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PROPORTIONALITY ALLOCATION BETWEEN GOVERNMENTAL BRANCHES: LESSONS FROM THE CZECH REPUBLIC

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ABSTRACT

The proportionality of legal rules can be ensured by the legislature, the executive or the judiciary. This article examines how the allocation of responsibility for proportionality assessments between the branches affects the protection of fundamental rights. Based on the distinction between individual (case-by-case) and general (model-based) proportionality tests, the article argues that legislatures should primarily be responsible for general proportionality and incorporate rights-sensitive standards into statutory texts. Through a qualitative doctrinal analysis of Czech jurisprudence, the article explores types of (mis)alignment between proportionality tests and institutional roles. Firstly, it examines project-specific statutes where Parliament decides on

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individual cases; secondly, it elaborates on vague legislative frameworks that delegate all proportionality considerations to administrative authorities and courts; thirdly, it evaluates judicial insistence on case-by-case balancing, despite reasonably clear legislative schemes; and finally it discusses the possibility of judicially striking down vague norms. These case studies demonstrate that an overreliance on individualised proportionality can undermine legal certainty, equal treatment and democratic accountability while encouraging legislative buck-passing. Conversely, striking down under-specified statutes and requiring legislatures to articulate clearer, more differentiated general standards can improve foreseeability without weakening judicial review.

KEYWORDS

Proportionality, Parliament, responsibility, protection of rights, legal certainty.

INTRODUCTION

The proportionality principle is a central tool through which democratic legal systems seek to justify limitations on fundamental rights and to reconcile competing rights with public interests. Yet it remains understudied which institution, and in what form, should wield this tool. The polarised debate over which branch – whether legislature or judiciary – better protects human rights has *'grown old and tired'*.[1] This paper invites a more nuanced inquiry. It proceeds from two premises: proportionality can operate at different levels of abstraction, and responsibility for applying it is not confined to courts but is shared across all three branches of government. Therefore, rather than generally asking who is 'better', it examines how differing approaches to proportionality by the branches shape the protection of rights.

The central thesis is that the legislature should bear primary responsibility for certain kinds of proportionality assessments. This is best expressed through statutory texts that contain a 'baked-in' proportionality test, which is then applied to standardized situations. Legislation should therefore contain sufficiently precise and differentiated standards that already reflect a legislative proportionality assessment. The claim rests on the separation of powers, the democratic and institutional legitimacy of the branches, the demands of legal certainty, and the practicalities of everyday legal application.

To *'keep it real'*,[2] the analysis draws on case studies from the Czech Republic. Using a qualitative, doctrinal method, it shows how differently allocated responsibility for proportionality can alter outcomes on the ground. The cases were selected to illustrate this variable institutional allocation. The analysis is, therefore, illustrative and argumentative rather than statistically representative.

The paper is structured into three main segments.

The first segment (part 1) examines the proportionality principle in general. It classifies proportionality by the level of abstraction at which interests are evaluated. There is the individual test, where particular circumstances are decisive, and the general test, which addresses proportionality in typical situations. Moreover, it also considers how each branch is bound, as a matter of principle, by proportionality and how their activities are interconnected.

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[1] Kent Roach, "The Varied Roles of Courts and Legislatures in Rights Protection," in *Parliaments and Human Rights: Redressing the Democratic Deficit*, ed. Murray Hunt et al. (Hart Publishing, 2015), 405; for summary of this debate see Aileen Kavanagh, "Keeping It Real in Constitutional Theory," *Comparative Constitutional Studies* 1(2) (2023): 246–249 // https://doi.org/10.4337/ccs.2023.0006

[2] Ibid., 266.

The second segment turns to the case studies. It elaborates on Parliament deciding on a specific project by statute, usurping all proportionality considerations (part 2). This impermissibly constrains administrative and judicial roles. Next, it evaluates two examples showing how, and more importantly, with what outcome, a judiciary might react to a completely vague statute, which, on the other hand, leaves all balancing to the executive and courts (part 3). In one example, the vagueness was a reason for annulment by the Czech Constitutional Court; the other was 'saved' by the same court by imposing case-by-case examination. Finally, the paper shows how courts may insist on individual proportionality despite an already sufficiently clear statute, effectively reserving the balancing to themselves (part 4).

The third segment (part 5) synthesises the findings and argues that the legislature should have a greater say in proportionality. Courts should not reflexively revert to a case-by-case approach. Doing so can undermine democratic legitimacy, legal certainty, and foreseeability, and it risks drawing the judiciary into the realm of political decision-making.

1. THE PROPORTIONALITY TESTS AND ACTORS

Laws are made and applied by several institutional actors. They differ in composition, selection, procedures, and mandates (adoption of rules versus their application). Those features shape whether – and how – they use proportionality and how they intertwine with others.

This part addresses three linked themes. First, it distinguishes between an individual – for example, should Irene obtain information on salaries of public employees under the freedom of information request – and a general – for example, should the courts provide access to not-yet-binding decisions – proportionality test, two practically useful levels of abstraction in proportionality analysis. Very abstract balancing – for example, generally weighing privacy against access to information in theory – is impractical and not considered here.

Second, it explains that all branches are bound by proportionality, as the concept is institutionally neutral. Third, it examines inter-branch relations when applying the principle of proportionality. The cooperative model requires each branch, within the separation of powers, to respect others while performing its own duties, including consideration of proportionality.

1.1. Two kinds of proportionality testing

Proportionality tests can be classified in several ways (area of law, number of steps, etc.). Following Aharon Barak, the key distinction for this paper is the level of abstraction at which balancing occurs.

1.1.1. Individual proportionality test

The individual (*ad hoc*[3]) test balances competing interests in the concrete circumstances of a case. It provides an answer to the maximum speed Thomas, a former professional racer, may drive on a rainy motorway at night with a full moon behind his car.

While Thomas surely appreciates this kind of individualisation, it has limits. Society cannot function if every decision requires a bespoke assessment; the state lacks

3 Aharon Barak, "Proportionality and Principled Balancing," *Law & Ethics of Human Rights* 4(1) (2010): 11 // https://doi.org/10.2202/1938-2545.1041

the capacity to analyse each and every situation and provide an individual outcome.[4] It is practically impossible to set individual speed limits for every driver based on aspects such as road profile, their experience, weather conditions, and car type. Nor could officials reliably produce consistent results. Underspecified rules *'confer discretion, discretion confers power, and power sets the stage for abuse of power'*.[5] That, in turn, introduces unpredictability and may have a chilling effect.[6] These risks grow with the number and geographical dispersion of decision-makers.

Technological change also plays part in the proportionality considerations. The contemporary administrative state gives preference to the exercise of powers which respect individual circumstances.[7] By contrast, the actual and potential automation of the decision-making process requires precise rules.[8]

1.1.2. General proportionality test

The general (principled[9]) test addresses these limits by taking a step back and weighing values for typical, recurring situations, which allows proportionate rules to be formulated in advance.[10] The application then asks not whether an action is proportional in itself, but whether it meets pre-set conditions for already proportionate rights limitations.[11] In the speed limit example, the general proportionality test establishes a uniform limit for all drivers based on the specific road segments and vehicle types. This approach curbs discretion and makes balancing more transparent, structured, and predictable.[12]

Yet it may omit details relevant in particular cases (e.g., a driver's skill). Due to the omission of pertinent specific characteristics of the given situation, the generally proportional rule may lead to disproportional individual outcomes.[13] Because legislators can only anticipate some contexts in which a legal rule will be applied,[14] an 'exit option' may be needed to override the general rule in exceptional circumstances – say, exceeding the speed limit trying to save a partner's life.[15]

Nevertheless, the need for possible exceptions does not diminish the value of general rules. If they yield proportionate outcomes in most cases, they hold significance in enhancing legal certainty. Moreover, the general and individual proportionality

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4 Timothy Endicott, "The Generality of Law," in *Reading HLA Hart's 'The Concept of Law*, ed. Luís Duarte d'Almeida et al. (Bloomsbury Publishing, 2014), 43.

5 Roy Sorensen, "Vagueness Has No Function in Law," *Legal Theory* 7(4) (2001): 408 // https://doi.org/10.1017/S1352325201704041

6 Ibid., 408; see also Marc Ribeiro, *Limiting Arbitrary Power: The Vagueness Doctrine in Canadian Constitutional Law* (UBC Press, 2004), 489.

7 Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press, 2009), 256–257.

