

## An Unprincipled Principle?:\*

### A Comparative Study on the Application of the Principle of Proportionality in Environmental Cases in Taiwan and the EU

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#### Abstract

The principle of proportionality has been widely accepted across the globe as an objective principle of administrative law, including in new democracies such as Taiwan and supranational organizations such as the EU. The question is, whether the allegedly objective and universal legal doctrine adapts to different social context and nature of cases.

Through the review of judgments on environmental cases of Taiwanese Administrative Court and the European Court of Justice, this article takes a closer look at how the principle of proportionality is applied in different regimes and distinctive environmental cases.

This article finds that the principle is applied differently according to the social context and social needs. In Taiwan, a new democracy with a short history of legal succession, the court usually applies the principle superficially or incorrectly; in the EU, the court correctly understands the principle but strategically interprets it to promote European integration. In addition, the principle also adapts to the distinctiveness of

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environmental cases. The court in Taiwan shifts the standard of review and includes multiple interests into the balance; the EU court places an emphasis on the necessity test, compromising the principle with the precautionary principle to develop the concept of procedural proportionality.

**KEYWORDS:** the principle of proportionality, uncertainty, environmental issues, regional integration, democratization, precautionary principle.

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## 1. Introduction

Courts in many jurisdictions have examined the legality of administrative measures on the basis of the principle of proportionality. The principle has spread throughout continental Europe as well as the United Kingdom.<sup>1</sup> Today, it forms part of administrative law in many new democracies such as Taiwan, South Korea and regional organization such as European Union.<sup>2</sup> The principle is commonly viewed as an objective legal tool to protect individual rights from arbitrary government regulation. Scholars such as Kingsbury and Steward even argue that the principle of proportionality has become a general principle of global administrative law.<sup>3</sup>

The question is whether a legal principle can be reasonably applied universally not only across borders but also in various kinds of cases. This question can be separated into two different contexts. First, since every jurisdiction has its own unique legal system, culture and social context, it is not necessarily true that they understand and apply legal doctrines the same way. Second, some legal issues have distinctive features that might make the universal application of one administrative legal principle difficult, even within a single jurisdiction. For example,

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1 See Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174, 174 (2006); Margit Cohn, *Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom*, 58 AM. J. COMP. L. 583, 583-85 (2010).

2 The spread of proportionality principle and their explanation, see Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463, 464-74 (2011); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3096 (2015).

3 See Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 18 (2005).

when there is high uncertainty regarding the environmental deterioration caused by a new technology, it is not clear how to determine whether a given regulation is necessary and proportional. Although the principle of proportionality has been widely accepted as an objective principle to restrain administrators from overly infringing on individual rights, different social contexts and the distinctiveness of environmental cases challenge the objective application of the principle.

By analyzing judgments of environmental cases made by the European Court of Justice (ECJ) and by the Administrative Court in Taiwan, this article discusses the question of how different paths of legal transplantation and the unique nature of environmental cases affect the application of the principle of proportionality. In the following section, this article briefly explores the path of legal transplantation and acceptance of the principle of proportionality in two legal systems, demonstrating the path and the context where the principle was integrated into an existing legal system. The third and fourth sections examine the application and interpretation of the principle of proportionality on environmental cases. The third section suggests the context of new democracy and how the progress of regional integration affects the courts' interpretation of the same legal doctrine. The fourth section examines how the features of environmental cases affect the application of the principle by the courts. The article argues that while the principle of proportionality is widely purported to be an objective legal principle, it is in fact not applied in a universally consistent way. It changes over time and adapts to different social contexts and the varying nature of cases.

## 2. A Shared Principle of Administrative Law in Taiwan and the EU

In Taiwan and the EU, the principle of proportionality has been accepted as the governing principle of administrative law. The principle itself, however, was not invented in these two jurisdictions. How has a principle refined in German law been transplanted into Taiwan's administrative law while at the same time developing into the general guiding principle of the EU?<sup>4</sup> Is it understood differently in these two jurisdictions? Interestingly enough, the path and context of legal transplantation was quite different, yet the two jurisdictions share similar understandings of the principle of proportionality.

### 2.1 Taiwan: An Imported Constitutional Principle Becomes a Foundation of Administrative Law

In Taiwan, the principle of proportionality is not a grass-roots legal principle that can be found in its legal tradition. One cannot find any provision enacting this principle in the Constitution of R.O.C of 1947. It was borrowed by the Constitutional Court from German jurisprudence to deal with the history of arbitrary exercise of government power by the past authoritarian regime, which helped pave the path toward

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<sup>4</sup> The Principle of Proportionality aims to restrain the exercise of public authority from overly infringe individual rights. Similar idea can be found in some legal principles of other jurisdictions. For example, William Stuntz argues that the prohibition of cruel and unusual punishments could be plausibly read to imply a proportionality principle of sentencing. See William Stuntz, *The Uneasy Relationship between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 72-73 (1997); see also E. THOMAS SULLIVAN & RICHARD S. FRASE, *PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS* (2009). The principle of proportionality in this article specifically refers to the German-refined principle with three-step test.

democratization. In addition to the need for legal doctrine to restrain government power, the background study by early law scholars also contributed to the transplant of the principle of proportionality. Many early law students who studied abroad chose to pursue their master or doctoral degree in Germany because of the relatively low tuition and living expenses. Some of them became important scholars or Justice later and are devoted to the introduction of the German Jurisprudence of the proportionality principle to Taiwan.<sup>5</sup> Through its continued application in one interpretation after another, the principle has become the most important principle in the practice of constitutional review in Taiwan.

The first constitutional interpretation that directly and literally mentions the principle of proportionality is the *J.Y. Interpretation No. 409*.<sup>6</sup> Interestingly, the court did not derive it from a specific

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5 Before the term “the principle of proportionality” appeared in official Interpretation of Taiwanese Constitutional Court, textbooks of Constitutional Law and Administrative Law in Taiwan have mentioned the principle of proportionality as a general principle of law. Relevant studies please see, e.g., Tzung-Jen Tsai, *Preliminary Research on the Principle of Proportionality of Public Law—Focus on German Law*, 62 NCCU L. REV. 75, 77 (1999) (蔡宗珍, 公法上之比例原則初論——以德國法的發展為中心, 政大法學評論, 62期, 頁77 (1999年)); Jau-Yuan Hwang, *Judicial Standards of Review for Restrictions on Constitutional Rights: Comparative Analysis of the U.S. Categorized Multiple Tests Approach*, 33(3) NTU L.J. 45, 53-54 (2004) (黃昭元, 憲法權利限制的司法審查標準: 美國類型化多元標準模式的比較分析, 臺大法學論叢, 33卷3期, 頁53-54 (2004年)). In addition, Wen-Chen Chang and Jiunn-Rong Yeh also found that, Justice who studied in Germany for master or doctoral degrees open cited German precedents in their opinions. See Wen-Chen Chang & Jiunn-Rong Yeh, *The Use of Foreign Precedents by the Constitutional Court in Taiwan*, paper presented at The Conference on the Use of Foreign Precedents by Constitutional Judges, Interest Group of International Association of Constitutional Law, London, at 10-11 (Nov. 14-15, 2008).

6 J.Y. Interpretation No. 409 (Taiwan). English translation please visit official website of Judicial Yuan, R.O.C., [http://www.judicial.gov.tw/constitutionalcourt/EN/p03\\_01.asp?expno=409](http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=409) (last visited Jun. 14, 2013). Because the principle of proportionality was

constitutional provision or from the general spirit of the constitution, but from the Land Act. The court first resorted to Article 48 of the Urban Planning Act, which provides that “relevant organizations or undertakings should, according to law, expropriate the land which has been designated as reserve land for public facilities to be used by public utilities.” The court then suggested that, “the state should still be restricted by the principle of proportionality which is implied in the relevant provisions of the Land Act and Article 49 of the Enforcement Act of Land Act.” Without once mentioning proportionality, Article 49 of the Enforcement Act of Land Act prescribed that “in accordance with the aims of the expropriation, land expropriation should be conducted in such a way as to cause the minimum damage and to avoid encroachment upon agricultural land.”<sup>7</sup> Through an elaboration on this clause in the regulation of existing Acts, the court introduced the principle of proportionality, stating that all land expropriation must serve public interest and should simultaneously be implemented so as to cause the minimum amount of infringement on the property rights of individuals.

After the *J.Y. Interpretation No. 409*, the Constitutional Court asserted a constitutional basis for the principle of proportionality through the interpretation of Article 23 of the R.O.C. Constitution, which prescribes that “[a]ll the freedoms and rights enumerated in the preceding Articles shall not be restricted by law except by such as may

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derived from statutes in the *J.Y. Interpretation No. 409*, it is arguably the first case in which the Court introduced the “constitutional” principle. *See also*, Jau-Yuan Hwang, *Development of Standards of Review by the Constitutional Court from 1996 to 2011: Reception and Localization of the Proportionality Principle*, 42(2) NTU L.J. 215, 218-219 (2013) (黃昭元, 法官解釋審查標準之發展 (1996-2011): 比例原則的繼受與在地化, 臺大法學論叢, 42卷2期, 頁218-219 (2013年)).

<sup>7</sup> *J.Y. Interpretation No. 409* (Taiwan).

be necessary to prevent infringement upon the freedoms of other persons...” Based on the word “necessary” in this article, the court developed the current jurisprudence of proportionality used to justify the principle today.

