PROPORTIONALITY IN CONSTITUTIONAL LAW: WHY EVERYWHERE BUT HERE?

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INTRODUCTION

Suppose you are a judge—not on a European constitutional court, where the principle of proportionality is generally accepted, nor on the U.S. Supreme Court, where, according to general wisdom, the principle is hardly known and hardly used, but on a fictitious moral court. No statutes, no precedent—each case is decided on its moral merits only. Two neighbors, John and Frank, who live high up in the mountains come before you. In the middle of a cold and stormy winter night, John took Frank's four-wheel drive car without asking and didn't return it until the next evening. Frank who had wanted to pick up his elderly mother in the morning at the lonely bus station in the valley, couldn't do so. The old lady stood in the cold for two hours before the postman drove by; he had to bring her to the hospital with frostbite. Frank thinks John should at least apologize for his immoral action. John is truly sorry for what happened but thinks he shouldn't be morally blamed. You are the judge—what will you do?

You ask John how he could do what he did. He explains that he took Frank's car to bring his pregnant wife to the hospital; her water had broken. You ask why he didn't use his own car. He explains that he needed a four-wheel drive car because it had snowed heavily. You ask why he took the car without asking. He points out that he and Frank had often taken and used each other's things without asking and that he hadn't wanted to wake Frank up in the middle of the night.

Then you turn to Frank. In view of what John has explained, does he still blame John for his immoral action? Frank does, because he had told John of his plan to pick up his mother the next morning. You confront John with this information. He says he is sorry for the old lady's frostbite but that he knew that with the postman driving by nothing serious could happen to her, while his wife's situation was a matter of life and death. You call the hospital, and it turns out that indeed John's wife, who delivered

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unexpectedly early, could have died if she hadn't reached the hospital when she did. And it also turns out that Frank's mother has recovered well and fast.

Whatever you decide, maybe that John and Frank should reconcile because what happened was a chain of unfortunate events, you have engaged in a proportionality analysis. You asked Frank about the end that he pursued; you found out that the end was legitimate; that his action was a helpful, even a necessary means to pursue the end; that there was no alternative means that would have harmed Frank and his mother less; and that the end, saving John's wife's life, was important enough to justify the harm done to Frank's mother. Proportionality analysis is about means and ends, and whenever there is no law, here no moral law, specifically commanding, prohibiting, or allowing an action, we justify or condemn the action based on the legitimacy of the end pursued and on the helpfulness, necessity, and appropriateness of the action as a means to that end.

The proportionality principle thus reads as follows: If you pursue an end, you must use a means that is helpful, necessary, and appropriate. A means that doesn't help to reach the end isn't a real means—to use it would be out of proportion. It is also out of proportion to use a means that does more than necessary, for example a means which is more harmful or more expensive than necessary. It is equally out of proportion to use a means that is inappropriate because, even though it is necessary, by using it you do more harm than the end is worth or you spend more than you gain. It would have been out of proportion and, in our context, immoral if John had taken Frank's helicopter, when, even though he knew how to fly it, he didn't have the skill to land; this would not have helped him to save his wife. It would have been out of proportion and immoral for John to take Frank's four-wheel drive car if John's normal car would have worked just as well; this would have been unnecessary to save his wife. And to take Frank's four-wheel drive car would have been out of proportion and immoral if not the life of John's wife but the life of Frank's mother would have been in serious danger; the action would have done more harm to Frank's mother than good to John's wife.

In short: enough is enough and more is too much. More than enough is out of proportion, more than necessary is out of proportion, more than appropriate is out of proportion. So don't do more!

I. PROPORTIONALITY AND BALANCING

In law the principle of proportionality arises in those cases where specific norms commanding or prohibiting specific means or, to be more precise, actions that serve people as means, are lacking. The right of self-

defense is one example. Everyone is entitled to defend his or her life, liberty, and property. To pursue this end he or she is entitled to use means that would otherwise be prohibited and may thus cheat and strike and shoot. No action that might become helpful and necessary for one's self-defense is prohibited categorically. But the law doesn't go so far as to allow one to act any way one wants. Unable to deal with the abundance of self-defense situations more specifically, it requires proportionate self-defense.

Let's assume there is a lame man who sits on his porch and sees a child climbing into his apple tree and picking apple after apple. He shouts, but the child just laughs. His only means to drive the child off the apple tree is to use a gun that he can reach and to shoot the child down. The means of shooting the child is helpful and it is even necessary to reach the end of defending his property. But we easily agree that it is inappropriate or imbalanced: The life of the child is much more precious than the value of a couple of apples.

