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**The Origin and Migration of Proportionality**

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***Abstract***

*This paper analyses the origin and migration of proportionality covering the history of proportionality, the development into the Basic Law, its migration and current trends including its presence in international and human rights law.*

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*The text of this paper 4491 words.*

## **The Origin and Migration of Proportionality**

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### **The Origin and Migration of Proportionality**

The concept of proportionality in relation to human rights is a prime example of a concept that has migrated to various legal orders and systems. The idea has fundamental origins from Germany and has been adopted with various components in different legal systems however, the concept of ‘balancing’ rights against legal limitations has much further historical routes.

At the core of the modern understanding of human rights lays the distinction between the scope of a constitutional human right and, the justification for its limitation. The justification for its limitation determines the extent of its protection and/or realisation.<sup>1</sup>

In order to understand the origins and migration of proportionality, it is important to understand its core elements.

Proportionality is made up of four components;

- Proper purpose
- Rational connection
- Necessary means and;
- a proper relation between the benefit gained by realizing the proper purpose and the harm caused to the constitutional right – (proportionality *stricto sensu* – otherwise known as ‘balancing’).<sup>2</sup>

Proportionality in relation to human rights is found within the limitation clause of a constitution and can be explicitly or implicitly stated.

### **The Origins of Proportionality**

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<sup>1</sup> Aharon Barak *Proportionality: Constitutional Rights and their Limitations* (Cambridge UK; New York: Cambridge University Press 2012) at ch 7.

<sup>2</sup> Aharon Barak *Proportionality: Constitutional Rights and their Limitations* (Cambridge UK; New York: Cambridge University Press 2012) at ch 7.

Proportionality has philosophical origins. The fundamental concept of proportionality can be traced back to Babylonian times and can be seen within the context of the Code of Hammurabi (1754 BC);

If a man put out the eye of another man, his eye shall be put out. [ An eye for an eye].<sup>3</sup>

Proportionality can also be seen in classical Greek notions of corrective justice (*Justitia vindicativa*) and distributive justice (*Justitia distributive*)<sup>4</sup>. Ancient philosophers such as Plato and Socrates expressed concepts of proportionality as fundamental concepts in their works. The concept of proportionality was expressed in Plato's vision of the city and Socrates within *The Republic* through the notion of justice "rendering to each that which is fitting." Plato describes proportionate equality (genuine equality) as;

The general method I mean is to grant much to the great and less to the less great, adjusting what you give to take account of the real nature of each - specifically, to confer high recognition on great virtue, but when you come to the poorly educated in this respect, to treat them as they deserve. We maintain, in fact, that statesmanship too consists of essentially this - strict justice"<sup>5</sup>

Plato and *The Laws* has been summarised as;

Maintaining justice within the city is at least in part about educating citizens in a way that will enable them to maintain the right inner equilibrium to act as good citizens. The Lawgiver's task (in the *Laws*) is to provide an adequate balance of pleasure and pain in order to habituate citizens in the right way. Maintaining inner equilibrium involves not just the triumph of reason over the appetitive desires of the body (those "mindless advisers"), but more specifically that the various parts of body and soul are kept in proportion to each other. What is true of the human soul

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<sup>3</sup> Yale Law School "The Avalon Project: Documents in Law, History and Diplomacy" (2008) <<http://avalon.law.yale.edu/ancient/hamframe.asp>>

<sup>4</sup> Ernest .J. Weinrib, "Corrective Justice"(1992) 77 *Iowa L. Rev.* at 403; I.Englard *Corrective and Distributive Justice: From Aristotle to Modern Times* (Oxford University Press, 2009); On Plato and proportionality, see Thomas Poole "Proportionality in perspective" (2010) *New Zealand L. Rev.* 369 at 379.

