career scholars from various jurisdictions with different perspectives and preconceptions but a shared interest in the comparative foundations of private law. The concept of proportionality serves as a common starting point to examine its function and relevance in different private law settings and across different legal systems and contexts. Taken together, the contributions show both the pervasiveness and multifaceted nature of proportionality reasoning in private law.

We have structured the volume according to three main themes. After two introductory chapters, the first part is dedicated to the constitutional and theoretical foundations of proportionality reasoning, both in Germany and in the US. The contributions in the second part examine the potential of the concept in three specific areas of European private law: contract law, intellectual property law, and private international law. Finally, the third part explores whether and how ideas of proportionality can be used to address problems of procedural law.

As organisers of the conference and editors of this volume, we would like to express our immense gratitude to the contributors for their readiness to engage with the theme of the book, the fruitful and enjoyable discussions at the conference, and their lasting commitment to this project during the publication process. We are also very grateful to Professor Dr. Dr. h.c. mult. Reinhard Zimmermann for his generous support throughout the different stages of this project and his welcome address at the conference. We thank him, Professor Dr. Dr. h.c. Dr. h.c. Holger Fleischer, and Professor Dr. Ralf Michaels for the inclusion in the *Studien zum ausländischen und internationalen Privatrecht*, as well as Mohr Siebeck for the publication of the book. We would also like to say thank you to our colleagues at the Institute who contributed to the realisation of this project: to Anja Hell-Mynarik and the events team for their invaluable support in staging the conference; to Jonas Voigt for writing the conference report; and to Dr. Christian Eckl and Janina Jentz for their

work in the finalisation of the manuscript. Finally, our special thanks go to Michael Friedman for reading and editing all the contributions and for his stylistic advice.

Hamburg, January 2023

Franz Bauer
Ben Köhler

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Abbreviations

AC	Law Reports, Appeal Cases
AcP	Archiv für die civilistische Praxis
ADR	Alternative Dispute Resolution
All ER	All England Law Reports
All ER (Comm)	All England Law Reports (Commercial Cases)
ALT	American Legal Thought
Am Soc Soc'y	American Sociological Society
Am J Comp L	American Journal of Comparative Law
Annu Rep ABA	Annual Report of the American Bar Association
AöR	Archiv des öffentlichen Rechts
art/arts	article/articles
BAG	Bundesarbeitsgericht
BAGE	Entscheidungen des Bundesarbeitsgerichts
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BLR	Building Law Reports
Buff L Rev	Buffalo Law Review
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
BYU L Rev	Brigham Young University Law Review
CA	Court of Appeal (England and Wales)
ca	circa
Cal L Rev	California Law Review
CAP	Carolina Academic Press
CC	Constitutional Court (South Africa)
CE	Conseil d'Etat
CFREU	Charter of Fundamental Rights of the European Union
Chi-Kent L Rev	Chicago-Kent Law Review
ch/chs	chapter/s
Ch	High Court, Chancery Division
CJEU	Court of Justice of the European Union
CJLJ	Canadian Journal of Law and Jurisprudence
CJQ	Civil Justice Quarterly
CLJ	Cambridge Law Journal
CML Rev	Common Market Law Review
Co	Company
Colum L Rev	Columbia Law Review
Comm	Commercial Court
Const Comment	Constitutional Commentary
CPR	(English) Civil Procedure Rules

