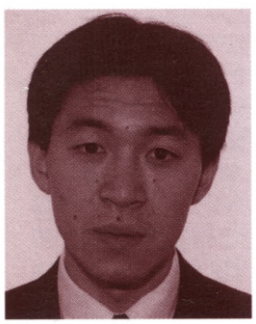
Proportionality – a German approach

by Yutaka ARAI-Takahashi



Yutaka ARAI-Takahashi

This article briefly discusses the nature and character of the principle of proportionality in relation to administrative discretion in German public law. The author argues that its rigorous application is premised on Germany's special historical context and its post-war determination to strengthen the protection of fundamental rights.

In German public law, the principle of proportionality (*Verhältnismäßigkeit*) is designed to measure the legitimacy for all the state organs. It is the most significant, but controversial, principle in administrative law in relation to the judicial review of wrongful use of discretion. This principle is not expressly provided for in the Basic Law (*Grundgesetz*, or GG), but it constitutes an unwritten constitutional principle of general importance recognised by the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) (BVerfGE (*Entscheidung des Bundesverfassungsgerichts*) 7, 377).

The proportionality principle has been incorporated into European Community law by the European Court of Justice (ECJ) which has adopted three requirements similar to those of German law. The growing influence of European law on national laws has indirectly transplanted this distinctively German concept to many European countries (see, e.g., F Teitgen, 'Le principe de proportionnalité en droit français', in: H Kutscher (Joint ed.), *Der Grundsatz der Verhältnismäßigkeit in europäischen Rechtsordnung*, (1985), 53; and J Ziller, 'Le principe de proportionnalité' (1996), special issue, AJDA 185). In the UK, while some leading authors propose that this notion should be fully 'naturalised' into English law (J Jowell and A Lester, 'Beyond Wednesbury: Substantive Principles of Administrative Law' (1987) PL 368) others argue that this principle will lower the threshold of *Wednesbury* reasonableness and entangle the court in a process of policy evaluation, trespassing the constitutionally-allocated boundaries (Lord Irvine of Lairg, 'Judges and Decision-Makers: The Theory and Practice of *Wednesbury* Review' (1996) PL 59 at p. 74).

ORIGIN

The origin of proportionality in German law can be traced back to the principle of necessity developed in the jurisprudence of Prussian administrative courts in the field of police law. After the *Kreuzberg* decision (14 June 1882, PrOVG 9, 353), the Prussian Supreme Administrative Court examined whether the measures adopted by the police went beyond what was considered necessary for attaining a relevant objective. Since World War II, the principle of proportionality has been applied not only in the field of administrative law but in all areas of public law and as such has gained the constitutional character which guides the interpretation of all the lower laws.

FIELD OF APPLICATION

The principle of proportionality applies to laws, acts and any legislative enactment as well as to executive and judicial actions implementing a relevant law, determining the constitutionality of law-making and law-enforcement. It serves to check and prevent the infringement of citizens' rights by legislative, administrative or judicial authorities in diverse issues. Its scope of application has been extended beyond the vertical context of citizens versus an interfering state and become established even in the horizontal context of citizens versus each other (see, e.g. the *Lebach* case, BVerfGE 35, 202).

LEGITIMACY

The legitimacy of proportionality is derived from the requirement to protect citizens' basic rights, one of the underlying constitutional values. The BVerfG has recognised proportionality as a constitutional principle on the basis of the principle of *Rechtsstaat* (rule of law or constitutional state) and the essence of the fundamental rights themselves. First, while requiring the legitimacy of all the state's actions to be compatible with the constitution, *Rechtsstaat* is designed to protect citizens' rights against interference by powerful state authorities. Secondly, the concept of human dignity enunciated in art. 1(1)GG and the right to the free development of the individual guaranteed in art. 2(1)GG preordain that citizens can enjoy the maximum freedom of action. No restrictions are allowed if not appropriate or strictly necessary for the purpose of protecting the interests of the public or the rights of third persons guaranteed under the Basic Law (see A Bleckmann, 'Begründung und Anwendungsbereich des Verhältnismässigkeitsprinzips', (1994) 34 JuS 181). It is not clear, however, whether this objective principle also constitutes a constitutional core which cannot be amended under art. 79(3)GG (G Ress, 'Der

Grundsatz der Verhältnismässigkeit im deutschen Recht', in: H Kutscher (Joint ed.), *Der Grundsatz der Verhältnismässigkeit in europäischen Rechtsordnung* (1985) 16).

THREE COMPONENT ELEMENTS

Proportionality in German public law is an elusive concept, and its terminology in the case law has been the source of strong disagreement among legal writers. Nevertheless, the development of jurisprudence and academic theory has fleshed out a standardised scrutiny process consisting of three often overlapping, but theoretically distinct, elements or sub-principles.