In *J.Y. Interpretation No. 428*, the Court was dealing with the question about whether or not Article 25 of the Act Governing the Administration of Post Offices, which provides the Post Office compensate only for the loss of certain categories of registered mails and parcels, is constitutional. The court referred to the principle of proportionality and stated that, “Article 25 of the Act Governing the Administration of Post Offices is formulated by taking into consideration the balance among such factors as the fees charged, the nature of the services, the operating cost, and the degree of injury to the interest of the people, and is necessary for maintaining the operation of the postal services and essential to the furtherance of the public interest. The statute ... is consistent with the principle of proportionality embodied in Article 23 of the Constitution.”<sup>8</sup>

In *J.Y. Interpretation No. 476*, the Constitutional Court reviewed the constitutionality of capital punishment under special criminal laws and further elaborated the content of the principle of proportionality in full in the following:<sup>9</sup>

“...these special criminal laws should be deemed consistent

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8 J.Y. Interpretation No. 428 (Taiwan). English translation, please see Judicial Yuan, R.O.C., [http://www.judicial.gov.tw/constitutionalcourt/EN/p03\\_01.asp?expno=428](http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=428) (last visited Sep. 23, 2015).

9 J.Y. Interpretation No. 476 (Taiwan). English translation, please see Judicial Yuan, R.O.C., [http://www.judicial.gov.tw/constitutionalcourt/EN/p03\\_01.asp?expno=476](http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=476) (last visited Jun. 14, 2013).



with the principle of proportionality (Verhältnismäßigkeitsprinzip) under Article 23 of the Constitution if the methods used to achieve such purposes are necessary to correct and prevent mistakes and are also reasonable actions to take even though they restrict the people's fundamental rights. The balance between the means and ends is prescribed in these special criminal laws. In consideration of protecting legal interests, special criminal laws contrary to the regulations set forth in the general criminal laws should not be deprived of their legal value solely based on personal judgment. In addition, the special criminal laws will not be held unconstitutional solely because they may infringe upon people's lives and physical freedom guaranteed by the Constitution."<sup>10</sup>

The constitutional court elaborated the principle of proportionality to include three concepts: appropriateness, necessity, and the principle of proportionality in a narrow sense. In both interpretations, the English translation specifically noted the phrase "Verhältnismäßigkeitsprinzip" after the translated phrase "principle of proportionality." Although the court did not refer to the German concept directly in the original Chinese version of J.Y. interpretations, the note of German in the English translation implies one typical understanding that the principle was borrowed from German jurisprudence. The Constitutional Court has consistently applied the principle of proportionality to evaluate and nullify various laws afterwards.

The principle of proportionality was further inscribed as a fundamental principle of administrative law with the enactment of the

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<sup>10</sup> *Id.*

Administrative Procedure Act in 2000. Article 7 prescribes clearly that, “[a]dministrative acts shall be performed in pursuance of the following principles: 1) The method adopted must be helpful to the achievement of the objectives thereof; 2) Where there are several alternative methods which will lead to the same result in achievement of the objectives, the one with the least harm to the rights and interest of the people shall be adopted; and 3) The harm that may be caused by the method to be adopted shall not be clearly out of balance against the interest of the objectives anticipated to be achieved.”<sup>11</sup>

Nowadays, the principle of proportionality is frequently applied to evaluate the legality of administrative acts by administrative courts in Taiwan.

## **2.2 The EU: The Community’s General Principle Derives from Legal Tradition**

The principle of proportionality is enshrined in EU law. Article 5 (4) of the Treaty on European Union (TEU) of 2012 states that, “under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”<sup>12</sup> Accordingly, all actions taken by the EU should take the principle of proportionality into consideration.

Although prescribed in treaty, the root of the principle of proportionality lies in the legal tradition of some member states. A product of the interpretation of Platonic and Cicerian theory, the principle of proportionality was codified in the late 18th Century and

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11 XINGZHENG CHENGXU Fa (Administrative Procedure Act) art. 7 (2000) (Taiwan).

12 Article 5(4) of the Treaty on European Union.

refined by the German courts in the 19th Century.<sup>13</sup> By the 1970s at the latest, the German-refined principle had affected EU law. In the *Internationale Handelsgesellschaft* case in 1970, the court wrote that, “a public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure.”<sup>14</sup> The principle took further hold in continental Europe after the Second World War when proportionality became embedded in the new German constitution. The process of integration and the frequent legal communication between EU members have provided fertile soil for some jurisdictions that lack the tradition of the principle to incorporate it into their own jurisprudence, since it has become a central part of the EU’s supranational law.<sup>15</sup>

As a ground for review, the principle of proportionality was first developed by the court to counter-balance the effects of market regulation measures restricting economic freedom adopted under the Treaty that established the European Coal and Steel Community (ECSC Treaty). In 1956 the Court referred to “a generally accepted rule of law according to which the reaction by the high authority to illegal action must be in proportion of the scale of that action.”<sup>16</sup>

It was then taken up by the European Court of Human Rights upon

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13 Thomas Poole, *Proportionality in Perspective* (LSE Law, Society and Economy, Working Paper, 2010), [http://www.lse.ac.uk/collections/law/wps/WPS2010-16\\_Poole.pdf](http://www.lse.ac.uk/collections/law/wps/WPS2010-16_Poole.pdf).

14 Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr - und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

15 It is arguably the Wednesbury unreasonableness doctrine in UK common law a milder version of the principle of proportionality. Cf. Paul Craig, *Unreasonableness and Proportionality in UK Law*, in *THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE* 85, 85-106 (Evelyn Ellis ed., 1999).

16 Case 8/55, *Fedechar v. High Authority* [1955-56] ECH 211, at 228.

its founding in 1959 and later by the fledgling European Community as a conceptual “meta principle of judicial governance”.<sup>17</sup> The integration of European countries triggered a convergence in national administrative law, leading to the “Europeanisation of administrative law.”<sup>18</sup> In this process the European Court of Justice adopted the principle of proportionality from German Law but has since made it its own.<sup>19</sup>

The TEU has not fully elaborated on its definition of “the principle of proportionality.” The court, however, has explained the content in its decisions. For example, in one case concerning a measure taken by the European Community, the European Court of Justice (ECJ) explained the full steps for proportionality test as follows:

[T]he principle of proportionality ... requires that measures adopted by Community institutions should not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, and where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aim pursued...<sup>20</sup>

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17 Alec Stone-Sweet & Jud Mathews, *Proportionality, Judicial Review and Global Constitutionalism*, in REASONABLENESS AND LAW 173, 192 (Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini eds., 2009).

18 See, e.g., KARL HEINZ LADEUR ED., *THE EUROPEANISATION OF ADMINISTRATIVE LAW: TRANSFORMING NATIONAL DECISION-MAKING PROCEDURES* (2002).

19 The opinion shared by other author, see, e.g., ROBERT THOMAS, *LEGITIMATE EXPECTATIONS AND PROPORTIONALITY IN ADMINISTRATIVE LAW* 78 (2000).

20 Case C-331/48, *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, Fedesa et al.* [1990] ECR I-4023, para 13. The Court referred to this paragraph in some subsequent cases, such as *Pfizer case*. See also Case T-13/99, *Pfizer* [2002] ECR II-3305, para. 411-13.

The ECJ understands the principle as a three-test principle. EU legislation or administrative acts have to be appropriate, necessary, and proportional to be legally valid. The principle of proportionality and the three-step test are widely used and recognized in European law by the ECJ now. The court now regards the principle of proportionality as a general principle for EU law and all administrative measures taken by EU agencies.<sup>21</sup>

### **2.3 The Shared Understanding of the Proportionality Principle**

Despite the different paths of transplantation, the principle of proportionality operates similarly in Taiwan and the EU. To satisfy the requirement of the principle of proportionality, an administrative measure should be appropriate, necessary, and proportionate. The appropriateness clause indicates that the legislation must be able to achieve a proper purpose. In the context of administrative law, the principle asks the administrative agency to choose an effective measure to fulfill the purpose of the legislation. The necessity clause requires administrative agencies to act in accordance with the law and consider all the relevant elements in order to make sure that individuals suffer the minimum burden. The principle of proportionality in a narrow sense (*proportionality stricto sensu*) asks administrative bodies to ensure they have legitimate purposes for their actions and then to balance the damage to the rights of individuals and the interests of the administrative purpose. If the damage to citizens' rights outweighs the pursued interests

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<sup>21</sup> See Takis Tridmas, *Proportionality in the European Community Law: Searching for the Appropriate Standard of Scrutiny*, in *THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE* 65, 75 (Evelyn Ellis ed., 1999).

of the measure, the measure could be unconstitutional. The third test, *proportionality stricto sensu*, involves a fair balance between the disadvantage suffered by the rights holders and the interests of the state in pursuing its legitimate aims. That is to say interference with rights needs to be proportionate to the policy aims that underlie them. The third test is indispensable because legitimate state measures can still cause excessive harm to individual rights. In some situations, an administrative measure can overly infringe on individual rights even though it is the only effective and necessary measure. It is after a finding of necessity that careful balancing and weighing will come into play.

Core to the principle of proportionality is interest-balancing and cost-benefit analysis. In order to analyze the costs and benefits and make a balance, in applying the principle of proportionality the court has to conduct a two-stage test. In the first stage, the court has to identify the protected right or interest first and then identify the extent to which the right is interfered with or restricted. The next step is to identify the reasons and interest pursued for that restriction.

The second stage is to assess whether the interference was excessive, and this balancing of interests is done based on the proportionality test. The court first assesses whether the measure in question was a useful, suitable or effective means of achieving the pursued objective. Secondly, the court examines whether the measure was necessary to achieve the objective, or whether it could have been achieved with a less restrictive alternative. Third, when the measure is the least restrictive, the court examines whether the measure has an excessive impact on individuals' rights.