CUP	Cambridge University Press
CYELP	Croatian Yearbook of European Law and Policy
CYELS	Cambridge Yearbook of European Legal Studies
DePaul L Rev	DePaul Law Review
Duke J Comp & Int'l L	Duke Journal of Comparative & International Law
Duke LJ	Duke Law Journal
EBL Rev	European Business Law Review
EC	European Community
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECLI	European Case Law Identifier
ECR	European Court Reports
ed/eds	editor/s
edn	edition
ED Tex	Eastern District of Texas
eg	for example
EHR	European Human Rights Reports
EIPR	European Intellectual Property Review
EJIL	European Journal of International Law
ER	English Reports
ERPL	European Review of Private Law
Erasmus L Rev	Erasmus Law Review
EU	European Union
EuR	Europarecht (journal)
Eur J Legal Stud	European Journal of Legal Studies
Eur L Rev	European Law Review
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWCA Civ	Court of Appeal of England and Wales (Civil Division)
EWHC	High Court of England and Wales
FCR	Federal Court Reports
Fed Cir	Federal Circuit
Fed Cts L Rev	Federal Courts Law Review
Fla L Rev	Florida Law Review
fn/fns	footnote/s (external to the chapter)
FRCP	Federal Rules of Civil Procedure
FRF	French franc
Ga J Int'l & Comp L	Georgia Journal of International and Comparative law
Geo LJ	Georgetown Law Journal
German LJ	German Law Journal
GPR	Zeitschrift für das Privatrecht der Europäischen Union
Harv Int'l LJ	Harvard International Law Journal

Harv JL & Pub Pol’y	Harvard Journal of Law & Public Policy
Harv L Rev	Harvard Law Review
Hastings Int’l & Comp L Rev	Hastings International & Comparative Law Review
Hastings LJ	Hastings Law Journal
HL	House of Lords
HUP	Harvard University Press
HLS	Harvard Law School
ICJ Rep	Report of the International Court of Justice
ICLQ	International and Comparative Law Quarterly
ie	that is
IIC	International Review of Intellectual Property and Competition Law
IJCA	International Journal for Court Administration
IJPL	International Journal of Procedural Law
Ill L Rev	Illinois Law Review
Int ALR	International Arbitration Law Review
Int’l J Const L	International Journal of Constitutional Law
Iowa L Rev	Iowa Law Review
IP	Intellectual Property
ISP	Internet service provider
J Civ LP	Journal of Civil Litigation and Practice
J Contemp Legal Issues	Journal of Contemporary Legal Issues
J Crim L & Criminology	Journal of Criminal Law and Criminology
J Law Soc	Journal of Law & Society
J Priv Int L	Journal of Private International Law
J Legal Stud	The Journal of Legal Studies
J Soc Wel & Fam L	Journal of Social Welfare & Family Law
Jr	Junior
JURA	Juristische Ausbildung
JuS	Juristische Schulung
JZ	JuristenZeitung
KB	High Court, King’s Bench Division Law Reports, King’s Bench Division
La L Rev	Louisiana Law Review
Law J Soc & Lab Rel	Law Journal of Social and Labor Relations
LQR	Law Quarterly Review
Marq L Rev	Marquette Law Review
Melb U L Rev	Melbourne University Law Review
McGill LJ	McGill Law Journal
MERCPC	ELI/UNIDROIT Model European Rules on Civil Procedure

Mich L Rev	Michigan Law Review
Minn L Rev	Minnesota Law Review
MLR	Modern Law Review
n/nn	footnote/s (internal to the chapter)
NC L Rev	North Carolina Law Review
NILR	Netherlands International Law Review
NJW	Neue Juristische Wochenschrift
no	number
Notre Dame L Rev	Notre Dame Law Review
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NYU	New York University
NYU L Rev	New York University Law Review
NZ L Rev	New Zealand Law Review
Ohio St J Crim L	Ohio State Journal of Criminal Law
OJ	Official Journal (of the European Union)
OJLS	Oxford Journal of Legal Studies
ONSC	Ontario Superior Court of Justice
OUP	Oxford University Press
Or	Oregon Reports
OR	Ontario Reports
Pac LJ	Pacific Law Journal
para/paras	paragraph/paragraphs
PL	Public law (journal)
PSC	President of the Supreme Court of the United Kingdom
PSPP	Public Sector Purchase Programme
pt/pts	part/parts
QB	High Court, Queen's Bench Division Law Reports, Queen's Bench Division
r/rr	rule/rules
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
Riv trim dir proc civ	Rivista trimestrale di diritto e procedura civile
s/ss	section/sections
SA	South African Law Reports
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
S Cal L Rev	Southern California Law Review
SCC	Supreme Court of Canada
SchwarzArbG	Gesetz zur Bekämpfung der Schwarzarbeit und illegalen Beschäftigung
SCR	Canada Supreme Court Reports
SDNY	Southern District of New York
SJD	Doctor of Juridical Science
Sup Ct Rev	The Supreme Court Review

