
RIGHT TO ENVIRONMENT, BALANCING OF COMPETING INTERESTS AND PROPORTIONALITY

Hana Müllerová*

Abstract: Addressing collisions between environmental protection and competing economic and social interests often constitutes the very core of environmental cases. At the constitutional level, a balancing approach based on the doctrine of proportionality is frequently employed to resolve contradictions between conflicting values. In this article, I demonstrate how the proportionality doctrine in its traditional meaning can be applied to balancing interests in environmental cases. Then I bring to the forefront two innovative ways of engaging proportionality in the environmental protection; one employing proportionality as an interpretative instrument with the power to help determining the scope and content of the right to environment; and the other adjusting proportionality to the form of eco-proportionality, offering a restructured framework to rule the human-nature relationship.

Keywords: environmental protection, proportionality, balancing, right to environment, public interest, conflicting interests

INTRODUCTION

This article examines how the doctrine of proportionality used for balancing of competing interests in the field of constitutional law can be applied in the context of enforcing the constitutional right to environment and defending the public interest in environmental protection. In environmental disputes, conflicts of colliding interests are usually at their very core. There is an ever-lasting tension between the interest in the protection of the environment and other interests, above all those of economic and social development. Generally, it is not possible to prescribe that one or the other side shall win *a priori*, as a rule. On the contrary, solutions of such collisions have to be made in individual cases, based on the relevant legislation and specific circumstances of the case, and usually accompanied with some kind of ‘balancing’, which thus makes an inherent component of solving environmental cases.

For balancing colliding interests, the method of proportionality is often used. It is a widely accepted principle of the rule of law, applied at numerous national jurisdictions, as well as at the Court of Justice of the European Union and at the European Court of Human Rights where the concept of a ‘fair balance’ is used as the closest to proportionality.¹ The proportionality method is based on assigning ‘weight’ to important societal values. The balancing then consists of weighing the harm caused to the one principle against the benefit brought to the competing principle. The doctrine of proportionality bestows

* JUDr. Hana Müllerová, Ph.D., Institute of State and Law, Czech Academy of Sciences, Prague, Czech Republic. The research for this article has been supported within the grant project of the Grant Agency of the Czech Republic No. 14-32244S “Human right to environment in national law: advanced theory, poor practice?”.

¹ According to the ECtHR jurisprudence, a ‘fair balance’ must be struck between the demands of the general interest of the community as a whole, and the requirements of the protection of the individual’s fundamental rights. See e.g. *Hatton and others v UK*, App. No. 36022/97 (ECHR, 8 July 2003), para 98.

the balancing with a methodology ensuring that all the morally relevant considerations are taken into account in a given case, and a correct weight is assigned to them in order to develop an argument. Nonetheless, in the field of environmental law the doctrine of proportionality has been generally unknown and insufficiently theorized.² Treating environmental topics within the constitutional law publications on proportionality is similarly sparse.³ Therefore, this article aims to open the question of possible interlinking both spheres in the topic of proportionality.

There are two basic patterns of constitutionally-related principles tested through proportionality: one constitutional right limits another constitutional right, or public interest considerations limit a constitutional right. In both cases, if the limitation is proportionate (if it passes all the tests that proportionality is composed of), then it is justified, and vice versa. From the environmental point of view, it is essential that the environmental protection has either of the two forms mentioned: depending on the circumstances of the case, it may work as a public interest, or it may be shaped as a constitutional right to a healthy (decent, clean, etc.) environment. This comes as a result of a historical development of legal approaches to environmental concerns that first started in the form of defending the environment as an important public interest but later on, the rights-based approach became engaged as well.

The main objective of this article is to explain how to apply the tests of proportionality to the collisions of environmental interests with other interests. Proportionality provides a neutral instrument to balance competing values. It is not a device ensuring that the environment will always prevail; it is an instrument ensuring that it prevails whenever the weight of the environmental protection side is objectively 'heavier', and offers a solid justification for it. Naturally the input conditions of individual cases relevant for this balancing depend a lot on the relevant legislation where the weight given to the environment may differ from one constitutional order to another.

