HART STUDIES IN CONSTITUTIONAL THEORY

VOLUME 8

Edited by Dimitrios Kyritsis

Essays on Freedom and Proportionality

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ESSAYS ON FREEDOM AND PROPORTIONALITY

This open access book explores the connection between proportionality and the moral concept of freedom from a variety of philosophical perspectives. It views proportionality as more than a technical, legalistic formula but as infused with moral meaning. It asks: Is the proportionality test committed to a particular philosophical conception of freedom?

Some contributors argue that proportionality subscribes to a morally defensible 'right to everything'. Others see in this a serious shortcoming of contemporary proportionality discourse. They claim instead that fundamental rights doctrine should abandon proportionality and adopt a less individualistic notion of freedom that is inherently limited by the reasonable interests of others.

The volume showcases novel attempts to combine proportionality and freedom that are inspired by Immanuel Kant, John Rawls and Bernard Williams. It also situates its central question within debates about the legitimacy of judicial power and considers the use of proportionality analysis by the courts to resolve pivotal issues about the meaning of human rights. Individual chapters are in dialogue with each other, offering readers a holistic examination of this important issue of human rights theory and practice.

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In memory of Stavros Tsakyrakis

FOREWORD

The concept of freedom has long exerted a powerful pull on the thinking of philosophers, who have debated the inevitability of choice in this regard as well as the need to accept moral responsibility for exercises of will and for judgements arrived at – good or otherwise. In a similar vein, the criterion of proportionality has engaged the intellectual faculties of legal and moral thinkers since Aristotle and Thomas Aquinas as a pertinent criterion to ascertain the presence of fairness and justice in the activities under scrutiny. This collection of essays brings these two notions into conversation with one another, asking what kind of understanding of freedom undergirds the proportionality analysis, as well as inquiring whether the former is unbridled or bounded by the reasonable interests of others. Dimitrios Kyritsis has brought together an impressive cast of contributors to reflect on these questions from a range of philosophical perspectives. Some powerfully advocate for proportionality, while others are critical of its application and use. The chapters also feature diverse approaches to identifying the possible foundations of moral justification and the values that should be engaged with in realising freedom, which also relates to particular conceptions of the community and the demands that it is capable of placing, and entitled to place, upon the individual. Yet all chapters share a commitment to probe how legal doctrine relates to moral reasoning. It is this common methodological outlook, as much as the considered views articulated in the volume, that should be of keen interest to all who are invested in constitutional theory and that is worthy of emulation, both as it relates to the complex interplay between freedom and proportionality and beyond.

Maartje De Visser
Professor of Law, Singapore Management University
November 2024

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This volume evolved out of a workshop that took place over two days in Molyvos, the late Stavros Tsakyrakis' hometown on the island of Lesvos, under the auspices of an annual retreat in his memory. I am grateful to Essex Law School and the Greek monthly review *The Books' Journal* for their generous financial support, and to the Molyvos Tourism Association and its President Mr N Molvalis for making available to us its cultural centre 'Desmos' in the scenic port of Molyvos. I am also extremely grateful to the Tsakyrakis family and Professor Antonis Karabatzos, George Nikolou and Nikiforos Panagis, the organisers of the retreat, for all the enthusiasm and love with which they embraced this project. George Nikolou, in particular, worked tirelessly, with skill and dedication, to make the workshop a success from its inception. I owe special thanks to Popi Roussomani for giving permission to reprint a previously published chapter by Tsakyrakis. Finally, I wish to thank all the participants in the workshop who made the long trip to Molyvos, braving the hot weather, for their original and thoughtful papers and our many fruitful discussions.

I would like to acknowledge the amazing professionalism and assistance of Hart Publishing, and in particular Verity Stuart and Kate Whetter, for seeing the volume through, and Catherine Minahan for her excellent copy-editing work. The book's publication is supported by the University of Essex's open access fund, and I am delighted that, thanks to it, its contents will be freely accessible.

The volume is dedicated to Tsakyrakis, an original and inspiring constitutional theorist, a great teacher and friend to many of us.

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Two Forms of Proportionality: Substantive and Institutional

CORRADO CARUSO AND CHIARA VALENTINI*

I. Introduction

The idea of proportionality plays a central role in contemporary law as a guide for legal reasoning in applying principles. These are norms that demand the fulfilment of normative reasons in generic and indeterminate terms. On the one hand, they introduce and make institutionally enforceable a quest for realising valid reasons in a legal system. On the other hand, they do not fully specify how, by whom and to what extent those reasons should be fulfilled. Therefore, principles allow the adaptation of the contents of the law to the circumstances of application, but also raise the important challenge of specifying those contents, from time to time, in a way that is acceptable in legal terms. The liberal constitutions enacted in the twentieth century have placed principles at the centre of legal systems, as basic norms defining their substance and structure: principles express the core values of a constitutional order, guiding the action of institutions and individuals with regard to the content and form of their decisions and (inter)actions. This practical prominence is reflected in the significance that principles have gained at a theoretical level,[1] lying at the centre of a heated debate on their nature, structure and content. This debate has primarily evolved by contrasting principles with rules as different types of legal norms.[2] Anti-positivists have identified principles as

* The excerpts from the judgments quoted are all taken from the translations available on the institutional websites of the various courts.

[1] The debate on principles has involved, among many: R Dworkin, *Taking Rights Seriously* (New York, Bloomsbury, 2013 [1977]); J Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal* 823; N MacCormick, *Legal Reasoning and Legal Theory* (Oxford, Clarendon Press, 1994); R Alexy, 'On the Structure of Legal Principles' (2000) 13 *Ratio Juris* 294; M Atienza and J Ruiz Manero, 'Rules, Principles, and Defeasibility' in J Ferrer Beltrán and GB Ratti (eds), *The Logic of Legal Requirements: Essays on Defeasibility* (Oxford, Oxford University Press, 2013) 238.

[2] This analysis has resulted in different views on the nature of principles in relation to rules: the 'strong distinction' view and the 'weak distinction' view; H Avila, *Theory of Legal Principles* (Dordrecht, Springer, 2007) 11 ff.

standards that express moral values in open-ended terms and that are to be applied in respect of specific application circumstances. By contrast, rules would prescribe actions in categorical terms, operating as 'all-or-nothing' norms that should be applied using subsumption.[3] Positivists contend that the difference between principles and rules is one of degree, with the former having the same type of content and structure but being more generic and indeterminate.[4]

Against this background, the idea of proportionality has gradually emerged as a dominant notion, playing a central role in legal theory and practice. It serves as the main standard orienting reasoning upon principles and the application of what they demand towards a fulfilment that is legitimate in so far as it is *proportionate* to their relevance, as pondered against the relevance of conflicting principles. In these terms, the standard of proportionality expresses the quest for a balance among legal principles, as the most appropriate way of keeping together the different demands that those principles pose in pluralist constitutional systems. In this sense, the use of this standard has been spreading in legal practice on a global scale; nevertheless, it remains very controversial.[5] There is a broad debate on the grounds for and against the use of the standard of proportionality in legal reasoning, and the type of constraints and analytical steps that this standard sets for that reasoning.

This debate has primarily evolved with respect to the use of proportionality in constitutional adjudication and, in particular, the adjudication of constitutional rights. Nonetheless, the standard of proportionality has shown the potential to operate beyond that domain, as a guide for legal reasoning upon principles that do not grant substantive protection but rather pertain to structural and formal aspects of a constitutional system.[6] Although overlooked, this latter role of proportionality is gradually taking shape. On the one hand, norms of positive law and emerging judicial doctrines point to the use of proportionality as a standard for reasoning upon the institutional structure of a constitutional system, as defined by principles concerning the distribution and exercise of competences in a regime of separation of powers. On the other hand, at a theoretical level, there is growing interest in the relationship between legal reasoning, those principles and the idea of proportionality.

