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**GLAWCAL  
COMMENT #179**

**Arguments Against the Application of  
the Principle of Proportionality**

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*Based on*

**Valentina Vadi**

**“A history of success? Proportionality  
in international economic law”**



**gLAWcal**  
Global Law Initiatives for Sustainable Development

## A gLAWcal comment on Valentina Vadi's "A history of success? Proportionality in international economic law" in Antonio Segura Serrano (Ed.) "The Reform of International Economic Governance".

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Despite the fact that the concept of proportionality has brought much needed balance to the international sphere, one can not deny the existence of plenty of disadvantages associated with the concept as well and which were examined by multiple scholars throughout the years. Hence, one would wonder about the possible ways that could be used to eliminate the advantages associated with the concept or whether there is even a possibility to do so. Indeed, the first major criticism directed against the idea of using the proportionality principle for balancing the different competing interests is that such use would put an end to the concept of separation of powers between the executive, judiciary and legislative institutions. Thus, from a democratic perspective such division is extremely important to ensure that each organ is adequately supervised by another institution for the purpose of ensuring the well-being of the society. Hence, in a way the application of the concept of proportionality blur the lines between the political and the legal which is a highly undesirable outcome in a democratic country. The second criticism directed against the theory of proportionality is related to the inability to balance the values in the sense that it is impossible to create a hierarchy of values through which one could apply the theory of proportionality. Indeed, how would it be possible to determine which value is more important? In this case, the risk is that the judge or the policy-maker will make decisions on the basis of his own values reflecting its culture and way of life, which means that there is a huge

risk of having arbitrary decisions. In this regard, the third criticism is directed against the fact that policy-makers might actually use their specific cultural background ignoring the culture in which the values are competing. In that sense, Burke White and von Staden pointed out to the fact that: "prioritization of the values chosen by the polity requires both familiarity with those values and a degree of embeddedness within that polity." Not only that, but also there are situations where the concept of proportionality can not simply be applicable as some values can be incommensurable. In this case, what would be the solution for this legal dilemma and what would be the basis for the decision that shall be made? Furthermore, the concept of proportionality originated as a result of the distrust between the public administrations and the public in the aftermath of World war II. As such, one could clearly see the inevitable clash that is set to take place because of the motives for which such principle was adopted in the first place. Finally, the concept has been criticized due to the fact that many scholars claim that the application of this notion would provide the elites with the necessary tool for shifting from the democratic process to the courts. In the Chapter "A History of Success? Proportionality in International Economic Law", of the book "The Reform of International Economic Governance," the author Valentina Vadi examined all these elements in an extremely detailed manner.

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