In addition to examining the application of proportionality in its classical form to the environmental field, I consider two alternative ways of using proportionality in favour of the environment: first, using proportionality as a tool to create the content and scope of the right to environment, and second, using proportionality as a tool to govern the human activities towards nature. None of these is based on the doctrine of proportionality in its widely accepted form. The approach to proportionality as shaping the content and scope of rights is supported by certain authors but rejected by others. If accepted, it can open new perspectives to strengthening the role the environment plays in law through better fulfilment of the right to environment with its content. The approach suggesting proportionality to govern human activities towards nature builds upon Gerd Winter's concept of

² For one rare exception of treating proportionality in connection with environmental rights, see FITZMAURICE, M., MARSHALL, J. Human Right to a Clean Environment - Phantom or Reality: The European Court of Human Rights and English Courts Perspective on Balancing Rights in Environmental Cases. *Nordic Journal of International Law*. 2007, Vol. 76, p. 134 ff.

³ Here, it is worth referring especially to the analysis of the *Hatton* case (which is very well known among environmental lawyers) from the proportionality point of view - how proportionality should or could have been applied to it: KLATT, M., MEISTER, M. *The Constitutional Structure of Proportionality*. Oxford: Oxford University Press, 2012, p. 87 ff.

eco-proportionality⁴ that introduces the doctrine in a hypothetically adjusted form to regulate the relationship between humans and the environment. In this shape, proportionality has only been theorized about so far and has only little occurrence in the law in force and the case-law. Moreover, it is not neutral: contrarily, it gives *a priori* the preference to the environment over other values.

Taking the view that proportionality can well contribute to developing the cases where environmental concerns are at stake, I open this article with a brief explanation of the doctrine as such and I show on environmental examples how the doctrine can be applied in the field of environmental protection (section 1). Next, I introduce proportionality as an instrument that can co-create the content and scope of the right to environment (section 2), and as a tool that would reverse the order of priority given to the environment on one hand, and to the human activities towards nature on the other hand (the eco-proportionality, section 3). I conclude by summarizing the tangible and potential benefits of the doctrine in defending the environmental values in law.

1. PROPORTIONALITY AND BALANCING THE ENVIRONMENT AGAINST OTHER VALUES

Proportionality is a methodological tool developed to structure relationships between governmental power and citizens to ensure that the public power, if intruding into the rights of citizens, is limited by certain preconditions. The key question in resolving situations of conflicting norms using proportionality is whether the limitation of the constitutional right in question that the collision brings about is not disproportionate. Proportionate limitations of rights are justifiable; disproportionate ones are not. This rule applies the same whether the limitation of the constitutional right is caused by another constitutional right or a public interest.⁵

Limitations of rights are usually caused by laws or decisions based on constitutional provisions called limitation clauses. Such clauses often accompany human rights provisions regarding relative constitutional rights⁶ in both international conventions and national constitutions. In most cases, limitation clauses provide no or minimal additional guidance as far as more detailed conditions required for imposing the limitations. Such guidance is exactly what proportionality as a method is able to fulfil. Neither national constitutions nor international conventions usually prescribe explicitly the use of proportionality to solve cases of rights limitations. However, many constitutional courts as well as international courts have interpreted limitation clauses as containing the requirement of proportionality.⁷

⁴ WINTER, G. Ecological Proportionality: An Emerging Principle of Law for Nature? In: Voigt, C. (ed.). *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law*. Cambridge: Cambridge University Press, 2013, p. 111.

⁵ BARAK, A. *Proportionality: constitutional rights and their limitations*. Cambridge: Cambridge University Press, 2012, pp. 161–162. RIVERS, J. Proportionality and Variable Intensity of Review. *The Cambridge Law Journal*. 2006, Vol. 65, No. 1, p. 174.

⁶ Relative rights can be limited, based on a limitation clause, while absolute rights (e.g. the prohibition of slavery) cannot be limited.

⁷ BARAK, A. *Proportionality: constitutional rights and their limitations*, p. 139.

In testing proportionality, four tests are usually included: the purpose pursued by the limiting law; suitability; necessity; and the proportionality in the narrow sense (*stricto sensu*). The applicability of the individual parts of proportionality differs, depending on what values are at stake. While testing justiciability of a limiting law on the ground of a public interest, the law must uphold all four components to pass constitutional muster. In contrast, to solve conflicts between two constitutional rights, only balancing *stricto sensu* (the fourth component) is applied.⁸

The proper purpose test⁹ means asking whether the purpose for which the constitutional right is limited is proper. In a constitutional democracy, protecting another constitutional right always constitutes a proper purpose; in contrast, not every interest included within the public interest may pass the threshold to become a proper purpose. At a general level, the proper purpose is usually related to the fulfilment of important societal goals and necessitates a constitutional foundation, either explicit or implicit.¹⁰