8 Arjan Widlak et al., "Towards Principles of Good Digital Administration: Fairness, Accountability and Proportionality in Automated Decision Making," in *The Algorithmic Society: Technology, Power, and Knowledge*, 1st edn, ed. Marc Schuilenburg and Rik Peeters (Routledge, 2021), 67–68 // https://doi.org/10.4324/9780429261404; Lena Enqvist and Markus Naarttijärvi, "Discretion, Automation, and Proportionality," in *The Rule of Law and Automated Decision-Making: Exploring Fundamentals of Algorithmic Governance*, ed. Markku Suksi (Springer International Publishing, 2023), 161 // https://doi.org/10.1007/978-3-031-30142-1_7

9 Aharon Barak, *supra* note 3, 12.

10 Pavel Ondřejek, "Poměřování jako klíčový argument přezkumu ústavnosti v éře proporcionality a některé projevy jeho kritiky" (Balancing as a key argument in constitutional review in the era of proportionality and some manifestations of its criticism), *Právník* 155(4) (2016): 356.

11 Aharon Barak, *supra* note 3, 12.

12 Ibid., 13–14.

13 Lena Enqvist and Markus Naarttijärvi, *supra* note 8, 167–68.

14 Philip Sales, "The Contribution of Legislative Drafting to the Rule of Law," *The Cambridge Law Journal* 77(3) (2018): 631 // https://doi.org/10.1017/S0008197318000624

15 To this end see decision of Zürich High Court from 18.01.2022, No. SB210261-O/U/ad-cs, where the court acquitted a driver who had driven at 200 km/h on a motorway in order to get his wife home to take her heart medication. The decision is available from https://www.gerichte-zh.ch/fileadmin/user_upload/entscheide/oeffentlich/SB210261-O1.pdf, accessed 16 November 2025.

assessments can sometimes be combined.[16] In that sense, law-making is a collaborative enterprise where the suitable bodies must do the right things at the right time.[17]

1.2. Branches of government and proportionality

With the two proportionality tests clarified, the focus turns to actors applying them. The principle of separation of powers gives us three traditional branches of government.[18] Society needs a representative legislature to deliberate and enact rules,[19] administrative bodies (the executive) empowered by law to implement them,[20] and an independent judiciary to resolve disputes.[21]

The proportionality is, at least in continental Europe[22], institutionally neutral. Although it can predominantly be addressed by the courts, it is not solely intended for them. Rather, it provides a general framework for establishing rights and limitations that applies to every branch. Actions by all branches must therefore be proportionate.[23] The shift at the European Court of Human Rights also underscores this, as it previously treated the state as a single actor, but now more often addresses specific branches within it.[24]

1.2.1. The legislative power

A parliament, as the creator of the norms, is the first actor[25] that gets to consider the balance between different rights and public interest. The specific function of the legislative branch is to produce generally applicable norms, which are essential to the rule of law principle, the interconnected requirements of clarity and predictability of the law, and the values of fairness and equal treatment.[26]

Diverse representatives debate topics from multiple perspectives, remain politically accountable yet relatively insulated, and are equipped to compromise.[27] Consequently, they have the democratic legitimacy to make decisions on behalf of the community.[28]

Legislative legitimacy, however, is constrained. Parliament must refrain from enacting laws that are disproportionate.[29] Through the legislative process, it defines

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16 Lena Enqvist and Markus Naarttijärvi, *supra* note 8, 170.
17 Joseph Raz, "Sorensen: Vagueness Has No Function in Law," *Legal Theory* 7 (2001): 419.
18 Jiří Baroš et al., "Unpacking the Separation of Powers," in *New Challenges to the Separation of Powers*, ed. Antonia Baraggia et al. (Edward Elgar Publishing, 2020), 126 // https://doi.org/10.4337/9781788975278.00015
19 Aileen Kavanagh, "The Constitutional Separation of Powers," in *Philosophical Foundations of Constitutional Law*, ed. David Dyzenhaus and Malcolm Thorburn (Oxford University Press, 2016), 230 // https://academic.oup.com/book/11221/chapter/159740146
20 Timothy Endicott, *supra* note 4, 39–40. In practice, administration has a profound influence on individual life, as bureaucrats can have a more significant impact on the interpretation and application than the other branches – see Eoin Carolan, *supra* note 7, 255.
21 Aileen Kavanagh, *supra* note 19, 230.
22 Julian Rivers, "Proportionality and Variable Intensity of Review," *The Cambridge Law Journal* 65(1) (2006): 181 // https://doi.org/10.1017/S0008197306007082
23 Aharon Barak, Proportionality: Constitutional Rights and Their Limitations (Cambridge University Press, 2012), 380; see also the case law of the European Court of Human Rights in Lena Enqvist and Markus Naarttijärvi, *supra* note 8, 151.
24 Hinako Takata, "Separation of Powers in a Globalized Democratic Society: Theorizing the Human Rights Treaty Organs' Interactions with Various State Organs," *Global Constitutionalism* (3 August 2023): 7 // https://doi.org/10.1017/S2045381723000114; Robert Spano, "The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law," *Human Rights Law Review* 18(3) (2018): 488–489 // https://doi.org/10.1093/hrlr/ngy015
25 Aileen Kavanagh, *The Collaborative Constitution*, Cambridge Studies in *Constitutional Law* (Cambridge University Press, 2023), 122.
26 Philip Sales, *supra* note 14, 630.
27 Aileen Kavanagh, *supra* note 25, 152–153.
28 Aileen Kavanagh, *supra* note 19, 231; Hinako Takata, *supra* note 24, 12–13.
29 Aharon Barak, *supra* note 23, 380.

purpose,[30] selects means,[31] and may even perform proportionality *stricto sensu*.[32] In short, it can bake proportionality into the rules during adoption. The legislative branch can foresee and weigh different interests, and then articulate its stance on them.[33]

1.2.2. The executive power

Next comes the executive. Its role in the (pre-)legislative process is undoubtedly significant[34] – for example, in the Czech Republic, the government may propose bills[35] – but for proportionality, the key is the application of enacted law. Modern bureaucracies wield substantial interpretive power,[36] backed by legitimacy stemming from their expertise, resources, and experience.[37]

When applying general rules to specific facts, administrative authorities exercise delegated or discretionary powers, and those choices must comply with the principle of proportionality.[38]

Accountability precludes hiding behind the 'we only applied the rule' argument. The executive's role is active, not merely mechanical. Under the principle of accountability, the administrative bodies are responsible for their decision and cannot hide behind generally applicable rules.[39] In this sense, the executive's role is not passive or merely responsive[40], but notably active.

1.2.3. The judiciary

Finally, the judiciary – the branch most closely associated with proportionality – brings independence from the other branches[41] and legal expertise[42]. Operating mainly at the subconstitutional level, courts – like the executive – are bound by the principle of proportionality.[43]

In the constitutional review of legislation, the question is whether the courts are permitted only to evaluate proportionality assessments made by parliament[44] or if they may replace them with their own.[45] Without going into details, it is sufficient to note that the proportionality is in play.

1.3. Different actors, same proportionality

The paper has presented two claims thus far. First, the proportionality can be assessed via an individual test (fact-sensitive) or a general test (model-based); and second, the principle binds all branches. This raises the question of how the roles of different actors interconnect, since the proportionality is tied to a rule, not the actor. Therefore, no

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30 Ibid., 401.
31 Ibid., 405.
32 Ibid., 413.
33 Lena Enqvist and Markus Naarttijärvi, *supra* note 8, 161.
34 To that end, see Aileen Kavanagh, *supra* note 25, 123.
35 The Czech Constitution, art. 41(2).
36 Eoin Carolan, *supra* note 7, 255.
37 Hinako Takata, *supra* note 24, 13–14.
38 Aharon Barak, *supra* note 23, 380.
39 Arjan Widlak et al., *supra* note 8, 72.
40 Aileen Kavanagh, *supra* note 25, 123.
41 Dimitrios Kyritsis, "Constitutional Review in Representative Democracy," *Oxford Journal of Legal Studies* 32(2) (2012): 320 // https://doi.org/10.1093/ojls/gqs004
42 Hinako Takata, *supra* note 24, 13.
43 Aharon Barak, *supra* note 23, 380.
44 Ibid., 403, 405, 414.
45 Martin Borowski, "Limited Review in Balancing Constitutional Rights," in *Proportionality, Balancing, and Rights*, ed. Jan R. Sieckmann, Law and Philosophy Library (Springer International Publishing, 2021), 136, 144–45 // https://doi.org/10.1007/978-3-030-77321-2_6

branch has a private 'backyard'; Parliament considers the proportionality of a rule when legislating, and the executive and judiciary when applying the same rule.

