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Definition

The dictionary defines proportionate as “properly related in size or degree or other measurable characteristics”. The term “proportionate” is usually employed as a qualifying adjective and refers to the relationship or balance among the parts of something.

As a general principle of law, the concept is introduced as a way of addressing tensions and conflicts between individuals and groups and balancing their competing claims and aspirations. In criminal law, it is used to convey the idea that the punishment of an offender should fit the crime. Under international humanitarian law governing the legal use of force in an armed conflict, proportionality is an important factor in assessing military necessity, where the overall destruction expected from the use of force must be outweighed by the good to be achieved. As its most abstract level, the principle of proportionality requires that action undertaken must be proportionate to its objectives.

The Proposed use of the term “Proportionate” in a revised Article 42.5 of the Constitution

Under Proposition 2 (Protection of Children taken into the Care System) of the Government’s Briefing Note issued to Opposition Parties on 30 January 2007, it is suggested that revisions to Article 42.5 would include the insertion of the word ‘proportionate’. The proposed revised wording was as follows:

In exceptional cases, where the parents of any child for physical or moral reasons, fail in their duty towards that child, the State as guardian of the common good, by appropriate and proportionate means shall endeavour to supply the place of the parents but always with due regard for the natural and imprescriptible rights of the child.

The inclusion of the word “proportionate” in this context should ensure that, when the State intervenes in family life, the means used by the State are both appropriate and proportionate. The *basis* on which the State intervenes (i.e. the circumstances that trigger intervention) is not affected by the inclusion of the word ‘proportionate’ and hence the threshold for State intervention is rendered neither higher nor lower by the change in wording.

History

Although the roots of the principle of proportionality can be found in Roman law, the modern understanding of the concept was introduced by German post-war legal thinking. Proportionality is now well established as a general principle of European Community law, against which any restricting law is to be assessed.¹ It can be used to challenge Community action itself, and also the legality of any State action that falls within the sphere of application of Community law. The European Court of Human Rights also respects the doctrine of proportionality in its judgements.

The principle of proportionality has influenced national legislation in many fields and has been imported into the judicial review process in many European jurisdictions (for example, Germany, France, Greece, Sweden, Denmark). It is often used as a general starting point for public authorities in negative administrative decisions. This means the decisions of officials should be judged not just against the criteria of legality and rationality, but against a benchmark which says that any limitations on fundamental rights must be necessary to meet a legitimate end in a democratic society, and must not infringe a basic right to a greater extent than is required to achieve that end. It is argued, finally, that these jurisprudential and legislative developments increase the judicial protection of the individual and also modifies the structure of traditional judicial review by attributing a new role to national courts.

¹ See Grainne De Burca (1993) ‘The Principle of Proportionality and its Application in EC Law’, *Yearbook of European Law*, 13, pp.105–150; Nicholas Emilou (1996) *The Principle of Proportionality in European Law: A Comparative Study*, The Hague/London/Boston: Kluwer Law International.

Proportionality as a Principle of Irish Law

Ireland has for many years had concepts of reasonableness and equity in its jurisprudence, based on the *Wednesbury Principle* developed by the UK courts.²

In recent years, the Irish Supreme Court has imported the doctrine of proportionality into Irish law as a way of structuring the general criteria of reasonableness and equity. The principle of proportionality is now generally assumed to be implicit in Irish Constitutional interpretation and there is a developing jurisprudence on the subject.

The first elaborate statement by an Irish court of the principle of proportionality was in *Heaney v. Ireland*³ in 1994, a case where the plaintiffs had challenged the constitutionality of section 52 of the Offences against the State Act, 1939 as being contrary to Article 38.1 of the Constitution. Costello J. referred to a formulation of the test of proportionality in Canada. He stated:

*In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights (see, for example **Times Newspapers Ltd. v. United Kingdom**, (1979) 2 E.H.R.R. 245) and has recently been formulated by the Supreme Court in Canada in the following terms. The objectives of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:*

- (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;*
- (b) impair the right as little as possible, and*
- (b) be such that their effects on rights are proportional to the objective:*

Chaulk v. R. [1990] 3 S.C.R. 1303 at pages 1335 and 1336.