Suitability

The first element is the requirement of suitability (*Geeignetheit*). It suggests that a public action be regarded at least as suitable for attaining its aim. The examination of this filtering element is limited only to the question whether the means chosen are considered as 'unsuitable for the purpose' or 'completely unsuitable' at the time of the legislation. A judicial decision with hindsight or even a false interpretation of the legislature does not automatically render a measure unsuitable and unconstitutional. Only a subsequent change in circumstances requires the legislature to repeal or amend the law, but this does not mean that the initial prognosis of the legislature was unsuitable. Very few means, whether laws or measures, have been held to be unsuitable (BVerfGE 17, 307, at 31ff (prohibition of an agency arranging car lifts); and 19, 330 at 338 (requirement of retailers to prove the expertise in the goods that they handled)).

Necessity

The second element is the requirement of necessity (*Erforderlichkeit*). This means that the administrative authority must choose the least restrictive among equally effective means. The degree of scrutiny depends on such factors as the nature of the rights to be protected and the serious effect of interference on individuals. The most stringent form of review is disclosed when either the legislature or administration is required to demonstrate the existence of the least harmful measure. Nevertheless, this requirement is subject to an *ex ante* examination by the courts. Administrative agents are obliged to choose a measure considered as the least burdensome at the time of their decision. This means that if judges find a less injurious action with hindsight, this will not necessarily make the relevant authority's decision unlawful.

Proportionality stricto sensu

The third element is the idea of proportionality in the narrow sense. This demands a proper balance between the injury to an individual and the public interest in the course of an administrative measure. It prohibits those measures where the disadvantage to the individual outweighs the advantage to the public or the third person. The Basic Law is silent on how to balance and evaluate conflicting interests of different nature, but an examination of the case law identifies certain variables determining the standard of judicial control. These include the nature of the area concerned, the value of the purpose to be aimed at, the extent of the interference, as well as the nature of the constitutional rights affected.

ADMINISTRATIVE DISCRETION

The most significant aspect of the German theory of administrative discretion is that an agent is allowed discretion only where this is expressly provided for in law. Exceptions to this requirement are allowed only in limited circumstances. The requirement of an express authorisation for administrative discretion means that the legislature must attempt to predict possible future developments in our society.

Another distinctive feature is that a sharp distinction is drawn between two stages of administrative actions: first, the interpretation of *Tatbestand* (constituent elements or definition of a provision) and, secondly, the determination of legal effects (*Rechtsfolge*) in particular facts of the case. On the basis of this distinction, the BVerfG and the prevailing academic views (H Maurer, *Allgemeines Verwaltungsrecht,* 11th edn. (1997) 129–31) suggest that the specific interpretation of statutory provisions (*Tatbestand)* allows only one correct decision and that courts can always examine the legality of this interpretation and even replace it with their own. This stringent rule applies even to the so-called indeterminate legal concepts *(Unbestimmte Rechtsbegriffe*) within *Tatbestand*, i.e. those concepts which need to be interpreted and made more concrete before they are applied to the specific facts of a case, such as public order, public interest, unreasonableness, environmentally-harmful effects and so on. In contrast, the concept of discretion (*Ermessen*) is allowed to the agents only with respect to their decision concerning legal effects. An administrative agent is given a certain margin of discretion in choosing one out of many lawful decisions suitable for achieving the same legal consequence. It remains controversial to what extent courts can ascertain the administration's interpretation and application of indeterminate legal concepts and replace them with their own judgment (Maurer, 130, 131).

Many authors attach qualitative significance to this distinction, considering that while the exercise of discretion is a value-laden action that needs to take into account the legal purpose and consequences, the determination of indeterminate legal concepts is a cognitive exercise which can be reviewed objectively. However, it is doubtful how much practical use there is in retaining this distinction, as in many cases the same legislative objective can be effectively attained either by indeterminate legal concepts in *Tatbestand* or by the discretion concerning legal effects (Maurer, 141). One can recognise the symbiotic relationship between the two processes, considering that it is possible to select one of many lawful decisions only where the *Tatbestand* of the relevant provision has been determined. Administrative discretion is essential for supplementing the *Tatbestand* and adjusting its legal effects to particular circumstances (F Ossenbühl, 'Rechtsquellen und Rechtsbindungen der Verwaltung' in H-U Erichsen (ed.), *Allgemeines Verwaltungsrecht*, 11th edn. (1998) 203).

Against this background, the principle of proportionality serves as a yardstick for ascertaining and controlling whether the result of discretion, be it actions or omissions, is lawful or not (Ress, 26). Proportionality and discretion should be deemed as two sides of the same coin, as the scope of discretion hinges on the standard of proportionality. A failure to conform to the principle of proportionality constitutes a wrongful use of discretion that nullifies the administrative act. It is possible to consider that a

stringent application of proportionality effectively removes any scope of discretion, requiring an administrative authority to adopt only one of the legal consequences. For example, the BVerfG has held that, in the absence of a genuine danger caused by remand prisoners, the choice left to the administrative authority is none other than to lift the ban on receiving parcels (BVerfGE 34, 384).