The answer lies in the principle of separation of powers. It allocates authority,[46] divides labour, and supplies checks and balances. Branches are therefore interdependent;[47] each must exercise its function without overreach and with due regard for the others.[48] Mutual respect means leaving leeway for fellow institutions, together with mutual support,[49] enabling more democratic governance.[50]

Because all play in the same backyard, earlier choices by one actor shape the later choices of others. A careful legislative proportionality assessment narrows disputes and reduces the need for judicial 'completion' of rules; poor drafting can push law-making to courts.[51] Sometimes Parliament deliberately leaves proportionality to later actors by design,[52] as part of their directed powers,[53] reflecting an inevitable trade-off between individual and general proportionality.[54]

The remainder of the paper explores the Czech practice of how this trade-off works. It examines real cases, which show varying assessments of proportionality by the legislative, executive, and judiciary branches and their consequences.

2. AN OVERZEALOUS LEGISLATURE

The previous part provided a basic outline of the proportionality tests and the actors in the process from the law's enactment to its application. In this and the following sections, I examine how institutional design – specifically, who decides and when – shapes proportionality analysis and its practical implications. The following sections will explore situations where Parliament under-specifies statutory rules and the Constitutional Court's resistance to a 'bake-in' of a preferred outcome. However, I begin with a legislature which encroaches on other powers with overly specific legal norms.

This occurs when the legislature enacts statutes that pre-emptively decide single-issue cases through a tailored, individualised proportionality assessment. This crowds out the administrative and judicial branches, and thereby threatens the separation of powers, as the *Weirs on the Elbe*[55] make plain.

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46 This limiting aspect (together with the checks and balances) should not be underestimated, especially while looking at rising populism in Central Europe – see David Kosař et al., "The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism," *European Constitutional Law Review* 15(3) (2019): 129, 141 // https://doi.org/10.1017/S1574019619000336

47 Aileen Kavanagh, *supra* note 19, 237.

48 Aharon Barak, *supra* note 23, 385.

49 Aileen Kavanagh, *supra* note 19, 235–236.

50 David Kosař et al., *supra* note 46, 127.

51 Philip Sales, *supra* note 14, 634–635.

52 That can be done using vague words such as "unreasonable search", where the legislative passes the interpretation task to other officials – see Roy Sorensen, *supra* note 5, 397.

53 Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press; Oxford University Press, 1994), 243.

54 Lena Enqvist and Markus Naarttijärvi, *supra* note 8, 170.

55 The plenary decision of Czech Constitutional Court from 28 June 2005, No. Pl ÚS 24/04, Jezy na Labi [Weirs on the Elbe]. Unfortunately, the decision does not have numbered paragraphs, so it is impossible to refer to particular parts. Later on, the Czech Constitutional Court dealt with similar situation in regard to construction of second runway of Prague's airport with similar outcome – see the plenary decision of the Czech Constitutional Court from 17 March 2009, No. Pl ÚS 24/08, *Přistávací dráha na Ruzyni [Ruzyně Runway]*. All Court's decisions are available in Czech at www.nalus.usoud.cz.

2.1. How not to build weirs

The Elbe is the largest river in the Czech Republic and a vital part of the country's national waterways for freight transport. To accommodate freighters, plans to raise water levels with new weirs emerged in the early 2000s.

As it happens, the plan has run into delays caused 'sometimes by failing authorities, sometimes by environmental activists, sometimes by the Ministry of the Environment'.[56] Parliament's response was a special statute declaring that the *'development and modernisation of the Elbe waterway* […] *is in the public interest,'*[57] pre-weighing competing interests and short-circuiting administrative and judicial review.

A few members of the Czech Parliament's upper chamber objected that the Parliament had acted *ultra vires* by declaring the public interest to prevail by statute. The Constitutional Court agreed and annulled it.

In *Weirs on the Elbe*, the Constitutional Court relied on two pillars. First, the act operated as an individual decision, rather than a generally applicable rule, which offended the rule-of-law demand for the generality of statutes. Second, by deciding a concrete case, Parliament intruded on executive and judicial roles. The legislature is not *'equipped with the means to assess individual cases with all their contexts and implications.'* Therefore, a prevailing public interest cannot be fixed in advance in an individual situation.

2.2. Legislative bodies and individual proportionality tests

The *Weirs on the Elbe* example demonstrates the consequences of a legislature overstepping its bounds and invading the other branches. One aspect of the separation of powers is that the legislative branch should not regulate social conduct by applying legal standards to a particular situation.[58] Individual decisions are not part of parliament's role in the government. Project-specific statutes leave no space for administrators or courts to weigh local facts and competing interests.

Although an elected body usurps the power, its democratic legitimacy does not override the institutional legitimacy of other branches (based on their expertise, proximity to the particular circumstances and decision-making style). The democratic element does not trump institutional competence. That is obvious just by looking at the reasons for using this course of action, which is typically aimed at circumventing other branches,[59] and was also admitted in the *Weirs on the Elbe*.[60]

Crucially, the message from *Weirs on the Elbe* is limited only to the individual proportionality tests**,** not tailor-made law, which provides generally applicable rules for one-off situations. During the COVID-19 pandemic, for instance, the Czech Republic

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56 This is a quotation from a member of a lower chamber of the Czech Parliament, Jaromír Schling, who argued in favour of passing the described norm. Transcript from the parliamentary proceeding is available in Czech from https://www.psp.cz/eknih/2002ps/stenprot/022schuz/s022218.htm, accessed 13 January 2024.

57 Act no. 114/1995 Coll., *O vnitrozemské plavbě [The Inland Waterway Traffic Act]*, in the version after 1 May 2004, § 3a. The provision also covered a part of the Czech Republic's second-largest river, the Vltava, which was omitted here for redundancy.

58 Timothy Endicott, *supra* note 4, 44.

59 Vratislav Koštál, "Dealing with Public Interest in the Framework Regulations and in the Tailor-Made Laws," *The Lawyer Quarterly* 10(1) (2020): 52–53.

60 See the reasoning presented above (n 56) by a member of a lower chamber of the Czech Parliament, Jaromír Schling. He also mentioned that various ecological assessments already cost around four mil. EUR and the building of the weirs have not started.

adopted an act limited to that specific crisis;[61] critics questioned its generality,[62] but the statute set a framework – authorising the Ministry to issue measures – rather than imposing restrictions directly. Because institutional roles remained intact, such tailor-made yet general laws do not, by themselves, endanger the separation of powers.

To conclude this part, the bottom line is that a legislature may not predetermine the outcome of a specific proportionality balance. Doing so violates the separation of powers.

3. A MISSING LEGISLATOR

So far, the paper has examined overly specific statutes (such as *Weirs on the Elbe*) that were unconstitutional because the legislator went too far in its proportionality assessment. This part turns to the opposite situation – when lawmakers do too little. Here, Parliament enacts broad statutes and leaves the balancing to the executive or judiciary in each particular case. Two cases illustrate this dynamic.

3.1. Forcing parliament to engage in proportionality analysis

First, the Constitutional Court annulled the telecommunications data retention regime for being vague, as it granted sweeping access despite a case-by-case review. This illustrates how courts may respond when Parliament omits a general proportionality test.

3.1.1. Mass collection of telecommunication data

Before the Court of Justice famously annulled the Data Retention Directive,[63] the Constitutional Court reviewed its national implementation.[64]

In *Data Retention II*,[65] the Constitutional Court reviewed a clause allowing police access to the retained data when *'necessary to clarify facts relevant to criminal proceedings'*.[66] This wording effectively permitted access whenever the data might help an investigation. Although requests were subject to individual judicial review, the Constitutional Court found the statute unconstitutional. The judicial oversight makes it

> 'possible to protect against disproportionate interference with the right […] in the light of the facts of a particular case'; nonetheless, the Constitutional Court deemed that the ordinary courts 'cannot remedy the deficiencies consisting in the vagueness and excessive generality of the challenged statute by replacing […] the legislature's consideration of the intensity of a particular public interest in restricting a fundamental right or freedom in the case of individual offences and how the restriction is applied.'[67]

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[61] Act no. 94/2021 Coll., *O mimořádných opatření při epidemii onemocnění COVID-19 [Act on Emergency Measures for the COVID-19 Epidemic]*. The Czech Constitutional Court reviewed this Act in the plenary decision of the Czech Constitutional Court from 7 December 2021, No. Pl ÚS 20/21, *Ústavnost pandemického zákona [Constitutionality of the Pandemic Act]*. The court upheld the Act with a minor exception of damages. The reasoning does not address the question of the Act's general applicability.

[62] Jakub Handrlica et al., "Black Swans" in Administrative Law," *The Lawyer Quarterly* 11(3) (2021): 489.

[63] *Digital Rights Ireland*, Court of Justice, C-293/12.