<sup>5</sup> Thomas Poole "Proportionality in perspective" (2010) *New Zealand L. Rev.* 369 at 379.

is also true of the city. Harmony and unity will be produced only if the city is structured in such a way as to keep various classes of people in the right balance.<sup>6</sup>

The concept of proportionality is further reflected in the *Magna Carta 1215*;

For a trivial offence a few man shall be fined only in proportion to the degree of his offense, and for a serious offence correspondingly but not so heavily as to deprive him of his livelihood.<sup>7</sup>

The writings of St. Thomas Aquinas made a significant contribution to the development of the notion of proportionality.<sup>8</sup> During the middle ages, the international law doctrine of “Just War” made use of the term. According to the doctrine, there was a need to balance the overall utility of the war with the damage it may inflict.<sup>9</sup>

### **The concept of Proportionality and The Enlightenment**

Proportionality is linked to the 18<sup>th</sup> century enlightenment through examples such as the notion of the social contract created by Hobbes in his writings of *The Leviathan* 1651 and reflected in further works including that of Locke and Rousseau. The concept of the social contract, lead to a different perception between citizens and their rulers/Government. The concept encapsulated the notion that citizens provided their ruler/Government with limited powers. These limited powers were only granted for the peoples’ benefit and therefore, could not be arbitrarily granted for the ruler/Government’s own benefit. This idea reflects the balancing notion of proportionality.

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<sup>6</sup> Thomas Poole “Proportionality in perspective” (2010) *New Zealand L. Rev.* 369 at 379.

<sup>7</sup> G.R.C. Davis, *Magna Carta* (London: Trustees of British Museum. 1963), 19.

<sup>8</sup> Saint Thomas Aquinas *Summa Theologica II-II* (1947). Question 6, and 7.

<sup>9</sup> For the notion of Just War see Joachim Von Elbe, “The evolution of the concept of the Just War in International Law”(1939) 33 *Am.J. Int’l L.* 665.

Sir William Blackstone echoed the notion of conferring limited powers into law. Hence, his commentaries note that the idea of civil liberty should be found only within “natural liberty so far restrained by human laws (and not father) as is necessary and expedient for the general advantage of the public”<sup>10</sup>

The idea of conferring limited powers is also linked to the idea of the social state, which emerged from Europe at the end of the 19<sup>th</sup> century. According to the notion, not every purpose that serves the public interest is justified when it also limits fundamental human rights.<sup>11</sup>

### **Proportionality as Counter- Formalism**

During the end of the 19<sup>th</sup> century/beginning of the 20<sup>th</sup> century, the development of the concept of proportionality was seen as part of the more general move in German law from the jurisprudence of concepts ( *Begriffsjurisprudenz*) to the jurisprudence of interests ( *interessenjurisprudenz*).<sup>12</sup>

At the centre of the development of the concept of proportionality stood the need and want to protect human rights from the powers of the state;<sup>13</sup>

... there are several conclusions that may be drawn from the development of the principle of proportionality in German public law. First, proportionality was an instrument by which the idea of rights was introduced into German law. Consequently, the principle of proportionality stands in Germany for the protection of rights. Second, the effect of proportionality was to enhance the protection of political and economic rights, which were considered at that time to be "natural" rights. Obviously, the liberal bourgeoisie had a fundamental interest in ascertaining that such a legal development take place. Third, the legal doctrine of proportionality was not related to realistic or pragmatic theories of law, such as those championed by the *Freirechtsschule* and American legal realist school. Its origins are in the

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<sup>10</sup> William Blackstone *Commentaries on the Laws of England* ( Oxford: Clarendon Press, 1765) at 125.

<sup>11</sup> Aharon Barak *Proportionality: Constitutional Rights and their Limitations* (Cambridge UK; New York: Cambridge University Press 2012) at ch 7.

<sup>12</sup> Aharon Barak *Proportionality: Constitutional Rights and their Limitations* (Cambridge UK; New York: Cambridge University Press 2012) at ch 7.

<sup>13</sup> Moshe Cohen-Eliya and Iddo Porat, “American Balancing and German Proportionality: The Historical Origins” (2010) 8 *Int’l J Const. L.* . at 263.

formalistic approaches that are deeply embedded in the German legal tradition. Proportionality was a prerequisite for improving the law's administration and making it more effective, and this improvement could be achieved by focusing on the means-ends nexus rather than by ad hoc balancing of opposing interests. Finally, the proportionality doctrine originated in administrative law, not in private law<sup>14</sup>