The test of suitability precludes adopting the means that hinder the colliding principle at stake if the means are not suitable to realize the principle or goal for which they have been adopted.¹¹ The suitability test examines if the means used by the limiting law fit (are rationally related to) the purpose the limiting law was designed to fulfil, i.e. if the use of such means would rationally lead to the realization of the law's purpose. If not, the use of such means would be disproportionate.¹²

The test of necessity requires that out of two equally suitable means promoting the purpose of the law, it is the one that interferes less intensively with the right that has to be chosen.¹³ Therefore, according to the test of necessity, the legislator has to choose – from all those means that may advance the purpose of the limiting law – the one which would limit the human right in question the least.¹⁴

The test of proportionality *stricto sensu* means that in order to justify a law limiting a constitutional right, a proportionate relation is required between the benefits of the limiting law and the harm caused to the right. The essence of this test thus emerges from the requirement of a proper relation ('proportional' in the narrow sense) that should exist between the benefits gained by fulfilling the purpose and the harm caused to the constitutional right from obtaining that purpose. The limitation on a constitutional right is not proportional *stricto sensu* if the harm caused to the right by the law exceeds the benefit gained by it. The test applies the same way whether the purpose of the limiting law is to protect another constitutional right or the public interest.¹⁵ The proportionality *stricto sensu* may be expressed either in words (Alexy calls this expression the 'Law of Balancing'),

⁸ Ibid., p. 131, 154–155.

⁹ Also called 'legitimate goal stage'. See MÖLLER, K. *The Global Model of Constitutional Rights*. Oxford: Oxford University Press, 2012, p. 181 ff.

¹⁰ BARAK, A. *Proportionality: constitutional rights and their limitations*, pp. 245–258.

¹¹ ALEXY, R. Constitutional Rights and Proportionality. *Revus - Journal for Constitutional Theory and Philosophy of Law*. 2014, Vol. 22, para 4 [online]. [2018-01-04]. Available at: <<http://revus.revues.org/2783#text>>.

¹² BARAK, A. *Proportionality: constitutional rights and their limitations*, p. 303.

¹³ ALEXY, R. *A Theory of Constitutional Rights*. New York: Oxford University Press, 2010, p. 398.

¹⁴ BARAK, A. *Proportionality: constitutional rights and their limitations*, p. 317.

¹⁵ Ibid., p. 317.

or in a mathematical formula (the ‘Weight Formula’), which will not be expanded in this article.¹⁶ The main rule reads as follows: *The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other.*

Due to the dual form of the environmental values (as the right to environment or as a public interest) we may find that in some cases the environmental concerns qualify as rights and in some as public interests. In fact, proportionality methods can be applied in three types of collisions between the environment and another interest: the right to environment against another constitutional right; the right to environment against some public interest; and the public interest on environmental protection against a constitutional right. Here, I start with the last of the scenarios mentioned where all the stages of proportionality must be tested. A simplified environmental case will help to explain all steps of proportionality. Then, I follow with clarifying how proportionality (there, only the proportionality *stricto sensu*) shall be applied if the right to environment is at stake.

1.1 The environment as a public interest: Going through all the stages of proportionality

If the environment plays the role of a public interest for which a constitutional right shall be limited, the purpose of such limitation must first be tested to see if it is proper, i.e. legitimate to limit a constitutional right. As regards environmental protection, it could be said intuitively that in general, environmental protection is *of course* an important public interest, and in most situations, it will be the case. However, based on the constitution’s wording and on the circumstances of the case, the urgency of the purpose or other elements may also play a role. Most national legislators have already elevated environmental concerns to the constitutional level, which highlights the importance of the environment even as a public interest. From specific limitation clauses mentioning explicitly the environment,¹⁷ it follows univocally that environmental protection is a legitimate aim so that the relevant constitutional right may be limited. Under a general limitation clause,¹⁸ environmental protection can obviously also be among the public interests for which a constitutional right may be limited.

To illustrate the tests of proportionality with an environmental example, let us set a hypothetical case: In order to protect a specific endangered species of birds, the natural protection authority has designated a new area of natural protection imposing limitations on how the land within the area may be cultivated, which decreases the yields; an owner of a piece of land within the area argues that by limiting his farming activities his right to property was infringed. The protection of the endangered bird species is declared a public interest here. To be so, the relevant public authorities must substantiate such an interest adequately. The public interest in such a specific environmental protection may stem from

¹⁶ For that, see esp. the opuses of Robert Alexy referred to.

