

The History of the General Principle of Proportionality: An overview

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"Could we get over all our difficulties respecting a balance of interests"¹

Introduction

This article proposes a brief history of the concept of proportionality in law in order to understand the appearance, worldwide, of the legal rule that state action must be a rational means to a permissible end which does not unduly invade protected human rights. I argue that the concept of proportionality, though evolving in and through law, has shown remarkably continuity over several centuries, even millennia. The *theory* of proportionality appears to have arisen rapidly, almost spontaneously, in Aristotle's thought, springing like Athena fully armed from his brain.² However, the *practice* or proportionality jurisprudence, the practical legal implementation of the general concept, occurred over several centuries as an historical evolution refining and modifying Aristotle's original theory along the way. Aristotle's idea, that the just is a ratio between two parties mediated by an abstract principle, is still a part of contemporary law as shown by the general principle of proportionality. However, his abstract general concept became more precisely defined through legal practice.

The general principle of proportionality (means end rational review with strict scrutiny for suspect classes) represents a key aspect of contemporary legal thought. It is the methodological capstone of the current post-positivist neo-naturalist perspective on law which unites both positive and natural law. Aristotle saw the co-existence of a universal natural law, valid in all places and times, *alongside* positive national laws which would hold true in one land, but not in another. As Aristotle pointed out, positivism and natural law are complementary, not dichotomous.³ Inalienable rights are universal. They are natural in that they are inevitably linked to well being and humanity and thus subject to the deductive general principles of the law of reason (*Vernunftrecht*) - such as proportionality. Alienable economic rights in contrast are positive and subject to economic analyses (interest evaluation and balancing). Proportionality, a universal principle for resolving conflicting (fundamental) norms is one of the main vectors which drives convergence of common law and civil law into a globalised *jus commune*. This contemporary *ius commune* is a hybrid. It features aspects of

¹ Source: "Empire and Nation: Letters from a Farmer in Pennsylvania" (John Dickinson). *Letters from the Federal Farmer* (Richard Henry Lee), ed. Forrest McDonald (Indianapolis: Liberty Fund 1999).

² Aristotle, *Nicomachean Ethics*, Book V

³ Aristotle, *Nicomachean Ethics*, Book V; Hobbes, *Leviathan* (1684).

common law (inductive binding case law) and civilian law (deductive general principles - which subsume common law fundamental rights). This hybridized *ius commune* in turn, converges substantive rules of national laws toward uniform global rules. Norm convergence arises due to intensified trade, vastly improved communications, and to reduce transaction costs. Base and superstructure here both reach toward the same goal, the withering of the state and its replacement by civil society through peaceful trade to replaces war as the principal mode of state interactions.

The general principle of proportionality is today a world-wide principle of law.⁴ It is found in *both* the common law and civil law before national⁵ and transnational courts alike.⁶ It is a key organizing principle of contemporary legal thought,⁷ and is the example *par excellence* of the depth of convergence of civil law and common law to a global uniform *ius commune* which hybridizes aspects of common law (binding case law) *alongside* civil law (general principles of law, into which common law fundamental rights are imported/subsumed). Theories are also converging: at the broadest level, conceptual jurisprudence (*Begriffsjurisprudenz*) fuses with legal process interest balancing. (*Interessenjurisprudenz*). Conceptual jurisprudence is then applied to positive law, and legal process interest balancing is applied to natural law. To understand the global rise and success as well as the contours of this general principle of (constitutional) law and how proportionality serves the constitutionalization of law, we examine the history of the concept.

I. Proportionality in Antiquity

The idea of justice as proportionality appears first and clearly in Aristotle's *Nicomachean Ethics* Book V.⁸ Proportionately measures distributive justice⁹ in Aristotle's schema, which

⁴ "From German origins, proportionality analysis spread across Europe, into Commonwealth systems (Canada, New Zealand, South Africa), and Israel; it has also migrated to treaty-based regimes, including the European Union, the European Convention on Human Rights, and the World Trade Organization." Alec Stone Sweet, Jud Mathews, *Proportionality Balancing And Global Constitutionalism*, 47 Colum. J. Transnat'l L. 72, 96 (2008) .

