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Grigory Vaypan: *The Principle of Proportionality in Contemporary International Law* (PhD diss. Moscow 2017, 196 pages)

Grigory Vaypan's doctoral thesis is an immensely ambitious dissection of the character and operation of modern deformalised law. The notion of "proportionality", the author claims, is a means for "softening" formal legal standards to enable their application in a way that the law-applier thinks appropriate to the particular circumstances of a case. As the author correctly notes, such deformalisation is a typical aspect of modern – "pragmatic" – law. It enables responding to the complexity of legal situations and the variety of contexts in which legal rules are applied. Especially when those rules are to be applied in new or cross-cultural situation, the problem of formalism's alleged "inflexibility" needs to be tempered by devises such as equity, reasonableness, good faith – and proportionality. And yet, the search for contextual responsiveness threatens to undo law's autonomy and collapse it into "political" discretion. Thence the need for a some type of specific, professionally controllable way of disciplining this search for "responsiveness". This is the problem of pragmatism: how to ensure that the law is both "relevant" and "autonomous" or as the author puts it, how to maintain a "third space" between (pure) politics and (pure) law?

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The dissertation is in broadly two parts. The first part – Chapter 1 – produces a complex and quite original theory about the discursive rules for the professional employment of "proportionality". Mr Vaypan suggests that proportionality operates as a "second-order principle" that helps to specify the meaning of other rules of principles and assist in their realistic application in particular situations. Proportionality appears as a useful, pragmatic technique of modern legal argument to the extent that appears to guarantee the law's contextual responsiveness ("relevance") and technical specificity ("autonomy"). In this way it appears to avoid excessive inflexibility ("premodern formalism") while still preserving the law's distance to political discretion.[1] The problem, however, according to the author is that this leads proportionality arguments to oscillating endlessly between the two points: the more "relevant" something is, the less "autonomous" it will appear, and vice-versa. Hence special "approaches" have been developed that seek to consolidate legal decision-making so that it would reach beyond "mechanical application" and "pure discretion". Proportionality is then inserted in what the author calls "process-approaches" and "institutional approaches" that appear to provide controllability and closure to the relevant debates. But these are derivative from substantive arguments that examine proportionality either from the perspective of "facts" or "values". But these are again indeterminate as the relevant facts are determined by an appraisal of their "value" and the relevant value by what seems to be "factually relevant". In the end, the author seems to adopt a variant of a *realist* position according to which all this oscillation between different notions appears as a mediator of conflicts of (vertical or horizontal) *interests* where various

[1] I have a small problem with the author's characterization of the "third space" as something between law and politics. Surely what proportionality intends to attain is a distinctly "legal" sphere or a technique. It does not so much look for a space between law and politics as between something that could be labeled "excessive formalism" and "excessive realism".

argumentative types are reduced to patterns followed in regard, either, to states of the same type or between different types of legal subjects (e.g. states and individuals) . While this in some ways explains how the (in principle interminable) oscillation ends at some point (namely the point where the relevant "interest" will decide the matter), I wonder about how this takes place in practice and, especially, whether "interest" would be any more determinative than, say,"fact" or "value".

The second part of the thesis (Chapters 2-4) illustrates the operation of the proportionality argument in the fields of international responsibility, humanitarian law and human rights law. In each field, proportionality leads first into an identification of two opposing concerns that play the role of "relevance" (or contextual responsiveness) and "autonomy" (or technical specificity). It then creates precisely the oscillatory movement described in Chapter 1 that can only be ended by an apparently random choice (perhaps dictated by some conception of "interest"). The discussion uses examples from judicial decision-making in cases from the International Court of Justice and European Court of Human Rights, from arbitrations as well as from standard monographs and articles. In each case the author seeks to demonstrate the indeterminacy of proportionality by the way it leads into irresolvable oppositions between "quantitative" and "qualitative" approaches, between arguments from (civilian) "harm" and (military) advantage, between the nature of the "means" and the nature of the "ends" desired. Sometimes "values" seem to be prioritised against "facts" – but then again the relevance of particular facts is argued from the perspective of "values", and so on. Throughout the writing is confident, the argument crystal-clear and well supported by the materials dealt with. The structure of the argument is also usefully illuminated by graphs and

pictures that show its indeterminate, and yet patterned nature. There is a specific set of argumentative or rhetorical "rules" that direct the production of legally competent positions – even as the positions remain in principle as strong or weak as the countervailing positions.

In the end, the author concludes that proportionality has not provided a "third space". Everything in a world of modern pragmatism depends on "discretion, indeterminacy and arbitrariness". The conclusion follows from the author's premises. The logical circle is complete. The promise of legal specificity (and I suppose contextual relevance) is undermined by the inability of the argument to stop at any one of its chosen claims.

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This is a powerful, original, and very critical thesis. It is a skilfully accomplished and wholly believable dissection of the pragmatics of international legal argument. *I have not the slightest doubt that it well qualifies the grant of the title of doctor of laws to its author.* The thesis points to a number of important problems with international legal practice and its role in the settlement of international disputes: is it as random and discretionary as the author seems to suggest? It also raises the question of where it leaves us, its readers, and its author. In the last pages the author explains that he has aimed to contribute to something like professional enlightenment (he uses the expression "disenchantment"). We may not be able to repair the way proportionality operates in legal argument. But at least we now know where its weakness and contestability lie. But neither the author nor his readers are able to escape the prison-house of indeterminate oscillation the author has sketched for us. What

follows? I do not believe the author wants to suggest that lawyers should no longer use proportionality at all – but what are the consequences of its use if the users already at the outset know that it is not going to provide that "third space" promised, that it does not leads into substantive resolution of conflicts? I wonder whether the "critical studies" and "practical engagement" recommended by the author (169) actually lead him beyond the abyss he has sketched to us. But I look forward to discussing such and other matters in the course of the examination of this wonderfully erudite, sharp and stylish thesis.

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