Here the balancing of the the property to be saved against the life to be sacrificed appears as the last step of proportionality analysis. That is often the case. The Federal Constitutional Court of Germany, for example, reviewed whether the state could extract a defendant's cerebrospinal fluid in order to determine his mental capacity. It decided that determining mental capacity was a legitimate goal and that the extraction was helpful and necessary. However, the court recognized that since the extraction is painful and dangerous, the state can require an extraction to resolve only a serious crime. Only then are the pain and danger of the extraction and the resolution of the crime properly balanced.[1]

But sometimes balancing also appears as the framework for proportionality analysis. The U.S. Supreme Court, for example, in reviewing the use of deadly force against fleeing felons, balanced the state's interest in preventing the escape of a criminal with the individual's interest in preserving his or her life. To find the proper balance, the Court engaged in a means-end analysis that had the characteristics of proportionality analysis even though the court didn't name it that. The court focused on the use of force against fleeing felons as a means and on the mean's end. The end is to protect citizens; therefore, deadly force is necessary against a fleeing felon only if he or she poses a serious physical threat to a citizen. Only in these situations does the court regard the use of deadly force to be properly balanced.[2]

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1. Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] June 10, 1963, 16 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 194.

2. Tennessee v. Garner, 471 U.S. 1, 27 (1985).

In jurisprudence as well as in legal literature, we find balancing used both as the last step of proportionality analysis and as the framework for proportionality analysis. This can be confusing. But it only means that, as happens often, one and the same problem can be tackled from different angles.

II. PROPORTIONALITY IN GERMANY

In Germany the principle of proportionality came into its own not in criminal law or law enforcement but in administrative law, when the police act to protect the public.[3] From the late eighteenth to the early twentieth century, the relevant norm provided little more than a definition of the task of the police: The police had to do what was necessary to fight dangers to public safety and order.[4] The norm was meant to give the police wide discretion in fighting dangerous behavior of all sorts, from offending the Prussian king at a Socialist rally to building a house without proper structural engineering or running a chemical plant without proper waste disposal. In the beginning the norm even meant to give the police uncontrolled discretion. But once the ideas of individual rights and the Rechtsstaat (the state under the rule of law) began to prevail, the courts started to institute controls over the police. The days of uncontrolled discretion were over. In the last decades of the nineteenth century, the Prussian High Administrative Court developed this norm, a norm that did no more than define the task of the police, into a jurisprudence of proportionality. The police were entitled to use only means that were fit, necessary, and appropriate or, as it was also called, proportional in the narrow sense as opposed to proportional in the wide sense, meaning fit, necessary and appropriate. The means had to work, there had to be no other means that would be equally effective but less intrusive, and the end had to be important enough to justify the intrusion.

The court had only two normative premises. First, the police were entitled to do what was necessary to fight dangers to public safety and order. Second, citizens' life, liberty, and property were protected against police intrusion. Together the two premises created a dilemma. It is impossible to fight dangers without intruding into citizens' life, liberty, and property. So how could the police fight dangers, necessarily resulting in some intrusion, and at the same time protect citizens against intrusion? The court resolved the dilemma by allowing the police to intrude, but not in an

3. *See* BODO PIEROTH, BERNHARD SCHLINK & MICHAEL KNIESEL, POLIZEI- UND ORDNUNGSRECHT MIT VERSAMMLUNGSRECHT 4-13 (6th ed. 2010).

4. ALLGEMEINES LANDRECHT FÜR DIE PREUSSISCHEN STAATEN [ALR], Feb. 5, 1794, Part II, Title 17, § 10.

arbitrary way, and by defining the nonarbitrary way as the proportional way.

In the second half of the twentieth century, the German Federal Constitutional Court found itself with two very similar premises and not much more.[5] The German constitution contains a bill of rights that grants individuals a wide variety of rights and freedoms. At the same time, the constitution empowers the legislature to limit these rights and freedoms and intrude upon them. Here again is the dilemma of how to reconcile these conflicting provisions. The constitution's grant of rights cannot mean that the rights always trump the legislature's power. Nor can the constitution's empowering the legislature mean that the citizens' rights are meaningless. The provisions have to coexist, and again, together they can mean only that the legislature is empowered to limit and intrude, but not in an arbitrary way. And again, the court defined and still defines this nonarbitrary way as the way under the principle of proportionality: The laws that the legislature enacts in pursuing its ends must be proportional.

What other definition of the nonarbitrary way could the court have devised? Once there is significant, but not total empowerment to achieve an end and to use means to achieve the end, the only way to curtail and control the empowerment is to require the means to be proportional.