⁵ Margherita Poto, *The Principle Of Proportionality In Comparative Perspective*, 8 German L.J. 835 (2007).

⁶ Mads Andenas, Stefan Zleptnig, *Proportionality: Wto Law: In Comparative Perspective*, 42 Tex. Int'l L.J. 371, 372 (2007) (WTO).

⁷ "Over the past fifty years, proportionality balancing--an analytical procedure akin to 'strict scrutiny' in the United States--has become a dominant technique of rights adjudication in the world. From German origins, proportionality analysis spread across Europe, into Commonwealth systems (Canada, New Zealand, South Africa), and Israel; it has also migrated to treaty-based regimes, including the European Union, the European Convention on Human Rights, and the World Trade Organization." Alec Stone Sweet, Jud Mathews, *Proportionality Balancing And Global Constitutionalism*, 47 Colum. J. Transnat'l L. 72 (2008)

⁸ Also see: Aristotle, *The Nicomachean Ethics* Book III, chs. 10-12.

⁹ "Proportionality as an element of Legal Concept [Rechtsidee; lit. idea of right]

appears to be the earliest known historical source of the contemporary general principle of proportionality in law.¹⁰ From Aristotle, tracing the concept forward leads to the conclusion that while the principle has evolved and become more refined, more precise, we are still essentially looking at Aristotle's concept: the right relationship (*recta ratio*; *Verhalten*) between the state and the citizen, adjudicated by the rule of law.¹¹

In Aristotle, the proportionality inquiry goes to justice as the right ratio - the relationship between a distributive principle and the shares apportioned thereby. The idea of proportionality as a specific rule of law emerged obliquely from Aristotle's thought as a vague and general but increasingly concrete and definite proposition of the law of self defence in Cicero,¹² Justinian,¹³ Augustine,¹⁴ and Aquinas.¹⁵ The well defined abstract

1. Iustitia distributiva as an ultimate form of justice. Distributive justice

The ancient [Ur] form of justice goes back to Aristotle, and later was called by the commentators distributive justice.* The goal of distributive justice is the relative relational equality in the treatment of different persons in measure to a pre-conditional differentiation criterion. The proportion which falls to individuals corresponds to the degree to which the differentiation criteria is fulfilled, in connection with the comparator group. This principle then determines entire categories of compensatory interests. Distributive Justice appears in various forms which can all be traced back to this principle.

The exemplary case of distributive justice is the judgement of the comportement of a judicial instance which decides about the allocation to third parties. In this case of (at least) three persons' relationship the judging instance is superior to the receivers. The judgement meets the right measure of the demands of distributive justice only when the (at least four) elements are taken into account by the judgement. (A will perform C and B will perform D) in a determined according to Aristotle, geometric proportion. If for example money should be distributed according to the different needs of the addressees of rights, the different degrees of necessity of A and B must correspond to the different levels of the distributed contribution (the paid-out contributions of C and D must relate to each other to the degree the needs of A to B; A:B::C:D)." Hans Hanau, *Der Grundsatz der Verhältnismässigkeit als Schranke privater Gestaltungsmacht: Zu Herleitung und Struktur einer Angemessenheitskontrolle von Verfassungswegen*, Mohr Siebeck, 2004 (Author's translation).

¹⁰ Gustav Radbruch, *Rechtsphilosophie*, Studienausgabe, Ralf Dreier, Stanley L. Paulson, ed. Heidelberg: C. F. Müller, 2d edn. (2003), p. 122. Footnotes; *See also*, Bydlinksy, *Methodenlehre*, p. 339; Engisch, *Auf der Suche nach Gerechtigkeit*, p. 162, 222, 229.

¹¹ "we do not allow a man to rule, but rational principle, because a man behaves thus in his own interests and becomes a tyrant" Aristotle, *Nicomachean Ethics*, Book V.

¹² "No war can be undertaken by a just and wise state, unless for faith or self-defence. This self-defence of the state is enough to ensure its perpetuity, and this perpetuity is what all patriots desire. Those afflictions which even the hardiest spirits smart under poverty, exile, prison, and torment private individuals seek to escape from by an instantaneous death. But for states, the greatest calamity of all is that death, which to individuals appears a refuge. A state should be so constituted as to live for ever. For a commonwealth, there is no natural dissolution, as there is for a man, to whom death not only becomes necessary, but often desirable. And when a state once decays and falls, it is so utterly revolutionized, that if we may compare great things with small, it resembles the final wreck of the universe.

