Legality and Proportionality in the Performance of Law: Introduction

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ABSTRACT
This introduction identifies the thematic core of the fourth volume of *Undecidabilities and Law* (the counterpoint between legality and proportionality in the context of juridically relevant practical performance) and anticipates the diverse contributions which constitute its seven chapters.

KEYWORDS
Principle of proportionality, legality, defeasibility, balancing, ecoproportionality, *rule of law*, tragic cases

The fourth volume of *Undecidabilities and Law* is dedicated to the relationship between legality and proportionality in the context of practical performance (or realization) of law. To explain this thematic core, attention be paid primarily to its two crucial dimensions – legality and proportionality –, both relevant for academic considerations in the field of the conflicting demands of political philosophy and legal philosophy, but also important for practical-normative dogmatic approaches, as well as for the process of interpreting the law in practice by law-enforcing Authorities.

The principle of proportionality is one of the fundamental principles used in various branches of law, including administrative, civil and criminal law. Its purpose is to ensure that measures taken to achieve a certain goal are adequate, necessary and do not exceed what would be reasonable

to achieve that goal. This principle is intended to protect the rights of the individual and prevent the excessive use of legal measures. However, this does not change the fact that part of the doctrine, for various reasons, considers the proportionality test to be an imperfect tool, consequently raising criticism concerning not only the (theoretical) construction of the principle of proportionality itself, but also the practice of its application, which, in their view, is flawed.

Legal theory emphasizes as fundamental the requirement that a certain measure is appropriate to achieve the intended purpose. There must be a functional and logical relationship between the means and the end. If there are alternatives that are less restrictive regarding individual rights, they should certainly be preferred. Sometimes we distinguish the principle of proportionality in the narrower sense: this means that it is sufficient that the benefits of the measure are proportional to its negative effects on the individual.

A plausible separate group is formed by issues related to the application of the principle of proportionality by the courts. There are several dangers. The main one is the non-uniformity of jurisprudence, because the proportionality principle itself can be interpreted differently by different courts, leading to non-uniform rulings. Judges may have different opinions on what is "proportionate" in a given situation. Assessing whether a measure is adequate, necessary and proportionate often requires a complex analysis of the facts and circumstances of the case. Another problem for judges is the difficulty of balancing different interests. The application of the principle of proportionality in the realm of human rights can be complicated because different values and interests often have to be taken into account, which can lead to conflicts. Finally, due to the relationship between different jurisdictions, different legal systems may interpret and apply the principle of proportionality differently, which can lead to difficulties in international legal cases.

It is clear from the works presented in this volume that legality and proportionality –in the context of the process of realizing the "essence" of the law– are two issues that are both sensitive for academic deliberation and important for the process of interpreting the law in adjudication (or for the institutionalized practice of the bodies applying the law). The postulate of taking proportionality into account in the realization of the principle of legality is a suggestion backed by very extensive theoretical and philosophical-legal analyses, part of which concern the articles presented in this volume.

In this volume, the Authors examine the problem of taking into account the relationship between the claims of legality and proportionality whilst respecting the necessary relationship between the corresponding aspirations: this means on one hand taking into account (within the framework of sentencing, i.e., considering the issues of interpretation and application of law) that the concept of legality can be self-restrained by the law which conceptualizes the order of proportionality in the implementation of the public interest; this means on the other hand that the experience of application cannot forget the contemporary phenomena of multicentricity, i.e. the necessary interconnection of national and supranational orders, their mutual interpenetration, as well as their internalized sharing of common axiological bases – for which national jurisprudence should remain responsive.