Let me give you a few examples. The German constitution protects individuals' freedom to choose and to practice a profession. At the same time, it empowers the legislature to limit this freedom. To safeguard patients' health, the legislature instituted all kinds of controls on pharmaceutical sales, among them a limitation on the number of pharmacies that can be opened in each district. This was invalidated by the Federal Constitutional Court as an unnecessary intrusion into professional freedom that was out of proportion; the legislature could and should have achieved its goals by instituting regulations on the storing and sales of pharmaceuticals.[6] The German constitution also protects freedom of assembly and at the same time empowers the legislature to limit it. The statutory requirement to seek police permission for a public demonstration would go too far and would be out of proportion; notifying the police of the public demonstration is enough to allow it to make sure that the public demonstration doesn't clash with general traffic.[7] The free use of property,

5. *See generally* Bernhard Schlink, *Der Grundsatz der Verhältnismäßigkeit*, *in* 2 FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT 445 (Peter Badura & Horst Dreier eds., 2001).

6. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 11, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 377.

7. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 14, 1985, 69 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 315.

while constitutionally protected, can be limited by statute, among others by landmark statutes. A landmark regulation that requires an owner to keep up his house even though it has become unusable to him is out of proportion and unconstitutional; if the state wants to landmark the house it has to expropriate and compensate the owner.[8]

III. PROPORTIONALITY WORLDWIDE

In comparative constitutional law, the principle of proportionality is often traced back to German roots.[9] Indeed, in the second half of the twentieth century, it was after the German Federal Constitutional Court used the principle already, that constitutional courts from most European countries as well as Israel, Canada, and South Africa, made the principle of proportionality the cornerstone of their rights' and freedoms' jurisprudence.[10] But there is nothing inherently German about the roots of the principle of proportionality, nor is the introduction of the principle into other constitutional contexts a transfer of a German principle. It is a response to a universal legal problem. Once it is understood that an authority's reach is extensive but also limited, without the limits being specified, the principle of proportionality serves as an instrument for reconciling both: the extensive reach with the unspecified limits.

Therefore the universal legal problem and the principle of proportionality as a response to that problem are not restricted to conflicts of state versus citizen and citizen versus citizen. When state agencies have conflicting powers, that are not clearly defined in their reach and limits, and the fiat of a higher authority cannot resolve the conflict, then a court must resolve the conflict, and the principle of proportionality can again come into play. The U.S. Supreme Court relied on the principle of proportionality, perhaps for the first time, in its jurisprudence on the

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8. Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] Mar. 2, 1999, 100 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 226.

9. Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 U. TORONTO L.J. 369, 370 (2007); Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 ICON 263, 271 (2010); Christoph Knill & Florian Becker, *Divergenz trotz Diffusion? Rechtsvergleichende Aspekte des Verhaeltnismässigkeitsprinzips in Deutschland, Grossbritannien und der Europäischen Union*, 36 Die Verwaltung 447, 454 (2003); Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 74, 97 (2008) [hereinafter Stone Sweet & Mathews, *The Hidden Foreign Law Debate in* Heller].

10. *See* Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in* Heller*: The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. 367, 379-80 (2009) (offering detailed references); Stone Sweet & Mathews, *The Hidden Foreign Law Debate in* Heller, *supra* note 9, at 74, 112.

relation between the federal government and the states under the Dormant Commerce Clause.[11]

But the principle comes into play primarily in conflicts over fundamental rights and freedoms and the legislature's power to limit and intrude upon them. Here courts find themselves with the two premises and not much more: the first that rights and freedoms are protected against limitations and intrusions; the second that these rights and freedoms can be limited and intruded upon. Here the answer must be that the limitations and intrusions must not be arbitrary, but proportional.

But rights can also be granted in a different way. The Bill of Rights of the American Constitution protects fewer rights than other constitutions but protects the most prominent among them categorically. The free exercise of religion must not be prohibited; freedom of speech, freedom of the press, the right to assemble peaceably must not be abridged. The legislature is not empowered to limit these rights or to intrude upon them. This doesn't mean that the rights don't conflict with goals that the state pursues or with rights of other citizens. But without a caveat for legislative limitations and intrusions, demarcations and categorizations help resolve such conflicts. The jurisprudence draws lines: The exercise of religion may be curtailed where a religion-neutral law, as opposed to a religion-specific law, states its commands or prohibitions. Speech is not protected when it turns into a fight or commercial action or, as obscenity or defamation, lacks the value of speech. It may also be restricted where the restrictions are not content-specific, but content-neutral, and refer only to the time, place, and manner of what is said.