### **The Contribution of Carl Gottlieb Svarez**

The historical roots of proportionality as a public law standard can be found in 18<sup>th</sup> century German administrative law. Carl Gottlieb Svarez (1746-1798) contributed to the development of modern proportionality while never explicitly using the term 'proportionality' (Verhältnismässigkeit).<sup>15</sup> He was the principle drafter of the Prussian Civil Code of 1794 (Allgemeines Landrecht für die Preussischen).<sup>16</sup>

Svarez noted that the state may only limit the liberty of one subject in order to guarantee the freedom and safety of others. He emphasized the "minimum relationship" that has to exist between the social hardship to be averted and the limitation on ones "natural freedom;"

Only the achievement of a weightier good for the whole can justify the state in demanding from the individual the sacrifice of a less substantial good. So long as the difference in weights is not obvious, the natural freedom must prevail... the [social] hardship, which is to be averted through the restriction of the freedom of the individual, has to be more substantial by a wide margin than the disadvantage to the individual or the whole that results from the infringement.<sup>17</sup>

### **The development of proportionality in German public law 1800-1933**

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<sup>14</sup> Moshe Cohen-Eliya and Iddo Porat, "American Balancing and German Proportionality: The Historical Origins" (2010) 8 Int'l J Const. L. at 276.

<sup>15</sup> David .P. Currie, *The Constitution of the Federal Republic of Germany* (University of Chicago Press, 1994), at 307; Alec Stone Sweet and Jud Mathews "Proportionality, Balancing and Global Constitutionalism" (2009) 47 Colum. J. Transnat'l L.72.

<sup>16</sup> *ibid*

<sup>17</sup>Alec Stone Sweet and Jud Mathews "Proportionality, Balancing and Global Constitutionalism" (2009) 47 Colum. J. Transnat'l L.72. at 99.



Proportionality as a positive legal concept (as opposed to Svarez' ideal social notion) began appearing in Prussian administrative law in the second half of the 19<sup>th</sup> century.<sup>18</sup> Proportionality is first seen in German administrative law literature towards the end of the 18<sup>th</sup> century<sup>19</sup>

In Prussian administrative law it was seen in the context of Police Laws (Polizeirecht), however the concept itself was mainly developed by the Supreme Administrative Court of Prussia (Preussisches Oberverwaltungsgericht).<sup>20</sup> This is demonstrated through a case where the court overruled the police order, explaining that a complete closure was a disproportional sanction in the case, given the clear option of revoking the stores liquor license.<sup>21</sup> Proportionality developed through a string of similar cases up until the 1930s.

### **The development of proportionality in German constitutional law post second world war**

After the war, Germany implemented the Basic Law (i.e. The constitution of Germany). Notably, the Basic Law does not explicitly reference 'proportionality' however, pragmatically, it is a core consideration. The Basic Law has only one absolute right being, the right to human dignity (Wurde des Menschen). All of the other Basic Law rights are relative. Furthermore, some of the rights have no specific limitation clause, and some can be limited only 'by law.' Despite this discrepancy, the German constitutional court has been strict in interpreting that all the rights in the constitution are bound to the fundamental principle of proportionality, other than the absolute right to human dignity.

What this means is that in each case, the court must find a proper purpose and a rational connection between the means used by the limiting statute and the proper purpose.<sup>22</sup>

An example of this connection is the Secret Tape recordings case of 1973. The court had to decide whether a recording made without the knowledge and consent of the speaker could be

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<sup>18</sup> Mahendra Pal Singh *German Administrative Law in Common Law Perspective* (2<sup>nd</sup> ed Berlin: Springer-Verlag, 1985).

<sup>19</sup> Aharon Barak *Proportionality: Constitutional Rights and their Limitations* (Cambridge UK; New York: Cambridge University Press 2012) at ch 7.

<sup>20</sup> Mahendra Pal Singh *German Administrative Law in Common Law Perspective* (2<sup>nd</sup> ed Berlin: Springer-Verlag, 1985) at 16.

<sup>21</sup> Alec Stone Sweet and Jud Mathews "Proportionality, Balancing and Global Constitutionalism" (2009) 47 Colum. J. Transnat'l L.72, at 101.