All wars, undertaken without a proper motive, are unjust. And no war can be reputed just, unless it be duly announced and proclaimed, and if it be not preceded by a rational demand for restitution.

Our Roman Commonwealth, by defending its allies, has got possession of the world."

Marcus Tullius Cicero, "Treatise on the Commonwealth" [54 BC] in *The Political Works of Marcus Tullius Cicero: Comprising his Treatise on the Commonwealth; and his Treatise on the Laws*. Translated from the original, with Dissertations and Notes in Two Volumes. By Francis Barham, Esq. (London: Edmund Spettigue, 1841-42). Vol. 1. Available at:

http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=546&layout=html

¹³ *Digest of Justinian* 43.16.3.9 (Alan Watson ed., Univ. of Penn. Press 1985), p. 291. "Those who do damage because they cannot otherwise defend themselves are blameless... . It is permitted only to use force against an attacker and even then only so far as is necessary for self-defense." P. 291.

theoretical principle became concretized and realized by Cicero in the positive law.¹⁶ Cicero describes law as the *recta ratio naturae congruens*¹⁷ the right ratio, i.e. the proper proportion. This concretization (*realization*) was further refined by Aquinas in the law of self defense of states.¹⁸ Aquinas presented the first decomposition of Aristotle's concept into the now known *multi-step proportionality procedure*.¹⁹ In the law of self defense, Aquinas argued that there are conditions which must exist for the use of force to be just; that force, when used, must not be excessive, and that it must be exercised by the sovereign according to rules. Aquinas's theory on proportional self defense in turn became seen as a general principle of law by Grotius.²⁰ The principle would apply not just to states in their mutual relations but also to individuals in their mutual relations. Grotius thus transitions the concept into modernity and links the idea of *justice as proportion* (ratio) to the idea of *interest balancing* as a method for dispute resolution. In sum, with Grotius we see the union of the ancient concept of justice as ratio, the medieval concept of proportional self defense, and the modern concept of balancing interests.²¹ Modern proportionality thus emerged as a general principle of law. This legal

¹⁴ Augustine discusses just war theory but doesn't use the term proportionality (between force and threat). He does however use the term "just war". This seems to be the first use of the signifier "just war" (certainly is one of the earliest) See Augustine, *The City of God*, chapter 7 available at:

<http://www.newadvent.org/fathers/120119.htm> (search term: "just war")

¹⁵ Thomas Aquinas, *Summa Theologica, Treatise on Law*, Chicago: Henry Regnery Co. (1965) 81-82. Generally, Questions 90-97 esp. 95/3, 96/1. (Hereinafter ST) available at:

<http://www.ccel.org/a/aquinas/summa/FS.html> (English)

<http://www.corpusthomicum.org/sth0000.html> (Latin)

<http://www.ccel.org/ccel/aquinas/summa.txt> (searchable)

"Whenever a thing is for an end, its form must be determined proportionally to that end; as the form of a saw is such as to be suitable for cutting (Phys. ii. text. 88). Again, everything that is ruled and measured must have a form proportionate to its rule and measure." ST, 95/3

¹⁶ Historical Introduction to the Study of Roman Law H.F. Jolowicz, Barry Nichols, 3d Edn. Cambridge: CUP (1972) pp. 104-105; A. Arthur Schiller Roman, Law: Mechanisms of Development. New York: Mouton (1978) pp. 374-375; Jackson, E. Hilton. Latin for Lawyers, London: Sweet and Maxwell (1915).

¹⁷ Cicero, *De Republica (Commonwealth)*

¹⁸ Thomas Aquinas, *Summa Theologica*, Second Part of the Second Part, Q. 40,

(Benziger Bros. edition, 1947). Available at: <http://www.ccel.org/a/aquinas/summa/SS.html>

¹⁹ Thomas Aquinas, *Summa Theologica, Treatise on Law*, Questions 90-97.