¹⁷ E.g. Article 14 (3) of the Czech Charter of Fundamental Rights and Freedoms (Constitutional Act No 2/1993 Coll., further referred to also as the ‘Czech Charter’) that stipulates that the freedom of movement and of residence may be limited by law, inter alia, for the purpose of protecting nature in demarcated areas.

¹⁸ E.g. Article 11 (4) of the Czech Charter: Expropriation or some other mandatory limitation upon property rights is permitted in the public interest, on the basis of law, and for compensation.

the relevant national constitution that probably provides the environmental protection with a special status,¹⁹ as well as from the international conventions and EU law on the protection of biodiversity, endangered species and their habitats.

The suitability test requires examining the means selected by the legislator as for their appropriateness in relation to the purposes chosen. Here, the measure consists of designating a protected area with some restrictions on cultivation; its purpose is the preservation of the specific endangered bird species population. The suitability test fails (and the measure is thus disproportionate) when the means chosen is in fact not suitable to achieve the goal. In our case, the suitability test would not be passed if e.g. the natural or other characteristics of the area in fact did not constitute good living conditions for the life of the given species.

The test of necessity requires that if there are several possible measures equally suitable to fulfil the pursued objective, the one that interferes less intensively with the constitutional right has to be chosen. In our case, let us imagine two alternative measures: one with a permanent regime of limitation to farming activities, while the other setting a temporary periodical limitation in time of nesting. If the latter measure has the same level of suitability, i.e. it is able to achieve the same level of protection of the bird species, the first one would be disproportionate.

The proportionality *stricto sensu* test is based on the balancing rule: one has to ask whether, by adopting the measure, the intensity of interference with the constitutional right is higher than the intensity of interference with the measure fulfilling the public interest would hypothetically be if the measure is not adopted.²⁰ In our example, it means asking whether by establishing the protected area that brought limiting rules for certain ways of cultivating the land, the intensity of interference with the right of the land owners is higher than the (hypothetical) intensity of interference with the public interest on the protection of the endangered species would be if the measure is not adopted.

The intensity of interferences can be expressed by means of propositions that can be intelligibly substantiated by an argument, for example in a scale 'light', 'moderate', and 'serious'.²¹ Assessing the intensity of interferences necessarily entails numerous questions and specific details related to the specific situation; in the presented example e.g. what harm would be caused to the affected bird species if the measure is not taken; whether there are also some other habitats of that species in the country; how restrictive the rules for farming are in the protected area compared to the other (not protected) sites, etc. Therefore, it seems to be appropriate to add more details to the case: presume that the bird species is a critically endangered one, with one of the last areas of occurrence. The measure to protect the bird species consists of a temporary ban on enumerated farm

¹⁹ For example, the Constitution of the Czech Republic (the Constitutional Act No. 1/1993 Coll.) stipulates in Article 7 that the State shall take care of the natural wealth and of considerate utilisation of natural resources.

²⁰ ALEXY, R. On Constitutional Rights to Protection. *Legisprudence: International Journal for the Study of Legislation*. 2009, Vol. 3. No. 1, p. 9.

²¹ According to R. Alexy. See ALEXY, R. *A Theory of Constitutional Rights*, p. 409 and ALEXY, R. Rights and Proportionality. *Revus - Journal for Constitutional Theory and Philosophy of Law*. 2014, Vol. 22, para 11 [online]. [2018-01-04]. Available at: <<http://revus.revues.org/2783#text>>.

activities throughout the whole area of the reserve, every year during the nesting period. The restriction may substantially decrease the yield. In order to compensate the farmers, there is a modest financial support for them. The ban on farming activities presents a substantial infringement of the farmers' rights. At the same time, the farmers are compensated. Thus the intensity of the infringement to the proprietary right can be evaluated as moderate. With the measure, the intensity of the protection to the environment is high. If the measure is not implemented (and proprietary right suffers no harm), the intensity of the infringement (of the non-protection) to the preserved environmental values would be serious. It means that the side of the public interest on the preservation of birds is 'heavier' and shall prevail over the side of the proprietary right. Therefore, the suggested measure is proportional in this case and the limitation to the proprietary right is justified.

To demonstrate an obvious disproportionality, let us rearrange the case: now, the measure consists of a permanent ban on the enumerated farming activities and there is no financial compensation to the farmers. Moreover, there are in fact two other areas in the country where the birds of the same species are nesting abundantly. Here, the intensity of the infringement to the proprietary right is serious, while the intensity of the infringement (of the non-protection) to the preserved environmental values would be moderate. In this case, the side of the proprietary right is 'heavier' and shall prevail over the side of the environmental measure. Thus, the measure is disproportionate and the limitation to the proprietary right is unjustified.