Temp LQ	Temple Law Quarterly
TEU	Treaty on European Union
Tex L Rev	Texas Law Review
TFEU	Treaty on the Functioning of the European Union
tr/trs	translator/s
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
U Chi L Rev	University of Chicago Law Review
U Pa L Rev	University of Pennsylvania Law Review
U St Thomas LJ	University of St. Thomas Law Journal
U Toronto LJ	University of Toronto Law Journal
UCLA L Rev	University of California, Los Angeles (UCLA) Law Review
UK	United Kingdom
UKHL	United Kingdom House of Lords
UKPC	United Kingdom Privy Council
UKSC	United Kingdom Supreme Court
UP	University Press
US	United States of America
USC	United States Code
US Const	United States Constitution
US Const amend	Amendment to the United States Constitution
UW Austl L Rev	University of Western Australia Law Review
vol	volume
Va L Rev Online	Virginia Law Review Online
Wash & Lee L Rev	Washington & Lee Law Review
Wis L Rev	Wisconsin Law Review
WLR	Weekly Law Reports
WTO	World Trade Organisation
Yale LJ	Yale Law Journal
YEL	Yearbook of European Law
YPIL	Yearbook of Private International Law
ZEuP	Zeitschrift für Europäisches Privatrecht
ZEuS	Zeitschrift für Europarechtliche Studien
ZfPW	Zeitschrift für die gesamte Privatrechtswissenschaft
ZZP	Zeitschrift für Zivilprozess

Introduction

Proportionality in Private Law: A Primer

Ben Köhler

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I. Introduction

Proportionality is a ubiquitous and yet elusive concept in law. It has long been a topic of legal and philosophical discourse.¹ Accounts of the history of proportionality usually start with Aristotle or Thomas Aquinas.² An all-encompassing historical or genealogical account of proportionality in law goes well beyond the scope of this volume. Instead, we will focus on the more recent debates that proportionality has sparked across many jurisdictions and different areas of law. While the notion of proportionality is mostly associated with constitutional rights review, the main focus of this volume is a different one: the contributions will analyse how proportionality is contained in or affects private law settings in different jurisdictions. A study of proportionality in private law cannot, however, ignore the constitutional dimension. Proportionality’s role in private law is deeply intertwined with constitutional law: it can influence and, in some cases, even determine private

¹ Franz Wieacker, ‘Geschichtliche Wurzeln des Prinzips der verhältnismäßigen Rechtsanwendung’ in Marcus Lutter, Walter Stimpel and Herbert Wiedemann (eds), *Festschrift für Robert Fischer* (De Gruyter 1979) 867.

² Emily Crawford, ‘Proportionality’ in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (OUP 2022) paras 3–5; Oliver Remien, ‘Principle of Proportionality’ in Jürgen Basedow, Klaus Hopt and Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (OUP 2012) 1321; Michael Stürner, *Der Grundsatz der Verhältnismäßigkeit im Schuldvertragsrecht* (Mohr Siebeck 2010) 13–14.

law outcomes, as many of the contributions to the present volume demonstrate.³ Constitutional law and private law discussions can therefore not be neatly separated. At the same time, proportionality in private law goes beyond ‘constitutionally-infused’⁴ proportionality.⁵

With such a wide field to cover, this introduction can give only a cursory account of the permutations and migrations of proportionality, before Franz Bauer provides a framework for proportionality in private law more specifically.⁶ The contributions in the present volume will thereafter focus on specific instances in which proportionality affects or should affect private law and private law theory. This tour d’horizon will start with the role of proportionality in German law (II.), before it will turn to proportionality as a global principle of law (III.) and the potential role for comparative private law (IV.).