[64] For a more detailed description of the Constitutional Court's case law on this topic, see Radim Polčák, "Data Retention in the Czech Republic," in *European Constitutional Courts towards Data Retention Laws*, ed. Marek Zubik et al., Vol. 45, Law, Governance and Technology Series (Springer International Publishing, 2021) // https://doi.org/10.1007/978-3-030-57189-4_7

[65] The plenary decision of the Czech Constitutional Court from 20 December 2011, No. Pl ÚS 24/11, *Data retention II*.

[66] Act No. 141/1961 Coll., *trestní řád [the Criminal Procedure Act]*, in the version prior to 30 September 2012, § 88a.

[67] Decision *Data Retention II*, para 24.

Essentially, the Constitutional Court criticised Parliament for drafting overly broad access conditions that ignored the necessity requirement[68] and compromised legal certainty. As a result of the strike-down, the lawmakers had to pass new legislation. The outcome was a clearer rule restricting data access to investigations of serious or specifically listed offences.[69] Subsequently, in *Data Retention III*,[70] the Constitutional Court upheld this revised statute as constitutional.[71]

3.1.2. Vague can be as unconstitutional as specific

At first glance, *Data Retention II* seems to contradict *Weirs on the Elbe*. The Constitutional Court in the latter case told Parliament not to perform individual proportionality tests, whereas in the former, it demanded more detailed proportionality considerations. The contradiction vanishes once one realises what kind of test the court is discussing. *Weirs on the Elbe* barred the legislature from micromanaging single cases; *Data Retention II* required it to perform a general proportionality test.

The Constitutional Court had two alternative paths, preferring an interpretation that conforms with the constitutional order to annulment, thereby drawing from the principle of minimising judicial interference with other powers.[72]

First, the court itself could have performed the general proportionality test and derived detailed constraints from constitutional and international norms. However, crafting offence lists or retention periods based on such abstract norms in its decisions lacks both democratic and institutional legitimacy,[73] risks judges imprinting personal value choices,[74] and would entrench policy in higher-order law that Parliament could scarcely alter.

The second option was to approve the lack of a general proportionality test in the statute and leave the balancing to the courts in individual cases. However, as the Constitutional Court notes in *Data Retention II*, it erodes legal foreseeability.[75] It simply shifts Parliament's policy choices to courts on a mass scale. Individual proportionality review is vital; nevertheless, the courts cannot be the sole guarantors of proportionality.[76]

Both options shift the proportionality questions onto the unelected branches, which are then responsible for any balancing but not constrained by any particular statutory limits. There, we could question whether the alternative paths are actually in line with minimising the judicial interference with the legislature.

I do not think so. By adopting the norm reviewed in *Data Retention II*, the Parliament ran away from its responsibilities. That effectively shifted the responsibility for compliance with proportionality onto the courts.[77] While the Parliament did not fulfil

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68 Ibid., para 25.
69 Criminal Procedure Act, in the version after 1 October 2012, § 88a.
70 The plenary decision of the Czech Constitutional Court from 14 May 2019, No. Pl ÚS 45/17, *Data Retention III*.
71 For the sake of completeness, in 2025 the civil courts declared Czech *data retention* as a whole to be contrary to EU law – see decision of Municipal Court in Prague from 22 April 2025, No. 54 Co 89/2025-276, which was subsequently upheld by the decision of the Czech Supreme Court from 30 December 2025, No. 30 Cdo 2556/2025. The latter decision is available in Czech at www.rozhodnuti.nsoud.cz.
72 See, e.g., plenary decision of the Czech Constitutional Court from 23 May 2017, No. Pl ÚS 10/16, para 26, and the case law cited there.
73 Aileen Kavanagh, *Situating the Strike-Down (Draft Paper)*, (n. d.): 14–15 (accessed 5 March 2024) // https://www.dropbox.com/s/x2ccpywzzqytbyp/AK%20Situating%20the%20Strike-Down.pdf?e=1&dl=0
74 Philip Sales, *supra* note 14, 635.
75 Decision *Data Retention II*, para 24.
76 Lena Enqvist and Markus Naarttijärvi, *supra* note 8, 169.
77 Philip Sales, *supra* note 14, 635.

its constitutional obligations, the Constitutional Court, on the other hand, stayed well within its constitutional limits. Through annulment (or 'referral back' to the legislature, if you want), the court refused to create or replace parliamentary considerations, as it should have.[78]

The path chosen by the Constitutional Court (striking the statute down and letting the Parliament pass new legislation) is the least intervening action. It shows that the strike-down does not always have to be the result of a small number of justices thwarting the effort of a democratic majority. Quite the contrary, it may return the power to decide on exact human rights limitations back to the people's representatives.

An outcome of *Data Retention II* is that a specific legal framework has been established, which does not appear to cause noticeable practical problems. If the Constitutional Court had taken any of the alternative routes (in particular, the case-by-case approach), it could have been a different story. The following section presents the type of story.

3.2. Substituting parliament's proportionality

The second example concerns the collection of DNA from criminal suspects and offenders. Here, the Constitutional Court upheld a broad statutory framework while demanding individualised proportionality assessments, yielding a practical tangle.

3.2.1. Unforeseeable DNA

In *Weirs on the Elbe*, the Constitutional Court trusted administrative bodies to be able to weigh competing interests in individual cases. *Data Retention II* was more cautious and stressed legal foreseeability. The DNA database cases demonstrate why the latter approach appears to be the more suitable one.

The Czech police operate a national DNA database. By a broad statute, they may take biological samples 'for future identification' from anyone 'accused of committing an intentional offence or a person who is suspected of committing such an offence' or imprisoned for such offence.[79] The authorisation does not differentiate between types of offences (e.g. between violent and white-collar crimes) or sentence length, and the police retain data as long as they deem necessary.[80]

The Constitutional Court partially reviewed this framework in the context of *DNA sampling*[81]. Vagueness – under *Data Retention II*'s standards – was the principal objection. The Court nevertheless rejected the challenge in a puzzling way.

On one hand, it accepts the broad power, noting that the legislature sought identification data for all intentional crimes and that this 'rather broad' concept is unobjectionable. It explicitly notes that *'the legislator clearly considered it important for the police to be able to obtain identification data for all intentional crimes'*.[82] Subsequently,

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[78] Pavel Ondřejek, *supra* note 10, 361.

[79] Act No. 273/2008 Coll., o *Policii České republiky [the Act on the Police of the Czech Republic]*, § 65. For more detailed description of the DNA database and applicable legal framework see Renáta Boráková, "Vymezení okruhu trestných činů, jejichž pachatelům by měla být odebírána DNA pro účely budoucí identifikace a stanovení doby uchování profilu DNA v Národní databázi DNA" (Definition of the range of criminal offenses for which perpetrators should have their DNA collected for future identification purposes and determination of the period of storage of DNA profiles in the National DNA Database), *Časopis pro právní vědu a praxi* 30, No. 3 (2022): 523–46 // https://doi.org/10.5817/CPVP2022-3-2

[80] Act on the Police of the Czech Republic, § 65(5).

[81] The plenary decision of the Czech Constitutional Court from 22 March 2022, No. Pl ÚS 7/18, *Odběr a uchovávání vzorků DNA [DNA sampling]*.

[82] Ibid., para 97.

it approves the broadness, stating that '*the Constitutional Court has no objection to such a concept (albeit a rather broad one).*'[83]

On the other hand, it pivots to individual proportionality, insisting that sampling be 'duly and sufficiently justified' and that the police must 'proceed on a case-by-case basis, weighing all the circumstances of the crime under investigation.'[84] Finally, in a part headed obiter dictum, it criticises the very vagueness of the norm by noting that 'the main problem with the current state of legislation is the lack of clarity of (the extent of) restrictions on fundamental rights'.[85] The message is mixed: the statute can be broad, yet clarity is lacking, and every case still requires granular justification.

3.2.2. Practical consequences of applying vague norms

The confusion arises from the Constitutional Court's blending of general and individual proportionality. First, the Court approves Parliament's general proportionality embodied in the norm. Then it obliges case-by-case balancing. If the general test suffices, why the individual on such a scale? As a result, any legislative proportionality is sidelined and performed *ad hoc* – precisely what *Data Retention II* warned against. The pendulum of constitutional responsibility swings away from the legislator, pushing executive and judicial actors toward quasi-legislative line-drawing.

The administrative courts responded to such vague norms by 'read-in' of limiting conditions into the statute. The Supreme Administrative Court, even before the *DNA sampling* decision, held that the police may not '*proceed* [to collect the DNA sample] *without further ado in every case of suspicion or accusation of an intentional offence, since the practice of administrative authorities of collecting identification data across the board cannot be generally accepted'.*[86] Officers must consider the offence's nature, the time elapsed, the suspect's age, and the strength of suspicion[87] – factors nowhere found in the statute, but supplied judicially.