The examples mentioned are tailored to demonstrate the processing of proportionality as clearly as possible. In practice, environmental cases are usually not so straightforward and include many more details that need to be reflected; they must also follow the existing sub-constitutional legislation relevant for the case.

1.2 Environment as a Constitutional Right: Specificities in Testing Violations of Positive Rights

In this part of the article, I focus on cases in which environmental protection is formed as a constitutional right. If the right to environment is limited by another constitutional right or another public interest, proportionality shall be applied in its *stricto sensu* version. Here, the character of the right to environment as a positive right²² plays a key role: the differentiation between negative and positive rights stemming primarily from their struc-

²² The historical origins of constitutional rights were rooted in negative rights that consist of preventing the governments from harming individuals, i.e. of their refraining from unjustified interference. Later on, positive aspects of many negative rights were recognized, as well as a new type of rights labelled as positive rights. By positive (or 'protective') rights [Alexy calls the positive rights constitutional rights to protection or just protective rights, while the negative rights he calls defensive rights ALEXY, R. *On Constitutional Rights to Protection*], the state protects the right-holder from the interference of their right by third parties. In the right to environment, for example in the 'right of everyone to a favourable environment' as it is recognized under Article 35 (1) of the Czech Charter the positive dimension means that the state is required to establish and enforce legislation specifically aimed at the protection of the environment as a whole and its elements (water, air, land, nature and biodiversity, etc.), at the protection against activities dangerous for the environment (waste production, noise, nuclear energy, etc.), and to ensure the right is protected.

ture²³ results in a need to treat each category differently when applying proportionality. Positive constitutional rights assume a positive action from the state to be fulfilled; therefore, the violation of such right has a form of an *omission*. An omission to perform a positive action in positive rights is unconstitutional only where the omission is disproportionate. The guiding rule of proportionality applied in asserted infringements of positive rights is: *The positive right is violated if the protection afforded to it, in relation to the intensity of interference with the colliding defensive right, is insufficient.*²⁴

By way of illustration, here is another environmental example: an environmentally conscious person claims that her right to environment is violated when a forest owner in the vicinity of her residence cuts the trees down in order to build a new residential area or new business premises. In this type of cases, the most important factor in balancing is the intensity of the negative consequences for the colliding positive right, which would hypothetically occur in case of non-interference with the negative right.²⁵ The specificity here is that this intensity has to be assessed, taking into account that a measure with a lower degree of protection is adopted (hypothetically) instead of the protective measure in question:²⁶ In the environmental case suggested, let us think two alternative measures representing two different degrees of forest preservation concerning the ecosystems, species, habitats and the landscape that could regulate the matter in an imaginary legal order. The measure No.1 stands for a general prohibition on logging, accompanied by allowing exceptions, based for example on the consent of the nature protection authority and the compliance with laws stipulating the maximum continuous felling area, the minimum age of trees, etc. The measure No. 2 only requires compliance with the laws setting the maximum continuous felling area and the minimum age of trees, but no permission is needed, only a subsequent notification to the forest authority that the trees were cut.

It means that the measure No. 1 is a strict one targeted at a very high protection of the right to environment. Therefore, if it is applied, the degree of the protection of the right to environment is very high, i.e. serious. At the same time, the intensity of the infringement to the negative right – the right to the property is also serious, as the right-holder is substantially limited in enjoying their right. As for the intensity of the non-protection, we can imagine that if instead of this measure, the one with the lower degree of protection is realized, with the intensity of the infringement to the right to environment being moderate: in such a case, the side of the proprietary right has ‘more weight’ and should be given prevalence. Here, the positive right to environment has not been violated but the first measure is disproportionate anyway and thus shall not be taken (the protective measure is excessive – it prohibits too much).

On the opposite, the measure No. 2 is so minor that it brings only minimal protection to the right to environment. Then, the intensity of its protection is only light, and, at the same time, that measure causes only a light infringement of the negative right. As for the intensity

²³ Protective rights have an alternative or disjunctive structure, whilst defensive rights have a conjunctive structure. For details, see ALEXY, R. *On Constitutional Rights to Protection*, p. 5.

²⁴ ALEXY, R. *On Constitutional Rights to Protection*, p. 11, and KLATT, M., MEISTER, M. *The Constitutional Structure of Proportionality*, p. 97.

²⁵ KLATT, M., MEISTER, M. *The Constitutional Structure of Proportionality*, p. 95.