Nowadays, the principle of proportionality is regarded as a general

principle—a principle that is inherent to the legal system in both Taiwan and the EU. Following a general principle, rather than merely a methodological rule, the court is bound by the fact that all cases that are of the same nature would have to be decided in the same way. In other words, the court is bound by how it reaches the result.<sup>22</sup>

The acceptance of the principle of proportionality and its shared understanding requires an explanation: How can we identify a successful application of the principle of proportionality? Why does this doctrine fit the needs of different countries and jurisdictions?

One major argument focuses on the nature of administrative law and its need for justification. For example, Kingbury suggests that, the central concern of modern administrative law is how to curb the discretion of administrative agencies without straightjacketing modern administration. The principle of proportionality has been regarded as a successful doctrine and useful tool for the balancing of agency discretion and protection of human rights. The principle of proportionality is widely accepted, not only because of foreign imitation or regional integration but also because of the substantive value of administrative law's publicness as well as the need of justification.<sup>23</sup>

From this aspect we may better understand the spread of the proportionality principle in Taiwan and the EU. For Taiwan, the progress of democratization created the space for more expansive judicial interpretations.<sup>24</sup> Concerning the poor record of human rights violations

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22 Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 EUR. L. J. 158, 159 (2010).

23 Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. INT'L L. 23, 32-33 (2009); see also Cohen-Eliya & Porat, *supra* note 2, at 464-65.

24 See Jiunn-Rong Yeh, *Constitutional Reform and Democratization in Taiwan: 1945-*

and abuse of power by the government, the Constitutional Court, as has been the case with many other courts in new democracies, was aware of the importance of restraining the power of the government. When the Constitution's provisions and domestic jurisprudence at that time provided little inspiration, leading Taiwanese legal scholars and some of the Court's Justices with German educational background introduced the doctrine of proportionality and required administrative authority to justify their actions.<sup>25</sup> For the EU, with the path of integration, the EU exercises more power that could lead to restraining the power of member states and rights of their people. The legal tradition of justification thus inscribes the doctrine into EU law.

Yet some others believe it is the flexibility of the principle that serves the need of a developing legal system and their courts so that the principle can be widely accepted. Proportionality is a standard-based doctrine that allows for flexibility in the development of law, and its empty concept provides the court the opportunity to do whatever they want.<sup>26</sup>

How do courts adapt the doctrine to serve the need of development of law for different social contexts and different natures of cases despite the same belief in justifying administrative action?

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2000, in TAIWAN'S MODERNIZATION IN GLOBAL PERSPECTIVE 47, 52-60 (Peter Chow ed., 2002).

25 See, e.g., Tom Ginsburg, *Constitutional Courts in East Asia: Understanding Variation*, 3 J. COM. L. 80, 83 (2008). See Ming-Sung Kuo, *From Administrative Law to Administrative Legitimation?* 61 INT'L & COMP. L.Q. 855, 855-59 (2012). One study finds the foreign educational background of Justice can explain the frequent use of German legal doctrine in Taiwan. Chang & Yeh, *supra* note 5, at 14-15.

26 Cohen-Eliya & Porat, *supra* note 2, at 466.



### **3. The Proportionality Principle for a New Democracy and for the European Integration**

Taiwan and the EU both accept the principle of proportionality as a general principle of law, yet different social contexts result in different applications. Taiwan imported the principle in the process of democratization, but the lack of a legal tradition behind the principle often leads the court to applying the principle incompletely, inconsistently and in a confusing manner. In the process of regional integration, the EU employs the principle strategically to promote integration and applies it differently to measures of the EU as a whole and measures of individual member states.

#### **3.1 Taiwan: A Young Principle in a New Democracy**

The acceptance of the principle of proportionality is relatively new to Taiwan. The proportionality principle was inscribed in the Administrative Procedure Act in 1999 as an administrative legal principle. It was an effort to respond to the progress of democratization and prevent the abuse of power by the government that haunted the Taiwanese people during the past authoritarian regime. The principle has rapidly become the foundational rule for administrative law. Yet, the content and meaning of the principle have not yet been fully understood in Taiwan's judiciary.

Despite the short period of history for legal transplantation, the legacy of the past authoritarian regime still substantially affects the administrative court. Rather than protecting human rights, the administrative court before democratization tended to endorse the

legitimacy of executive orders and served political interests.<sup>27</sup> In the early period of democratization, judges in administrative courts were not well trained; some of them were executive officers or judges of military courts. The administrative courts were widely criticized for their tendency to favor the decisions of agencies and downplay the interests of citizens. This lingering mentality may deter the court from exercising its power to scrutinize agencies and make decisions strictly according to the principle of proportionality.

Environmental cases are no exception. An overview of environmental cases heard by administrative courts in Taiwan indicates three shortcomings of the review process in applying the principle: incomplete understanding, confusion with other legal doctrines, and unclear standards for balancing interests.

### 3.1.1 Incomplete Understanding

The principle of proportionality has become one of the most frequently applied legal principles in environmental law cases in Taiwan.

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<sup>27</sup> Taiwan adopts a dual litigation system. All disputes arising out of legal relations in the area of the public law are tried by administrative courts, and controversies arising out of relations under private laws are tried at courts of general jurisdiction. See J.Y. Interpretation No. 448 (Taiwan). During the authoritarian era, the administrative court can review only cases regarding revocation of an administrative disposition and constructed the concept of disposition, lawfulness and standing to sue narrowly. The XINGZHENG SUSONG FA (Administrative Litigation Act) (1998) (Taiwan) expanded the types of administrative litigation. With the effort of the Constitutional Court and Administrative Court, the exercise of government power can be effectively restraint by the court. For example, before the enactment of the XINGZHENG SUSONG FA, the rate of judgment in favor of the plaintiff was only 7%. The rate grew to 12-15% after 2000, indicating that courts are more willing to substantially examine the legality of government act. See Wen-Chen Chang, *Courts and Judicial Reform in Taiwan: Gradual Transformations Towards the Guardian of Constitutionalism and Rule of Law*, in ASIAN COURTS IN CONTEXT 143, 176 (Jiunn-Rong Yeh & Wen-Chen Chang eds., 2015).

Yet ironically, plaintiffs in environmental cases raising the claim of proportionality often fail to clearly define the principle and its application. In many cases, even the court fails to present its reasons for applying the principle in concrete cases.

Take the *Supreme Administrative Court 85 Pan No. 127 Judgment* (最高行政法院85年度判字第127號判決, hereinafter “*Animal Husbandry case*”) as an example. The plaintiff asked for permission to run an animal husbandry business on a piece of farmland. The authority denied the application on the basis of water pollution prevention.<sup>28</sup> The plaintiff believed that the authority did not understand the situation and thus applied the law incorrectly, yet the plaintiff alleged that the decision of the authority “violated the principle of proportionality.” Whether the agency correctly investigates the facts and interprets the law is hardly relevant to the principle of proportionality, but the plaintiff challenged the administrative decision in the name of proportionality without further explanation. Even more interestingly, in the judgment, the court simply stated that the farmland was within the regulated area of water preservation and then concluded the decision satisfied the principle of proportionality.<sup>29</sup> In this case, the plaintiff and the court both mentioned the principle of proportionality, indicating that they recognized the importance and the acceptance of the legal doctrine. However, it seems that neither the plaintiff nor the court correctly applied the principle despite mentioning it so blatantly.

The court sometimes makes judgments based on proportionality, but fails to provide sufficient analysis and reasoning. Take the example

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<sup>28</sup> Zuigao Xingzheng Fayuan [Sup. Admin. Ct.] 85 Pan No. 127 (1996) (Taiwan).

<sup>29</sup> *Id.*

of waste disposal cases. In the *Supreme Administrative Court 92 Pan No. 1754 Judgment* (最高行政法院92年度判字第1754號判決, hereinafter “*Waste Disposal case*”), the appellee was fined 6,000 NTD for improperly disposed waste. The court concluded that the measures taken by the administrative agency do not significantly restrict the appellee’s right, thereby satisfying the requirement of the proportionality principle.<sup>30</sup> The court tends to sustain an administrative measure if it may help achieve a legitimate purpose.

Arguments such as those in the cases mentioned above are common in the judgments of administrative courts in Taiwan. In comparison to constitutional cases made by the Constitutional Court of Taiwan, the use of the principle of proportionality used by plaintiffs and judges in administrative courts are not carefully elaborated or correctly understood. Whenever people make claims against agency decisions, they simply link whatever argument they give to proportionality. Then, when the court denies these claims, they in turn often state that the administrative decision the claim is made against does not violate the principle of proportionality. Despite this routine invocation of the principle of proportionality, considerations regarding the goal, affected interests, and the proportionality between them are usually absent from the legal discussion when the principle is applied.

### **3.1.2 A Principle Confused with Other Principles**

The second problem is that the court sometimes confuses the proportionality principle with other legal doctrines. The three legal doctrines that are sometimes confused with the proportionality principle

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<sup>30</sup> Zuigao Xingzheng Fayuan [Sup. Admin. Ct.] 92 Pan No. 1754 (2003) (Taiwan).

are the principle of undue burden, the principle of prohibiting improper connection, and principle of legal reservation (Gesetzesvorbehalt).

