

Proportionality, the CJEU, and Discrimination

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Overview

What is proportionality for?

What *is* proportionality?

How is proportionality applied by the
CJEU?

View from the UK

The future and other questions



What is proportionality for?

A general principle of EU Law

A general principle of constitutional and administrative law

A standard of review?

A test of the scope of a right?

A test of objective justification in cases of indirect discrimination



What is proportionality?

A fair balance?

A form of reasonableness?

A structured test:

Legitimate aim

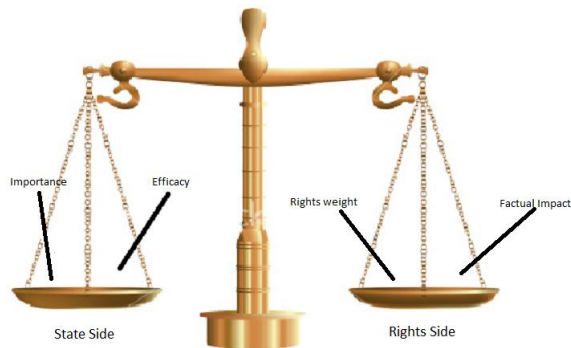
Appropriate/suitable to achieve the aim

Necessary/least intrusive means

Proportionality *stricto sensu*



ECHR Version of Proportionality



CJEU Version of Proportionality

“the means chosen for achieving [the] objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end.” (*Bilka*)

Note that all of this relates to the means, so mere legitimate aim is assumed

Balancing of some kind is expected to differentiate weak from strong aims



CJEU approach: specific cases

Sex discrimination/equal pay

Age discrimination

Disability discrimination

Clashing rights

Free movement



View from the UK

Allonby represents most familiar version:

Legitimate aim

Real need

Balance between real need and disparate impact

Requirement of “necessity” gone from this formulation, replaced by balance

Balance much weaker than necessity unless impact taken very seriously

GMB v Allen version: anything “necessary” to a legitimate aim is proportional



The future and other questions

From *Elias* to *Homer*: the UK trend of harmonizing CJEU and ECtHR tests

More specification of legitimate aims?

The growing importance of evidence and forms of proof

What are the limits of relevant impacts?