II. Invention or Rediscovery? Proportionality in German Law

A traditional stronghold of the proportionality principle has been German constitutional law and scholarship, most notably in relation to its function as a safeguard against the excessive restriction of fundamental rights.⁷ Shortly after the adoption of the German Basic Law, the Federal Constitutional Court introduced, in its famous ‘pharmacy judgment’,⁸ the requirement of proportionality for restrictions of fundamental rights.⁹ Assisted by legal scholarship,¹⁰ the

³ See, for instance, Victor Jouannaud, ‘The Various Manifestations of the Constitutional Principle of Proportionality in Private Law’, in this volume; Philip M Bender, ‘Private Law Adjudication versus Constitutional Adjudication: Proportionality between Coherence and Balancing’, in this volume; see also Franz Bauer, ‘Proportionality in Private Law: An Analytical Framework’, in this volume.

⁴ Bauer (n 3).

⁵ Stürmer (n 2) 2.

⁶ Bauer (n 3).

⁷ See Oliver Lepsius, ‘Die Chancen und Grenzen des Grundsatzes der Verhältnismäßigkeit’ in Matthias Jestaedt and Oliver Lepsius (eds), *Verhältnismäßigkeit: Zur Tragfähigkeit eines verfassungsrechtlichen Schlüsselkonzepts* (Mohr Siebeck 2015) 2.

⁸ BVerfG 11 June 1958, 1 BvR 596/56, 7 BVerfGE 377 (*Apotheken-Urteil*).

⁹ For the early development, see Lepsius (n 7) 5–10; Ralf Poscher, ‘Das Grundgesetz als Verfassung des verhältnismäßigen Ausgleichs’ in Matthias Herdegen and others (eds), *Handbuch des Verfassungsrechts. Darstellung in transnationaler Perspektive* (CH Beck 2021) 160–167; Alexander Tischbirek, *Die Verhältnismäßigkeitsprüfung* (Mohr Siebeck 2017) 27–38.

¹⁰ Peter Lerche, *Übermass und Verfassungsrecht* (1961); Bernhard Schlink, *Abwägung im Verfassungsstaat* (1976); Lothar Hirschberg, *Der Grundsatz der Verhältnismäßigkeit* (Otto Schwartz 1981); on the role of constitutional law scholarship in the development of the proportionality principle, see Christian Bumke, ‘Die Entwicklung der Grundrechts-

Court further developed the proportionality principle as the bedrock of fundamental rights doctrine in its subsequent jurisprudence.¹¹ While there are still discussions on the implementation of the principle, most notably as it relates to the delineation of competence as between the legislature and the Constitutional Court,¹² the central role of proportionality in the protection of fundamental rights seems universally acknowledged.¹³ Proportionality in this context has been labelled ‘one of the great legal inventions after the Second World War’.¹⁴ The label ‘invention’ may, however, be slightly misleading given that proportionality as such could hardly be seen as a totally novel idea. Its roots have been traced back to 19th century administrative law¹⁵ and, perhaps less obviously, to 19th century private law, most notably with respect to emergency rights.¹⁶

This connection to 19th century private law shows that proportionality is not confined to public law. It also plays a significant yet arguably more complicated role in private law. The principle of proportionality has been a component of private law debates for quite some time.¹⁷ Many private law scholars would surely contend that private law, in essence, consists of balanced rules that embody the principle of proportionality.¹⁸ In other words, traditional private law rules are, or at least should be, proportionate by their nature.¹⁹ This traditional view of private law is now confronted with the different, very specific

dogmatik in der deutschen Staatsrechtslehre unter dem Grundgesetz’ (2019) 144 AöR 1, 52–54.

¹¹ Johannes Saurer, ‘Die Globalisierung des Verhältnismäßigkeitsgrundsatzes’ (2012) 51 Der Staat 3.

¹² See, for instance, Matthias Jestaedt, ‘Verhältnismäßigkeit als Verhaltensmaß. Gesetzgebung angesichts der Vielfalt der Rationalitäten und des Eigenwerts des politischen Kompromisses’ in Lepsius and Jestaedt (n 7) 300–302.

¹³ Poscher (n 9) 159.

¹⁴ Lepsius (n 7) 2.

¹⁵ Hirschberg (n 10) 2–7; Lepsius (n 7) 2; Tischbirek (n 9) 8–11.