In the *Kaohsiung Administrative High Court 92 Su-Geng No. 80 Judgment* (高雄高等行政法院92年度訴更字第80號判決, hereinafter “*Time-limited Pollution Reducing case*”), it seems that the court confuses the principle of undue burden with the proportionality principle. The plaintiff argued that the demand on them by the EPA to reduce pollution in 20 days is illegal for such demand fails to satisfy the principle of proportionality.<sup>31</sup> Yet the plaintiff then went on to say that, considering the cost and time of renewing technology and facilities, it is almost impossible to comply with the demand in time. The court pointed out that, whether or not the time-limited requirement is appropriate should be examined on the basis of the situation in which it was demanded. The court then concluded that, the decision made by the EPA satisfies the proportionality principle, for its deadline was not beyond reasonable expectation.<sup>32</sup>

If an administrative requirement is beyond reasonable expectation, it may cause undue burden to citizens.<sup>33</sup> It may not necessarily violate the principle of proportionality. However, both the plaintiff and the court suggested that a measure that is beyond reasonable expectation is disproportional. It is true that, an administrative measure that is impossible to comply with can be inappropriate, meaning that the

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<sup>31</sup> Kaohsiung Gaodeng Xingzheng Fayuan [Kaohsiung Admin. High Ct.] 92 Su-Geng No. 80 (2003) (Taiwan).

<sup>32</sup> *Id.*

<sup>33</sup> The principle of undue burden prohibits the government from taking measures that might cause significant difficulty or expenses beyond reasonable expectation to citizens. When government demands a citizen a legal obligation that is beyond reasonable expectation, it may violate the principle of undue burden.

decision in question can be disproportional and beyond reasonable expectation at the same time. Yet, without additional analysis and explanation, it is hard to tell whether the court failed to distinguish the two principles.

In another controversial case, the *Supreme Administrative Court 100 Pan No. 1022 Judgment* (最高行政法院100年度判字第1022號判決, hereinafter “*An-Kang Incineration Plant case*”),<sup>34</sup> the court applied the principle in a way similar to the principle of prohibiting improper connection.<sup>35</sup> The case was about whether the decision to not proceed to carry out a second stage Environmental Impact Assessment (EIA) was illegal.<sup>36</sup> One of the most controversial issues was whether the second stage EIA can be skipped “for the cause of convenience.”<sup>37</sup> The court believed that the decision on whether to proceed to the second stage of the EIA should be based on professional evaluation. In this case, if the EIA commission fails to consider necessary elements, or considers elements that should not be included, the decision is arbitrary. Moreover, if the commission gives too much weight to a single element and undermines the precedented proportion of weight accorded to an analysis of a specific profession without due cause, the decision violates

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34 Zuigao Xingzheng Fayuan [Sup. Admin. Ct.] 100 Pan No. 1022 (2011) (Taiwan).

35 The principle of prohibiting improper connection means that the exercise of public authority should have proper connection with its purpose. The XINGZHENG CHENGXU FA (Administrative Procedure Act) (2000) (Taiwan) does not prescribe this principle, but it is recognized as a general principle of administrative law by the courts. *See, e.g.*, J.Y. Interpretation No. 612 (Taiwan).

36 According to the HUANJING YINGXIANG PINGGU FA (Environmental Impact Assessment Act) (2003) (Taiwan), a developer should prepare an environmental impact statement for the phrase one environmental assessment. If the review suggests that the project may significantly impact the environment, developer should prepare a more detailed assessment report for the phrase two.

37 *Id.*

the principle of proportionality as well. Concerning the case, the court concluded that, the EIA commission's decision failed to properly consider elements that may impact the environment and placed unwarranted weight on the element of convenience in their considerations, thus violating the principle of proportionality. The court further elaborated that the decision to refuse to proceed to carrying out a second phase EIA not only infringed on the procedural and substantial rights of residents but also damaged public interests, because it was unjust to the residents who were boycotting the construction expecting that the proper procedure would follow before construction could begin.

The court believed that each professional subject should be considered in proportion and required the authorities to follow the rules of proportionality when making EIA decisions. The court invalidated the decision to not require a second stage EIA because the EIA commission's decision was primarily based on the consideration of "convenience" and "urgency," which should not be so heavily weighted.

Yet, instead of evaluating the proportionality between purpose and means, the court was actually saying that the EIA commission's decision should exclude an irrelevant basis of consideration and instead base its decision on a reasonable consideration of all professional opinions. As one scholar commented, the application of the principle in this case concerns not the balance between means and ends, but the interpretation of legal provision and facts. It is an issue of improper connection between administrative discretion and the elements considered.<sup>38</sup> In this

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<sup>38</sup> Chien-Liang Lee, *Environmental Impact Assessment Review and the Principle of Proportionality: The Meaning and Concerns of the Supreme Administrative Court 100 Pan No. 1022 Judgment*, 185 TAIWAN L.J. 101, 109 (2011) (李建良, 環境法實務專題講座(四): 環評審查與比例原則——最高行政法院100年度判字第1022

judgment, however, the court interpreted the principle of proportionality as the principle of prohibiting improper connection.

In another case, the *Supreme Administrative Court 89 Pan No. 3272 Judgment* (最高行政法院89年度判字第3272號判決, hereinafter “*Air Pollution Penalty case*”), it seems the court confuses the principle of legal reservation with the proportionality principle.<sup>39</sup> The court suggests that, if the plaintiff polluted the air and the measure taken by the administrative agency was within the discretion authorized by the law, the measure is considered “necessary” to maintain social order and improve public welfare. The way the court determined whether the measure was “necessary” under the proportionality principle was by seeing whether the measure taken had gone beyond the powers authorized by the law. Yet, the issue of legal authorization derives from the demand of rule of law, which requires all administrative measures to be made on the formal basis of law. The requirement of formal legal authorization is different from the principle of proportionality that emphasizes substantive legitimacy between purpose and means.

### 3.1.3 Inconsistent Identification of Interests

The principle of proportionality requires each administrative decision to be made with a reasonable balance between the pursued public interest and infringed individual rights, requiring all means undertaken to be proportionate to the objective. Accordingly, the court should compare the interests pursued by an administrative measure with

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號判決的意義與隱憂，台灣法學雜誌，185期，頁109（2011年）。

<sup>39</sup> The principle of legal reservation means that administrative actions restraining people’s rights should be prescribed by law. Many Interpretations made by the Constitutional Court of Taiwan had emphasized this principle. See, e.g., J.Y. Interpretation No. 380, 394 (Taiwan).



the damage it would cause. Yet, the judgments of environmental cases often fail to appropriately incorporate its applications of the principle of proportionality.

In the *Supreme Administrative Court 89 Pan No. 3272 Judgment* (最高行政法院89年度判字第3272號判決, hereinafter “*Chemical Factory Penalty case*”), the proportionality principle is used to evaluate whether the punishment is proportional to the damage caused by the plaintiff.<sup>40</sup> The plaintiff owned a chemical factory that was investigated by the EPA and fined 300,000 NTD for its illegal emission of air pollutants. When the plaintiff failed to improve the facility and manufacturing process, the EPA continued to fine it on a daily basis, amounting to a total of 1,800,000 NTD. The plaintiff brought the suit to the court, saying that the EPA should evaluate the degree of pollution and the protected interests and choose the measure causing the least harm according to the principle of proportionality. The plaintiff believed that the pollution created by their factory was not serious and should not be so heavily fined for it. The plaintiff thus challenged the measure in court by claiming the fine violated the principle of proportionality. The plaintiff did not examine whether the purpose of the administrative measure outweighed its damage to the plaintiff but instead looked at the amount of pollution caused as the basis for the degree of the administrative punishment. The plaintiff’s approach seems to be an incorrect application of the principle of proportionality. The primary purpose of administrative punishment is to ensure compliance with administrative law. Sanctioning the violation of administrative regulations should be regarded as the method to achieve the purpose of

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40 Zuigao Xingzheng Fayuan [Sup. Admin. Ct.] 89 Pan No. 3272 (2000) (Taiwan).

compliance. The degree of violation can be considered when deciding the punishment, but addressing the degree of violation alone is not the purpose of the administrative measure under the Article 7 of the Administrative Procedure Act. Although the degree of pollution produced by the plaintiff is one important consideration in the choice of administrative measures, it is not equivalent to the entire purpose of the measure.<sup>41</sup>

### **3.2 EU: A Deep-rooted Principle in the Context of Regional Integration**

With a long history of applying the principle of proportionality, judgments produced by the ECJ generally provide more detailed reasoning for how the court applied the principle in concrete contexts. The understanding of the principle of proportionality presented in the court's judgments mostly adheres to the original definition devised by scholars. Yet when applying the principle in cases concerning the legality of EU administrative action and cases concerning the legality of measures taken by EU member states, the court seems to differentiate the standard of review and the purpose, making the principle not coherent.

Although the Treaty of European Union was not passed until 1991, the principle of proportionality had been prevalent prior to that in European countries. Despite the fact that Article 5 of the EC Treaty regulates community institutions only, the court has been applying the principle both to community and national measures (when applying

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<sup>41</sup> In the judgment, the court considered the fine as default surcharge rather than administrative punishment and concluded that the amount of fine should be comparable to the degree of failed compliance of the plaintiff. *Id.*

community law) in regards to both legislative and administrative action. The court requires that all administrative acts or decisions and all legislation conform to the general principle of proportionality.<sup>42</sup>

The *Fedesa* case reflects the way the ECJ understands and applies the principle. The judgment states that “by virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.”<sup>43</sup>

### 3.2.1 Strategic Application for the Sake of Integration

The progress of integration affects the interpretation of legal doctrines. In addition to its traditional function of restraining government power, the proportionality principle in EU law is also used to prevent national constitutional review from trumping EU law.

The *Internationale Handelsgesellschaft* case was the first case that applied the principle at the EU level. Its application was made in the context of common agricultural policy. As the court put it, “respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of

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<sup>42</sup> Protocol (No. 30) on the application of the principles of subsidiarity and proportionality (1997).