Our aim in the present work is to shed light on these important developments, both practical and theoretical, and to advance the reflection on the different ways in which proportionality can provide guidance for legal reasoning.

[3] R Alexy, 'On Balancing and Subsumption: A Structural Comparison' (2003) 16 *Ratio Juris* 433.

[4] Raz (n 1) For an extended overview of the debate on principles and rules and the use of balancing in their application, see also C Valentini, 'Principles, Balancing and Proportionality' in R Chang et al (eds), *Research Handbook on Legal Argumentation* (Cheltenham, Elgar Press, forthcoming).

[5] A Stone Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 68; K Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2012).

[6] B Schlink, 'Proportionality (1)' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, Oxford University Press, 2012) 718.

II. Forms of Proportionality

The standard of proportionality directs the application of legal principles to ensure that their fulfilment is proportionate to their importance, taking into account the extent to which that fulfilment is factually possible and the extent to which it is legally possible, given other relevant principles that might interfere with it. In this sense, the standard of proportionality is the core element of a framework for legal reasoning – call it proportionality analysis (PA) – that currently dominates the practice of principles and, in particular, the jurisprudence of constitutional and supranational courts worldwide.[7] However, PA is not a single, unitary framework for legal reasoning; it is a family of reasoning models that share a common approach: they test whether sacrificing the fulfilment of a principle is acceptable as a proportionate means to achieving a legitimate end requiring the application of a conflicting principle. These models, then, differ in how they design the tests needed. The 'standard' model – the most influential in both theoretical and practical terms – features a four-step analytical process aimed at determining to what extent fulfilling a principle justifies interfering with the fulfilment of other relevant principles.[8] More precisely, the standard model proceeds to test whether an interference (i) has a legitimate objective and can be justified as a (ii) suitable, (iii) necessary and (iv) *stricto sensu* proportionate means to realise such objective. This last step encompasses a balancing test, which weighs the conflicting principles so as to establish a balance among them, by determining how much their fulfilment/sacrifice is narrowly proportionate to their relative weight.[9] This is the model of PA that has emerged from the case law of the German Constitutional Court, as reconstructed and theorised by Robert Alexy.[10] The underlying view of

[7] On the wide circulation of proportionality see, among many, Valentini (n 4); Stone Sweet and Mathews (n 5); V Jackson, 'Constitutional Law in an Age of Proportionality' (2015) *Yale Law Journal* 3094; D Beatty, *The Ultimate Rule of Law* (Oxford, Oxford University Press, 2004).

[8] On the distinction between a standard version of PA and other versions, see also G Bongiovanni and C Valentini, 'Balancing, Proportionality and Constitutional Rights' in G Bongiovanni et al (eds), *Handbook of Legal Reasoning and Argumentation* (Dordrecht, Springer, 2018) 581; and Valentini (n 7). For an overview and analysis of the different versions of PA, see, among many others, Jackson (n 7); A Stone Sweet and J Mathews, 'All Things in Proportion? American Rights Doctrine and the Problem of Balancing' (2011) 60 *Emory Law Journal* 101; D Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383.

[9] This is the *proportionality as such* (Jackson (n 7) 3094) or *proportionality stricto sensu* stage (Alexy (n 3) 436–37). According to Alexy, it is the stage that allows balancing of the interests realised by one principle against the interests realised by conflicting principle(s), and it is aimed at balancing the non-satisfaction of a principle with the importance of satisfying the other: 'The greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other.' The result is a 'conditional relation of precedence' among the principles at stake.

[10] See N Pietersen, 'Alexy and the "German" Model of Proportionality: Why the Theory of Constitutional Rights Does Not Provide a Representative Reconstruction of the Proportionality Test' (2020) 21 *German Law Journal* 163, highlighting that Alexy's 'reconstruction of the jurisprudence of the German Constitutional Court is only partly accurate'.

principles is that they are optimisation requirements, that is, standards requiring the optimisation of normative reasons. Other models combine the analytical steps in a different order and/or differ in including a balancing test as a specific passage devoted to weighing the principles at stake.[11]

Still, it is the 'standard' model of PA that has become the main point of reference for courts and the ongoing theoretical debate on the questions raised by this form of reasoning. Such questions include normative ones, concerning the grounds for PA in the law, and descriptive ones, concerning what PA is and the type of structure it gives to legal reasoning. In both respects, this debate mainly revolves around the use of PA by courts in the judicial review of laws interfering with principles of constitutional rank that concern the protection of rights.

Nonetheless, PA plays an important, yet overlooked, role in other contexts and domains. It is emerging as a framework for reasoning upon – and applying – principles that concern the allocation and exercise of institutional competences under conditions in which those competences concur and potentially conflict. This development brings to light the two forms that proportionality can take as a standard for applying principles: substantive and institutional. Or so we argue.

Substantive proportionality operates as a standard for reasoning on substantive considerations, especially those that pertain to the fulfilment of substantive principles concerning the protection of rights. As such, proportionality structures the legal analysis to appreciate whether and to what extent it is legitimate to interfere with the fulfilment of a substantive principle/right to fulfil conflicting principles/rights.

Institutional proportionality operates in the dimension of institutional considerations, especially those that concern the fulfilment of principles that allocate powers and competences among institutional entities and levels of government. In this form, proportionality serves as a standard that allows us to appreciate whether and to what extent it is legitimate to interfere with an institutional principle/competence to fulfil conflicting institutional principles/competences. In this form, proportionality is a standard for reasoning upon the appropriate scope and intensity of potentially conflicting institutional competences, to realise the underlying institutional reasons in proportion to the weight they carry, one in relation to the other, in the circumstances of their application.

Indeed, the standard of proportionality gives a certain structure to legal reasoning, but it does not determine its content: PA is an *empty* framework for reasoning upon the application of legal principles. It operates by organising the legal analysis independently of the substantive or institutional principles that form its content; PA does not provide such principles itself but rather requires a substantive or institutional theory that delivers those principles.

[11] For an overview and analysis of the different versions of PA, see, among many others, G Letsas,'Rescuing Proportionality' in R Cruft and M Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford, Oxford University Press, 2015) 316; Jackson (n 7); Stone Sweet and Mathews (n 8); Grimm (n 8); Valentini, 'Principles, Balancing, and Proportionality' (n 8).

So far, the theory and practice of proportionality have primarily focused on, and developed, the substantive form of proportionality, whereas institutional proportionality has remained relatively underexplored.[12] At a theoretical level, the reflection on institutional PA has been unfolding as a sort of second-order inquiry aimed at shedding light on how institutional considerations may bear on substantive PA and the reasoning upon rights. At a practical level, there is no defined, established doctrine of institutional proportionality like those established and practised in the domain of substantive proportionality and rights adjudication. Nonetheless, there are developing ideas and legal doctrines, at a national and a supranational level, that point to the use of PA in the domain of institutional principles. Let us now shed some light on these developments.

A. From Substantive to Institutional Proportionality

The theoretical reflection on the use of proportionality in applying institutional principles has been mostly subsidiary, focusing on how those principles may be encompassed by the PA of substantive principles. This reflection has taken shape largely in light of Alexy's view of principles as optimisation requirements and his distinction between two types of principles: material and formal.[13] Material principles are those that require the optimising of specific content, mostly concerning the protection of rights – such as freedom of speech or life – given the legal and factual circumstances of their application. Formal principles are those that do not optimise specific content but instead optimise a particular way of making decisions or acting. They are concerned about how – and by whom – a substantial content is to be determined and fulfilled.