¹⁶ Tischbirek (n 9) 11–13; on the history of s 228 of the German Civil Code, see Tilman Reppen, in *J. von Staudinger Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (DeGruyter 2019) § 228 para 10.

¹⁷ See, monographically, Marcus Bieder, *Das ungeschriebene Verhältnismäßigkeitsprinzip als Schranke privater Rechtsausübung* (CH Beck 2007); Hans Hanau, *Der Grundsatz der Verhältnismäßigkeit als Schranke privater Gestaltungsmacht* (Mohr Siebeck 2004); Matthias Ruffert, *Vorrang der Verfassung und Eigenständigkeit des Privatrechts: eine verfassungsrechtliche Untersuchung zur Privatrechtswirkung des Grundgesetzes* (Mohr Siebeck 2001) 99–102; Stürner (n 2); see also Dieter Medicus, ‘Der Grundsatz der Verhältnismäßigkeit’ (1992) 192 AcP 35; for recent contributions, see Peter Derleder, ‘Die uneingelöste Grundrechtsbindung des Privatrechts’ in Lepsius and Jestaedt (n 7) 234; Lorenz Kähler, ‘Raum für Maßlosigkeit: Zu den Grenzen des Verhältnismäßigkeitsgrundsatzes im Privatrecht’ in Lepsius and Jestaedt (n 7) 210.

¹⁸ See, with examples, Medicus (n 17) 37; Stürner (n 2) 289–290.

¹⁹ Ruffert (n 17) 100; Stürner (n 2) 3, 289–290.

type of proportionality of constitutional law.²⁰ Conversely, the constitutional version of proportionality leaves its natural habitat of rights review and needs to be integrated into the broader framework of private law. In the private law realm, proportionality, or even parts of it, may come in different shapes and with ambivalent meanings that need to be disentangled and distinguished.²¹

It is not the purpose of this short introduction to recapitulate the multifaceted discussion on fundamental rights, private law and proportionality. I will therefore limit myself to highlighting some of the most important tensions. One of the crucial differences concerns the different actors in public and private law as addressees of the proportionality review. The solution is relatively simple for legislators: it is clear that they are bound to legislate without disproportionately restricting fundamental rights, also in private law settings.²² This includes, of course, restrictions placed on fundamental rights protecting foundational values of private law, such as freedom of contract.²³ The situation of courts is a bit more complex. There are some conceptual challenges and disagreements as to the reasons for and the extent of the courts' duty to balance the fundamental rights of different actors in private law settings.²⁴ In this volume, Philip M. Bender will identify different features and modes of reasoning for constitutional adjudication on the one side and private law adjudication on the other.²⁵ Irrespective of these conceptual challenges, there is little doubt that courts are often charged with balancing fundamental rights when adjudicating private law disputes.

The real conundrum concerns proportionality requirements for private actors.²⁶ There is a strand of private law scholarship which maintains that the requirement of proportionality is fundamentally at odds with private autonomy.²⁷ While proportionality is a structured form of a rationality review,²⁸ private law, at least as far as private actions are concerned, to a large extent denies this rationality review and defers to the will of the parties: *stat pro*

²⁰ For more detail, see Bauer (n 3) 23–29.

²¹ Bauer (n 3) 23–31.

²² Medicus (n 17) 46–47; Stürner (n 2) 297–299.

²³ Medicus (n 17) 46; for freedom of contract in EU law, Jan Lüttringhaus, *Vertragsfreiheit und ihre Materialisierung im Europäischen Binnenmarkt* (Mohr Siebeck 2018) 218–221.

²⁴ For a recapitulation of the debate on 'third party effects', see Ruffert (n 17) 8–28.

²⁵ Bender (n 3).

²⁶ Köhler (n 17) 210.

²⁷ See, eg, Köhler (n 17).