This approach was met with some resistance from the police. The Supreme Administrative Court held, regarding repeated failure of the police to evaluate individual circumstances, that '*it appears that in the present case this may not be an isolated failure on the part of the* [police]*, but rather a systemic deficiency which indicates a failure to implement the conclusions of the case-law in administrative practice.*'[88] The Court then firmly stated that the police '*was stuck in the older stereotypes of its thinking, which it itself had so far been unable or unwilling to reconsider.*'[89]

This case exposes the costs of blurring the separation of powers. By accepting an extremely wide norm and mandating a case-by-case approach, the Constitutional Court shifted responsibility downward. The result was not tailored, proportionate decisions, but institutional reluctance to make them, either because officers view the statute as generally proportionate or because individualised tests are too complex.

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83 Ibid.
84 Ibid., para 78.
85 Ibid., para 104.
86 Decision of the Czech Supreme Administrative Court from 13 December 2017, No. 1 As 13/2017-93, *Š. M. v Regional Police Headquarters Jižní Čechy*, para 33. This conclusion, together with the requirement for an individual proportionality test, was repeated in many subsequent cases (see decision of the Czech Supreme Administrative Court from 19 April 2018, No. 3 As 335/2017-33, *R. K. v Vysočina Regional Police Headquarters*, paras 25–26; or from 17 May 2022, No. 9 As 124/2018-46, *N. R. v Jihočechy Regional Police Headquarters*, paras. 25–27). All Court's decision available in Czech at www.vyhledavac.nssoud.cz.
87 Decision of the Czech Supreme Administrative Court from 18 May 2022, No. 5 As 254/2019-49, *I. P. v Praha Regional Police Headquarters*, para 18.
88 Decision of the Czech Supreme Administrative Court from 10 August 2023, No. 2 As 115/2023-38, *P. H. v Praha Regional Police Headquarters*, para 20. See also paras 17–19.
89 Ibid., para 20.

The lesson is quite clear. Sometimes, the courts and administrative bodies should not redeem Parliament's omissions by substituting individualised proportionality for legislative precision and clarity. They lack the institutional tools to consistently shoulder that role. The courts simply cannot be the only actors safeguarding proportionality.[90] In the DNA database context, the only winner is Parliament, which does not need to amend the law while others struggle to retrofit proportionality on a case-by-case basis.

4. A STRIVING PARLIAMENT – WRONG AGAIN?

The last two chapters examined laws that either micromanaged proportionality or hid behind vagueness – both failures arguably attributable to Parliament. This chapter examines freedom-of-information disputes[91] to illustrate the push-and-pull between Parliament and courts over proportionality, legal certainty, and day-to-day enforceability.

4.1. Actors staying within lines

The first discussed example concerns providing non-final court decisions[92] on request under the Freedom of Information Act. Here, the Parliament provided proportionality considerations but erred in weighing.

4.1.1. Providing non-final judgements

There are several exceptions to providing requested information, including barring of disclosure of *'information on the decision-making of the courts, except for legally binding judgments'.*[93] The words *'legally binding'* were challenged, as somebody wanted to obtain a not-yet-legally-binding decision.

The administrative courts held the exception proportionate.[94] The Constitutional Court disagreed and annulled the words *'legally binding'*, insisting that rights are *prima facie* equal and require case-by-case balancing.[95] A later decision clarified that refusing access to a non-final judgment to protect judicial independence *'may be the exception rather than the rule.'*[96]

4.1.2. Parliament erring in proportionality

From a theoretical perspective, Parliament had given considerable weight to judicial impartiality and opted for nondisclosure. The Constitutional Court ultimately rejected this calibration. The first decisions, unfortunately, called for case-by-case analysis under the guise of *prima facie* equal rights.

However, the follow-up shifted the proportionality test in favour of access. The net result is that the Parliament overvalued adjudicative integrity relative to transparency; the Constitutional Court corrected course, thereby performing the corrective role

[90] Lena Enqvist and Markus Naarttijärvi, *supra* note 8, 169.
[91] For some general overview of the Czech freedom of information framework see Marek Antoš, "The Constitutional Right To Information In The Czech Republic: Theory And Practice", *International Comparative Jurisprudence* 5(1) (2019): 47–55 // http://dx.doi.org/10.13165/j.icj.2019.05.006
[92] By 'non-final decision', I mean a decision that is under appeal and, as such, is not yet binding on the parties.
[93] Act No. 106/1999 Coll., *O svobodném přístupu k informacím [Freedom of Information Act]*, in the version prior to 29 April 2010, § 11(4)(b).
[94] Decision of the Czech Supreme Administrative Court from 29 April 2009, No. 8 As 50/2008-75, No. 1880/2009 Coll.
[95] Plenary decision of the Czech Constitutional Court from 30 March 2010, No. Pl ÚS 2/10, *Rozsudky a svobodný přístup k informacím [Judgements and Freedom of Information]*, paras 39 and 40.
[96] Decision of the Czech Constitutional Court from 5 May 2010, I. ÚS 1885/09-2.

assigned to it within the constitutional system.[97] Whether one agrees on substance is secondary; procedurally, each actor stayed in its lane.

4.2. Preventing parliament from conducting proportionality assessments

The second case in this chapter concerns the transparency of public employees' salaries, which produced a far knottier saga.

4.2.1. How much money do you make? And can I see it?

The Supreme Administrative Court interpreted the Freedom of Information Act as embodying an *ex ante* proportionality test imposed by Parliament regarding the disclosure of public employees' salaries. Therefore, proportionality should not be weighed in individual cases, but disclosure should generally be favoured,[98] subject to some narrow exceptions.[99]

The Constitutional Court disagreed, yet again imposing the case-by-case approach under the reasoning of *prima facie* equal rights,[100] warning against depriving individuals of judicial protection.

The aftermath of this decision was several administrative court decisions regarding information on variously ranked officials. Literature criticises the judiciary's approach, because the courts neither adopted a rule of universal disclosure nor supplied an unambiguous alternative.[101] Generally, a workable pattern emerged in the *Office of the President*,[102] according to which the higher the rank and competencies, the stronger the presumption for disclosure.

Parliament responded with a legislative amendment, intended to clarify fragmented case law, resulting in fewer incorrectly assessed requests[103] by administrative bodies.[104] Newly adopted rules accepted the proportionality test expressed by courts and created two groups of officials. First, high-ranking officials (constitutional officeholders and heads of central administrative bodies) whose salaries are disclosed without an individual proportionality test; and second, other officials, where the requester must demonstrate a public interest that outweighs privacy in the specific case.[105] Whether

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97 *'Legislators can, and do, make mistakes*. […Therefore the judges have] *the power to second-guess the correctness of the legislature's judgement'* – see Dimitrios Kyritsis, *supra* note 41, 317.

98 Decision of the enlarged senate of the Czech Supreme Administrative Court from 22 October 2014, No. 8 As 55/2012-62, *J. T. v Zlín Regional Authority*, para 52.

99 The exception includes persons involved indirectly and in an insignificant way with the public authority, which also does not raise specific doubts as to whether public funds are spent well – see ibid., para 96.

100 The decision of the Czech Constitutional Court from 17 October 2017, No IV. ÚS 1378/16, in particular paras 130, 134–136. The same senate subsequently issued a similar ruling in the decision of the Czech Constitutional Court from 3 April 2018, No. IV. ÚS 1200/16. Moreover, its conclusion cited in the text was approved by a plenary decision of the Czech Constitutional Court from 17 January 2023, No. Pl ÚS 25/21, *Poskytování informací z Národního zdravotnického informačního systému [Provision of information from the National Health Information System]*, para 43. There, the Court cited the decision and noted: *'that no law can exclude in the abstract the protection of the fundamental rights and freedoms […,] in each individual case of a conflict between constitutionally guaranteed rights, the courts and other public authorities must, employing a proportionality test, compare the conflicting rights in question and ensure that a fair balance is struck between them'*.

101 Radek Píša, "Poskytování informací o platech – případová studie soudů na volném poli" (Providing information on salaries – a case study of courts in the open field), *Správní právo* 51(8) (2018): 490–91.

102 Decision of the Czech Supreme Administrative Court from 27 May 2020, No. 2 As 88/2019-29, No. 4044/2020 Coll., *Office of the President*, in particular para 28.

103 The literature claims that the regional authorities (acting as an administrative appeal body) can correctly make the individual proportionality assessments. The unjustified refusals to provide the information are usually caused by political intervention – see Radek Píša, *supra* note 101, 499–500. However, the reasons for the unlawful decisions are not decisive; what matters is that unlawful decisions exist.