<sup>43</sup> Case C-331/48, *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, Fedesa et al.* [1990] ECR I-4023, para 13.

the community.”<sup>44</sup> In order to prevent the supremacy of EU law being undermined by challenges from national law regarding fundamental rights, the ECJ adopted fundamental rights and proportionality as principles of EU law, attempting to strengthen the constitutional credentials of the EU. In some cases, the interests of the community mingle with individual rights during the application of the proportionality principle.

### 3.2.2 Different Standards for the EU and Its Member States

In order to endorse the goal of regional integration, the ECJ seems to adopt different standards of scrutiny depending on whether it is applying the principle of proportionality to the EU or to an individual member state. The ECJ tends to support the measures adopted by EU institutions and reviews them with less strict standards, while it strictly examines administrative decisions made by member states.

In the *Fedesa* case, the court asserted that “with regard to judicial review of compliance with those conditions it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by Articles 40 and 43 of the Treaty. Consequently, the legality of a measure adopted in the sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.”<sup>45</sup> In one judgment, the court repeats the argument by saying that, “[w]ith regard to judicial review of the conditions for application of such a

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44 Case 10/70, *Internationale Handelsgesellschaft, bH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1070] ECR 1125, at 3.

45 Case C-331/88, *Fedesa and Others* [1990] ECR I-4023.

principle, having regard to the broad discretion which the Community legislature is allowed in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments, the legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.”<sup>46</sup>

The ECJ suggests the court should opt for a less rigid standard of review in certain fields where political responsibility is involved.<sup>47</sup> It seems that the court applies a highly deferential or marginal test, examining whether a certain decision or measure is “manifestly inappropriate” or is “vitiating by a manifest error.”

Yet, in certain other cases, especially involving measures that might undermine the EU goal of economic integration by member states, the court adopts a much stricter test. The court requires the member states to demonstrate the necessity of the chosen instruments and the importance of the aims pursued. For example, in *Danish Bottles* case, the interests evaluated by the ECJ are between the EU and Denmark.<sup>48</sup> The Danish government approved a stringent regulatory measure, which requires beer and soft drinks producers to use re-usable containers approved by the Danish government only. Some drink companies believed the measure violates EU law. EU prohibits the restriction on the free movement of goods for the interest of an integrated market. The

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<sup>46</sup> Judgment of The Court (Third Chamber) 12 January 2006, Case C-504/04.

<sup>47</sup> Case C-535/03, *The Queen on the application of: Unitymark Ltd and North Sea Fishermen’s Organisation v. Department for Environment, Food and Rural Affairs* 23 March 2006.

<sup>48</sup> Case 302/86, *Commission v. Denmark* [1988] ECR 4607; [1989] 1 CMLR 619.

Commission argued that the Danish rules are contrary to the principle of proportionality because other less restrictive means can also achieve the aim of environmental protection.

The court endorsed the deposit and return system, viewing it as proportionate and necessary to achieve the aims. As for the approval requirements, the court found it disproportionate. The court believed that, the producer would have to purchase already approved containers, which would involve substantial costs according to Danish law, making importation difficult. The court concluded that if a foreign manufacturer could comply with the Danish re-use policy by establishing its own system, the approval system was not necessary and did not violate the EC principle of free trade. However, the judgment was not only based on the degree of rights infringement or the proportion between damage and benefits. In this case, the court changed the balance by adding the EU interests of free trade on the infringed right of manufacturer. The infringed rights along with the interests of the EU exceed the pursued interest, and the court thus held the measure disproportionate. As the court put it, “it is therefore necessary to examine whether all the restrictions which the contested rules impose on the free movement of goods are necessary to achieve the objectives pursued by those rules.”<sup>49</sup>

The original meaning of the proportionality principle is to balance the pursued interests and the infringement of individual rights. In pursuit of the goal of regional integration, however, the interpretation of the principle has to be compromised with the community goal, so that the principle sometimes even becomes a tool to promote deeper integration at the expense of individual rights. The interpretation and application of

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<sup>49</sup> *Id.* para. 17.

the principle have thus been criticized as inconsistent and arbitrary.

#### **4. Adapting to Environmental Cases in Taiwan and the EU**

Key features of environmental cases are uncertainty, multiple and conflicting interests, and the need for a future-oriented perspective. These features also challenge the objectivity of the proportionality principle. Interestingly, the principle has been adapted to environmental cases in Taiwan and the EU in different ways.

##### **4.1 The Proportionality Principle Confronting Environmental Cases**

The distinctiveness of environmental cases may also affect the application of the principle by courts in the two jurisdictions. The principle of proportionality is a way to evaluate and balance interests of a specific administrative measure or legislation. For the balancing to be effective and objective, there are some pre-conditions, such as a specified goal and knowledge of the means and ends. Since environmental cases tend to feature uncertainty, complicated interests, and the necessity for a forward-looking perspective, they may bring challenges to the application of the proportionality principle.

###### **4.1.1 Uncertainty in Environmental Issues**

First, the uncertainty of environmental issues is usually high. “Uncertainty” refers to cases in which the probability of alternative future scenarios cannot be determined. Robert Duncan suggests three components that contribute to environmental uncertainty: 1) the lack of

information regarding the environmental factors associated with a given decision-making situation; 2) not knowing the outcome of a specific decision in terms of how [insert what could be lost] could be lost if the decision was incorrect; 3) inability to assign probabilities with any degree of confidence with regard to how environmental factors are going to affect the success or failure of the decision unit in performing its function.<sup>50</sup>

In the presence of uncertainty, the proportionality principle would balance an *ex ante* measure of policy benefits with an *ex ante* measure of policy costs. When probabilities are unavailable, it is not obvious how the balance can be calculated. A scientific warning may turn out to be valid after being ignored at first, and it can also be heeded but turn out to have been unwarranted. Both mistakes depend on the policy chosen *ex ante* and the scientific finding that turns out to be true *ex post*.<sup>51</sup> Moreover, the assessment of appropriateness and necessity also depends on the knowledge available. When the knowledge available to practitioners and policy makers alike is fragmentary and not systemized, the effectiveness of regulation is difficult to assess.

One commentator has questioned how we can weigh whether such potential damage to human health or environment is disguised by a larger or smaller degree of uncertainty.<sup>52</sup> The proportionality principle

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50 Robert B. Duncan, *Characteristics of Organizational Environments and Perceived Environmental Uncertainty*, 17(3) ADMIN. SCI. Q. 313, 318 (1972).

51 Terrence Iverson & Charles Perrings, *Precaution and Proportionality in the Management of Global Environmental Change*, 22 GLOBAL ENV'T'L CHANGE 161, 165 (2012).

52 Hannes Veines, *Determination of the Level of Environmental Protection and the Proportionality of Environmental Measures in Community Law*, IX JURIDICA INT'L 89, 95 (2004).



turns out to be a mechanism for trade-off: how much cost you would accept to exchange for the expected interests. The more resources society commits to environmental protection, the more likely it is that unnecessary costs also increase.<sup>53</sup>

#### 4.1.2 Complicated Interests and Competing Values

The proportional principle is powerful in the single objective case. However, the difficulty of identifying interests and conflicting values also tests the applicability of the principle of proportionality. Environmental regulation involves competing values, which cannot always be translated into clearly defined rights or interests to be objectively balanced.<sup>54</sup> The application of the three-step test of proportionality is based on the specified interests pursued and infringed. In environmental legal issues, several difficulties may be encountered during the operation of the proportionality three-step test. For example, complicated environmental interests may not be identified, calculated or fairly represented through rights-holders. How much does an occupied reef island cost? How do we calculate the costs and benefits of the construction of a nuclear power plant on an island? One might find the answer depends on not any objective calculation but some incompatible division of ideology or belief.

Moreover, the interest of environmental protection is always intertwined with the need for development. This feature is present in the guiding legal principles—the principle of sustainable development—of environmental law. Both Taiwan and the EU embrace the principle of

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<sup>53</sup> *Id.*

<sup>54</sup> Laurence Tribe, *Ways Not to Think about Plastic Tree: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1318 (1974).

sustainable development. In Taiwan, Section 2, Article 10 of the R.O.C Constitutional Amendment states, “Environmental and ecological protection shall be given equal consideration with economic and technological development.” Article 3 of the Basic Environment Act also states that “economic, technological and social development shall equally emphasize environmental protection based on long-term national interests.”<sup>55</sup> The EU also incorporates other values into environmental policy in addition to the principle of proportionality. Article 3.3 TEU states that the Union “shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.”

Sustainable development principles reflect the complexity of environmental issues and the compromises inherent in environmental decision-making.

Environmental cases always involve multiple goals and interests, making the evaluation of proportionality difficult. Veines suggests that, in assessing environmental regulations, “not only the benefits and costs but also values must be weighed.”<sup>56</sup> Tribe also argues, “analytic techniques can be of virtually no use outside the few situations (rarely encountered in the environmental field) where one is optimizing a single, well-defined objective subject to agreed-upon constraints.”<sup>57</sup>

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55 HUANJING JIBEN FA (Basic Environment Act) art. 3 (2002) (Taiwan).

56 Veines, *supra* note 52, at 95.

57 Tribe, *supra* note 54, at 1322.

### 4.1.3 A Forward-looking Perspective

Third, resolving environmental cases require a forward-looking perspective, which also challenges the application of the proportionality principle. The principle of proportionality is basically a retrospective, rather than *ex nunc* principle. The court can objectively examine the proportionality of administrative measures only if the interests pursued and infringed are known.