²⁸ On the relationship between proportionality and other forms of rationality controls, see Alison L Young and Gráinne de Búrca, 'Proportionality' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law* (Hart 2017) 138; for the argument that proportionality is (only) a rationality review, see Niels Petersen, *Verhältnismäßigkeit als Rationalitätskontrolle* (Mohr Siebeck 2015) 269–274; on the justificatory function, see also Bauer (n 3) 19–21.

ratione voluntas.²⁹ Or, as a German scholar has recently put it: private law offers ‘room for excessiveness’.³⁰ This traditional view of private law with party autonomy reigning supreme is increasingly challenged by more instrumental conceptions of private law.³¹ One of the current debates, for instance, focuses on sustainability in private law and shows that interests beyond the bi- or multilateral relationships of private law need to be accounted for.³² A well-established tool to balance these interests could perhaps be found in proportionality. The role for proportionality in private law thus seems to depend upon the relationship between constitutional and private law as well as on the understanding of the function of private law.³³ This tension is addressed by Victor Jouannaud in this volume.³⁴

In addition to the proportionality analysis within private law itself, also civil procedure is confronted with the expectation that proceedings be proportionate in terms of expenditure in relation to both the issues at stake as well as the overall resources of the court system, as Wiebke Voß demonstrates in her contribution to this volume.³⁵ As she shows, this procedural version of proportionality is markedly different from proportionality within private law. In this regard, the challenge for civil procedure is to balance demands for procedural efficiency with the objective of material justice.

III. The ‘Ultimate Rule of Law’? Migrations and Permutations of Proportionality

Proportionality transcends national jurisdictions.³⁶ It has even been dubbed the ‘ultimate rule of law’³⁷ and identified as a characteristic trait of the globaliza-

²⁹ Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts, Zweiter Band: Das Rechtsgeschäft* (3rd edn, Springer 1979) 6; on this principle and its relationship with proportionality in private law, see Stürner (n 2) 7–10.

³⁰ Kähler (n 17): ‘Raum für Maßlosigkeit’.

³¹ See Alexander Hellgardt, *Regulierung und Privatrecht: Staatliche Verhaltenssteuerung mittels Privatrecht und ihre Bedeutung für Rechtswissenschaft, Gesetzgebung und Rechtsanwendung* (Mohr Siebeck 2016) 64–73.

³² Alexander Hellgardt and Victor Jouannaud, ‘Nachhaltigkeitsziele und Privatrecht’ (2022) 222 AcP 163; Jan-Erik Schirmer, ‘Nachhaltigkeit in den Privatrechten Europas’ [2021] ZEuP 35, 41–43.

³³ Hellgardt (n 31) 301–302.

³⁴ Jouannaud (n 3).

³⁵ Wiebke Voß, ‘Proportionality in Civil Procedure: A Different Animal?’, in this volume.

³⁶ Duncan Kennedy, ‘A Transnational Genealogy of Proportionality in Private Law’ in Roger Brownsword and others (eds), *The Foundations of European Private Law* (Hart 2011) 185; Saurer (n 11) 8–21; see also Matthias Klatt and Moritz Meister, *The Constitu-*

tion of law.³⁸ And indeed, many jurisdictions have adopted a proportionality analysis for rights review.³⁹ Sources of inspiration are not only the German Constitutional Court: in common law countries, the Canadian Supreme Court's decision in *Oakes* has been particularly influential.⁴⁰ It goes without saying that the specifics of the proportionality analysis vary from one jurisdiction to another. For instance, while the decisions of the German Constitutional Court often centre around appropriateness, the Canadian constitutional jurisprudence seems to focus on necessity.⁴¹ Although it is important to highlight these terminological and doctrinal differences, it is equally noteworthy that they are not necessarily indicative of differences in results or levels of scrutiny.⁴²

It goes beyond the scope of this brief introduction to provide details on individual jurisdictions and their implementation of the proportionality principle, but it is worth briefly addressing the European dimension of proportionality, especially in EU law (1.), as well as the (seemingly) precarious status of proportionality in US law (2.).

1. Proportionality in EU Law

Proportionality is also anchored firmly in the law of the European Union.⁴³ The principle, which is today enshrined in article 5(1)(4) TEU and article 52(1)

tional Structure of Proportionality (OUP 2012) 1–6; for Asia, see Po Jen Yap (ed), *Proportionality in Asia* (CUP 2020).

