

Table of Contents

About the Author	v
Foreword	xiii
Preface	xv
Introduction	1
CHAPTER 1	
The Relationship between the Rule of Reason, the Standard of Reasonableness and Proportionality in Search of Fairness	9
1.1 The Origins of the Standard of Reasonableness, the Rule of Reason, and the Principle of Proportionality	9
1.2 Their Interaction, Differentiation, and Classification as Rules, Standards or Principles	11
1.3 Their General Importance to Fundamental Tax Principles and Issues (Equality, Legal Certainty, Tax Avoidance, Effectiveness, International Double Taxation) in Search of Fairness: What Is Tax Fairness	16
CHAPTER 2	
American Legislation and the US Supreme Court	25
2.1 The Constitutional Clauses regarding Reasonableness and Proportionality Standards of Review	26
2.1.1 The Role of Proportionality in the American Federalism	26
2.1.2 Constitutional Clause on Contract Protection (The Rule of Reason)	30
2.1.3 Reasonableness and Legal Interpretation	33
2.1.4 The Living Notion of Reasonableness and Proportionality	34

Table of Contents

2.2	Excessive Taxation	35
2.3	Tax Discrimination	37
2.4	Retrospective Taxation	42
2.5	Domestic Notions of Reasonableness and Proportionality and Their International Tax Dimension	44
CHAPTER 3		
International Jurisdictions and Proportionality and Reasonable Standards of Review (The ICJ, the ECHR and the WTO)		49
3.1	The Role of Proportionality within the Jurisdiction of the <i>International Court of Justice</i>	50
3.2	The <i>European Court of Human Rights</i> : Proportionality and Reasonableness Tests in Tax Matters and in General	52
3.2.1	General Principles and the Origin of Proportionality and Reasonable Standards of Review in the ECHR	52
3.2.2	The Meaning and Ascertainment of Reasonableness via Proportionality	53
3.2.3	Reasonableness and Proportionality as an Unwritten and Overarching Principle	55
a)	Discrimination: Reasonableness Coupled with Proportionality	55
b)	The Right to Property, Its Three Rules and the Overall Assessment of Proportionality	57
c)	Proportionality and Other Fundamental Rights	60
1)	Express Limited Rights	60
2)	The Rights to a Fair Trial and to an Effective Remedy	61
3)	Absolute Rights and Implied Limitations	63
d)	Conclusion	65
3.2.4	The Margin of Appreciation Doctrine and Its Interference with the Proportionality Principle	66
a)	Tax and Non-tax Matters, Notion of the Margin of Appreciation	66
b)	The Margin of Appreciation in Taxation	70
3.2.5	Tax Discrimination	71
a)	The Joint Taxation of Married Couples and Family Taxation	71
b)	Tax Discrimination on Grounds of Sex and Strict Proportionality	75
c)	Tax Discrimination on Grounds of Fiscal Residence	78
3.2.6	Justification for Retrospective Taxation	79
a)	Retrospective Legislation, Tax Avoidance, and Tax Evasion	79

b)	Contrast between Tax and Non-tax Retrospective Legislation	83
c)	Some Conclusions on Retrospective Legislation and Proportionality	86
3.2.7	Other Tax Principles Derived from Proportionality	87
a)	Lawfulness (Clarity and Predictability) in Taxation	87
b)	Fiscal Penalties and Forfeiture	89
c)	Excessive Taxation, and Ability to Pay ('Financial Position')	94
d)	VAT and the Rights to Deduction and Refund	96
3.2.8	Conclusion on the ECHR	97
3.3	The WTO: The Interaction between the Rules and Principles of International Free Trade, Taxation and the Role of the Proportionality Principle	100
3.3.1	The Core Principle of Non-discrimination within the WTO	100
3.3.2	National Treatment Principle and Other GATT/GATS Rules	103
a)	The Principle of Non-discrimination	103
b)	The General Exceptions, the Wording 'Necessary': The Cost-Benefit Analysis and Proportionality	105
c)	Chapeau of Articles XX and XIV: Balance and Non-abuse of Rights	110
3.3.3	Contrast with Other Jurisdictions and Conclusion	117
CHAPTER 4		
A European Union Law (The European Court of Justice)		
		121
4.1	Proportionality as a General Principle of EU Law	122
4.2	Proportionality, Taxation, and the Fundamental Freedom of Goods	125
4.2.1	Custom Duties (Articles 28-30 TFEU)	125
4.2.2	Trade Restrictions on Imports and the Rule of Reason (Articles 34-36 TFEU)	126
4.2.3	The Relationship between State Aid and the Freedom of Movement of Goods (Articles 34-36 Rule of Reason and 107 TFEU)	128
4.2.4	Domestic Taxation and Protective Measures (Articles 110-113 TFEU)	130
4.3	Free Movement of Persons, Services and Capital (Proportionality as an Explicit Condition for Any Restrictive Measure)	132
4.4	Interaction between Environmental Taxation and the Fundamental Freedoms	138
4.5	Proportionality and Tax Imperative Requirements (Fiscal Coherence, Effectiveness of Fiscal Supervision, Balanced Allocation of Taxing Powers and Tax Avoidance)	142
4.5.1	The Tax System Coherence as a Justification	142

Table of Contents

	4.5.2 The Fiscal Supervision Requirement	145
	4.5.3 The Allocation of Tax Powers between Member States	147
4.6	Proportionality, Abuse and Tax Avoidance	151
	4.6.1 The Role of Proportionality in Addressing Tax Avoidance	151
	4.6.2 Development of a General Doctrine of Abuse of Rights (Direct Taxation)	153
	4.6.3 Specific Tax Avoidance Rules and Proportionality	159
4.7	VAT Principles and Proportionality	161
	4.7.1 Tax Avoidance, Tax Evasion, Simplification, Neutrality and Fairness (Substantive Measures)	161
	4.7.2 Abuse of Rights as a General Anti-avoidance Rule within the VAT System	166
	4.7.3 Fiscal Supervision, Fraud, Neutrality, Fairness (Procedural Measures)	169
	4.7.4 Conclusions on VAT Principles and Proportionality	172
4.8	Retrospective Tax Legislation, Legitimate Expectation, and Proportionality	173
	4.8.1 The Principles of Legal Certainty and Its Corollary of Legitimate Expectation	173
	4.8.2 Proportionality, Legitimate Expectation and Retrospective Legislation in General	175
	4.8.3 Actual Retrospective Taxation. Simplification as a Justification	177
	4.8.4 Retrospective Taxation and Justifications of Tax Avoidance, Abuse and Evasion: Actual and Apparent Retrospective Taxation	178
	4.8.5 Retrospective Taxation and Procedural Rules regarding Limitation Periods	181
4.9	Conclusion on the EU and Some Comparisons with Other Jurisdictions	183
	Conclusion	187
1	Proportionality and Reasonableness as Overarching or General International Principles or Standards of Law	187
2	Fundamental Tax Issues and the Role of Proportionality and Reasonableness	190
	2.1 Equality, Non-discrimination and International Tax Law	190
	2.2 The Abuse of Tax Law and Other International Tax Principles Developed via Proportionality and Reasonableness	193
	2.3 The Features of Proportionality (Optimization, Effectiveness and Neutrality) and the Principle of Good Faith in Assessing Fair Taxation	196
	2.4 Proportionality and Reasonableness as Applied to Double Taxation Conventions	199
3	Costs and Benefits of Proportionality: International Tax Certainty and Fairness	201

Bibliography	205
Table of Cases	217
Index	231