The case of *Rock v. Ireland*⁴ also addressed the concept of proportionality. The judgment of Hamilton C.J. noted that the principle of proportionality is by now a well-established tenet of Irish constitutional law. He stated that while it had surfaced obliquely in *Cox v. Ireland*⁵, it was applied more thoroughly in *Heaney v. Ireland*.

The Principle of Proportionality in ECHR and EC Law

The principle of proportionality as applied by the European Court of Justice and the European Court of Human Rights has also exerted an impact on the Irish courts, particularly since the introduction in Ireland of the European Convention on Human Rights Act, 2003. The doctrine of proportionality introduces a number of fundamental restrictions on the rights enshrined in the European Convention on Human Rights and involves balancing the rights of the individual and the interests of the State. What this means is that although an individual may establish that his or her rights under the Act have been violated, the court must then decide in the light of all the circumstances of the case whether or not the authorities had “relevant and sufficient reasons” for taking the contentious measures.⁶

The Convention states that no restrictions shall be placed upon these rights other than:

*such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.*⁷

² *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB. See Grainne De Burca (1993) ‘The Influence of European Legal Concepts on UK Law: Proportionality and Wednesbury Unreasonableness’, 3 *European Public Law*, pp. 561–587.

³ *Heaney v. Ireland* [1994] 3 IR 593.

⁴ *Rock v. Ireland* [1997] 3 IR 484.

⁵ *Cox v. Ireland* [1932] 2 IR 503.

⁶ *Olsson v. Sweden*, judgment of 24 March 1998, Series A, No. 130, (1989) 11 E.H.R.R. 259.

⁷ See for example Protocol No.1, Articles 8 to 11, Article 14, Article 15, Article 17, Article 18 of the Convention.

Restrictions on fundamental rights that are ‘necessary in a democratic society’ for a clearly defined ‘social good’ such as maintaining public health or public order, should therefore not be used if there is an approach which is less severe but is likely to have similar consequences. The court will ask the question, applying an objective test, whether the decision maker could reasonably have concluded that the interference was necessary to achieve the legitimate aims recognised by the Convention.

Principle of Proportionality and the Family under Article 8 ECHR

Article 8 of the European Convention provides that:

Everyone has the right to respect for his private and family life...

The essential object of this Article is ‘to protect the individual against arbitrary action by the public authorities’.⁸ The wide scope of this Article has meant that the case law of the Court touches on a great variety of family and child law areas.

However, it is a qualified right. Article 8(2) states that:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society... for the protection of health and morals or for the protection of the rights and freedoms of others.

Thus, any interference in family life can only be justified under Article 8.2 if three particular conditions are fulfilled:

- that the interference is ‘in accordance with the law’
- the interference is in pursuit of one of the legitimate aims defined in Art 8(2), e.g., the protection of the rights and freedoms of others (which encompasses the interests of the child).
- that the intervention must be ‘necessary in a democratic society’: i.e., the reasons given for the interference must be ‘relevant and sufficient’⁹; it must meet a pressing social need and be proportionate to that need.¹⁰

With regard to the nature of the interference, it is clear that the more far-reaching and severe the interference, the stronger the reasons required to justify it. Weightier reasons are needed to justify a prohibition on contact between a parent and a child in care, than for example, a restriction on such contact.

Proportionality in Adoption and Care Proceedings under Article 8 ECHR

In *K and T v. Finland*,¹¹ the Grand Chamber of the European Court of Human Rights summarised its case law on the impact of Article 8 in cases where a child is taken into care by the authorities. The Court stressed that the mutual enjoyment by parent and child of each other’s company represents a fundamental element of family life. Any interference with this enjoyment will constitute an interference with the respect for family life guaranteed by Article 8 and must therefore be in accordance with law and for a legitimate aim.

Care proceedings will normally be taken in order to protect the child and, as a result, they will usually meet the legitimate aim of being for the protection of health or morals, or for the protection of the rights of the child. Most cases will therefore turn on whether the interference is necessary in a democratic society and the Court will often have regard to the State’s margin of appreciation in relation to the sensitive issue of whether a care order achieved the correct balance between protecting the child’s best interests and respecting family life.¹²

⁸ *Kroon v. Netherlands* (1994) 19 EHRR 263, para 31.