For a long time, as already mentioned, the theory of proportionality has overlooked formal principles to focus on material principles and their judicial application. Despite having this secondary role, formal principles are highly relevant for the theory and practice of proportionality: they provide institutional depth, moving PA beyond the analysis of specific rights and interests to also encompass considerations concerning the institutional setting. Formal principles design the exercise and distribution of competences among different actors and spheres of action. In doing so, they bring into PA elements of institutional differentiation that are needed to calibrate this form of reasoning in light of the substantive interests at stake as well as the institutional entities and competences involved. This institutional aspect is particularly important given the criticisms of over-constitutionalisation and over-judicialisation that have been levelled

[12] For an overview of the discussion on institutional (formal) principles and proportionality, see M Klatt, 'Judicial Review and Institutional Balance' (2019) 38 *Revus* 21.

[13] Introduced by R Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2002); and further refined and developed in R Alexy, 'Formal Principles: Some Replies to Critics' (2014) 12 *International Journal of Constitutional Law* 511.

against PA.[14] More precisely, the charge is that this form of reasoning ultimately centres the application of the law on constitutional principles protecting rights and, in particular, on the judicial enforcement of those rights in the exercise of the judicial review against legislatures. As argued by Tsakyrakis, amongst others, one limit of PA, in this sense, would be that it grounds and fosters a constitutional discourse centred on courts and individual liberties, giving a marginal role to other institutional actors and relevant normative issues.[15]

To address this charge, Robert Alexy, in the 'Postscript' to *A Theory of Constitutional Rights*,[16] has started developing a theory of discretion that brings formal principles, especially the principle of democracy, within the framework of PA. Nonetheless, as Alexy admits, this theory 'has generated more questions than answers',[17] many of which are still open and highly controversial. Two approaches have emerged from the ongoing debate on these questions: a combination approach and a separation approach. As we shall see, these approaches also find application in judicial practice.

B. Institutional Proportionality: The Combination Approach and the Separation Approach

The combination approach permits – or, better, requires – that proportionality reasoning integrates the optimisation of formal and substantive principles and, therefore, contemplates the direct balancing of formal and material principles in a single process. According to this approach, in the case of assisted suicide, for example, and the conflict between the substantive principles at stake – the principle that protects the right to life, on the one hand, and the principle that protects the right to self-determination, on the other – the proportionality framework also requires the weighing, and balancing against those substantive principles, of the formal principle ascribing to Parliament the competence to decide on the issue according to the principle of majority.[18]

Initially, Alexy endorsed a view akin to this, facing significant criticisms concerning the moral justification for deviating from substantive rights based solely on formal principles with the risk of undermining the authority of constitutional

[14] J Rivers, 'Proportionality, Discretion and the Second Law of Balancing' in G Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford, Hart Publishing, 2007) 167.

[15] S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468; and Tsakyrakis, ch 1 of this volume.

[16] Alexy, *Theory of Constitutional Rights* (n 13).

[17] Alexy, 'Formal Principles' (n 13) 511.

[18] However, it should be noted that the majoritarian principle also implies values or substantive principles (such as political equality and ideological pluralism). See C Caruso, 'Majority' in R Grote, F Lachenmann and R Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford, Oxford University Press, 2022).

rights. Allan has emphasised this concern, arguing that formal principles, like democratic principles, cannot substantively justify infringing on rights.[19]

Due to these criticisms, an alternative approach has emerged: the separation approach. This approach maintains a clear distinction between the substantive level of constitutional rights and the formal level of power and authority. It ensures that the PA of principles occurs within their respective domains: formal principles are analysed and balanced against other formal principles, whereas material principles are analysed and balanced against other material principles.[20] One key advantage of the separation approach would be its logical consistency and the possibility of addressing the gap between legislative actions that set limits to rights and the judicial review of those limits. Additionally, it would prevent the conflation of competence considerations with material considerations, ensuring that state authority – whatever institutional form it takes – adheres to the substance of constitutional rights.[21] Furthermore, the separation approach has served as the basis of more elaborated accounts, providing detailed operational frameworks that favour and enhance its practical application.

As mentioned above, Alexy first endorsed the combination approach but subsequently rejected it to propose an 'epistemic model' of discretion and institutional PA.[22] According to Alexy, the combination approach risks legitimising disproportionate interferences with rights, undermining their constitutional supremacy over ordinary legislation. From this perspective, Alexy has introduced a distinction between two kinds of legislative discretion: structural and epistemic. The former covers what is neither prohibited nor commanded by the constitution, whereas the latter involves the legislature's competence to determine the constitution's boundaries amid uncertainty. Formal principles primarily influence epistemic discretion. In this sense, empirical uncertainty necessitates a second-order PA and the balancing of epistemic reliability against formal democratic principles. Indeed, constitutional rights require optimisation based on assured truth, but the absolute precedence of these rights could paralyse legislation in complex areas where such truths are unavailable. Second-order PA thus permits calibration of the balancing of substantive principles, allowing institutional considerations to mitigate the weight of uncertain empirical assumptions without overriding substantive principles. In these terms, institutional principles would allow the establishment of the appropriate degree of legislative discretion, particularly in cases in which different empirical assumptions are equally plausible. This discretion, indeed, is upheld by the institutional principle of a

[19] TRS Allan, 'Constitutional Rights and the Rule of Law' in M Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford, Oxford University Press, 2012) 132.

[20] See Klatt (n 12). In favour of the separation approach, see also J Waldron, 'The Circumstances of Integrity' (1997) 3 *Legal Theory* 1.

[21] M Klatt and M Meister, *The Constitutional Structure of Proportionality* (Oxford, Oxford University Press, 2012).

[22] Alexy, 'Formal Principles' (n 13).

democratically legitimated legislature, ensuring legislative freedom in uncertain contexts.

This 'epistemic' model has since been revised and integrated by others, such as Klatt and Meister, who have proposed a two-level model of balancing and PA.[23] On a first level, balancing is part of a PA upon substantive principles. On a second level, balancing applies to formal principles and conflicts among competences. The separation of these levels would allow for reasoning upon the fulfilment of substantive principles independently from the institutions that are competent to fulfil them. In these terms, the establishment of what substantive principles require, in terms of optimisation, is not influenced by the institutional actors involved but rather depends on their relative weight in the circumstances of application. At the same time, balancing competences would unfold separately, considering what has been established as regards the balance among substantive principles.[24]

From this perspective, Klatt has developed a theory of balancing institutional competences, centred on the legislative and judicial competences concerning social rights issues.[25] According to this theory, the solution of conflicts among constitutional competence norms – that come about at a formal level and regard the exercise of judicial review – should be based on balancing. The idea is that such norms, like constitutional norms that protect rights, are norms of principle that can come into conflict and thus need to be optimised by means of balancing. Therefore, when a conflict arises among competence norms, concerning the exercise of judicial review, this conflict should be settled by balancing those norms against one other, to this end considering the weight carried by the different institutional reasons at stake in a given case. In other words, the 'institutional problem' concerning the determination of the scope and intensity of judicial review is presented as a conflict between formal principles of competence, that is, between the political competence to decide on certain issues and the judicial competence to review those decisions.[26] In these terms, Klatt's theory makes an important contribution to the role that proportionality can play in the allocation of institutional competences and conflicts among them.