<http://www.ccel.org/a/aquinas/summa/FS.html> (English) <http://www.corpusthomicum.org/sth0000.html>

(Latin) <http://www.ccel.org/ccel/aquinas/summa.txt>

"Whenever a thing is for an end, its form must be determined proportionally to that end; as the form of a saw is such as to be suitable for cutting (Phys. ii. text. 88). Again, everything that is ruled and measured must have a form proportionate to its rule and measure.

...it should be just, possible to nature, according to the customs of the country, adapted to place and time" ST 95/3.

²⁰ "The Law of Nations does not consist, therefore, of a mere body of deductions derived from general principles of justice, for there is also a body of doctrine based upon consent" Hugo Grotius, *The Rights of War and Peace, including the Law of Nature and of Nations*, translated from the Original Latin of Grotius, with Notes and Illustrations from Political and Legal Writers, by A.C. Campbell, A.M. with an Introduction by David J. Hill (New York: M. Walter Dunne, 1901). Chapter: Introduction, paragraph 62 Accessed from <http://oll.libertyfund.org/title/553/90737/2052898> on 2009-03-08

²¹ "V. In all cases of deliberation, not only the ultimate but the intermediate objects leading to the principal ends are to be considered. The final object is always some good, or at least the evasion of some evil, which amounts to the same. The means are never to be considered by themselves, but only as they have a tendency to the proposed end. Wherefore in all cases of deliberation, the proportion, which the means and the end bear to each

principle of proportional self defence, first articulated in the law of nations (syn. jus gentium, public international law) was increasingly applied in cases of self defence²² not only of states, but also of the person, and then in national police and then administrative law: the right to self defence must be exercised in proportion to the threat; punishments should be proportional to crimes; the administration must not act excessively.

II. Proportionality in Modernity:

A. German Law

This now domesticated principle became a heavily litigated aspect of German domestic administrative law.²³ In German law, the principle, as Wieacker noted,²⁴ is rooted in antiquity. The concept evolved from a prohibition of disproportionality (*Uebermassverbot*)²⁵ (the state must not act too broadly) toward a more clearly defined and restrictive principle that the state must use proportional means to legitimate ends (*Verhältnismaessigkeit*) in the

other, is to be duly weighed, by comparing them" Hugo Grotius, *The Rights of War and Peace, including the Law of Nature and of Nations*, translated from the Original Latin of Grotius, with Notes and Illustrations from Political and Legal Writers, by A.C. Campbell, A.M. with an Introduction by David J. Hill (New York: M. Walter Dunne, 1901). Chapter: Chapter XXIV.: Precautions Against Rashly Engaging in War, Even Upon Just Grounds . Accessed from <http://oll.libertyfund.org/title/553/90788/2053672> on 2009-03-02

²² "This principle appears in his discussion of individual self-defense. Id. at 1471-72. [Aquinas, *Summa Theologica* 1471-1472 (Fathers of the English Dominican Province trans., Benziger Bros. 1948).] The historical antecedents of necessity and proportionality lie at least as far back as the Roman law concepts of *incontinenti* and *modernamen inculpatae tutelae* in the context of individual self-defense. The former relates to the norm of necessity and concerns the time in which a person can respond to a violent attack upon her person. The Digest of Justinian 43.16.3.9 (Alan Watson ed., Univ. of Penn. Press 1985). The latter relates to the principle of proportionality and requires moderation in a forceful response relative to the circumstances. Both norms appear in this passage from the Digest: "Those who do damage because they cannot otherwise defend themselves are blameless....[I]t is permitted only to use force against an attacker and even then only so far as is necessary for self-defense." The Digest of Justinian, *supra*, at 291. These ideas appear throughout the writings of the canonists. Mark Totten, *Using Force First: Moral Tradition And The Case For Revision*, 43 *Stan. J. Int'l L.* 95 (2007) n. 36.

²³ "Scholars proposed an embryonic version of PA in the late eighteenth century, when they began to contemplate new forms of state intervention and, therefore, the prospect of regular conflict between public purposes and individual freedoms. The doctrinal area where this conflict was first seriously theorized was the developing field of *Polizeirecht*.

...