⁹ *supra*. note 5.

¹⁰ *Re W & B; Re W (Care Plan)* [2001] EWCA Civ 757, para (54), per Hale LJ *Re B (Adoption by One Natural Parent to Exclusion of Other)* [2001] 1 FLR 589 at 599 (39), per Hale LJ.

¹¹ *K and T v. Finland* (2003) 36 EHRR 255.

¹² See, for example, *Olsson v. Sweden*; *Johansen v. Norway*; *L. v. Finland*, judgment of 27 April 2000; and Ursula Kilkelly (1999) *The Child and the European Convention on Human Rights*, Aldershot: Dartmouth Publishing Company, pp. 204–206 and an article by the same author, entitled, ‘Children’s Rights: A European Perspective’, *Judicial Studies Institute Journal*, Vol. 4(2), pp. 68–95.

The case of ***K and T v. Finland*** (mentioned above) concerned the removal into care of a new-born baby at the moment of its birth, a measure which the court considered to be extremely harsh and not justified by any extraordinarily compelling reasons in the instant case. While the decision to take the baby into care was based on *relevant* reasons such as the clear need to protect the baby from harm, the court deemed these reasons not to be *sufficient* and as having a disproportionate effect on the parents' potential for enjoying a family life with their new-born child, thereby giving rise to a violation of Article 8.

In relation to adoption proceedings, the leading case is ***Keegan v. Ireland***,¹³ which concerned the adoption of a child against the wishes of the natural father (not married to the natural mother) who complained that his Article 8 rights had been violated. Noting that the birth of the child 'was the fruit of a planned decision taken in the context of a loving relationship', the Court concluded that there was family life in the case and questioned whether a process of adoption which did not allow any involvement by the father could be justified. The Court said:

*The fact that Irish law permitted the secret placement of the child for adoption without the applicant's knowledge or consent, leading to the bonding of the child with the proposed adopters and to the subsequent making of the adoption order, amounted to an interference with his right to respect for family life. Such interference is permissible only if the conditions set out in paragraph 2 of Article 8 are satisfied.*¹⁴

The Court had little difficulty in concluding that the interference could not be justified by the limitations in Article 8 (2).

Principle of Proportionality in UK Courts

Since the introduction of the UK Human Rights Act in 1998, the UK Court of Appeal has also shown a rigorous application of the principle of proportionality.

In ***Re C and B (Care Order: Future Harm)***¹⁵ two older children had been taken into care under orders based on actual harm and subsequently two younger children were removed from the mother, the ten month child under an interim care order and the new born baby under an emergency protection order. In respect of the younger children it was held although there was a real possibility of future harm, the action taken must be a proportionate response to the nature and gravity of the feared harm and as there were no long-standing problems which would interfere with the capacity to provide adequate parenting, the local authority could have taken time to explore other options. Hale LJ said:

There is a long line of European Court of Human Rights jurisprudence on the third requirement (under Art 8 i.e. the interference must be 'necessary in a democratic society'), which emphasises that the intervention has to be proportionate to the legitimate aim. Intervention in the family may be appropriate, but the aim should be to re-unite the family when the circumstances enable that, and the effort should be devoted towards that end. Cutting off all contact and relationship between the child or children and their family is only justified by the overriding necessity of the interests of the child.

In ***Re O (Supervision Order)***¹⁶ it was held that a supervision order was the proportionate solution rather than a care order. Hale LJ said:

Proportionality...is the key. It will be the duty of everyone to ensure that in those cases where a supervision order is proportionate as a response to the risk presented, a supervision order can be made to work, as indeed the framers of the Children Act always hoped that it would be made to work...

¹³ *Keegan v. Ireland* (1994) 18 ERR 342. For a detailed exposition of the case, see Clare Ovey and Robin C.A. White (2006) *The European Convention on Human Rights*, 4th ed., Oxford: Oxford University Press, pp. 259–60.

¹⁴ *Ibid.*, para. 51 of the judgment.

¹⁵ *Re C and B (Care Order: Future Harm)* [2001] 1 FLR 611.

¹⁶ *Re O (Supervision Order)* [2001] 1 FLR 923.