104 The explanatory report to the amendment is available from https://www.psp.cz/sqw/text/orig2.sqw?idd=212282, accessed 7 March 2024. In particular, see 49–53.

105 § 8c of the Freedom of Information Act, in the version after 1 January 2023.

that is – in the light of the abovementioned ruling of the Constitutional Court – constitutional is yet to be determined.

This episode exposes the costs of a strict case-by-case model. Proportionality is the constitutional lawyer's daily bread; for front-line administrators, it can be a recipe for hesitation, uneven outcomes, and low legal certainty.

5. PROPORTIONAL LEGISLATION

Earlier chapters surveyed proportionality tests and identified the institutional actors responsible for balancing the interests. Moreover, it mapped outcomes of different situations: (i) project-specific statutes in which an interventionist legislature tied a proportionality assessment to a single measure; (ii) statutory silence or incompleteness that pushed balancing to administrators and courts; and (iii) statutes embedding outcome-preferences, which the Constitutional Court rejected in favour of an individualised approach.

Building on these case studies, this chapter advances the claim that non-judicial actors – particularly legislatures – should have a greater say in determining proportionality. Parliament may 'bake in' preferred outcomes by legislating general proportionality standards. In some instances, it may even have an obligation to do so. Other actors should not routinely correct legislative omissions by defaulting to case-by-case balancing, or mandate it regardless of the general proportionality test in the statute.

In many of the areas discussed above,[106] the Constitutional Court has demanded case-by-case weighing of competing interests. The Court's premise is that rights are *prima facie* equal and cannot be ranked in the abstract, so each decision-maker must conduct an individual proportionality test.

The key point concerns the *prima facie* approach. As shown in part 1.1, the impossibility of such ranking truly holds only at the highest level of abstraction, where the rights are incomparable. There is also a general proportionality test that can guide routine situations by weighing interests at a less abstract level, where one interest may prevail over the other. The Constitutional Court's failure (apart from *Data Retention II*) to distinguish between the most abstract balancing and general proportionality tests is the main reason why its approach is erroneous.

Requiring individual tests across the board shifts power, workload, and responsibility to administrators and judges. While the courts decide individual cases, general standards will inevitably emerge over time (if not, the principle of equality before the law is threatened) after hundreds of decisions. It is unclear what makes the administrative bodies and courts more suitable and institutionally better[107] than Parliament for creating these general rules.

This approach also deprives society of the advantages offered by the legislative process. Those include democratic accountability and representation. The legislative branch is the one branch best suited to give a voice to citizens' input in an ever-changing world.[108] When the courts mandate a case-by-case approach, the only elected body cannot dictate how transparent (as with the freedom of information) the state should be, as it is prevented from laying down general rules on what kind of information should

[106] See DNA sampling (part 3.2); access to not yet binding decisions (part 4.1); or disclosing wages (part 4.2).
[107] Timothy Endicott even argues that when setting the line, *'the court will not be able to reach a better decision than it would reach by flipping a coin.'* – see Timothy Endicott, "The Impossibility of the Rule of Law," Oxford Journal of Legal Studies 19(1) (1999): 4–5.
[108] Dimitrios Kyritsis, *supra* note 41, 312–313.

and should not be provided. A certain amount of deference towards a democratically legitimised body is warranted[109] and should be given to the legislative decision on how to solve a particular issue.[110]

Setting proportionality *ex ante* through legislation, rather than *ex post* through application, improves foreseeability, reduces the scope for abuse,[111] and increases administrative efficiency. With thousands of decision-makers – from small municipalities to central authorities and courts – clear statutory standards ensure that like cases are treated alike and reduce litigation.

It is important to note that greater legislative precision does not eliminate judicial control.[112] It narrows executive discretion and cabins interpretive drift – precisely to curb arbitrariness – while preserving review for disproportionate interferences. Courts can and do assess general balancing by the legislator.[113] If Parliament errs, courts may strike down the statute.

Generally, a proportional rule may lead to disproportionate decisions in light of individual circumstances.[114] The legislature may institute an 'exit option' under which the rule is disapplied when its application would be disproportionate. Alternatively, the post-reform salary and freedom-of-information rules[115] present a mixed model[116] – *per se* disclosure for certain offices, and individualised weighing elsewhere. In some instances, this approach may yield the best results, as the majority of applications of the rule are sorted *ex ante*. However, in situations where it is not possible to establish a general rule, decisions must be made in the light of the specific circumstances. Nevertheless, the need for possible exceptions or a mixed model does not diminish the value of a general rule, provided it yields proportional outcomes in a large majority of cases.

Based on factors such as the frequency of application of the norm, the structural (im)possibility of meaningful individual balancing by front-line actors or general evaluation by legislators, or the intensity of interference with rights, in some cases, it may even be unconstitutional for Parliament to offload proportionality assessments to the courts. The need for foreseeable rights' limitation (such as *Data retention II*) is so strong that the courts should insist on clear statutes.

How? Some reject the judicial annulment as illegitimate,[117] which is too simplistic. The result of a strike-down is a return to square one, allowing the lawmakers to try to reconcile their goals with the constitutional requirements.[118] This is even more true when discussing some considerations missing from the statute. So long as courts stay within their bounds – reviewing for constitutional adequacy without discussing the least-restrictive alternatives[119] – and conclude that Parliament must first balance these interests, the legislative domain remains open. The eventual solution then carries

[109] Martin Borowski, *supra* note 45, 137.
[110] Aileen Kavanagh, "Defending Deference in Public Law and Constitutional Theory," *Law Quarterly Review* 126 (2010): 224.
[111] Marc Ribeiro, *supra* note 6, 38.
[112] Vratislav Koštál, *supra* note 59, 52. Similarly – using the absence of judicial review – argued the Constitutional Court in *Weirs on the Elbe* case as well as in the *Zlín City Council*.
[113] See *Data Retention III* (part 3.1.2); or access to not yet binding decisions (part 4.1).
[114] Lena Enqvist and Markus Naarttijärvi, *supra* note 8, 167–68.
[115] See part 4.2.1.
[116] Lena Enqvist and Markus Naarttijärvi, *supra* note 8, 170.
[117] As, e.g., famously argued in Jeremy Waldron, "The Core of the Case against Judicial Review," *The Yale Law Journal* 115(6) (2006): 1349 // https://doi.org/10.2307/20455656
[118] Aileen Kavanagh, *supra* note 73, 14.
[119] Kent Roach, *supra* note 1, 419; on the threat of the review overshadowing the role of legislature also see Dimitrios Kyritsis, *supra* note 41, 318–320.

democratic legitimacy, avoiding counter-majoritarian difficulty. Simply put, Parliament should be the first body[120] to shape *'a certain vision of the just and well-ordered polity'*.[121]

An anticipated objection is legislative inaction after annulment, which may render even a partially valuable regime ineffective, resulting in the loss of any benefit even the vague statute could have provided.[122] However, raising governance costs is a deliberate feature of the separation of powers.[123] Therefore, the possible inability of elected representatives to pass more detailed regulations is a feature, not a bug, of the democratic form of government. Judicial invalidation highlights issues that were omitted – either by design or oversight – and prompts deliberation.[124] From the citizen's perspective, a clear and proportionate framework enacted ex ante is preferable to a lengthy, uneven process of judicial patchwork.[125]

Moreover, judicial resistance to the case-by-case approach can deter political buck-passing. For their own sake, politicians might avoid taking a stand on some legislation if any position would be unpopular.[126] If courts refuse to shoulder open-ended case-by-case governance for contentious measures, responsibility returns to Parliament, and judicial impartiality is preserved.

The obligation argument is strongest for negative obligations (as with data retention). Without a proper law, the state may not act, which prompts it to take further legislative action if it wishes to continue. Positive obligations (as with freedom of information) are more challenging, as annulment may create a legislative gap. Yet even there, the worst-case outcome is adoption of individual tests, or the judiciary may supply a general standard.