<sup>22</sup> Aharon Barak *Proportionality: Constitutional Rights and their Limitations* (Cambridge UK; New York: Cambridge University Press 2012) at ch 7.

used as evidence in proceedings. The court ruled that the use of a recording limits the right to the 'free development of his personality' – which is protected by article 2(1) of the Basic Law. The court's constitutional reasoning was that;

*It is not the entire sphere of private life which falls under the absolute protection of the basic right under article 2(1) in conjunction with article 1(1) of the basic law... the individual, as part of a community, rather has to accept such state interventions which are based on an overriding community interest under the strict application of the principle of proportionality, as long as they do not affect the inviolate sphere of private life.<sup>23</sup>*

In a long line of cases, the German constitutional court emphasized the importance of proportionality regarding the Basic Law. Similar developments followed in German administrative law and in other fields of law.<sup>24</sup>

### **The Migration of Proportionality from German law to European Law**

The concept of proportionality can be seen migrating from German law to European Law in two contexts, that being; 1) the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and its amending protocols as interpreted by the European Court of Human Rights and 2) the European Union and its establishing treaties as interpreted by the European Court of Justice.<sup>25</sup>

### **Proportionality and the *European Convention on Human Rights and Fundamental Freedoms* and its amending protocols**

The European convention on Human Rights and Fundamental Freedoms is the primary shared human rights text in Europe.<sup>26</sup> While the convention does not explicitly reference 'proportionality', some of the rights do have a limitation clause being, that the limitation of a

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<sup>23</sup> The English Translation appears at S. Michalowski and L.Woods *German Constitutional Law: The Protection of Civil Liberties* ( Sudbury, MA: Dartmouth Publishing Co Ltd, 1999), at 127.

<sup>24</sup> Aharon Barak *Proportionality: Constitutional Rights and their Limitations* (Cambridge UK; New York: Cambridge University Press 2012) at ch 7.

<sup>25</sup> Aharon Barak *Proportionality: Constitutional Rights and their Limitations* (Cambridge UK; New York: Cambridge University Press 2012) at ch 7.

<sup>26</sup> Aharon Barak *Proportionality: Constitutional Rights and their Limitations* (Cambridge UK; New York: Cambridge University Press 2012) at ch 7.

right can only be to the extent “necessary in a democratic society.”<sup>27</sup> Other rights have been interpreted as relative rights.<sup>28</sup>

According to the European Court of Human Rights and Fundamental Freedoms, the concept and components of proportionality, including proportionality stricto sensu (balancing) is a critical feature of human rights in relation to the convention.<sup>29</sup>

According to Eissen, proportionality first appeared in a judgement in the case of Handyside in 1976:

Every formality, condition, restriction or penalty imposed in this sphere must be proportionate to the legitimate aim pursued.<sup>30</sup>

### **Proportionality and the law of the European Union (EU)**

The concept of Proportionality is not explicitly mentioned in the founding documents of the EU however, has been developed by the European Court of Justice.<sup>31</sup> The concept has been developed in;

- 1) Matters relating to review of EU institutions; and
- 2) In matters where a member state court referred a legal question to the Court of Justice to be determined in accordance with the principles of European law.
  - i) This is with general principles that sit alongside formal written text including;
    - a) Protection of human rights
    - b) The fulfilment of legitimate expectations
    - c) The basic principle of natural justice; and
    - d) The rule of law.

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<sup>27</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature on 4 November 1950, entered into force 1953), art 8,9,10 and 11.

<sup>28</sup> Golder v. UK [1979-80] 1 ECHR, at 524.

<sup>29</sup> George Letsas *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2009).

<sup>30</sup> Handyside v United Kingdom [1979] App. No 5493/72, 1 EHRR 737.

<sup>31</sup> Aharon Barak *Proportionality: Constitutional Rights and their Limitations* (Cambridge UK; New York: Cambridge University Press 2012) at ch 7.

ii) Proportionality was given a central place among those principles<sup>32</sup>

The concept of proportionality was fully developed in the case of *Internationale Handelsgesellschaft*.<sup>33</sup> The Advocate General examined the concept of proportionality and found that it had roots in the documents establishing the European Union. This position was accepted by the Court;

The system of deposits instituted by Regulation No 120/67 is contrary to the principles of freedom of action and disposition, of economic liberty and of proportionality stemming in particular from Articles 2(1) and 14 of the German Basic Law. More particularly, the adverse effects of the system of deposits on the interests of trade appear disproportionate to the objective sought by the regulation, which is to ensure for the competent authorities as precise and comprehensive a view as possible of market trends. The same result could in fact be obtained by less radical means.