Nonetheless, this reflection remains incomplete and narrow. On the one hand, it does not fully capture the dynamic of interaction between the substantive and the institutional levels on which proportionality reasoning can unfold. On the other hand, it is mostly concerned with how institutional principles shape the relation between courts and legislatures in the domain of constitutional adjudication. Yet the relevance of those principles goes well beyond this relation, having a broader scope of application and impact. Indeed, institutional proportionality

[23] On the 'two-level model', see Klatt and Meister (n 21) 141–46.

[24] ibid.

[25] M Klatt, 'Positive Rights: Who Decides? Judicial Review in Balance' (2015) 13 *International Journal of Constitutional Law* 354.

[26] ibid; see also Klatt (n 12).

concerns many other types of relations of power and authority, based on a distribution of competences among different entities in horizontal and vertical terms. In this sense, institutional principles express institutional reasons – concerning 'who' should make certain decisions and 'how' they should do so – that apply to the different spheres of institutional action in a constitutional system, complementing the reasons expressed by substantive principles and concerning 'what' institutional actions should realise. Therefore, institutional principles have a crucial bearing on the reasoning upon substantive principles and their application. Nonetheless, as illustrated above, the terms in which those principles should interact within the proportionality framework remain highly controversial. The emerging approaches – the combination approach and the separation approach – are still being refined and are subject to ongoing discussion.[27]

Legal practice offers some important insights into this debate. Various elements – norms of positive law and emerging judicial doctrines – establish a connection between the standard of proportionality and the application of principles concerning the distribution and exercise of institutional competences. An important example, in this sense, is Article 5(4) of the Treaty on European Union (TEU), which provides that '[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. Based on this norm, the standard of proportionality has become part of a broader legal framework, setting the standards that constrain the delineation of institutional competences and the exercise of powers within the system of the European Union (EU). Another element is provided by Article 118 of the Italian Constitution, as interpreted by the Italian Constitutional Court, concerning the distribution of competences, in vertical terms, among the Italian state and the regions. Furthermore, very recent developments in the case law of constitutional courts, such as the Italian Constitutional Court, point to the use of proportionality as a standard for reasoning also upon issues concerning different types of institutional competences, including the competences of constitutional courts vis-à-vis the competence(s) of the legislature.

Let us now turn to analysing the elements offered by the case law, with a focus on important rulings of the Italian Constitutional Court and the German Federal Constitutional Court, which are relevant for our purposes because they allow us to grasp essential elements of institutional proportionality. First, they show how institutional principles can conflict in different contexts – namely, with each other but also with substantive principles. Second, they provide the elements needed to reconstruct how the combination approach and the separation approach shape the reasoning of courts 'in action', guiding the adjudication of institutional principles in concrete cases. Third, these cases offer important normative insights, suggesting that the use of proportionality in the adjudication of institutional principles and competences rests on a particular conception – a 'functional' conception – of the

[27] Klatt and Meister (n 21); and Rivers (n 14).

separation of powers and, relatedly, on a connotation of those principles as standards that can be optimised and balanced, rather than categorical rules.

III. Institutional Proportionality in Action

Constitutional courts increasingly use the standard of proportionality to address the interferences that arise among institutional principles, concerning constitutional competences. This use of proportionality occurs on many fronts, shaping the relations between constitutional courts and other courts (both ordinary and supranational courts), the relations between constitutional courts and legislatures, and, furthermore, the relations between different levels of government and territorial authority. Let us now delve into the analysis of cases that show how institutional proportionality operates across this wide set of institutional settings.

We will first consider relevant cases in which the standard of proportionality has been used to apply, and balance, only institutional principles, and then we will move to the analysis of cases in which the proportionality reasoning has been used to apply, and balance, institutional principles in (direct or indirect) connection with substantive principles. In doing so, we will shed some light on how the combination approach and the separation approach can guide the adjudication of concrete cases. To this end, we will look at the case law of the Italian Constitutional Court as well as a recent and relevant development in the case law of the German Federal Constitutional Court that has occurred with the decision in the *Weiss* case.[28]

The adjudication of the Italian Constitutional Court will be the main point of reference for our analysis, as it has consistently paid close attention to the institutional dimension of substantive issues and to the institutional relevance and impact of its own decisions. Indeed, one of its notable successes is the attention devoted to institutional principles and the establishment of cooperative relations in both horizontal and vertical terms – among different constitutional branches, including the Court itself, ordinary judges, supranational courts, the legislature, the executive,[29] and among the different levels of territorial authorities within the state.

Before moving on, two caveats are in order. First, the selected cases are not mere illustrations of the use of proportionality in the application of institutional principles. They serve as case studies providing crucial insights into the practical and normative implications of that use. Second, it is hard to isolate substantive considerations from institutional considerations in the arguments of the Italian

[28] German Federal Constitutional Court, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, judgment of 5 May 2020.

[29] See V Barsotti et al, *Italian Constitutional Justice in Global Context* (Oxford, Oxford University Press, 2018) 66, 235–38.

Constitutional Court. Nonetheless, for analytical purposes, it is important to identify and set these considerations apart in order to consider their role in the Court's reasoning and the way in which this reasoning combines, or separates, them.

A. Proportionality Analysis of Institutional Competences

Let us start with the use of PA to reason only upon institutional principles, concerning the distribution of competences among constitutional actors that operate on different levels of a constitutional system. First, we will look at the reasoning of the Italian Constitutional Court on the 'vertical' allocation of competences within the state, among institutions that operate on different territorial levels of government. Second, we will inquire into a significant development in the case law of the German Federal Constitutional Court, with regard to the 'vertical' allocation of competences beyond the state, among institutions that operate at the national and supranational levels.

i. State and Regions before the Italian Constitutional Court

The Italian Constitutional Court traditionally plays a central role in defining institutional competences within the Italian constitutional system. In many cases, the idea of proportionality guides the Court's action in this respect, serving as a tool to detect illegitimate interferences with competences, particularly in the case of territorial entities. In cases concerning these interferences, the Italian Constitutional Court stands as an arbiter among institutions, and proportionality provides the standard to appreciate the weight of the competences at stake and establish a balance among them.

The basis for using the standard of proportionality, here, is provided by the constitutional principle of loyal cooperation. This principle is used in different domains, but it has proved to be especially relevant in the abstract judgement of the law's constitutionality, concerning disputes between state and regions.[30]

It is necessary to take a step back in order to understand how this principle operates. In 2001, the Italian Constitution was amended to enrich the legislative competences of regions and to further delineate the boundaries between the sphere of those competences and the competences of the state. The amended Article 117, indeed, comprises a wide set of rules on competences, providing a long list of matters on which the state has an exclusive competence[31] and matters on which there is a concurrent competence of the state and regions.[32] Then there is a

[30] See C Caruso, 'Sincere Cooperation in Times of Judicial Regionalism: From a Method of Governance to a Standard of Judgment' (2021) 4 *Quaderni costituzionali* 909–31.

[31] Art 117.2 Italian Constitution.

[32] Art 117.3 Italian Constitution.

final, residual clause that allocates the non-enumerated competences to regions.[33] Given this long list of norms specifying the competences of different territorial entities, one would expect the Italian Constitutional Court to apply Article 117 as a set of rules of competence, that is, by subsuming cases under those rules.