²⁶ For details see KLATT, M., MEISTER, M. *The Constitutional Structure of Proportionality*, pp. 96–97.

of the non-protection, we can imagine that if even that measure is not applied, then no protection to the protective right is provided and therefore, the intensity of the infringement of the protective right is serious. Therefore, the side of the right to environment is 'heavier' and shall prevail over the side of the negative right; the measure No. 2 is disproportionate (the protection of the protective right is insufficient – it prohibits too little).

Here, the measures 1 and 2 are the radical ones. We can imagine a variety of means in between them where the intensity of the non-protection of the right to environment caused by non-adopting the relevant measure would be of the same or similar level as the intensity of the infringement of the defensive right. In such cases, the result would be 'proportional'. If several measures are proportional, it means that the legislator has the discretion to decide for any of them.

2. PROPORTIONALITY AS A TOOL TO CREATE THE CONTENT AND SCOPE OF THE RIGHT TO ENVIRONMENT?

Some commentators of proportionality suggest that besides its main function as the guide to resolve conflicts of norms, the doctrine may also serve interpretive purposes, as a criterion for providing meaning to legislative norms. For example, Aharon Barak mentions 'interpretive balancing' as a method to determine the objective purpose of law by balancing the conflicting principles underlying each norm. For that, proportionality *stricto sensu* shall be applied.²⁷ Xenophon Contiades and Alkmene Fotiadou go even further claiming that proportionality can work as a tool forming the content and scope of social rights.²⁸ According to these authors, the application of proportionality should develop its creative aspect and thus work to help defining the content of the right. However, such an idea is not generally accepted: due to certain authors, it is questionable if the proportionality doctrine may really serve to *give content* to any rights. It may be claimed that for the proportionality enquiry to make sense, one needs to understand the content of the right before applying proportionality to it. According to this view, proportionality cannot itself provide the content or 'weight' to be attached to existing entitlements.²⁹

The question whether proportionality can be used to help create the content of rights can hardly be resolved within the environmental law theory. I argue that if proportionality may be used this way and when further developed for that purpose, such an approach could be greatly beneficial to positive rights. In positive rights, the exact extent of the obligations of the state is often indeterminate or difficult to define. The precise scope of the right's protection has to be defined vis-a-vis colliding interests such as the rights of others and the available financial resources of the state.³⁰ This is exactly the case of the right to

²⁷ BARAK, A. *Proportionality: constitutional rights and their limitations*, p. 75 and 147.

²⁸ CONTIADES, X., FOTIADOU, A. Social rights in the age of proportionality: Global economic crisis and constitutional litigation. *International Journal of Constitutional Law*. 2012, No. 3, p. 665.

²⁹ Compare BILCHITZ, D. Socio-economic rights, economic crisis, and legal doctrine: A rejoinder to Xenophon Contiades and Alkmene Fotiadou. *International Journal of Constitutional Law*. 2014, Vol. 12, No. 3, pp. 748–750.

³⁰ KLATT, M. Positive Rights: Who decides? Judicial Review in Balance. *International Journal of Constitutional Law*. 2015, Vol. 13, p. 356.

environment in its substantive meaning: determining its content is one of the most difficult problems impeding its effective application and enforcement. It seems to be almost impossible to determine the exact content of this right *a priori*, in a general way or on a higher level of abstraction.³¹ Thus, it may seem more comprehensible to try to delimit the exact content of the right to environment within its relations to other rights or interests. It could be a good idea to engage proportionality also here, to grasp the right better.

I suggest applying the propositions of Contiades and Fotiadou related to *social rights* to the category of *positive rights* to include the right to environment, too, to avoid the problem of its possible classification as a social right, which could be called into question. In their article, these authors present proportionality as a mediating tool for balancing the conflicting values inherent in the application of these rights and thus substantiating their content. Under their approach, the process of balancing of various interests that is inevitable to determine the content of positive rights can and should be done through the use of proportionality bestowing its technique for that purpose.³²

It is not completely clear how exactly the technique of proportionality, commonly applied under the circumstances of individual cases, can be used for a generalization of the rights' components. Nevertheless, to make the first small step in developing this approach, I take the right to a favourable environment recognized in the Czech Charter as an example. Article 35 (1) of the Czech Charter stipulates that everyone has the right to a favourable environment. One of the most serious problems of the interpretation of the right where proportionality could be helpful is the question what exactly 'favourable' means; more precisely what favourable means in those fields where no environmental standards exist.³³