The system of deposits, as it is instituted by the provisions criticized, is contrary to the principle of proportionality forms part of the general principles of law, recognition of which is essential in the framework of any structure based on respect for the law. As these principles are recognized by all the Member States, the principle of proportionality forms an integral part of the EEC Treaty.<sup>34</sup>

Proportionality can be explicitly found in the Treaty of Lisbon (entered into force in 2009). Article 3b (4) reads;

...under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.<sup>35</sup>

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<sup>32</sup> J H H Weiler and N Lockhart "Taking Rights Seriously: The European Court and its Fundamental Rights Jurisprudence Part 1" (1995) 32 *Common Market L. Rev.* 51, at 81.

<sup>33</sup> Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr – und Vorratsstelle für Getreide und Futtermittel* [1970] ECH 1125; Juergen Schwarze *European Administrative Law* (London: Sweet and Maxwell Ltd., 1992), at 708.

<sup>34</sup> *ibid*

<sup>35</sup> The Treaty of Lisbon (opened for signature 13 December 2007, entered into force 1 December 2009).

The explicit recognition of the concept of proportionality in the treaty ratifies proportionality into European Union law today. Furthermore, the treaty gives effect to a charter of fundamental rights and its general limitation clause.

The migration of proportionality to European Law resulted in its acceptance in Spain, Portugal, France, Italy, Belgium, Switzerland and Greece.<sup>36</sup>

### **From European Law to Canada, Ireland and England**

#### **Canada**

Until the *Canadian Charter of Rights and Freedoms* of 1982, the Canadian supreme court did not recognise the concept of proportionality as part of Canadian human rights law.

#### The Charter

The Charter has an explicit provision rendering any legislation conflicting with the charter as “of no force and effect”. This enables the Canadian courts to make declarations and enforcements. Alongside the recognition of several human rights, article 1 of the charter includes a general limitation clause as follows;

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”

What does ‘reasonable’ and ‘demonstrably justified’ mean? When reviewing this in 1985, Hogg referred to the European Convention for the Protection of Human Rights and Fundamental Freedoms and its interpretation by the European Court of Human Rights.<sup>37</sup> He added;

In applying section 1 of the charter, Canadian courts will have to follow a reasoning process similar to that employed in the Sunday Times Case. The word “reasonable” in section 1 requires that a limit on charter rights be rationally related to a legitimate purpose. The word “reasonable” also contains within it an idea of proportionality. In the Sunday Times case, the court acknowledged the legitimacy of the governmental purpose

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<sup>36</sup> Aharon Barak *Proportionality: Constitutional Rights and their Limitations* (Cambridge UK; New York: Cambridge University Press 2012) at ch 7.

<sup>37</sup> Peter. W. Hogg *Constitutional Law of Canada* (2<sup>nd</sup> Ed Toronto: Carswell, 1985), at 687.

of protecting the courts from undue public pressure, but held that the suppression of all speech relating to ongoing litigation was a disproportionately severe restraint. The same kind of reasoning would be put under section 1.<sup>38</sup>

A year after Hogg wrote this review, the decision by the Supreme Court in the case of Oakes came out. Chief Justice Dickson adopted a 'form of proportionality test.' The Chief Justice ruled that "reasonable limitations that can be demonstrably justified in a free and democratic society" require a "sufficiently significant objective" and a proportional means used to achieve it. The "sufficiently significant objective" must "relate to concerns which are pressing and substantial."

The Chief Justice found that the proportionality of the relationship will be determined through the following three tier test;

- 1) the means should be "rationally connected to the objective."
- 2) the means should impair "as little as possible" the right or freedom in question; and
- 3) there should be a proportional relation between the effects on the rights of the means chosen and the objective identified as having sufficient importance.<sup>39</sup>

The approach adopted by the Canadian Supreme Court in Oakes closely follows the understanding of the European Court of Human Rights and Fundamental Freedoms in interpreting the European Convention for the Protection of Human Rights and Fundamental Freedoms.