Strictness of review

In evaluating the level of scrutiny, particular attention must be paid to the questions whether and to what degree the judicial review involves any meaningful examination of facts and laws. German judicial control goes beyond ascertaining whether or not a measure is manifestly arbitrary or unreasonable in relation to the purpose pursued. A lax review should be disclosed unless the review focuses on the positive rather than negative proof of whether a specific action is actually necessary and proportionate (E Grabitz, 'Der Grundsatz der Verhältnismässigkeit in der Rechtsprechnung des Bundesverfassungsgerichts' (1973) 98 AöR 576).

Apart from the degree of interference the standard of scrutiny depends on the nature of rights concerned, varying from a highly strict examination of any infringement of civil and political rights to a relatively lax review as regards interference with fundamental rights of an economic nature (freedom to choose and exercise a profession and the right to own property). Such variations are based on an apparent, albeit not explicit, hierarchy of rights: while administrative actions encroaching on civil and political rights imply an infringement of the democratic foundation of the constitution, economic rights need to be weighed against the requirements of the welfare state. On the one hand, interference with civil rights must be scrutinised more rigorously than the merely 'not-reasonable' test and accompanied by an extensive examination; on the other, judges tend to defer to the discretion of the legislature and administration in respect of the choice and form of necessary measures in the area of economic policy. The BVerfG has required that the 'objective effectiveness' of a less restrictive alternative be established 'unambiguously in every respect'. It may be argued that such a stringent requirement is no different from a burden of proof placed on individual applicants. However, the standard of control over economic rights depends on the combination of more complex factors. As regards the right to choose and exercise a profession under art. 12 GG, the BVerfG has established a three-tier control (*Drei-Stufen-Theorie*), applying different standards of review to each of the three aspects: exercise of profession, subjective and objective requirements for the choice of profession (BVerfGE 7, 377, at 399ff in particular, 401–9, 431, 432 and 442: pharmacy judgment).

Limitations

The principle of proportionality is subject to limitations on its scope of application and effectiveness by virtue of certain constitutional mandates. Such limitation is justified on the ground of the separation of powers, and more precisely, judicial deference to the democratic legislator (N Emiliou, *The Principle of Proportionality in European Law* (1996) 36–7). The Basic Law lacks any guideline on how to balance competing, but equally important, constitutional values and interests. The legislator is authorised to balance the relative values of conflicting private and communal interests in order to achieve a just result. The legislature's task in this respect is even more complicated as the Basic Law is again silent on whether some constitutional rules override others. The drafter of the Basic Law has left only small clues, explicitly allowing certain basic rights to be regulated by legislation. Apart from such an express limitation, it is possible to consider that the constitution implicitly authorises the legislature to restrict even unreservedly guaranteed rights, but only in furtherance of other constitutional values (Grabitz, 576, 577). Nevertheless, no infringement of the essential content of fundamental rights is allowed under art.19(2)GG.

CONCLUSION

The application of the principle of proportionality has often been criticised for being so strict that it leaves little room for administrative discretion. Some also warn that a frequent and rigorous application of proportionality would lead to 'judicial legislation' in breach of the separation of powers, as judicial interpretation may override the scope of the rules intended by the legislature (Ress, 10). They argue that the power of balancing should be limited to cases where it is necessary to remedy unreasonable consequences that a literal application of laws may cause individuals (F Ossenbühl, *Der Grundsatz der verhältnismässigkeit des Grundrechtseingriffs'* (1997) 12 Jura 610–21). In contrast, Maurer emphasises the historical significance attached to art. 19(4)GG, which is designed to protect individuals through the courts against encroachment by the state after the bitter experience under the Nazis. As he maintains, if this strict requirement no longer matches social needs, it is the task of the legislature to amend it, and the administrative authorities or judges are not allowed to make any restrained interpretation (Maurer, 143).

It is unlikely that the rigid features of proportionality and administrative discretion will be changed in jurisprudence in the near future. Recent decisions have reaffirmed the BVerfG's consistent policy and dominant role in the protection of fundamental rights (Nolte, 208, 209; BVerfGE 83, 130; and 84, 59). Stringent judicial control over administrative discretion is embedded in Germany's special historical experience and buttressed by the post-war legal consciousness underpinning the requirements of *Rechtsstaat*, effective judicial remedy and due process (J Schwarze, *European Administrative Law* (1992) 272). At a time when the incorporation of proportionality is being hotly debated in England, it is of considerable importance to comparative lawyers to appreciate the particular historical consciousness underlying the German principle of proportionality.

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The author would like to thank Professor J Abr Frowein, the Max-Planck-Gesellschaft for the fellowship which enabled him to carry out the research and Dr T Giegerich for his advice in preparing the article.