Within Article 35 (1), the adjective 'favourable' works as an internal modifier. It determines the scope of the constitutional right. In fact, it narrows down the scope of the right, compared to a hypothetical right to a completely clean or totally unimpaired environment. The favourable environment may be seen as an environment influenced by human activities but still richly satisfactory from the point of view of environmental quality. The favourable environment is then an environment of a quality somewhere between two ultimate points, one standing for an unimpaired nature, representing the highest possible protection of the environment and prioritizing it over human activities, while the other signifying an environment that bears the burden of any kind and intensity of human activities. The decisive factor here is where exactly we place the boundary between a favourable and unfavourable environment which is at the same time the boundary between compliance and non-compliance with the right.

³¹ For certain more comprehensive suggestions about what the right to the environment should contain, see e.g. SHELTON, D. Developing substantive environmental rights. *Journal of Human Rights and the Environment*. 2010, Vol. 1, No. 1, pp. 89–120. MacDONALD, K. A Right to a Healthful Environment—Humans and Habitats: Rethinking Rights in an Age of Climate Change. *European Energy and Environmental Law Review*. 2008, Vol. 17, No. 4, p. 213–226.

³² CONTIADES, X., FOTIADOU, A. *Social rights in the age of proportionality: Global economic crisis and constitutional litigation*, p. 662.

³³ Where environmental standards were established, as e.g. in air quality, the 'favourable environment' has been interpreted as the environment of a quality respecting these standards.

As Barak points out, the interpretive issues posed by the internal qualifiers may include – as a part of constitutional interpretation – a need to balance two (or more) competing constitutional principles, based on applying proportionality *stricto sensu* by analogy.³⁴ Here, the one constitutional principle is the environmental protection. In the Czech Republic, environmental protection is embodied in Article 7 of the Constitution: *The State shall take care of the natural wealth and of a considerate utilisation of natural resources*. As competing constitutional principles, we may find a variety of constitutional rights and public interests together, representing the economic and social well-being on different micro- or macro-levels (from the individual to the state level): the right to property, freedom of business, economic and social prosperity of the country, etc. Further, the Czech Constitution includes certain balancing instructions determining the relation between environmental and other values. These provisions offer some guidance in resolving conflicts and must be taken into account: Article 11 (3) of the Charter stating that the ownership may not be exercised so as to harm human health, nature, or the environment beyond the limits laid down by law, and Article 35 (3) of the Charter, stating that no one may, in exercising his or her rights, endanger or cause damage to the environment, natural resources, the wealth of natural species, or cultural monuments beyond the extent set by a law.

The Law of Balancing is fully applicable here: *The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other*. When searching for an exact figure of favourableness, the ‘importance’, as expressed in the Constitution, is crucial. In the context of the above-mentioned provisions of the Czech Constitution, I argue that even at the general level (with no relation to any individual case), the boundary of what is favourable is not just in the middle of the two ultimate points, but it must be seen closer to the ‘environmental’ end of the scale. Such a general result does not seem to be satisfactory enough in its accuracy. However, more specific considerations are to be tied with individual competing interests and their constitutional and theoretical framing.

3. PROPORTIONALITY SUGGESTED AS A TOOL GOVERNING THE HUMAN ACTIVITIES TOWARDS NATURE

The doctrine of proportionality might be engaged to protect the environment against human intrusion, if we place ‘nature’ on the side of the balancing scale which defends the protected principle against unjustified limitations. This idea is behind the concept of ecological proportionality brought by Gerd Winter. Winter suggests engaging proportionality as the main rule to justify any uses of nature by the society. The reason for this new approach to proportionality is the increasing scarcity of natural resources that requires that people justify their interests in consuming or utilizing natural resources. The relation between the mankind and the nature should be reversed: Nature shall be no longer seen as the environment *of* mankind, but it is rather the natural resources that must be spared unless there is a good reason to consume them.³⁵

³⁴ BARAK, A. *Proportionality: constitutional rights and their limitations*, p. 153.

³⁵ WINTER, G. *Ecological Proportionality: An Emerging Principle of Law for Nature?*, p. 114.