³⁷ David M Beatty, *The Ultimate Rule of Law* (2004).

³⁸ Kennedy (n 36) 187; see also David S Law, 'Generic Constitutional Law' (2005) 89 *Minn L Rev* 652; Mark Tushnet, 'Comparative Constitutional Law' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 1214.

³⁹ Saurer (n 11) 16–21, on South Africa and Israel; Giuseppe Martinico and Marta Simoncini, 'An Italian Perspective on the Principle of Proportionality' in Vogenauer and Weatherill (n 28) 235–240, pointing to terminological uncertainty in the jurisprudence of the Italian Constitutional Court; for an overview, see Poscher (n 9) 158; monographically, Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012) 178–209.

⁴⁰ *R v Oakes* [1986] 1 SCR 103; on this decision and its influence, see Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *U Toronto LJ* 383; Petersen (n 28) 248.

⁴¹ Grimm (n 40) 393–395; Petersen (n 28) 247–267.

⁴² Grimm (n 40) 394–395; Petersen (n 28) 266, for the case of Germany and Canada.

⁴³ Christian Calliess, in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit der Grundrechtecharta: Kommentar* (6th edn, CH Beck 2022) art 5 para 45; Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer 1996) 134–139; Uwe Kischel, 'Die Kontrolle der Verhältnismäßigkeit durch den Europäischen Gerichtshof' [2000] *EuR* 380; Verica Trstenjak and Erwin Beysen, 'Das Prinzip der Verhältnismäßigkeit in der Unionsrechtsordnung' [2012] *EuR* 265.

CFREU,⁴⁴ was adopted by the European Court of Justice early on and is used in different contexts ranging from the review of fundamental rights or fundamental freedoms to the delineation of competence in the Union.⁴⁵ In the jurisprudence of the ECJ, the structure and the level of scrutiny can differ significantly depending on the context in which the principle is applied.⁴⁶

The German Constitutional jurisprudence seems to have served as a source of inspiration for the development of proportionality in EU law.⁴⁷ Despite these roots, the understanding and application of proportionality seems to differ considerably.⁴⁸ Particularly, the four canonical steps of the German test cannot always be identified in the ECJ's reasoning.⁴⁹ The different handling of the proportionality analysis has recently contributed to a serious jurisdictional conflict between the ECJ and the German Federal Constitutional Court in the saga concerning the European Central Bank's (ECB) public sector purchase programme (PSPP):⁵⁰ the Federal Constitutional Court declared the ECJ's determination of the competences of the ECB to be 'arbitrary from an objective perspective'.⁵¹ One of the focal points of the decision was the ECJ's proportionality analysis. The Federal Constitutional Court held that 'the manner in which the [Court of Justice of the EU] applies the principle of proportionality in the case at hand renders it meaningless' for the purposes of establishing the competences of the ECB.⁵² In a way, differences in how propor-

⁴⁴ Saurer (n 11) 8–9.

⁴⁵ Trstenjak and Beysen (n 43), pointing to these areas as among the most important in which the proportionality principle is applied.

⁴⁶ Remien (n 2) 1321.

⁴⁷ Saurer (n 11) 8.

⁴⁸ Hans D Jarass, *Charta der Grundrechte der Europäischen Union unter Einbeziehung der sonstigen Grundrechtsregelungen des Primärrechts und der EMRK* (4th edn, CH Beck 2021) art 52 para 36.

⁴⁹ See on this point, Jürgen Kühling, 'Fundamental Rights' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart 2011) 479, 505; Trstenjak and Beysen (n 43) 269–270, noting that the distinction between suitability, necessity and appropriateness underlies the dominant line of ECJ jurisprudence, although it is not always made explicit; for a detailed analysis, see Christian GH Riedel, *Die Grundrechtsprüfung durch den EuGH: Systematisierung, Analyse und Kontextualisierung der Rechtsprechung nach Inkrafttreten der EU-Grundrechtecharta* (Mohr Siebeck 2020) 234–326.