Manuel Atienza draws our attention to the role performed by the assumptions of positivist legal theory that need to be taken into account in the study of the problem of the relationship between legality and proportionality. According to his view, defeasibility and balancing are concepts that reflect intrinsic characteristics of legal systems, emphasizing the need for flexibility in law to accommodate the unpredictability of human behaviour. The Author reminds us that Herbert Hart suggests that legal concepts cannot be strictly defined by necessary and sufficient conditions, as they often require an "unless" clause to the account for exceptions that defeasibility allows. According to the Author, this notion is echoed in the work by Stephen Toulmin, who applied similar reasoning to argumentation, highlighting the importance of exceptions in both legal and philosophical contexts. The idea that legal norms may have implicit exceptions is foundational to understanding how law operates in practice. Manuel Atienza notes that balancing, closely related to defeasibility, serves as a mechanism to navigate conflicts between competing legal principles and rights. The Author reminds us that Robert Alexy has been influential in articulating the concept of balancing within legal theory, particularly in the context of fundamental rights. He distinguishes between rules, which provide definitive guidance, and principles, which require a balancing approach due to their inherent flexibility. In his reflections, the Author recognises that this distinction is crucial for legal practitioners, as it underscores the necessity of deliberation in complex cases where strict application of rules may lead to unjust outcomes. The interplay between defeasibility and balancing is essential for the evolution of legal systems, particularly in the

context of constitutionalism and the protection of fundamental rights. Legal reasoning must account for both the authoritative nature of laws and the moral and philosophical underpinnings that justify them. As legal systems increasingly recognize the importance of implicit exceptions and the need for balancing, they become more adaptable to societal changes and the complexities of human behaviours. Ultimately, Manuel Atienza recognizes that these concepts, taken as integral to legal practice, can enhance the pursuit of justice while maintaining the necessary structure of Law**.**

The theme of the relationship between proportionality and normativity is also considered by Jorge Silva Sampaio. According to the Author, the concept of proportionality in legal systems has sparked extensive debate regarding its nature, function, and foundational sources. Scholars have explored whether proportionality is a rule, principle, or something else, and its role in regulating legal norms, establishing preferences, or serving other purposes. Despite the widespread acknowledgment of proportionality across various legal frameworks, there remains a lack of consensus on its foundational basis, with potential sources ranging from justice and democracy to human dignity and fundamental rights. The ambiguity surrounding what constitutes the "foundation" of proportionality complicates discussions, as it can refer to the reasons for its creation, underlying principles, or its validity within legal systems. The paper aims to clarify the reason for appearance of proportionalities in legal systems by distinguishing between the reasons for its incorporation and the justifications for its validity. It critiques the tendency of some scholars to link proportionality to concepts like democracy or equality without establishing a clear conceptual relationship. The Author argues that rationality and the protection of fundamental rights are the primary reasons for the adoption of proportionality, emphasizing that mere conceptual connections are insufficient to justify its membership in legal systems. The analysis reveals that proportionality is a human construct grounded in social facts, which explains its varying presence and content across different legal systems. Ultimately, the paper concludes that the normative foundation of proportionality is rooted in customary law, evidenced by its consistent application and acceptance within legal communities. While some legal systems explicitly incorporate proportionality into their constitutions, many others recognize it through judicial practices that reflect a commitment to its binding nature. This reliance on custom not only accounts for the historical development of

proportionality but also supports its subsequent formal inclusion in legal texts, highlighting the importance of customary practices in establishing the validity of legal norms.

A relatively new issue is the application of proportionality in times of climate crisis, which is sometimes called ecoproportionality. This problem is taken up by Alexandra Aragão, who introduces the new concept of ecoproportionality. For the Author the principle of ecoproportionality is essential in balancing environmental protection with competing interests, particularly in the context of the Anthropocene, where human activities significantly impact the Earth's ecosystems. This principle emphasizes that legal decisions must align environmental needs with the actions taken to address them, ensuring fairness and justice in environmental law. According to the Author, as humanity's understanding of ecological processes has evolved, so too has the necessity for legal frameworks that prioritize sustainable outcomes, particularly in light of the urgent challenges posed by climate change and ecological degradation. Understanding ecoproportionality involves visualizing it as a balance scale, where one side represents economic development and the other pristine natural environments. This metaphor highlights the need for sustainable decision-making that considers both environmental and non-environmental values. In the European Union, ecoproportionality is a guiding principle in public decision-making, requiring that environmental impacts be assessed and alternatives explored to ensure that development does not come at the expense of ecological integrity. The integration of environmental considerations into various policies is crucial for achieving a high level of protection and promoting sustainable development. The urgency of the climate and ecological crises necessitates a shift in how ecoproportionality is applied, moving from a balanced approach to one that prioritizes environmental protection. The "do no significant harm" principle serves as a critical legal tool to prevent environmental degradation while promoting sustainable investments. The paper concludes that, as the recognition of climate emergencies grows, the interpretation of ecoproportionality must evolve to emphasize environmental-positivity, where human activities actively contribute to restoring and enhancing the environment. This evolution is vital for addressing the pressing challenges of our time and ensuring a sustainable future for all.