On the contrary, the Court has radically 'rewritten' the distribution of competences established by Article 117, interpreting the norms of competences that it brings together as principles that can be balanced one against the other, rather than as categorical rules. In fact, the Italian Constitutional Court has used the technique of weighing, and balancing, institutional interests concerning competences. When reviewing a legislative intervention, the Court considers the territorial scope of the interests involved, to determine whether they are unitary or regional interests, and then seeks to establish the appropriate degree of interference among them. If unitary interests are at stake, the state can legitimately interfere with regional competences, provided that the region's prior involvement is demonstrated, showing that regional concerns have been considered.[34] In these terms, institutional proportionality has become the analytical tool used by the Court to apply the principle of loyal cooperation, taking into account the concrete circumstances in which regions exercise their competences and interact with the state in implementing national legislation.

ii. The Weiss *Case: Institutional Proportionality at the Crossroads of Legal Orders*

As illustrated in section III.A.i, the standard of proportionality can serve as a guide to reason upon interactions, and conflicts, among the competences of different territorial entities that operate on different levels of authority within the same state. This standard, then, can offer guidance beyond the state, to address the interferences that may occur between national and supranational spheres of competence. An important instance of this use is provided by the recent decision of the German Federal Constitutional Court in the *Weiss* case. Although the decision was formally addressed to the German authorities, the Court considered *ultra vires* (ie, beyond its competences) the programme of the European Central Bank, as well as the ruling of the Court of Justice of the European Union (CJEU) upholding that programme. The German Federal Constitutional Court, in fact, has reinterpreted the principle of proportionality established by Article 5(4) TEU

[33] Art 117.4 Italian Constitution.

[34] From a formal point of view, it is Art 118 of the Italian Constitution that provides the textual foothold for such an operation. Art 118 of the Constitution provides for the principles of subsidiarity, differentiation and suitability in the allocation of administrative functions; the Constitutional Court has extended these principles to the distribution of legislative functions as well, allowing the state to take legislative functions under its control when an intervention is justified by unitary interests. See the landmark Dec 303/2003, which inaugurated the 'Subsidiarity Call' doctrine, well-known in the Italian literature and case law. See Barsotti et al (n 29) 200.

in light of the German Basic Law (*Grundgesetz* (GG)). We cannot address here the impact of the decision, and its relevance, from the point of view of the dynamics of the European integration.[35] What is relevant for our purposes is the Court's reasoning in terms of institutional proportionality.

Within the EU, a principle of institutional proportionality was introduced by the Maastricht Treaty in the face of the extension of the Union's competences, as outlined in Article 5(1) TEU. It is a legal consequence of the principle of conferral that characterises the EU as a supranational organisation with enumerated competences. As noted, Article 5(4) TEU provides that 'the content and form of Union action shall not *exceed* what is necessary to achieve the objectives of the Treaties' (emphasis added). This principle, in the EU legal system, has a (*lato sensu*) federal dimension,[36] in that it uses the idea of proportionality to shape, and reconcile, the EU's competences with those of Member States. Indeed, the idea of proportionality was introduced, in this clause, 'to protect the interests of Member States, rather than the interests of the individual' against possible excesses and legitimate interferences.[37]

Returning to the *Weiss* case, the CJEU found the ECB's Quantitative Easing programme to be legitimate under a substantive proportionality test.[38] The Court indeed found the programme to be a suitable means for the realisation of a legitimate substantive goal – keeping inflation under 2 per cent – and also a necessary means not exceeding what was required to achieve that objective.[39] In these terms, the CJEU confirmed its deferential attitude towards the ECB as a technical, independent institution: the action of such an institution is illegitimate only if manifestly inappropriate for the realisation of the objective pursued.[40]

[35] For a critical appraisal, see FC Mayer, 'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP decision of 5 May 2020' (2020) 16 *European Constitutional Law Review* 733; P Faraguna and D Messineo, 'European Central Bank, National Constitutional Adjudication and the European Court of Justice: Latest developments from the "European case-law" of the German Constitutional Court' in R d'Ambrosio and D Messineo (eds), *No 91 – The German Federal Constitutional Court and the Banking Union* (Banca d' Italia Publishing, 2021) 11, 35–38. For a different perspective, see D Grimm, 'A Long Time Coming' (2020) 21 *German Law Journal* 944. Within a couple of years, the case was closed without serious repercussions: After the decisions, additional explanations on the proportionality of the measure were made by the ECB Governing Council on 3–4 June 2020, anticipated by the disclosure of confidential ECB documents in favour of the German authorities. In June 2021, the European Commission opened an infringement procedure against Germany for depriving an ECJ decision of its effectiveness, which was later closed in December because Germany had fully recognised the legal effects of the acts of European institutions.

[36] See G de Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 *Yearbook of European Law* 112, according to whom the federalism dimension of proportionality involves 'the extent to which the aim of a particular measure is one which lies primarily within the competence of the Member State, rather than the competence of the Community institutions'. See also J Steinbach, 'The Federalism Dimension of Proportionality' (2022) 28 *European Law Journal* 36, 39.

[37] Steinbach (n 36) 39.

[38] Case C-493/17 *Weiss and others*, ECLI:EU:C:2018:1000 (CJEU, 11 December 2018).

[39] The programme passed the necessity test also because it was quantitatively limited and temporary in nature.

[40] For the 'manifestly inappropriate test' on European institutions' action, see W Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 *Cambridge Yearbook of European Legal Studies* 439.

By contrast, according to the German Federal Constitutional Court,[41] the CJEU failed to grasp the grounds of legitimacy for the ECB's action: the basis of that legitimacy did not lie in a proportionate interference between substantive principles but rather pertained to a proportionate allocation of institutional competences among different institutional entities and levels of government. According to the German Federal Constitutional Court, the CJEU failed to take into account the distinction between monetary and economic policies (a competence left by the Treaties to the Member States) and, therefore, between the corresponding institutional spheres of competence. Therefore, according to the German Federal Constitutional Court, the CJEU performed a test of substantive proportionality, through the lens of monetary policy, without taking into account the dimension of economic policy, which required the exercise of other competences.[42] Indeed, the principle of allocation was illegitimately compressed and, at the same time, the (meta-)principle established by the eternity clause of the German Constitution was violated.[43] Regarding the European integration process,[44] this provision has been constantly interpreted to prevent surreptitious enlargements of powers in favour of the Union without passing through an expression of the will of the German people.[45] From this point of view, the decision of the German Federal Constitutional Court is an excellent example of institutional proportionality: the fulfilment of the substantive interest in keeping the level of inflation below two per cent and the related institutional interest in the functional independence of the ECB have disproportionately interfered with the fulfilment of two other institutional interests of constitutional rank. First, the principle of conferral and, second, the principle of democratic legitimation of choices related to European integration, both corollaries of the eternity clause enshrined by Article 79(3) GG. In this case, the principle of proportionality clearly takes an institutional form, with a degree of scrutiny that changes according to the legal context:[46] while, according to the CJEU, it poses a relative presumption of validity of the measures adopted by EU institutions, in the German Federal Constitutional Court's analysis it has

On the contrary, 'when proportionality is invoked in order to challenge the conformity of Member States' measures with EU law, the legality is typically measured against a "least-restrictive measure" benchmark' and the scrutiny is more stringent: see Steinbach (n 36) 37. One possible rationale for this variable-intensity scrutiny is the possible clash of Member States' actions with the four fundamental freedoms, which represent the bulwarks of the European legal and economic order: ibid (n 36) 37.

[41] See German Federal Constitutional Court (n 28).

[42] According to the German Federal Constitutional Court (ibid para 139), the CJEU (and the ECB before it) should have subjected monetary policy measures to an economic policy assessment, checking their impact on national 'public debt, personal savings, pension and retirement schemes, real estate prices' and – in an overall evaluation – 'weighing these effects against the monetary policy objective'.