⁵⁰ BVerfG, 10 October 2017 – 2 BvR 859/15 and others, 147 BVerfGE 39 (request for preliminary ruling); C-493/17 *Weiss and others* ECLI:EU:C:2018:1000 (decision by the ECJ); BVerfG, 5 May 2020, 2 BvR 859/15 and others, 154 BVerfGE 7 (decision by the Federal Constitutional Court).

⁵¹ BVerfG, 5 May 2020, 2 BvR 859/15 and others, 154 BVerfGE 7, translation available at <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html> accessed 11 November 2022.

⁵² BVerfG, 5 May 2020, 2 BvR 859/15 and others, 154 BVerfGE 7 para 127; on the different conceptions of proportionality in the context of art 5(1)(4) TEU, see Matthias

tionality is applied and questions regarding the role it should have in the reasoning of the court have now put the European institutional order to the test.⁵³

As one of the most fundamental principles of European law, proportionality has not left private law unaffected, with respect to both the private law systems of the Member States as well as EU private law itself. The private law systems of the Member States cannot unduly restrict fundamental freedoms because such restrictions need to satisfy the proportionality test.⁵⁴ Based on the ECJ's case law on the restrictions of fundamental freedoms, Sorina Doroga explores whether the proportionality analysis can be used to rationalise the use of public policy clauses in European private international law.⁵⁵ The perhaps most impactful effect of EU law on private law of the Member States can be observed in anti-discrimination law in which private actions are openly subjected to a proportionality analysis.⁵⁶ Proportionality can also be found in the private law rules of the EU,⁵⁷ for example as a restriction on claims for information or the disclosure of evidence.⁵⁸ In this

Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) 21 German LJ 979, 985–990; see also Orlando Scarello, 'Proportionality in the PSPP and Weiss Judgments: Comparing Two Conceptions of the Unity of Public Law' (2021) 13 Eur J Legal Stud 45, 48–52.

⁵³ The Federal Constitutional Court's decision is very controversial: for a criticism, see Christian Callies, 'Vorrang des Unionsrechts und Kompetenzkontrolle im europäischen Verfassungsgerichtsverbund' [2021] NJW 2845, 2848; Stefanie Egidy, 'Proportionality and procedure of monetary policy-making' (2021) 19 Int'l J Const L 285, 290–292; Franz C Mayer, 'Der Ultra vires-Akt. Zum PSPP-Urteil des BVerfG v. 5.5.2020 – 2 BvR 859/15 u.a.' (2020) 75 JZ 725; Friedemann Kainer, 'Aus der nationalen Brille: Das PSPP-Urteil des BVerfG' [2020] EuZW 533; for a defence of the decision, see Ulrich Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' [2020] NVwZ 817; Frank Schorkopf, 'Wer wandelt die Verfassung? Das PSPP-Urteil des Bundesverfassungsgerichts und die Ultra vires-Kontrolle als Ausdruck europäischer Verfassungskämpfe – zugleich Besprechung von BVerfG, Urteil v. 5.5.2020 – 2 BvR 859/15 u.a.' (2020) 75 JZ 734, 737; for an assessment of the methodology of the ECJ in light of the PSPP judgment, see Sorina Doroga and Alexandra Mercescu, 'A Call to Impossibility: The Methodology of Interpretation at the European Court of Justice and the PSPP Ruling' (2021) 13 Eur J Legal Stud 87; for a discussion of the communicative dimension of the decision, see Philip M Bender, 'Ambivalenz der Offensichtlichkeit – zugleich Anmerkung zur Entscheidung des BVerfG vom 5. Mai 2020' [2020] ZEuS 409.

⁵⁴ Remien (n 2) 1324.

⁵⁵ Sorina Doroga, 'The Use of Public Policy Clauses for the Protection of Human Rights in the EU and the Role of Proportionality', in this volume.

⁵⁶ Tischbirek (n 9) 119–127.

⁵⁷ See Jürgen Basedow, *EU Private Law: Anatomy of a Growing Legal Order* (Intersentia 2021) 347–351, with many examples; but see also Remien (n 2) 1325, offering examples but observing that a general principle of proportionality in EU private law does not seem to be discernible.

⁵⁸ Basedow (n 57) 347–348.