Two papers in this volume directly address the problem of the relationship between proportionality and legality. Milena Korycka-Zirk emphasizes that

the rule of law is fundamentally anchored in the legality of state actions, which must adhere to established legal norms and principles. This adherence ensures that state bodies operate within the confines of the law, similar to individuals. The interplay between legality and proportionality is crucial, as the legality test assesses whether actions are lawful, while the proportionality test evaluates the balance of interests involved. Together, these principles create a framework that protects individual autonomy against the potential overreach of state power, emphasizing the importance of justice based on individual rights rather than majority interests. Legalism, as articulated by thinkers like John Locke and Max Weber, emphasizes the subordination of state Authority to the law, relying on a bureaucratic structure that operates within a defined legal framework. The Author recognizes that this model prioritizes the application of law based on established norms, often sidelining the ethical considerations that may arise in complex legal scenarios. The challenge lies in reconciling the rigid application of legalism with the nuanced demands of legal principles, particularly when it comes to weighing conflicting rights and interests. The application of legal principles, especially in the context of individual rights, necessitates a more flexible approach that acknowledges the interpretive discretion of legal authorities. Ultimately, the principles of legalism and proportionality work in tandem to limit state power and protect individual rights. While legalism provides a formal structure for governance, proportionality ensures that any limitations on rights are justified and balanced against the need. Ana Raquel Moniz explores in turn the problem of the principle of proportionality in the context of the relationships between *Rechtsstaat* and *rule of law*. According to the Author, the concepts of *Rechtsstaat* and *rule of law* have historically been interpreted in various ways, reflecting a complex interplay of legal, political, and philosophical ideas. Central to these concepts is the limitation of state power, ensuring that this power is bound by law and accountable to citizens. The principles at stake emphasize in fact the protection of individual rights and the necessity of a legal framework that governs the relationship between the state and its citizens. The evolution of this idea has seen different interpretations across cultures, particularly in German, English, and French contexts, each contributing with unique perspectives on the relationship between law and governance. In England and the United States, the rule of law is closely tied to the development of common law and constitutional frameworks that prioritize individual liberties and the

accountability of public authorities. The English model emphasizes the historical evolution of legal principles through judicial decisions, while the American system underscores the supremacy of the Constitution and the role of judicial review in maintaining checks and balances. Both systems reflect a commitment to ensuring that governmental powers are exercised within the bounds of law, protecting citizens from arbitrary actions by the state. Ultimately for the Author, the principle of proportionality has emerged as a critical element in contemporary discussions of *Rechtsstaat* and *rule of law*, serving as a standard for evaluating the legitimacy of governmental actions. This principle requires that any restrictions on rights must be necessary, suitable, and balanced against the benefits they seek to achieve. However, the application of proportionality is complex and often influenced by evolving legal interpretations and political contexts. As new authoritarian regimes adopt democratic rhetoric, the foundational principles of constitutionalism face challenges, highlighting the ongoing struggle to uphold the rule of law in a changing global landscape.