### **Ireland**

The Constitution of Ireland (1937) has fundamental rights, but does not contain a general limitation clause. The constitution contains specific limitation clauses and several rights are allowed to be limited "in accordance with law" while several others may be limited without an express limitation.

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<sup>38</sup> *ibid*

<sup>39</sup> *R v Oakes* [1986] 1 SCR 103, at 136-137.

The Constitution of Ireland contains no specific mention of 'proportionality' however, was first explicitly accepted by the Supreme Court who accepted the European Court of Human Rights and Fundamental Freedoms and the ruling by the Supreme Court of Canada<sup>40</sup>

In the case of *Heaney* (1994), the Supreme Court provided an analysis of proportionality which relied on the European court of Human right's decisions and the Canadian decisions;

The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must a) be rationally connected to the objective and not arbitrary. Unfair or based on irrational considerations; (b) impair the right as little as possible, and (c) be such that their effects on rights are proportional to the objective.<sup>41</sup>

## **England**

The adoption of proportionality was problematic in England because of the 'reasonableness' principle adopted from the *Wednesbury* case. Lord Ackner stated that so long as the European Convention for the Protection of Human Rights and Fundamental Freedoms was not part of the Law of the United Kingdom, there is no legal basis for the adoption of proportionality in the United Kingdom.<sup>42</sup>

The introduction of the Human Rights Act 1998 gave effect to rights provided in the European Convention for the protection of Human Rights and Fundamental Freedoms. The act gives the courts the authority to declare whether a provision is compatible with the rights contained in the act (including retrospectively analysing any laws passed before the act's introduction).

This gave rise to the introduction of proportionality in England and the relationship between the UK and the European concept of proportionality became clear and well established.

## **From Canada to New Zealand**

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<sup>40</sup> *Cox v Ireland* [1992] 2 IR 503; *In Re Article 26 and the Matrimonial Home Nill* 1993 [1994] IR 305, at 326.

<sup>41</sup> *Heaney v Ireland* [1994] 3 IR 593, at 607.

<sup>42</sup> *R v Secretary of State for the Home Department, ex p. Brind* [1991] 1 AC 696.

**New Zealand:**

New Zealand has always had human rights contained within our common law however, the concept of proportionality has been traditionally less familiar. The traditional view has always been that any legislation can override common law principles (with the exception of the publications of Lorde Cooke).

In the late 80s there were attempts by Sir Geoffrey Palmer to entrench a constitution. This idea was rejected by the general public but led to the introduction of *the New Zealand Bill of Rights Act 1990 (NZBORA)*. The NZBORA adopted many parts of the Canadian Charter, including, its limitation clause:

subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society<sup>43</sup>

The adoption of the limitation clause effectively adopted the idea of proportionality.

**Proportionality and international human rights law****International and national human rights law**

Proportionality is a general concept of international law (e.g. through principles such as self-defence). It is also a concept recognised in international law through human rights however, it is mostly apparent through national constitutional law relating to human rights. Eg s39(1) the South African Constitution;

...when interpreting the Bill of Rights, a court, tribunal, or forum... (b) must consider international law.<sup>44</sup>

**Proportionality and the Universal Declaration of Human rights**

The *Universal Declaration of Human Rights* contains mostly absolute provisions. However, notably, it has one limitation clause;

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<sup>43</sup> The New Zealand Bill of Rights Act 1990, s4.

<sup>44</sup> Constitution of The Republic of South Africa 1996, S39(1).



in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements or morality, public order and the general welfare in a democratic society.<sup>45</sup>

This clause has been used as a template in international treaties on human rights (e.g. the international convention on Civil and Political Rights that is incorporated into the NZBORA).

### **Conclusion**

The concept of proportionality in relation to human rights is a prime example of a concept that has emerged from one legal system and migrated to various legal orders and systems. The concept, while having philosophical foundations, fundamentally originated in Germany and was adopted by European Law. From there, it migrated to Canada and has since been adopted by England, Ireland and New Zealand. Furthermore, it has become a principle reflected in international law as the conception develops into a transnational ideal.

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<sup>45</sup> The Universal Declaration of Human Rights (adopted and proclaimed by UN General Assembly Resolution of 10 December 1948), art 29(2).

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*SECONDARY SOURCES*