Prussia's *Oberverwaltungsgericht*, or Higher Administrative Court, began operating in 1875. Fed by a steady stream of cases, the court quickly gained a reputation across Germany as the leading expositor of administrative law principles. By the 1880s, it was employing the "necessary measures" clause of the 1794 ALR to annul police measures on LRM grounds. Thus, by the late nineteenth century, German administrative courts were striking down police actions that violated proportionality, which was conceptualized at that time as an enforceable LRM test.

Alec Stone Sweet, Jud Mathews, *Proportionality Balancing And Global Constitutionalism*, 47 *Colum. J. Transnat'l L.* 72, 100-101 (2008).

²⁴ Wiacker, *Festschrift fuer Robert Fischer*. De Gruyter (1979).

²⁵ Barbara Remmert, *Verfassungs und Verwaltungsrechtsgeschichtliche Grundlagen des Uebermassverbotes*, C.F. Mueller

post-war era, becoming a key principle of German constitutional law.²⁶ The idea is so popular that it even found expression in *East German law*,²⁷ an evidence of a broader thesis that Socialist law was a variant of Western law, albeit organized by the general principle of *equality* rather than the general principle of *liberty*.

B. Common Law

Proportionality, as a general principle of international law, found its way into the common law, too. The general principle of proportionality can be found in British history.²⁸ Its earliest form in common law is found at Magna charta.²⁹ Magna charta is the legal source of the principle of proportionality in British³⁰ and U.S. common law.³¹ Thus, the Eighth amendment of the U.S. Constitution commands proportional punishments.³² Just as in German law, the principle of proportionality found its earliest expression in common law in the areas of police powers³³ - punishment must be proportional to the crime³⁴ - because the

²⁶ Susanne Baer, *Equality: The Jurisprudence of the German Constitutional Court*, 5 Colum. J. Eur. L. 249, 261-264 (1999).

²⁷ Dr. Siegfried Mampel, *Die Sozialistische Verfassung der Deutschen Demokratischen Republik*, Frankfurt: Alfred Metzner Verlag (1982) 731-743. (proportionality as a concept in East German constitutional law; confirming parallel institutions hypothesis).

²⁸ Anchitell Gray, *Debates Of The House Of Commons, From The Year 1667 To The Year 1694*, at 844-847 (1763)).

²⁹ *Magna Charta*, at: <http://legal-dictionary.thefreedictionary.com/Magna+charta>

³⁰ "By the seventeenth century, England had extended this principle to punishments that called for incarceration. In one case, the King's Court ruled that "imprisonment ought always to be according to the quality of the offence" (*Hodges v. Humkin*, 2 Bulst. 139, 80 Eng. Rep. 1015 [K.B. 1615] [Croke, J.]). In 1689, the principle of proportionality was incorporated into the English Bill of Rights, which used language that the Framers of the U.S. Constitution later borrowed for the Eighth Amendment: "[E]xcessive bail ought not to be required, nor excessive fines imposed, or cruel and unusual punishments inflicted." Nine states adopted similar provisions for their own constitutions after the American Revolution."

³¹ Note, *The Eighth Amendment, Proportionality, And The Changing Meaning Of "Punishments*, 122 Harv. L. Rev. 960, 960 (2009). "In *Solem v. Helm*, [FN1] Justice Powell traced the history of the Cruel and Unusual Punishments Clause back to the Magna Carta and the English Bill of Rights of 1689, which he found to have embodied a strong principle of proportional punishment."; *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991). (Eighth Amendment: punishment must be proportional to crime).

"In *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), the Supreme Court also pointed to the Magna Charta as an early source of its Eighth Amendment proportionality analysis. Chapter 20 of the Great Charter prohibited the monarch from imposing a fine "unless according to the measure of the offense." It further provided that "for a great offense [a free man] shall be [punished] according to the greatness of the offense." Under the Eighth Amendment to the Constitution, the Supreme Court has echoed this principle by prohibiting state and federal governments from imposing fines and other forms of punishment that are disproportionate to the seriousness of the offense for which the defendant was convicted."

³² "The Eighth Amendment requires that every punishment imposed by the government be commensurate with the offense committed by the defendant. Punishments that are disproportionately harsh will be overturned on appeal. Examples of punishments that have been overturned for being unreasonable are two Georgia statutes that prescribed the death penalty for rape and Kidnapping (*Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 [1977]; *Eberheart v. Georgia*, 433 U.S. 917, 97 S. Ct. 2994, 53 L. Ed. 2d 1104 [1977])."