The problem of proportionality was also examined in the dimension of court cases. Referring to the analysis conducted by Manuel Atienza, Claudia Toledo asks the following question: are there really tragic cases? The Author discusses the complexities of legal argumentation, particularly in distinguishing between easy and hard cases within the framework of a Democratic Rule of Law. Easy cases are those where the law provides clear answers through statutes and precedents, while hard cases arise when legal provisions are ambiguous, conflicting, or incomplete. The Author emphasizes the importance of rationality in legal discourse, asserting that judges must base their decisions on sound reasoning rather than personal beliefs to avoid arbitrariness. The theories of legal argumentation, particularly those of Robert Alexy, are highlighted as essential for understanding how legal discourse operates within this context. The concept of tragic cases is introduced, where legal decisions may require sacrificing fundamental values, leading to dilemmas without clear correct answers. Manuel Atienza's conclusions about tragic cases suggest that judges must choose the lesser evil when faced with such dilemmas, indicating a limitation of legal rationality. However, the Author seems to argue against this notion, positing that tragic cases are better understood as collisions of fundamental rights principles, where one principle may outweigh another without violating the legal system. The Author contends that legal decisions must still be

grounded in rational argumentation, regardless of the complexity of the case. Ultimately, the text asserts that while legal discourse may not always yield a single correct answer, it must still adhere to standards of correctness and rationality. The interplay between institutional arguments (positive law) and non-institutional arguments (moral, ethical, and pragmatic considerations) is crucial in justifying legal decisions. The Author concludes that in a Democratic Rule of Law, the principles of correctness, rationality, and human rights are intertwined, reinforcing the necessity for legal decisions to be both justified and grounded in rational discourse.

Barbara Janusz-Pohl takes up the question of the limits of admissibility of so-called rulings radically based on proportionality and verging on judicial lawyering, but in situations where they reinforce the important principle of fair trial. The article discusses the implications of the Court of Justice of the European Union's (CJEU) ruling in the EncroChat case, particularly regarding the admissibility of evidence under the European Investigation Order (EIO). It introduces the concept of constitutive rules, which are essential for understanding evidentiary actions in criminal law. The analysis highlights the evolution of these rules, tracing their origins from the works of philosophers like J. Searle and their adaptation by Polish legal scholars, ultimately leading to a new framework for interpreting legal actions and their consequences. The CJEU's ruling in the EncroChat case is pivotal as it establishes a new constitutive rule concerning the admissibility of evidence obtained in violation of EU law. The court emphasized the importance of protecting defendants' rights and ensuring fair trial standards, asserting that evidence collected unlawfully must be excluded from criminal proceedings. This ruling not only clarifies the procedural requirements for issuing an EIO but also reinforces the principle of effectiveness in EU law, mandating that national courts disregard evidence that infringes upon the rights of the accused. In conclusion, the Author posits that the recognition of constitutive rules by the CJEU enhances the legal framework surrounding evidentiary actions, providing a clearer basis for sanctions related to violations. This development is significant for legal interpretation and practice, as it legitimizes the imposition of nullity sanctions even in the absence of explicit statutory provisions. The integration of constitutive rules into the discourse on legal actions represents a methodological advancement, ensuring that the rights of individuals are upheld within the EU's legal system.

Generalizing the conclusions of this volume, it can be said that the linking of the concept of legality with the principle of proportionality is intended, on the one hand, to modernize the classically understood principle of legality. However, it should, on the other hand, be added that a proper understanding of the theory of legal principles and discretion (in assessing the proportions and in reducing one principle at the expense of another) must adopt a framework that does not deviate from the canons of legality. The considerations of the Authors of this volume confirm the belief that it is archaic to consider the functioning of the state on the simple basis of legality (or legalism). In particular, the courts must take into account the most essential substantive basis for determining the principles of lawful state action, that is, for determining the proper balance between the public interest and the protection of the subject's individuality. This is particularly important especially when we are confronted with the socially dominant legal narrative that finds expression in the act of the legislature. The principle of proportionality as a basis for controlling the acts of the legislature in terms of maintaining the proper standards of the relationship between public interest and individual interest cannot, for the sake of maintaining democratic standards, be excluded from the analysis of the rule of law. It is stressed that a new dimension of this control is eco-subsidiarity. Thus, state action on the basis and within the limits of the law must mean that the essence of this boundary must be determined by the optimizing nature of the principles protecting individual autonomy. This boundary (concerning the protection of individual rights and freedoms and its jurisprudential consecration) is a barrier against the omnipotence of public authority, whenever this does not respect the proper proportions in limiting individual autonomy.