Environmental protection concerns future generations and requires a forward-looking perspective. Due to the uncertainty and cumulative character of environmental cases, there often exists a time lag between the human behavior and the moment at which the problem caused by this behavior becomes clear. Take the RCA case in Taiwan as an example. The U.S. company RCA (Radio Corporation of America) was established in 1919 and closed in 1986 when General Electric took over. Decades later, it was found to have dumped toxic wastes at its Taoyuan factory, polluting the soil and underground water and leading to alarmingly frequent reports of cancer among workers.

A multitude of international and domestic sources have acknowledged that the actions of present generations can interfere with the needs of future generations. To address this situation, legal documents commonly highlight the interests of future generations and state that they should receive attention alongside those of present generations. For example, Article 3 of the Basic Environment Act of Taiwan also states that sustainable development means satisfying contemporary needs without sacrificing the ability of future generations to satisfy their needs. Environmental regulation thus pursues long-term interests for future generations.

The legal principle that best highlights the forward-looking aspect of environmental law is the precautionary principle. The precautionary principle emphasizes avoidance of potentially damaging actions even when there is uncertainty about the consequence of those actions. Section 2, Article 174 of the Treaty Establishing the European Community emphasizes the precautionary principle in forming environmental policy, stating that “Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.”<sup>58</sup>

The enactment of the precautionary principle stresses the need to look ahead in environmental policy-making rather than taking the retrospective perspective more typical in the application of the proportionality principle. The requirement of a future-oriented perspective makes the interest-balance of the proportionality more difficult. When interests cannot be evaluated using the same timeline, cost and benefit analysis is difficult.

## **4.2 Adapting to Environmental Cases in Taiwan**

In order to deal with the distinctive features of environmental cases, the courts of Taiwan adapt the principle of proportionality in at least three ways: shifting standard of review, procedural proportionality, and proportional consideration on conflicting interests.

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<sup>58</sup> Treaty Establishing the European Community, The Section 2, Article 174.

#### 4.2.1 Shifting Standard of Review

The first way for the court to adapt the principle to environmental cases is through the choice of standard of review. The court does not apply the same standard of review consistently. Only occasionally will the court take uncertainty into consideration and review cases with less strict standard when considering the proportionality of the involved measure. While in some other cases, the court applies the principle in a stricter way that ignores the distinctive features of environmental cases.

*Taipei High Administrative Court 100 Su No. 1349 Judgment* (臺北高等行政法院100年度訴字第1349號判決, hereinafter “*Concentrated Townhouses Construction* case) is an example where the court adopted a less strict standard of review.<sup>59</sup> In order to protect the productivity of farms, Article 18 of the Agricultural Development Act regulates the construction of farmhouses in agricultural lands. The order of the Council of Agriculture provides that, “in order to protect farm lands from being excessively and improperly used and to sustain good farms for agricultural production, concentrated townhouses cannot be constructed in specific agricultural zones.” Both individual farmhouses and concentrated townhouse developments need to apply for approval from the competent authorities.<sup>60</sup> The plaintiffs in this case were farmers who applied to the Hsin-Chu County Government for the construction of

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<sup>59</sup> Taipei Gaodeng Xingzheng Fayuan [Taipei Admin. High Ct.] 100 Su No. 1349 (2011) (Taiwan).

<sup>60</sup> NONGYE FAZHAN TIAOLI (Agricultural Development Act) art. 18 (2000) (Taiwan) provides that, “farmers, who acquire agricultural lands after the enactment of this revised Act of January 4, 2000 and do not possess a farmhouse for their own use, may apply for the construction of individual farmhouses or concentrated townhouses on their own agricultural land with the approval of the competent authorities at the city or county/municipality, provided that the construction does not affect agricultural production environment and the development of farm villages.”

concentrated townhouses. The Hsin-Chu government denied the application because the Council of Agriculture considered the land in concern to be located in specific agricultural zones of the regional plan. The farmers were dissatisfied with the decision and contested that the executive order violated the principle of proportionality. They argued that concentrated townhouse will boosts the economy by maintaining a productive agricultural environment.

One of the parties involved in the suit, namely, the Council of Agricultural Affairs, attempted to justify its order by arguing that,

“[T]he farms are declining off rapidly recently in Taiwan. As climate changes and the crisis of food shortage increase, farm protection is one priority of national policy. However, specific agricultural areas that have been regarded as high-quality agricultural land, often becomes the site of farmhouses due to its better location and public infrastructure, decreasing the quality and quantity of good agricultural lands and impacting the environment of agricultural productivity. In order to ensure food security, protect high-quality agricultural land, and create a sustainable agricultural environment, the applications for farmhouse construction should be more restricted. Food security has become an issue of national security and the government has determined to protect specific agricultural areas in order to ensure the quantity of high-quality agricultural lands and maintain the capability of the food supply.”<sup>61</sup>

The court accepted the argument of the Council of Agriculture by

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<sup>61</sup> Taipei Gaodeng Xingzheng Fayuan [Taipei Admin. High Ct.] 100 Su No. 1349 (2011) (Taiwan).

referring to the principle of proportionality. The court pointed out that, the amount of farmland has declined rapidly and impacted the country's agricultural productivity. The administrative order made by the Council of Agriculture is necessary to prevent good farmland from being overused. Moreover, the court believed that the order could be used as reference for other authorities in making decisions, which would help maintain good farms for agricultural use and facilitate sustainable agriculture development. The court then concluded that the order was necessary to achieve the administrative purpose and satisfied the tests of the proportionality principle. Strict adherence to the three tests of the proportionality principle would indicate that the restriction of the use of personal property for the purpose of furthering the nation's agricultural policy could hardly be necessary. On the one hand, the order failed to limit the restriction on farmhouse beyond certain size or with specific conditions; it may not justify the necessity of restriction. On the other hand, whether the purpose of protecting farmland is proportional against the rights of many farmland owners is an issue that needs to be clearly examined. However, when the court took into consideration the uncertainty of climate change and the risk of food shortages, the principle of sustainable development led the court to make a compromise in its standard of review.

In some other cases the court adopted a strict standard of review without explanation. In the *Supreme Administrative Court 101 Pan No. 567 Judgment* (最高行政法院101年度判字第567號判決, hereinafter “*Canal pollution case*”), the court examined whether fining the plaintiff would be an appropriate means to achieve the pursued interest.<sup>62</sup> The

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<sup>62</sup> Zuigao Xingzheng Fayuan [Sup. Admin. Ct.] 101 Pan No. 567 (2012) (Taiwan).

case was about waste disposal. The appellant, the South Office of National Property Administration, was fined because the escape canal of a piece of national land was found to be dirty. The appellant claimed that, although it is in charged with managing the property, the canal is subject to the administration of Kaohsiung City Government. The appellant suggested that the decision was neither appropriate nor effective and was not the least restrictive measure preventing the entire 420-meter canal from being polluted. The court accepted the argument, recognizing that to ask the appellant to clean the said section of canal would not help the pollution of the entire canal. It would be more effective if the Kaohsiung City Government could manage the pollution of the canal as a whole. The court thus concluded that the fine imposed by the Environmental Protection Bureau of the Kaohsiung City Government was neither appropriate nor necessary.<sup>63</sup> In this case, the court seemed to suggest that a measure is appropriate and necessary only if it can completely fulfill the pursued goal. This standard is obviously stricter than the standard usually adopted by the court.

Perhaps because of the different contexts and degrees of uncertainty, court in Taiwan changes its standard of review when applying the principle of proportionality in environmental cases. The fluctuation indicates that the court might not apply a legal principle with consistent standard. However, the court in Taiwan fails to elaborate on a more convincing theory to justify its application.

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<sup>63</sup> *Id.*



#### 4.2.2 Proportionate Consideration on Multiple Interests in EIA Procedure

In cases involving Environmental Impact Assessment (EIA), the application of the proportionality principle by the court is distinctive in two ways. First, the court introduces many more interests to the balance even though some of them were not included in the original understanding of the doctrine. Second, the court has begun to apply the concept of proportionality to procedural matters.

In environmental cases, especially cases regarding Environment Impact Assessments (EIA), an emerging tendency is that the court includes more interests when examining whether a measure is proportional. Moreover, the court applies the principle of proportionality and requires the EIA decision makers to consider all elements proportionally.

The abovementioned *An-Kang Incineration Plant* case is one example.<sup>64</sup> The court held that the decision to not carry out the second stage EIA violated the principle of proportionality. The plaintiff claimed that the construction of the incineration plant in An-Kang (安康), Xindian may cause significant environmental impacts and an EIA should be carried out according to the law. Nonetheless, the committee of Environmental Impact Assessment decided that the project did not need to complete a detailed second phrase EIA, because it would be “inconvenient”. The plaintiff thus challenged the decision of the authority for failing to comply with the law.

Again, the court did not examine the purpose of the measure and

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<sup>64</sup> Zuigao Xingzheng Fayuan [Sup. Admin. Ct.] 100 Pan No. 1022 (2011) (Taiwan).

the damage caused when applying the principle of proportionality. The court states that the authority should consider various elements to determine whether a project would significantly impact the environment and decide whether to carry out a second stage EIA accordingly. The court first suggests that, the decision of the EIA fails to fulfill the EIA's purpose to "prevent and eliminate the environmental impact caused by constructions" and hence is not proper. The court further compared the damages and the benefits of the decision, stating, "the decision infringes the procedural and substantial rights of residents, as well as damaging the constructors' interests and public interests since it may invite residents' protestation and eventually result in delayed construction." The court thus believed that the damage outweighed the benefit, concluding that the decision to not enter the second phase of EIA violated the principle of proportionality.