³³ Note, *The Eighth Amendment, Proportionality, and the Changing Meaning of "Punishments"*, 122 Harv. L. Rev. 960 (2009).

principle grew out of the idea of proportional self defence and thus had particular application in police law³⁵ - not without controversy as to its exact form.³⁶

Early modernity thus developed in parallel two concepts:

- 1) interest balancing (political and thus non-justiciable)³⁷
- 2) proportionality (legal and thus justiciable)

The general principle of proportionality and interest balancing are sometimes subsumed into each other. I think they are in fact distinct mental operations. Late modernity sometimes links proportionality (means end testing) with balancing (cost benefit analysis) *or* with examining the relationship between the value of the right invaded and the extent of the invasion of that right. The latter view is the better one to avoid confusion between economic cost/benefit analysis of alienable *economic* rights versus proportionality analysis of conflicting *constitutional* rights.

C. Contemporary Law

In E.U. law the proportionality test (means-end rational review) is very well worked out. Most recently it was reiterated in *Viking*³⁸ and *Laval*, where the ECJ, once again, set out the now well known proportionality test. An interference with a basic right in the treaty “is warranted only if [1] it pursues a legitimate objective compatible with the Treaty [legitimate ends] and is justified by [2] overriding reasons of public interest [justifiable mean]; if that is the case, [3] it must be suitable for securing the attainment of the objective which it pursues and [4] not go beyond what is necessary in order to attain it”.³⁹ “In simplest terms, the

³⁴ U.S. Const., Eighth Amendment; *See, e.g., Coker v. Georgia*, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 [1977]; *Eberheart v. Georgia*, 433 U.S. 917, 97 S. Ct. 2994, 53 L. Ed. 2d 1104 [1977].” (State death penalty for rape and kidnapping unconstitutional as disproportionate).

³⁵ The proportionality of punishment to crime is however differently tested than the proportionality of means to ends. *See Solem v. Helm*, 463 U.S. 277, 284 (1983), *overruled by Harmelin v. Michigan*, 501 U.S. 957 (1991). In *Solem*, the Court determined that objective criteria should guide the proportionality analysis. *Solem*, 463 U.S. at 292. The objective criteria considered by the Court were “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.”

³⁶ K. G. Jan Pillai, *Incongruent Disproportionality*, 29 *Hastings Const. L.Q.* 645 (2002).

³⁷ *See: Anonymous, Federalist Papers; Montesquieu, Spirit of the Laws.*

³⁸ Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* (11 December 2007), para. 75.

³⁹ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* Judgment of the Court (Grand Chamber), (18 December 2007) para., 101.

proportionality principle requires some articulable relationship between means and ends, specifically that the means chosen by an administration be suitable or appropriate, and no more restrictive than necessary to achieve a lawful end. The principle operates in each of the member-state's domestic jurisprudence, though not always in *hic verba*, and it qualifies as a peremptory norm of international law."⁴⁰

As already mentioned earlier, people sometimes confuse the last step in proportionality - the scrutiny, as to whether the invasion of the fundamental right is as uninvasive as possible - with (economic) interest balancing. Aristotle's proportional justice isn't the balancing of competing interests. Interest balancing is however sometimes, in my view erroneously, taken for the final step in means-end review - the search for whether the state's power is exercised using the least restrictive means,⁴¹ i.e. proportionality in the narrower sense. The proportionality inquiry goes to the determination of the right relationship between the means and ends of state action with respect to private rights in accord with the nature of things - Cicero's *recta ratio naturae congruens*.⁴² It does not concern the evaluation of alienable costs and benefits or other economic relations.

The term "balancing" in law is used to indicate several different things, namely:

- 1) commutative justice -- after applying, e.g., *lex talionis*, the scales of justice are restored to their *ex ante* balance.
- 2) Cost-benefit analysis: we weigh the costs and benefits of a policy against the costs and benefits of another policy and decide for the one which generates the most social wealth.