[43] German Federal Constitutional Court, ibid paras 99–116.

[44] Since the decision on the Maastricht Treaty, so called 'Maastricht Urteil', 2 BvR 2134/92, 2 BvR 2159/92, 12 October 1993, available at https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf.

[45] Maastricht Urteil, C, para 2.

[46] See O Scarcello, 'Proportionality in the PSPP and Weiss Judgments: Comparing Two Conceptions of the Unity of Public Law' (2021) 13 *European Journal of Legal Studies* 45.

been used, thus, as a shield against the European integration process to assess compliance with the EU's principle of conferral. This strategic use becomes even more apparent when considering that the German Constitutional Tribunal never applies proportionality to assess the internal relations between the *Bund* (Federal Government) and the *Länder* (States).[47]

B. Institutional Proportionality and the Calibration of Judicial Review

In the cases illustrated in section III.A, the standard of institutional proportionality has guided constitutional courts' reasoning upon non-judicial competences and spheres of action established by norms of constitutional rank. Let us now turn to cases in which institutional proportionality applies to the reasoning on judicial competences and, in particular, serves as the yardstick to appreciate the legitimacy of the judicial review performed by a constitutional court interfering with the competence(s) of other institutions and, in particular, the legislature.

Several significant examples of such use can be drawn from the experience of the Italian Constitutional Court, where proportionality plays an important role in guiding the reasoning upon institutional principles in combination with substantive considerations. These are cases in which the Court seeks, on the one hand, to protect a substantive right or interest and, on the other hand, to calibrate its own action and avoid interferences with the competence of the legislature and legislative discretion. As pointed out by Alexy, the proportionality framework allows this to happen. Reasoning on the proportionality of interferences with substantive principles also requires a consideration of institutional principles and, in particular, the democratic principle that requires the granting of epistemic discretion to the legislature.[48] Guided by the standard of proportionality, a court can calibrate its own action so as to realise proportionate interferences with the competences of the legislature, given the weight of the substantive reasons at stake and, moreover, the extent to which there is uncertainty about the conditions of their legitimate fulfilment. The case law of the Italian Constitutional Court shows that there are (at least) two ways in which it can proceed in calibrating the scope and intensity of the review: (i) avoiding immediately declaring the unconstitutionality of a specific provision; (ii) modulating the effects of the declaration by setting, in particular, temporal limits on the efficacy of the ruling. The choice between these two options depends on the extent to which institutional proportionality ultimately demands judicial deference towards the legislature, which is greater in the first case – postponing the declaration – and smaller in the second – issuing the declaration but with temporally limited effects.

[47] J Saurer, 'Der kompetenzrechtliche Verhältnismäßigkeitsgrundsatz im Recht der Europäischen Union' (2014) 69 *Juristzeitung* 281; Steinbach (n 36) 39.

[48] Alexy, 'Formal Principles' (n 13) 519.

Two aspects, here, deserve attention. First, the Italian Constitution does not directly provide for these decisional techniques and, despite deference to the legislature, their elaboration and adoption shows a certain degree of creativity on the part of the Italian Constitutional Court. By contrast, in other systems, positive law contemplates decisional techniques for the modulation of the intensity and scope of judicial decisions.[49] Second, the standard of institutional proportionality applied to the relations between the Italian Constitutional Court and the legislature is an instance of the principle of loyal cooperation, guiding the interactions among institutions that unfold both horizontally and vertically within the Italian constitutional system.

i. Deferring Unconstitutionality

We turn now to the analysis of two important cases in which the Italian Constitutional Court has calibrated the scope and intensity of its own action, so as to fulfil the requirement of institutional proportionality posed by the principle of loyal cooperation.

The first relevant case is the *Cappato* decision.[50] Cappato, a libertarian activist, accompanied a man who had quadriplegia after a severe car accident to a Swiss clinic to assist him in the act of ending his own life. Cappato was thus charged with aiding and abetting suicide, behaviour expressly sanctioned by the Italian Criminal Code.[51] On the one hand, the Italian Constitutional Court established that the criminal provision was justified in terms of protecting vulnerable persons, by criminalising the act of providing assistance to a person in suicide; on the other hand, the Court ruled that the provision was too broad, because it was susceptible to being applied to cases in which persons affected by an incurable illness causing physical and/or psychological suffering, which they find intolerable, and who have the capacity to make free and informed decisions, are kept alive using life-support treatments.

According to the Italian Constitutional Court, in this complex case there was a conflict between two substantive principles of the same constitutional rank: the right to life; and the right to self-determination concerning treatments. For this reason, despite the over-inclusiveness of the challenged provision, the Court did not declare it unconstitutional. Indeed, according to the Court, the resolution of that conflict could not be the unconstitutionality of the challenged provision:

> [I]n the absence of specific regulations in the area … any individual – even one not working in healthcare – could legally offer, in their place or at the patient's home, as an

[49] See, eg, Art 140 of the Austrian *Bundesverfassungsgesetz*, allowing the Austrian Constitutional Court to defer *pro futuro* the effects of the decision (for up to 18 months), or to establish the general retroactivity of the decision; Art 31(2) of the German *Bundesverfassungsgerichtsgesetz*, which provides for decisions of mere incompatibility; Art 282(4) of the Portuguese Constitution, which makes it possible for the Portuguese Constitutional Court to limit the retroactivity of its decision.

[50] Italian Constitutional Court, ord 207/2018, *Cappato*.

[51] Art 580 Italian Criminal Code.

> act of charity or for a fee, suicide assistance to any patient who wished to have it, without any ex ante oversight that, for example, the individual is capable of self-determination, that the choice they have expressed is free and informed, and that the illness afflicting the patient is incurable.[52]

The Court noted that there were different possible ways of intervening and regulating these cases through the law. Therefore, the Court has called the legislature to account: since the question of constitutionality lay at the 'intersection between values of primary importance',[53] their balancing 'presupposes, in a direct and immediate way, choices that the legislator is … authorized to make'.[54] Therefore, it would be

> appropriate – in a spirit of faithful and dialogical institutional cooperation – to allow Parliament … every appropriate reflection and initiative, to avoid, on the one hand, that a provision continues to produce effects considered to be unconstitutional in the ways described, but, at the same time, to prevent potential gaps in the protection of values, which are no less relevant at the constitutional level.[55]

The Italian Constitutional Court arrived at this solution through an order of deferred unconstitutionality:[56] it suspended the pending proceedings, deferring the question and scheduling a new hearing after a one-year term. The Court warned Parliament that at the end of this term, in the event of legislative inertia, the Court would retain the power to declare the the provision unconstitutional. Indeed, after one year of inaction by the legislature, the Italian Constitutional Court declared this provision of the Criminal Code partially unconstitutional, in so far as it did not exclude the punishment of those who facilitate the fulfilment of the autonomously and freely formed intent of a person to kill themselves, when that person is fully capable of making free and informed decisions, being kept alive by life-support treatments and suffering from an incurable illness which is a source of intolerable physical or psychological suffering.[57]

The Court has used this technique in other, subsequent cases.[58] It has also been used by other courts in other constitutional systems, when they have found themselves deciding similar issues.[59] It is an example that explains how the reasoning in terms of institutional proportionality can combine with the reasoning in terms of substantive proportionality. Indeed, the Court found that the criminal provision was suitable with regard to the objective of protecting a substantive interest, such as vulnerable people's right to life. Nonetheless, the provision failed the necessity