To conclude, the legislative branch can foresee and weigh different interests and show its stance on them.[127] While judicial efforts to save under-specified statutes may seem like a step forward at first, they ultimately raise concerns about legitimacy[128] and competence. When dealing with polycentric questions that have multiple possible answers, the courts are not only inappropriate places to make a choice[129] but also illegitimate,[130] resulting in *ultra vires* action.[131] Parliaments have a unique place within the legal system that warrants certain respect.[132] When the courts mandate the case-by-case approach without considering its suitability for the particular area of law, they pay zero deference to the legislator. 'Reading-in' standards to avoid annulment also harms foreseeability, makes the law much more complex and operates retroactively for the first cases.[133]

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120 Kent Roach, *supra* note 1, 420.
121 Dimitrios Kyritsis, *supra* note 41, 312, 319.
122 Mark Tushnet, "Alternative Forms of Judicial Review," *Michigan Law Review* 101(8) (2003): 2792.
123 David Kosař et al., *supra* note 46, 127; on the increased costs of legislation also see Mark Tushnet, *supra* note 122, 2795.
124 Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)," *Osgoode Hall Law Journal* 35(1) (1997): 96 // https://doi.org/10.60082/2817-5069.1612
125 Marc Ribeiro, *supra* note 6, 160.
126 Mark Tushnet, *supra* note 122, 2788.
127 Lena Enqvist and Markus Naarttijärvi, *supra* note 8, 161.
128 Aileen Kavanagh, *supra* note 73, 14–15.
129 Pavel Ondřejek, *supra* note 10, 361.
130 Julian Rivers, *supra* note 22, 193.
131 Martin Borowski, *supra* note 45, 144.
132 Dimitrios Kyritsis, *supra* note 41, 315.
133 Marc Ribeiro, *supra* note 6, 38.

CONCLUSION

As this paper has demonstrated, proportionality analysis varies both in its level of abstraction and according to the institutional actor performing it, with significant consequences for the protection of rights. It is necessary to properly distinguish between the most abstract balancing of rights (which is practically unattainable), general proportionality (balancing in model-based situations), and individual proportionality (a case-by-case sensitive approach). Not every type of balancing is equally appropriate for every branch of government. Using the 'wrong' test by the 'wrong' institution risks undermining the separation of powers and legal foreseeability.

The Czech case studies illustrate both problematic extremes and more promising interactions. In *Weirs on the Elbe*, Parliament effectively issued an individual decision by statute, displacing the roles of administrative authorities and courts. This indicates that it is not the legislature's role to decide specific cases. At the other end of the spectrum, the *DNA sampling* demonstrates how judicial acceptance of an extremely vague statutory framework, combined with a demand for intensive case-by-case proportionality, pushes quasi-legislative line-drawing downwards onto administrative bodies and lower courts. The result was at least institutional friction and a series of judicial proceedings, while Parliament – the actor best placed to conduct general proportionality – remained largely unburdened.

By contrast, *Data Retention II* and *III* illustrate a more productive form of interaction between Parliament and the Constitutional Court (or judiciary in general). The annulment of a vague and overbroad regime prompted the legislature to adopt more detailed and differentiated rules. This example suggests that courts should be more willing to strike down under-specified laws that fail to conduct a general proportionality test in domains where there are frequent and severe interferences with rights, rather than attempting to save such statutes through judicially constructed standards or heavy reliance on case-by-case review. Annulment should be understood not primarily as a confrontation, but as an invitation to the democratically legitimate body to articulate ('bake-in') clearer, more proportionate rules about how society should function. Notably, judicial protection of rights remains intact, as the new statutory framework is still subject to review.

The freedom of information cases show a different tension. Parliament attempted to 'bake-in' proportionality by establishing a presumptive preference for disclosure. At the same time, the Constitutional Court insisted on case-by-case balancing grounded in the *prima facie* equality of rights. In mass-application contexts of this kind, an insistence on individualised proportionality can generate legal uncertainty, unequal treatment, and significant administrative burdens. The legislature should be expected, and in some circumstances required, to adopt more precise and more differentiated statutory frameworks (including mixed model) that embody general proportionality assessments, rather than passing the costs of balancing on to courts and street-level bureaucrats. In turn, courts should ask whether it is preferable to encourage such legislative responsibility – including by striking down vague norms – instead of normalising a case-by-case approach.

This dynamic seems not confined to the Czech context. How institutional design affects that allocation is a question for further research. Nevertheless, a similar pattern is evident at the Court of Justice. In the DNA sampling cases discussed above,[134] the European court, like the Czech courts, accepted a broad statutory authorisation for the police to collect DNA profiles. At the same time, it emphasised that *'the national case-law sets out certain requirements which seek to ensure that that principle is adhered to'* and effectively assigned the task of proportionality assessment to the national courts, holding that *'it is for the national courts to determine, in each case, whether the police have carried out the collection in breach of the principles governing the processing of personal data'*.[135]

Nevertheless, the argument advanced in this paper should be understood with two qualifications. First, the article is limited to a qualitative doctrinal inquiry into selected Czech cases and does not claim statistical or sector-wide representativeness. Secondly, although the Czech material suggests a broader institutional pattern, that pattern should be tested against other constitutional settings and other fields of law. Further research could thus combine comparative analysis with empirical inquiry into whether clearer legislatively embedded proportionality standards actually reduce arbitrariness, litigation, and the need for judicially created case-by-case balancing. Moreover, further research could explore whether unclear norms generate convergent or divergent lines of case law, and with what consequences for legal certainty, equal treatment, and administrative practice.

To conclude, proportionality is not, and should not be, the exclusive preserve of courts or administrative bodies. It is a shared constitutional responsibility and should be approached as such. The argument advanced here is that legislatures should take primary responsibility for general, model-based proportionality and express it in reasonably precise rules. A more compelling and foreseeable model would be a statutory regime under which the statute provides a clear list of offences (for example, violent offences against life and physical integrity) for which sampling is mandatory, allows for constrained discretion in other categories (for example, certain unintentional offences), and explicitly excludes the rest (for example, minor property offences).

Such a framework would allow the Parliament to set policy on collection of DNA samples and enable the police to simply apply the statutory text directly in the majority of cases. At the same time, courts and administrative authorities would focus on individual proportionality within those frameworks and on reviewing whether the general rules themselves are proportionate. Recognising and structuring this division of labour, rather than defaulting to ever more intensive case-by-case judicial balancing, is essential for maintaining rights protection, legal certainty, and democratic legitimacy.

BIBLIOGRAPHY

Literature

1. Antoš, Marek. "The Constitutional Right To Information In The Czech Republic: Theory And Practice." *International Comparative Jurisprudence* 5(1) (2019): 47–55 // http://dx.doi.org/10.13165/j.icj.2019.05.006
2. Barak, Aharon. "Proportionality and Principled Balancing." *Law & Ethics of Human Rights* 4(1) (2010): 1–16 // https://doi.org/10.2202/1938-2545.1041

[134] Part 3.2 of this article.
[135] *Policejni presidium (a génétiques)*, Court of Justice, C-57/23, paras. 91 and 92.

3. Barak, Aharon. *Proportionality: Constitutional Rights and Their Limitations*. Cambridge University Press, 2012.
4. Baroš, Jiří, Pavel Dufek and David Kosař. "Unpacking the Separation of Powers." In *New Challenges to the Separation of Powers*, ed. by Antonia Baraggia, Cristina Fasone and Luca P. Vanoni. Edward Elgar Publishing, 2020 // https://doi.org/10.4337/9781788975278.00015
5. Boráková, Renáta. "Vymezení okruhu trestných činů, jejichž pachatelům by měla být odebírána DNA pro účely budoucí identifikace a stanovení doby uchování profilu DNA v Národní databázi DNA" (Definition of the range of criminal offenses for which perpetrators should have their DNA collected for future identification purposes and determination of the period of storage of DNA profiles in the National DNA Database). *Časopis pro právní vědu a praxi* 30(3) (2022): 523–46 // https://doi.org/10.5817/CPVP2022-3-2
6. Borowski, Martin. "Limited Review in Balancing Constitutional Rights." In *Proportionality, Balancing, and Rights*. Edited by Jan-R. Sieckmann, Vol. 136. Law and Philosophy Library. Springer International Publishing, 2021 // https://doi.org/10.1007/978-3-030-77321-2_6
7. Carolan, Eoin. *The New Separation of Powers: A Theory for the Modern State*. Oxford University Press, 2009.
8. Endicott, Timothy. "The Generality of Law." In *Reading HLA Hart's 'The Concept of Law'*. Edited by Luís Duarte d'Almeida, James Edwards and Andrea Dolcetti. Bloomsbury Publishing, 2014.
9. Endicott, Timothy. "The Impossibility of the Rule of Law." *Oxford Journal of Legal Studies* 19(1) (1999): 1–18.
10. Enqvist, Lena and Markus Naarttijärvi. "Discretion, Automation, and Proportionality". In *The Rule of Law and Automated Decision-Making: Exploring Fundamentals of Algorithmic Governance*. Edited by Markku Suksi. Springer International Publishing, 2023 // https://doi.org/10.1007/978-3-031-30142-1_7
11. Handrlica, Jakub, Vladimír Šarapajev and Gabriela Blahoudková. "Black Swans" in Administrative Law." *The Lawyer Quarterly* 11(3) (2021): 479–92.
12. Hogg, Peter W., and Allison A. Bushell. "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)." *Osgoode Hall Law Journal* 35(1) (1997): 75–124 // https://doi.org/10.60082/2817-5069.1612
13. Kavanagh, Aileen. "Defending Deference in Public Law and Constitutional Theory." *Law Quarterly Review* 126 (2010): 222–50.
14. Kavanagh, Aileen. "Keeping It Real in Constitutional Theory." *Comparative Constitutional Studies* 1(2) (2023): 244–66 // https://doi.org/10.4337/ccs.2023.0006
15. Kavanagh, Aileen. *Situating the Strike-Down (Draft Paper).* (n. d.) (Accessed 5 March 2024) // https://www.dropbox.com/s/x2ccpywzzqytbyp/AK%20Situating%20the%20Strike-Down.pdf?e=1&dl=0
16. Kavanagh, Aileen. *The Collaborative Constitution*. Cambridge Studies in Constitutional Law. Cambridge University Press, 2023.
17. Kavanagh, Aileen. "The Constitutional Separation of Powers." In *Philosophical Foundations of Constitutional Law*. Edited by David Dyzenhaus and Malcolm Thorburn. Oxford University Press, 2016 // https://academic.oup.com/book/11221/chapter/159740146