⁴⁰ Ralph G. Steinhardt, Book Review, *European Administrative Law*, 28 Geo. Wash. J. Int'l L. & Econ. 225 (1994). p. 231-232.

⁴¹ "The just, then, is a species of the proportionate (proportion being not a property only of the kind of number which consists of abstract units, but of number in general). For proportion is equality of ratios, and involves four terms at least (that discrete proportion involves four terms is plain, but so does continuous proportion, for it uses one term as two and mentions it twice; e.g. 'as the line A is to the line B, so is the line B to the line C'; the line B, then, has been mentioned twice, so that if the line B be assumed twice, the proportional terms will be four); and the just, too, involves at least four terms, and the ratio between one pair is the same as that between the other pair; for there is a similar distinction between the persons and between the things. As the term A, then, is to B, so will C be to D, and therefore, alternando, as A is to C, B will be to D. Therefore also the whole is in the same ratio to the whole; and this coupling the **distribution** effects, and, if the terms are so combined, effects justly. The conjunction, then, of the term A with C and of B with D is what is just in **distribution**, and this species of the just is intermediate, and the unjust is what violates the proportion; for the proportional is *intermediate*, and the just is proportional. (Mathematicians call this kind of proportion geometrical; for it is in geometrical proportion that it follows that the whole is to the whole as either part is to the corresponding part.) This proportion is not continuous; for we cannot get a single term standing for a person and a thing." Aristotle, *Nicomachean Ethics*, Book V. (Emphasis added: Geometric justice is *distributive* it is the even handed application of a positive general principle to apportion shares of social goods to the citizens who then may interchange their goods according to the principles of commutatively i.e. arithmetic transactional justice).

⁴² Cicero, *De Republica (Commonwealth)*

This is the proper contemporary use of the term but should apply only to alienable rights, not to inalienable (fundamental, universal, human) rights.

3) Proportionality in the narrower sense. This last use of the term should simply be avoided and allowed to fall into disuse to prevent confusion with the other two uses. "proportionality in the narrower sense" or even "strict scrutiny" are both more exact and avoid the confusion of different concepts under one term. Any deep examination of the concept of balancing of competing interests (the general mode of *Interessenjurisprudenz*) fairly quickly reveals interest balancing comprehends the comparison of costs and benefits associated with competing interests - and thus is about alienable economic rights rather than inalienable fundamental human rights.

Conclusions

This historical overview aimed to show that proportionality as a principle of law arose out of the Aristotelian concept of justice. This general theoretical fact partly explains the worldwide success of the concept since it has deep common roots globally. The principle then became instantiated into law. First and most notably, the legal instantiation of the principle is seen in the law of self defense, first, as a principle of international law, in the law of war, then, as a principle of police law, the law of crime and punishment. Thus, for examples, victims may use proportional self defense and criminals should be punished only proportionally to their crime. From police and administrative law the principle then evolved into one of constitutional law arising as the dominant method of global legal convergence today, a vector for the formation of a transnational *ius commune*, a hybrid of common law (inductive binding case law) and civil law (deductive general principles). Because the proportionality principle is a key vector for global norm convergence, future developments of the general principle of proportionality should seek:

1) a universally coherent terminology which avoids confusion. Means-end review with strict scrutiny for suspect classes and proportionality are methodologically synonymous. Interest balancing, in contrast, is a much broader term.

2) to clearly delineate the positive law versus natural right aspects of proportionality discourse. Economic interest balancing through cost/benefit analysis and similar economic tests are inappropriate for adjudication of fundamental inalienable rights.

Despite his sexism, racism and homophobia, Aristotle was right about materialism, the complimentary character of positive and natural law, and in his theory of justice. The positive law / natural right distinction is an apt description of empirical legal reality. Aristotle's schema of justice holds.⁴³ His distinction between commutative and distributive justice is tenable and useful. Aristotle serves as a good common universal starting point for contemporary thought about proportionality. This brief historical overview hopefully provides a quick complete synopsis of the history of proportionality discourse so that contemporary jurists can continue to develop the rule of law in the most rational way to serve justice.

⁴³ See, Eric Engle, *Aristotle, Law and Justice: The Tragic Hero*, 35 N. Ky. L. Rev. 1-17 (2008).