[52] *Cappato* (n 50) 8.
[53] ibid 10.
[54] ibid.
[55] ibid.
[56] See Report of the President of the Constitutional Court, Professor Augusto Antonio Barbera, Extraordinary Meeting of the Constitutional Court, Rome – Palazzo della Consulta, Salone Belvedere, 18 March 2024, 16, available at www.cortecostituzionale.it/annuario2023/pdf/Relazione_annuale_2023_ENG.pdf.
[57] Dec 242/2019.
[58] See ord 132/2020-dec 150/2021, ord 97/2021- ord 31/2023.
[59] Supreme Court of Canada, *Carter v Canada*, 2015 SCC 5, expressly cited by ord 207/2018.

test because it was not the least intrusive means for realising that interest and, thus, disproportionately interfered with the freedom of therapeutic self-determination. The discontinuity between suitability and necessity opens the door to institutional proportionality: an immediate declaration of constitutional illegitimacy would have been a disproportionate (and unnecessary) judicial interference with legislative discretion. The case therefore required a less clear-cut and more nuanced solution, unveiling the existence of a plurality of regulatory options.

ii. Modulating the Temporal Effects of Unconstitutionality Decisions

Another important example of the adoption of the combined approach to proportionality reasoning may be found in the case law of the Italian Constitutional Court and its calibration of the temporal effects of its decisions. The Constitution establishes[60] the retroactive effect of declarations of unconstitutionality, but it makes no explicit reference to the power of the Constitutional Court to modulate the effects of its decision. The Court has explicitly addressed this problem.[61] In declaring constitutionally illegitimate a tax on extra profits coming from oil products, the Court decided to exclude retroactive effects of the provision that would have led to an onerous budgetary hole.

In this case, the Court applied proportionality as a standard that guides the exercise of judicial competences vis-à-vis other institutional competences. The Court expressly argued that the judicial choice of the decisional technique in a case, and therefore the choice regarding the scope and intensity of its own institutional action, must be guided by the standard of proportionality. Here, institutional proportionality combines with substantive proportionality:

> The institutional task vested in this Court requires the Constitution to be guaranteed as a unitary whole in such a manner as to ensure systematic and unfragmented protection for all rights and principles affected by the decision. If this were not the case, one of the rights would end up expanding and would thereby become 'dominant' over the other legal interests recognised and protected under the Constitution.[62]

Furthermore:

> The Italian Constitution, as is the case for other contemporary democratic and pluralist constitutions, requires an ongoing mutual balancing between fundamental principles and rights, none of which may claim to have absolute status. It is precisely the requirements laid down by a reasonable balancing between the rights and principles involved that condition the choice of the decision-making technique used by the Court …[63]

[60] Art 136 Italian Constitution; and Art 30 Law no 87/1953.
[61] Dec 10/2015, *Robin Hood tax*.
[62] ibid 15.
[63] ibid.

related, as in this case,

> to the temporal dimension of the contested legislation by limiting the effects of the declaration of unconstitutionality over time. … Naturally, considering the general principle of retroactivity resulting from the Constitution and Article 30 of Law no 87 of 1953, decisions taken by this Court involving the regulation of the temporal effects of the decision must be assessed in the light of the principle of proportionality. They must therefore be rigorously subject to compliance with two clear prerequisites: the compelling need to protect one or more constitutional principles, which would otherwise be irremediably compromised by a decision simply accepting the question of constitutionality and the fact that the restriction on retroactive effect must be limited to that which is strictly necessary to ensure the balancing of the interests in play.[64]

In these terms, the Italian Constitutional Court explicitly referred to the distinction between substantive proportionality – as a standard that guides the Court's application of substantive principles – and institutional proportionality – as the standard guiding the Court's reasoning upon the exercise of its own competence and the interaction with the legislature. Furthermore, the Court established a connection between these two forms of proportionality, in so far as it argued that the use of PA in assessing the legitimacy of interferences with rights allows for the fulfilment of the standard of institutional proportionality: it allows for an exercise of judicial power that is 'proportionate' to the relevance of the underlying institutional reasons vis-à-vis the reasons that justify the act under review.

In these terms, the Court's reasoning points to an understanding of proportionality as an overarching standard, guiding the action of the Court in both substantive and institutional terms: (i) it requires a systematic protection of rights through the adoption of PA in the application of substantive principles, which also (ii) allows the Court to exercise its own competence by taking proportionate institutional action. Substantive and institutional proportionality overlap. First, because what leads to the variation in decisional technique is the need to protect a principle that does not pertain to the division of powers: 'according to the Court, the retroactive application of this declaration of unconstitutionality would result first and foremost in a serious violation of the balanced budget requirement under Article 81 of the Constitution'.[65] Second, because the choice to modulate effects has an impact on the rights of the plaintiffs in the case, who, because of the Court's choice, will not see their claims met. Finally, even though the Italian Constitutional Court modulated the retroactive effects of its decisions in subsequent proceedings,[66] it added that the modulation applies under strict proportionality.

[64] ibid 16.
[65] ibid.
[66] Decs 178/2015, 246/2019, 152/2020.

C. A Separation Approach: Institutional Principles versus Substantive Principles

To sum up what has been argued so far: institutional proportionality is primarily concerned with conflicts between institutional principles; it can also involve substantive principles and lead to a modulation of the court's action to respect legislative discretion and, at the same time, enforce substantive principles.

Where this combination is lacking, the institutional principle of legislative discretion may override the substantive principles at stake. In such cases, there is no attempt to strike a reasonable accommodation between the different interests but a simple and highly deferential preference for legislative discretion. Here legislative discretion is understood in a substantive sense[67] and the Constitutional Court does not find a constitutional principle that is able to immediately bind the legislature. The outcome of these decisions is not the rejection of the question but its inadmissibility. This is not because a procedural requirement is missing but because the Court does not feel competent to enter a field deemed to be the exclusive domain of the legislature. Consider, for example, the status of children born to a female couple through medical assistance procreation (MAP),[68] or that of children of a male couple (born via surrogate motherhood).[69] In Italy, MAP is permitted only between couples of different sexes, and surrogacy is a crime in any case, with the consequence that children born through these techniques have full legal protection only against the biological parent. In these cases, the question of constitutionality concerned the extension of legal protection to the relation between the child and the intended parent. While finding a gap in legal protection, the Court believed that

> only an intervention of the legislator, regulating in a comprehensive way the condition of children born to same-sex couples through recourse to MAP, would make it possible to overcome the fragmentary and unsuitable legislative tools currently used to protect the 'best interests of the child'. It would also avoid the 'disharmony' that could arise as a result of intervention aimed only at resolving the problem specifically brought to the attention of this Court.[70]

Similarly, and with reference to surrogate births, the Italian Constitutional Court argued that

> the task of adapting existing law to the need to protect the interests of children born through surrogacy – in the context of the difficult balance between the legitimate aim of discouraging recourse to the practice and the need to ensure respect for the rights of children, in the terms set out above – can only lie, in the first instance, with the legislator, which must be granted a wide margin of appreciation for finding a solution capable

[67] Alexy, 'Formal Principles' (n 13).
[68] Dec 32/2021.
[69] Dec 33/2021.
[70] Dec 32/2021 10.