The argument of the court seems to be odd from a legal perspective. The principle of proportionality aims to restrain the abuse of government power from overly infringing human rights. It is only the public interest and the directly resulting right-infringement that matter. As Alexy puts, "the Law of Balancing requires the increasing intensity of interference with liberty to be matched by an increasing weight of reasons justifying the interference."<sup>65</sup>

If the court adheres to the original understanding strictly, it should examine the purpose of an EIA and its direct infringement on private rights. But the court did not mention the purpose of the EIA and the environmental interest in its decision, nor did it take the residents'

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<sup>65</sup> ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 231 (Julian Rivers trans., Oxford University Press 2010) (2002).

interest as pursued public interests.<sup>66</sup> Instead, the court considered the interests of the developer and the interests of the residents jointly, stating that the damage of the EIA decision on the residents and the developer was too much and hence not proportional. It seems that the court regarded all private interests as the opposite of the public interests pursued by a government agency.

EIA was designed to include understated environmental costs in the decision-making process of the government, preventing damage to the environment. EIA provides information for the government in order to balance environmental protection and other public interests such as economic development. It is an internal decision for reference and should not be examined under the logic of proportionality.

The way the court applies the proportionality principle to EIA cases in Taiwan can be explained from the aspect of late legal transplantation. While Taiwan learned the EIA system from the U.S. and the German-refined principle of proportionality, the court is required to adapt both doctrines to the local context. It is possible that the court applies the doctrine in EIA cases without careful consideration or out of insufficient understanding of the principle due to a shorter history of use and more recent transplantation. Yet, the distinctive design of EIA in Taiwan may better explain why the court applies the principle in EIA cases. In Taiwan, the EIA committee of the Environmental Protection Agency, instead of the responsible government agency, examines EIAs. In addition, the EIA decision has veto power for major development projects. The whole project becomes illegal if the assessment does not pass the EIA committee's examination. However, if the EIA concludes

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<sup>66</sup> Zuigao Xingzheng Fayuan [Sup. Admin. Ct.] 100 Pan No. 1022 (2011) (Taiwan).

that a project passes its review, it permits the project and subsequent environmental damages. Because EIA decisions directly impact the environment and the rights of the developers and citizens, it is understood as an exercise of public power that may threaten individuals' rights and freedom.

However, the "public interests" of EIA can be very different from different points of view. From the developers' point of view, if EIA rejects a project, it is because the public interest in protecting the environment outweighs the infringed rights of the developer. To environmental groups, if EIA permits a project, the court should consider both the interests of the development project and the impact on the environment. For other persons of interest, such as involved residents, it is the environmental interests and other rights of citizens that should be balanced against the interests of the projects. In the *Supreme Administrative Court 100 Pan No. 1022 Judgment*, the court examined the impact of the EIA on both the residents and the developer but left the environmental interest and the interest of the incineration plant unmentioned.

The case also exposes the problem of the principle of proportionality in confronting complex and conflicting interests in the EIA process. First, the balance of pursued government interests and the threatened private rights is only one part of environmental cases. The tension between economic growth and environmental protection as well as the resulting struggle between the developer and other citizens challenge the capability of the proportionality principle. Through including various interests in the balance, the principle is not merely a legal doctrine to restrain the government from power abuse but a platform reflecting and comparing different interests and policy goals.

In addition, the notice of multiple interests also contributes to shifting the focus from substantive justice to procedural justice. As discussed above, the *Supreme Administrative Court 100 Pan No. 1022 Judgment* suggests that the principle of proportionality requires EIA to consider all relevant elements and weigh each properly according to its proportion.<sup>67</sup> If the EIA commission fails to consider a necessary element, or places too much weight on certain elements, the decision violates the principle of proportionality. Different from the original requirement for substantive outcomes, the court requests a legitimate decision to be made under proportional consideration of necessary elements.<sup>68</sup>

By doing so, the court transforms the function of the principle of proportionality from restraining government power to facilitating better decisions through proportional procedure.

### **4.3 Adapting to Environmental Cases in the EU**

Regarding environmental cases, the ECJ's application of the principle of proportionality is affected by not only the distinctive features of environmental issues but also the politics and normative structure of EU law. If the bounds of normative or executive power are widely drawn, or if decision making requires difficult political choices or complex assessments of social and economic factors to be made, the court usually considers marginal review to be appropriate.

Although the integration into the EU was initiated for economic reasons, the protection of environmental interests is highly valued under

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

the current regime. Article 2 of the Treaty Establishing the European Community required the Community to promote a high level of protection for the quality of the environment; while Article 174(2) further emphasizes that the Community policy on the environment shall aim for a high level of protection. In addition, Article 37 of the Charter of Fundamental Rights of the European Union states that a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development. Under these provisions, a high level of environmental protection has become an essential goal of the EU, and therefore all policies should take the environment into consideration.

In order to achieve the highest level of environment protection, the EU endorses the precautionary principle. The interesting question is whether the ECJ applies the principle of proportionality differently in environmental cases considering that the EU considers environmental protection as one of the highest goals of EU law. How does the enactment of the precautionary principle affect the interpretation of the principle of proportionality? How does the court adapt the principle of proportionality to deal with uncertainty in environmental cases?

#### **4.3.1 Threading Proportionality with Environmental Values**

As a general principle of EU law, the court applies the principle of proportionality to precautionary measures taken by member states. The combination of the two principles serves as a more practical and reasonable guide for future policy.

First, the emphasis on environmental value and the enactment of the precautionary principle incorporates environmental value into the

value-neutral principle of proportionality, which may prevent the marginalization of environmental value in policy-making. In order to assess the proportionality of environmental protection measures, not only economic costs but also environmental value should be weighted. The Communication from the European Commission on the precautionary principle points out that society may be ready to pay a disproportionately high cost to protect prioritized values such as the environment and human health.<sup>69</sup> In the case of *Artegodan v. Commission* the court noted, “It followed that the precautionary principle can be defined as a general principle of Community law, requiring the competent authorities to take appropriate measures to prevent specific risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests.”<sup>70</sup>

The proportional review on precautionary measures was combined with the precautionary principle. In the *Pfizer* case, the plaintiff argued the authorities should wait for scientific studies on the risk of the virginiamycin before it imposed restrictions. The Court of First Instance, in assessing the necessity of the regulation, stated that the regulation was consistent with the precautionary principle “by reason of which a public authority can be required to act even before any adverse acts have become apparent.”<sup>71</sup> The court was also convinced that the use of antibiotics is not “strictly necessary in animal husbandry and that there are alternative methods of animal husbandry even if they can lead to

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<sup>69</sup> The precautionary principle: The Communication from the European Commission on the precautionary principle, COM(2000) 1 final of 2 at 19-20 (2000).

<sup>70</sup> Case T-74/00, *Artegodan GmbH v. Commission* [2002], para. 184.

<sup>71</sup> Case T-13/99, *Pfizer* [2002] ECR II-3305, para. 444.

higher costs for farmers, and ultimately, consumers.”<sup>72</sup> Although the court confirmed the proportionality principle as a general principle of Community Law, it concluded that the regulation satisfied the necessity test.

The court recalled the explanation from an already well-settled case from the European Court: “where there is uncertainty as to the existence or extent of risks to human health, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent.”<sup>73</sup> Therefore, the court concluded that the interpretation of the safeguard clause in light of the precautionary principle is permitted for a certain relaxation of the above-enumerated conditions. It may happen, according to the court, that in particular circumstances it is impossible to carry out “as full a risk assessment as possible” because of “the inadequate nature of available scientific data.”<sup>74</sup>

In the application of the principle of proportionality, the ECJ does not evaluate whether the measure adopted was useful, suitable or effective, but whether it was manifestly inappropriate. “Where the community legislature is obliged to assess the future effects of rules to be adopted and those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question.”<sup>75</sup>

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<sup>72</sup> *Id.* para. 456.

<sup>73</sup> *Id.* para. 162.

<sup>74</sup> *Id.*

<sup>75</sup> See Case C-504/04, Agrarproduktion Staebelow GmbH [2006] ECR I-679, para. 38. See also Case 43/72, [1973] ECR 1055, para. 24.



Applying the principle of proportionality may also contribute to reducing concerns over excessiveness and cost of precautionary measures, making the principle more pragmatic and economically efficient. Precautionary measures have often been criticized for not being economically efficient.<sup>76</sup> Under uncertainty, an environment-oriented regime may take excessive measures to prevent any environmental derogation. These measures may not only be unnecessary and costly but also sometimes leading to unexpected risks. For example, constructing a dam for a possible drought may interrupt the ecological system and become a threat to the maintenance of land and water. The proportionality principle pursues a “desirable” level of environmental protection and requires that all measures “cannot be used to accomplish anything more or less than necessary to achieve such a level.”<sup>77</sup> The proportionality principle may not examine precautionary measures with strict standards, yet it may help make precautionary measures more pragmatic. The above-mentioned Communication from the European Commission on the precautionary principle states that “measures based on the precautionary principle must not be disproportionate to the desired level of protection and must not aim at zero risk.”<sup>78</sup> The court in the *Pfizer* case echoes that precautionary measures should be based on “the most reliable scientific evidence available and the most recent results of international research” when scientific data is available.<sup>79</sup>

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<sup>76</sup> See Cass R. Sunstein, *Precautions Against What? Perceptions, Heuristics and Culture*, in *THE REALITY OF PRECAUTION: COMPARING RISK REGULATION IN THE UNITED STATES AND EUROPE* 492, 498-504 (Jonathan B. Wiener, Michael D. Rogers, James K. Hammitt & Peter H. Sand eds., 2010).

<sup>77</sup> See Natalie McNelis, *EU Communication on the Precautionary Principle*, 3(3) J. INT'L ECO. L. 545, 547 (2000).

<sup>78</sup> Commission Communication, *supra* note 69, at 4.