The structure of eco-proportionality would, according to Winter, follow the established structure of the principle of proportionality: in order to ascertain whether an activity encroaches upon natural resources, the actor must pursue a justifiable societal objective (which corresponds to the proper purpose test as explained above); the activity must be capable of serving the objective (the suitability test), must not be replaceable by an alternative that is less intrusive on natural resources (the necessity test); and it must not be excessively intrusive on natural resources in view of the importance of the societal objective (the proportionality *stricto sensu*). The ‘balancing rule’ for the eco-proportionality may be formulated, according to Winter, as follows: ‘*The more serious the damage or risk of damage, the more weighty the benefit must be if the adverse effect is to be accepted.*’³⁶

Certain approaches that resemble this kind of eco-proportionality have already been adopted by national, EU and international legal acts. These provisions resemble limitation clauses: e.g. under Article 9 of Directive 2009/147/EC, a derogation from the obligations to protect endangered bird species is permissible for reasons of interests of public health and safety, air safety and prevention of serious damage to crops, ‘where there is no other satisfactory solution’. Moreover, it seems that the higher value of the protected interest, the more ambitious the test is (e.g. for the Natura 2000, the conditions are the strictest).³⁷

The concept of eco-proportionality reverses views, compared to the ‘classical’ proportionality: here, we depart from a presumption that it is necessary to preserve the environment, and that not every human need or wish may justify its use or consumption.³⁸ It means that the value of the environment plays the role of the protected constitutional right of which the limitation is tested for proportionality to see if it is justified. The human need is in the position of the colliding value for which the interest of the environment is to be infringed upon. The measure tested is the human activity that causes the violation (including consumption) to the natural resource or an element of the environment. Here, proportionality means that the more valuable the natural resource, the more pressing the human need to justify using it.

At the conceptual level, the idea of eco-proportionality is well reasoned, especially in the context of the ongoing deterioration of the global environment. In order to embed the concept of eco-proportionality in law, however, an essential clarification would be needed. The first and underlying problem is that there is no legal commitment to apply eco-proportionality. Where could such a commitment emerge from? In my opinion, such an obligation might evolve if the ‘rights of nature’ are recognized, but they have been theorized only.

Second, the classical proportionality examining the justifiability of the rights’ limitations takes place as an *ex-post* instrument of judicial review in courts. By contrast, the eco-proportionality tests shall be situated as an *ex-ante* tool of environmental protection, i.e. before the activity is performed (or the natural resource used). Thus its place shall be in environmental decision-making procedures. A possible room for the process of evaluating eco-proportionality is within the process of the environmental impact assessment, which

³⁶ *Ibid.*, pp. 115–117.

³⁷ *Ibid.*, pp. 122–124.

³⁸ *Ibid.*, pp. 127–128.

Winter's examples support as well. However, it may be worth mentioning that not all the activities utilizing environmental resources are subject to permissions or other administrative decisions, or to the environmental impact assessment.

Third, the parties or 'litigants' of the proportionality exercise and the decision-making subjects are questionable. In classical proportionality, the holder of the constitutional right goes to court to defend their right ideally as unlimited, against another right-holder or against an authority advancing a public interest. In eco-proportionality, the testing takes place within the decision-making processes, not the courts; thus it is the environmental authorities who decide. That might unify those who would defend the interests of nature with those who decide, thus diverging eco-proportionality further from the proportionality applied in constitutional law.

CONCLUSION

In this article, I aimed to show that solving environmental cases necessarily covers balancing competing interests, to which the doctrine of proportionality can well contribute because it provides a powerful objectifying scheme and a factor in all the relevant aspects of an individual case. The balancing rule can guide the judge or the decision-maker in developing a sound argument, helping to cover all the relevant aspects of the case and take them into account properly. Assigning the 'weight' to individual societal values is the crucial part of any balancing and it is often decisive for the results of the case. Here, proportionality serves to build a more thorough, stronger, and thus more convincing argumentation.

Applying proportionality as a tool for determining the content of positive rights seems to be an innovative approach using the doctrine to serve new functions compared to those that were originally intended. In my opinion, if such a treatment of proportionality is correct, the human right to environment can benefit from that. With proportionality, certain unclear aspects of the right can be interpreted by balancing the colliding principles inherently present in its concept. For instance, the internal modifiers formed usually as adjectives describing the required quality of the environment can be partially clarified by proportionality. However, this way of applying proportionality will certainly need further research in the future.

The notion of eco-proportionality appears to me more a vision than reality. It outlines a possible future pattern of shaping the human–nature relationship in law. As such, it builds on the idea of reordering priorities, placing nature preservation above human needs. In my view, the concept of eco-proportionality is located further away from the doctrine of proportionality than its title suggests. It takes classical proportionality's essential point of balancing principles and values in the form of precepts and their exceptions, weighing the benefits and harms. It is a concept that seems unfeasible today but that may turn to be vital in the future.