

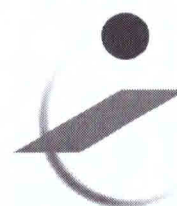
To Saint Petersburg State University

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 deformed 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 deformation 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 devices 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?

Erik Castrén Institute of International Law and Human Rights

P.O. Box 4 (Yliopistonkatu 3), 00014 University of Helsinki
Telephone +358 9 191 23140, Telefax +358 9 191 23076
E-mail firstname.surname@helsinki.fi, intlaw-institute@helsinki.fi
www.helsinki.fi/eci



09/2-47 om 19.04.2018

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”.