<sup>79</sup> *Id.* See also Case T-70/99, *Alpharma Inc v. Council* [2002] ECR II-3495.

In the EU, the applications of two principles—the principle of proportionality and the principle of precaution—interact with each other. The emphasis of precautionary measures in situations of environmental uncertainty facilitates the embodiment of environmental value in the application of the principle of proportionality. By the same token, the requirement of proportionality may also contribute to the reduction of unnecessary and costly precautionary measures.

#### **4.3.2 A Narrow Version of Proportionality with an Uncertain Standard of Review**

The ECJ usually applies the principle rigorously and explains how the three-step test is applied when reviewing administrative measures. Theoretically, the three-step test of proportionality forms a package; each step is equally important. In some other cases, the court indeed strictly adopts the test and demands a demonstration of the costs and benefits of the measure.<sup>80</sup> However, when measures and their environmental impacts are highly uncertain, the court tends to bypass the test of appropriateness and ignore the test of proportionality in the narrow sense, focusing most of its efforts on the test of necessity.<sup>81</sup> As a result, in cases involving environmental issues, the test of necessity is the core. However, the uncertainty of the meaning of “necessity” results in an inconsistent standard of review in the ECJ’s judgments. Take the judgments concerning biodiversity as an example. In the *German Crayfish* case, which concerns the banning of commercial imports of all species of live crayfish, the court found that the measure violated the

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<sup>80</sup> *E.g.*, Jointed case C-369/96 and C-376/96 [1999] ECR I 8453, para. 78.

<sup>81</sup> *See* PAUL CRAIG, *EU ADMINISTRATIVE LAW* 670 (2006). *See also*, Case C-28/05, G. J. Dokter and Others [2006] ECR I-05431, paras. 74-76.

necessity test. According to the court, a measure having discriminatory effects can only be justified under the expressed public grounds prescribed in Article 30 of the EC Treaty. The court applied the necessity test and found that the German measure can be replaced by alternative measures with less restrictive effects. As a result, the contested measure is disproportionate.<sup>82</sup>

In another case involving biodiversity and the free movement of goods, however, the court adopted a less strict standard of review. The *Bluhme* case concerns a Danish ban on importing yellow bees to a small island to protect against fauna falsification. The claimant argued the measure violates the free trade interest of the EU.<sup>83</sup> The objective recognized by the court is to maintain specific species of brown bees inhabiting the island. The court found the objective justified and suggested that only an outright import ban would be effective to conserve the species. Thus, the court concludes that the Danish ban satisfied the test of necessity.

One commentator writes, “in practice, this would imply that the court took a less coherent approach when applying the suitability and necessity test, applying a strict test in cases where it believed that the individual interests should prevail and a less strict approach when it believed that public interest should prevail. Whether the third test is applied or not depends on the desired outcome.”<sup>84</sup>

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82 Case C-131/93, *Commission v. Germany* [1994] ECR 3513.

83 Case C-67/97, *Ditle v. Bluhme* [1998] ECR I-08033.

84 Harbo, *supra* note 22, at 166.

### 4.3.3 The Development of Procedural Proportionality

Recently the EU applies the principle of proportionality in a procedural fashion. In the case of *Vodafone and Others*, instead of second-guessing the merits of the substantive choices made by the EU legislator, ECJ required the EU legislator to show that it has taken all relevant interests into consideration when making a law.<sup>85</sup> Perhaps because substantive evaluation of the means and goals is difficult in cases involving environmental uncertainty, the ECJ has gradually applied the principle of proportionality to procedural rights in environmental cases. The *Bluhme* case involved prohibiting marketing beers that contain additives.<sup>86</sup> When the court looked into the proportionality of the German regulation, it reviewed the procedural reasonableness. The court concluded that if a person has no opportunity to challenge administrative decision before the court, the decision cannot be considered as satisfying the principle of proportionality. The court pointed out that proportionality required an easily accessible and swift authorization procedure.<sup>87</sup> In other words, the German regulation failed the proportionality tests, not only because of the substantive rights it may infringe, but also because it leaves no procedural opportunity for traders to obtain authorization. It seems that, in the case of environmental issues where uncertainty is high, the court shifts its focus to procedural protection, which is analogous to the doctrine of due process of U.S. Constitutional Law.<sup>88</sup>

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85 See Case C-58/08, *Vodafone and Others* [2010] ECR I4999.

86 Case 178/84, *Commission v. Germany* [1987] ECR 1227.

87 *Id.*

88 Similar opinion, please see Sacha Prechal, *Free Movement and Procedural Requirements: Proportionality Reconsidered*, 35(3) LEGAL ISSUES ECON. INTEGRATION 201, 214 (2008).

## 5. An Unprincipled Principle?

The principle of proportionality is portrayed as a general principle of administrative law that can be transplanted across boundaries and should be accepted universally. Both in a new democracy like Taiwan or in a supranational organization such as the EU, the principle of proportionality is codified and widely applied. In Taiwan, scholars and the Constitutional Court introduced the principle of proportionality in order to restrain the arbitrary use of government power during the process of democratization. The principle was then codified into the Administrative Procedure Act of 2000, becoming the foundational principle of administrative law. In the EU, however, the principle was derived from legal traditions of European states and then adopted by the law of the supranational organization. Despite the very different routes of legal transplantation, the principle is surprisingly similar in the law of the two jurisdictions. It is a legal tool to evaluate the costs and benefits of an administrative measure, and it is structured with the famous three-step test.

Yet if we take closer look at how the principle is interpreted, applied and adapted by courts, we arrive at a different understanding of the universality of the principle.

Through an analysis of the judgments of the European Court of Justice and the Administrative court of Taiwan in environmental cases, this article suggests that the principle is used differently according to the context and the nature of cases.

The first observation is a general one. In Taiwan, the principle is frequently used in incorrect or incomplete ways. The court sometimes

mentions the principle without substantial application, sometimes confuses it with other legal doctrines, and sometimes misinterprets which interests should be evaluated. The short history of the principle's legal transplantation in Taiwan may well indicate that these problems will eventually resolve when the legal community of Taiwan becomes more mature. However, the experience of the EU suggests that even in a jurisdiction with a solid tradition of using the principle, the principle is strategically applied. The ECJ generally adheres to the original meaning and provides more thorough reasons when it applies the principle. However, the court strategically uses the principle to highlight the goal of integration and to endorse measures taken by EU institutions.

The second observation considers the differences inherent in environmental cases. Due to features of uncertainty, multiple but conflicting values, and the need for a future-oriented perspective, environmental law has become a distinctive research field of administrative law. The distinctiveness of environmental cases also challenges the claim of universality of the proportionality principle. In both Taiwan and the EU, courts do not consistently maintain the same standard of scrutiny when reviewing environmental cases. Taiwanese courts seem to be arbitrary, shifting between different standards of scrutiny without a convincing basis for the shifts. The ECJ asymmetrically favors the step of necessity among the three-step test, which also results in an inconsistent standard of review.

Furthermore, this article argues that the principle's content and formula are adopted contextually in both jurisdictions, but in somewhat different ways. In Taiwan, the salience of Environmental Impact Assessment cases and their unique form push the court to include multiple interests when evaluating the proportionality of an EIA decision.

The court also closely examines the decision-making process applied in EIA and requires each element to be considered proportionally. In the EU, where environmental protection is highly valued, the codification of the principle of precaution “greens” the application of the proportionality principle. In addition, the gradual emphasis on procedural justice has also led to the development of procedural proportionality.

The principle of proportionality, though widely claimed to be an objective way to protect human rights, is as varied in its application as it is widespread. The way the proportionality principle is applied by courts covers a spectrum ranging from a very deferential approach to a quite rigorous and thorough examination of the justification for a measure that has been challenged.<sup>89</sup> The paths of legal transplantation and specific social contexts lead to different strategies applied by the courts to interpret the principle of proportionality. The distinctive nature of environmental issues further exaggerates the arbitrariness. The application of the proportionality principle is now largely determined by the value and ideology of the court that applies it. Without proper monitoring and balancing, the proportionality principle could become a convenient excuse for courts to pursue their own agendas. In such situation, a supposedly objective legal principle can come to justify a breach of democratic accountability. It is worth noting that the development of climate change has increased the uncertainty of environmental issues to a high degree. Whether the court can deal with increasing environmental uncertainty while maintaining its legitimacy in applying the principle of proportionality is an issue we need to examine closely.

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<sup>89</sup> G. de Búrca, *The Principle of Proportionality and Its Application in EC Law*, 13(1) YEARBOOK EUR. L. 105, 111 (1993).

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## 差別適用的普世原則？ —— 比例原則在歐盟與臺灣環境案件的比較研究

林春元\*

### 摘 要

比例原則已經成為許多國家檢視行政行為合法性的重要判斷原則。然而，被認為是客觀、普世的比例原則，是否因為不同社會脈絡與法律架構、不同案件類型而調整其解釋與適用？

本文檢視臺灣行政法院與歐洲法院關於環境爭議的判決，嘗試分析臺灣與歐盟不同發展脈絡與環境案件之特殊性對比例原則客觀性之衝擊。

本文發現，比例原則會因為社會脈絡與案件性質而調整適用。從社會脈絡而言，臺灣尚淺的繼受傳統導致法院經常誤解或誤用比例原則；歐洲法院策略性適用以促成歐洲整合。從環境案件性質而言，臺灣法院因不確定性而有寬狹不一的標準並納入對多元價值的權衡；歐洲法院強調必要性、與預警原則妥協且發展出程序性比例原則。

關鍵詞：比例原則、環境議題、不確定性、區域整合、民主化、預警原則。

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