18. Kosař, David, Jiří Baroš and Pavel Dufek. "The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism." *European Constitutional Law Review* 15(3) (2019): 427–61 // https://doi.org/10.1017/S1574019619000336
19. Koštál, Vratislav. "Dealing with Public Interest in the Framework Regulations and in the Tailor-Made Laws." *The Lawyer Quarterly* 10(1) (2020): 48–56.
20. Kyritsis, Dimitrios. "Constitutional Review in Representative Democracy." *Oxford Journal of Legal Studies* 32(2) (2012): 297–324 // https://doi.org/10.1093/ojls/gqs004
21. Ondřejek, Pavel. "Poměřování jako klíčový argument přezkumu ústavnosti v éře proporcionality a některé projevy jeho kritiky" (Balancing as a key argument in constitutional review in the era of proportionality and some manifestations of its criticism). *Právník* 155(4) (2016): 349–68.
22. Píša, Radek. "Poskytování informací o platech - případová studie soudů na volném poli" (Providing information on salaries – a case study of courts in the open field). *Správní právo* 51(8) (2018): 489–509.
23. Polčák, Radim. "Data Retention in the Czech Republic." In *European Constitutional Courts towards Data Retention Laws*. Edited by Marek Zubik, Jan Podkowik, and Robert Rybski. Vol. 45. Law, Governance and Technology Series. Springer International Publishing, 2021 // https://doi.org/10.1007/978-3-030-57189-4_7
24. Raz, Joseph. *Ethics in the Public Domain: Essays in the Morality of Law and Politics*. Clarendon Press; Oxford University Press, 1994.
25. Raz, Joseph. "Sorensen: Vagueness Has No Function in Law." *Legal Theory* 7 (2001): 417–19.
26. Ribeiro, Marc. *Limiting Arbitrary Power: The Vagueness Doctrine in Canadian Constitutional Law*. UBC Press, 2004.
27. Rivers, Julian. "Proportionality and Variable Intensity of Review." *The Cambridge Law Journal* 65(1) (2006): 174–207 // https://doi.org/10.1017/S0008197306007082
28. Roach, Kent. "The Varied Roles of Courts and Legislatures in Rights Protection." In *Parliaments and Human Rights: Redressing the Democratic Deficit*. Edited by Murray Hunt, Hayley Jayne Hooper and Paul Yowell. Hart Publishing, 2015.
29. Sales, Philip. "The Contribution of Legislative Drafting to the Rule of Law." *The Cambridge Law Journal* 77(3) (2018): 630–35 // https://doi.org/10.1017/S0008197318000624
30. Sorensen, Roy. "Vagueness Has No Function in Law." *Legal Theory* 7(4) (2001): 387–417 // https://doi.org/10.1017/S1352325201704041
31. Spano, Robert. "The Future of the European Court of Human Rights — Subsidiarity, Process-Based Review and the Rule of Law." *Human Rights Law Review* 18(3) (2018): 473–94 // https://doi.org/10.1093/hrlr/ngy015
32. Takata, Hinako. "Separation of Powers in a Globalized Democratic Society: Theorizing the Human Rights Treaty Organs' Interactions with Various State Organs." *Global Constitutionalism* (3 August 2023): 1–30 // https://doi.org/10.1017/S2045381723000114
33. Tushnet, Mark. "Alternative Forms of Judicial Review." *Michigan Law Review* 101(8) (2003): 2781–802.
34. Waldron, Jeremy. "The Core of the Case against Judicial Review." *The Yale Law Journal* 115(6) (2006): 1346–406 // https://doi.org/10.2307/20455656

35. Widlak, Arjan, Marlies van Eck and Rik Peeters. "Towards Principles of Good Digital Administration: Fairness, Accountability and Proportionality in Automated Decision Making." In *The Algorithmic Society: Technology, Power, and Knowledge*, 1st edn. Edited by Marc Schuilenburg and Rik Peeters. Routledge, 2021 // https://doi.org/10.4324/9780429261404

Case law

1. Decision of Zürich High Court from 18.01.2022, No. SB210261-O/U/ad-cs.
2. Plenary decision of Czech Constitutional Court from 28 June 2005, No. Pl ÚS 24/04. *Jezy na Labi [Weirs on the Elbe]*.
3. Plenary decision of the Czech Constitutional Court from 17 March 2009, No. Pl ÚS 24/08. *Přistávací dráha na Ruzyni [Ruzyně Runway]*.
4. Plenary decision of the Czech Constitutional Court from 7 December 2021, No. Pl ÚS 20/21. *Ústavnost pandemického zákona [Constitutionality of the Pandemic Act]*.
5. Plenary decision of the Czech Constitutional Court from 20 December 2011, No. Pl ÚS 24/11. *Data retention II*.
6. Plenary decision of the Czech Constitutional Court from 14 May 2019, No. Pl ÚS 45/17. *Data Retention III*.
7. Decision of Municipal Court in Prague from 22 April 2025, No. 54 Co 89/2025-276.
8. Decision of the Czech Supreme Court from 30 December 2025, No. 30 Cdo 2556/2025.
9. Plenary decision of the Czech Constitutional Court from 23 May 2017, No. Pl ÚS 10/16.
10. Plenary decision of the Czech Constitutional Court from 22 March 2022, No. Pl ÚS 7/18. *Odběr a uchovávání vzorků DNA [DNA sampling]*.
11. Decision of the Czech Supreme Administrative Court from 13 December 2017, No. 1 As 13/2017-93. *Š. M. v Regional Police Headquarters Jižní Čechy.*
12. Decision of the Czech Supreme Administrative Court from 19 April 2018, No. 3 As 335/2017-33. *R. K. v Vysočina Regional Police Headquarters.*
13. Decision of the Czech Supreme Administrative Court from 17 May 2022, No. 9 As 124/2018-46. *N. R. v Jihočechy Regional Police Headquarters.*
14. Decision of the Czech Supreme Administrative Court from 18 May 2022, No. 5 As 254/2019-49. *I. P. v Praha Regional Police Headquarters.*
15. Decision of the Czech Supreme Administrative Court from 10 August 2023, No. 2 As 115/2023-38. *P. H. v Praha Regional Police Headquarters.*
16. Decision of the Czech Supreme Administrative Court from 29 April 2009, No. 8 As 50/2008-75, No. 1880/2009 Coll.
17. Plenary decision of the Czech Constitutional Court from 30 March 2010, No. Pl ÚS 2/10. *Rozsudky a svobodný přístup k informacím [Judgements and Freedom of Information]*.
18. Decision of the Czech Constitutional Court from 5 May 2010, I. ÚS 1885/09-2.
19. Decision of the enlarged senate of the Czech Supreme Administrative Court from 22 October 2014, No. 8 As 55/2012-62. *J. T. v Zlín Regional Authority*.
20. The decision of the Czech Constitutional Court from 17 October 2017, No. IV. ÚS 1378/16.
21. Decision of the Czech Constitutional Court from 3 April 2018, No. IV. ÚS 1200/16.

22. Plenary decision of the Czech Constitutional Court from 17 January 2023, No. Pl ÚS 25/21. *Poskytování informací z Národního zdravotnického informačního systému [Provision of information from the National Health Information System]*.
23. Decision of the Czech Supreme Administrative Court from 27 May 2020, No. 2 As 88/2019-29, No. 4044/2020 Coll. *Office of the President*.