> of taking into account all the rights and principles at stake. Given the range of possible options, all of which are compatible with the Constitution and involve interventions having a potential impact on the whole family law system, the Court must now stand back, and leave it to the discretion of the legislator to provide without any delay, for appropriate remedies to the current lack of protection for the interests of the child.[71]

There are two reasons for justifying such an approach: on the one hand, the technological progress, which amplifies de facto possibilities without a social consensus having matured around them that is capable of considering them legal rights; on the other hand, the impossibility of responding with a single normative response, since the protection of the subjective situations at stake would require a systematic revision of the regulatory apparatus.[72]

IV. Institutional Proportionality: The Grounds and the Structure

Institutional proportionality, as reconstructed so far on the basis of the elements provided by the theory and practice of proportionality, points to a certain understanding of the principle of separation of powers and, relatedly, the norms that allocate and regulate institutional competences in a constitutional order. According to this understanding, the legal questions concerning the separation of powers are not so much about identifying the institution to which a specific competence should be assigned. Rather, they concern how, and the extent to which, that institution is called upon to exercise it. Let us shed light on this perspective.

A. The Grounds: Functional Understanding of the Separation of Powers

As mentioned previously, using proportionality as a standard for applying institutional principles points to a 'functional' understanding of the separation of powers in a constitutional democracy. This approach enriches the traditional, formal understanding derived from Montesquieu's ideas, which posit that the separation of powers is grounded in a set of 'bright-line rules' articulated by the constitutional text. In contrast, the functional approach views this principle as an open-ended standard that does not strictly delineate and separate spheres of institutional competence. Instead, it demands the performance of 'functional cycles',[73] where

[71] Dec 33/2021 8.

[72] Similarly, eg, Dec 240/2021 on the system of election of the mayors of metropolitan cities.

[73] G Silvestri, 'Poteri dello Stato (divisione dei)' in *Enciclopedia del Diritto*, vol XXIX (Milano, Giuffrè, 1985) 713.

different institutions may need to exercise the same competence, and the same institution may need to exercise different competences, all within a framework of 'interbranch relations' and mechanisms of checks and balances. Indeed, the principle of separation of powers is not to be understood as a rigid division of functions among constitutional bodies, instrumental, as it was in the nineteenth-century state, to the protection of negative freedoms and individual property. In contemporary constitutions, the social pluralism they recognise and activate requires to be governed through functional cycles entrusted to organs that fail to contain, in their traditional labels (executive, legislative, judicial), the richness of the tasks entrusted to them. Functional cycles reflect the differentiation of social systems: as such, not only does each power exercise one function, which may not coincide with those of other powers, but also within each power there are distinct functions that concur, as they are exercised, to determine a dynamic and reflexive balance with those exercised by other powers.

According to the functional approach, different institutions can exercise the same function as long as institutional plurality is maintained: there is no concentration of power when the same institutional body exercises several functions and different bodies can also exercise those same functions.

Thus, we can distinguish between a formal approach to the separation of powers, which assigns fundamental state functions to different organs, and the theory of checks and balances or the theory of a functional division.[74]

Based on the functional approach, the traditional functions of the state (legislative, executive, judicial) can be carried out by various intra-state organs (parliament, government, constitutional courts) and entities (regions, sub-federal States, etc). Therefore, the separation of powers has both a horizontal dimension within the organs of the state and a vertical dimension favouring the territorial entities into which a certain polity is organised. This approach to the separation of powers requires abandoning the application of competence norms as categorical rules. Instead, 'functional cycles' rely on the intertwining of competences, potentially giving rise to conflicts that necessitate balancing and proportionality reasoning.

B. The Structure

Based on the elements provided by the theory and practice of proportionality, we can outline the framework that proportionality provides for reasoning upon competences, and conflicts among them, so as to determine the legitimate scope and intensity of institutional actions. In this sense, institutional proportionality guides and structures legal reasoning so as to assess whether the exercise of

[74] P Mikuli, 'Separation of Powers' in R Grote, F Lachenmann and R Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford, Oxford University Press, 2018) 1.

a competence: (i) has a legitimate aim; (ii) is suitable, relative to that (legitimate) aim; (iii) is necessary, concerning the realisation of that aim; and (iv) is balanced – that is, the weight of the interests realised by the exercise of that competence, and the extent to which they are fulfilled, justify interfering with the interests that underlie the conflicting competences at stake. As the illustrated examples in this chapter have shown, substantive principles may bear on this reasoning, in so far as they are relevant for assessing the objective pursued by the exercise of a competence and/or they add weight to the institutional reasons at stake, or, again, they can be weighed and overcome by institutional principles.

Ultimately, proportionality serves as a framework for legal reasoning and decision making, extending beyond substantive principles to also encompass institutional principles, concerning competences or levels of government: it is a framework that can guide institutional action comprehensively. In this sense, the potential of proportionality lies not only in providing a structured decision-making process but also in fitting the 'culture of justification' that permeates contemporary liberal constitutional systems.[75] In such a culture, institutional action is legitimate if grounded in reasons that can be intersubjectively controlled and reasonably accepted by free and equal individuals.[76]

Proportionality reasoning – in the substantive and the institutional form – contributes to such justifiability in different ways. First, by identifying and subjecting to control the *full* set of reasons – substantive and institutional – underlying institutional actions. Indeed, the framework of proportionality clarifies the different deliberative stages and reasons involved in institutional decision making. The balancing stage, in particular, requires identifying all relevant reasons, weighing them against each other and determining the extent to which they should be fulfilled or sacrificed. This process highlights not only the reasons justifying institutional actions but also the remaining reasons that, though sacrificed, still merit consideration.[77] These residual reasons are legally significant, as they represent relevant considerations that persist even after a justified action is taken.[78]

Second, proportionality reasoning proceeds by scrutinising the acceptability of all the principles and reasons at stake, using criteria (suitability, necessity and *stricto sensu* proportionality) that allow for the testing of justifiability in conditions

[75] D Dyzenhaus, 'Proportionality and Deference in a Culture of Justification' in G Huscroft, BW Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Reasoning, Justification* (Cambridge, Cambridge University Press, 2014) 234.

[76] M Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law & Ethics of Human Rights* 141–75, drawing on the ideal of public reason as introduced by J Rawls, *Political Liberalism* (New York, Columbia University Press, 1993).

[77] J Oberdiek, 'Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights' (2004) 23 *Law and Philosophy* 325.

[78] By detecting this residue, the framework of proportionality allows appreciation of their legal importance and, thus, provides us with a comprehensive account of institutional action grounds as well as information that can be relevant for future cases, concerning the existence of reasons that have been previously discarded but deserve consideration.

of constitutional pluralism.[79] Indeed, these criteria emphasise how realising some reasons allows for the consideration of other, conflicting reasons, so as to ground institutional actions in a balance of reasons that is acceptable to free and equal individuals.

Yet, as mentioned previously, while proportionality can set out the deliberative steps required to achieve this balance among principles and reasons, it does not itself provide these principles and reasons.

Proportionality ultimately provides an empty analytical structure that can be used to track, scrutinise and balance the substantive and institutional reasons brought by different actors based on different accounts of the constitutional order, as demanded by a culture of justification.

Indeed, a culture of justification requires institutions to apply substantive principles and fundamental rights taking into due account, and balancing, all the different and conflicting reasons that they provide. In the same way, that culture requires institutions to fulfil formal principles and exercise institutional competences taking into due account, and balancing, the conflicting reasons that they provide.

On both fronts, the idea of proportionality provides a response to this demand. It has the potential to serve as a *general* standard for legal and political decision making, providing guidance for making, and justifying, institutional decisions as based on the transparent and balanced consideration of *all* the relevant reasons, both substantive and institutional.

[79] Kumm (n 76). On these aspects of proportionality, see also Valentini (n 7); and C Valentini, 'Proportionalism, Justification and Inclusive Adjudication' (2019) *Archiv für Rechts -und Sozialphilosophie–Beihefte (ARSP-B)* 83.

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