But all of this doesn't mean that proportionality analysis doesn't come into play in the U.S. Whenever American courts review limitations and intrusions with strict scrutiny or a middle tier of scrutiny, or even with a requirement of mere rationality, theirs is a means-end analysis that is a more-or-less thorough proportionality analysis.[12] The often-mentioned, praised or criticized American exceptionalism exists. What this means in our context is that the word "proportionality" appears only rarely; that the means-end analysis is somewhat haphazard; and that balancing and means-

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11. *See* Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 814-24 (2011) [hereinafter Mathews & Stone Sweet, *All Things in Proportion?*]; J. H. Mathis, *Balancing and Proportionality in US Commerce Clause Cases*, 35 LEGAL ISSUES OF ECON. INTEGRATION 273, 273-75 (2008).

12. *See* T. Alexander Aleinikoff, *Constituitonal Law in the Age of Balancing*, 96 YALE L.J. 943, 963 (1987); Vicky C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 602; Mathews & Stone Sweet, *All Things in Proportion?*, *supra* note 11, at 824-33; DAVOR ŠUŠNJAR, PROPORTIONALITY, FUNDAMENTAL RIGHTS, AND BALANCE OF POWERS 146 (2010).

end analysis come systematically later. The first approach is to fine-tune the realm of the right, to specify its inner limitations before allowing for outer limitations by the legislature. Justice Breyer, who advocates proportionality analysis for American constitutional law, is right: Proportionality analysis would not be something alien to American constitutional jurisprudence and scholarship; it would sharpen the American methods of balancing, scrutinizing, and rationalizing.[13] But I understand that American courts and legal practitioners, like courts and legal practitioners everywhere, are not too interested in seeing their methods of legal reasoning sharpened and thereby their discretion restricted.

With the exception of the American constitution, most modern constitutions protect not just a few rights, but a plethora of rights and freedom, with the effect that all behavior, all action, and all expression is protected, but the state can limit and intrude upon these protections, as long as it does so proportionally. Sometimes these constitutions were the response to a previous totalitarian or dictatorial regime; lack of freedom in all areas of life subsequently leads to an emphasis on the protection of freedom in all areas of life as well. But even without the experience of totalitarianism or dictatorship, in a world ever-more crowded and ever narrower, freedom in all areas of life is ever-more valuable. With the far-reaching constitutional protection of rights and freedoms, in the last decades of the last century the principle of proportionality spread around the world. In European countries lacking constitutionally protected rights and freedoms or constitutional review, implementation of the European Convention on Human Rights into the national legal system leads also to implementation of the principle of proportionality into the national jurisprudence.[14] The European Court of Justice, the European Court of Human Rights, and the Panels and the Appellate Body of the World Trade Organization all operate under the principle of proportionality.[15]

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13. *See* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW, 159-71 (2010)

14. *See* Jeffrey Jowell, *Beyond the Rule of Law: Towards Constitutional Judicial Review*, 2000 PUB. L. 671, 678-79 (offering detailed references for the United Kingdom).

15. *See* Knill & Becker, *supra* note 9, at 463 (offering detailed references); *see generally* Stone Sweet & Mathews, *The Hidden Foreign Law Debate in* Heller, *supra* note 9, at 138-59. On the use of the principle of proportionality by the tribunals of the International Center for the Settlement of Investment Disputes see generally Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 LAW & ETHICS OF HUM. RTS. 47 (2010).

IV. PROBLEMS OF PROPORTIONALITY

It may sound as if I mean to say that proportionality works as the *solution* for conflicts between the legislature and the citizenry—everywhere and potentially even here in the U.S. But proportionality is also the *problem*. Or, to be more precise, it is a structure within which all kinds of problems unfold.

The first is the problem of insufficient or ambiguous information. It is sometimes simply impossible to determine whether a means works and whether it is necessary. The fitness and the necessity of a means is an empirical problem, and often science, scholarship, and experience can help in solving it. But often all one has are assumptions, contradictory experiences, and as many expert opinions as there are interests involved. Climate change is an example. Beyond a basic agreement that climate change is dangerous and has to be countered, information about the extent of the dangers and the effectiveness of the countermeasures is ambiguous and insufficient.

The second big problem is that while, at least ideally, it is objectively possible to determine whether a means works and is necessary, the balancing of rights, interests, and values entailed in the analysis of appropriateness is unavoidably subjective. There is no objective standard for measuring and weighing free speech vs. privacy, freedom vs. safety, privacy vs. public health, or the protection of an endangered species vs. the creation of badly needed jobs.

There are several ways to deal with these two problems. To solve the problem of insufficient or ambiguous information, one can establish a burden-of-proof rule under which it is either the legislature or the affected citizen who has to prove that the means at issue works or doesn't work, is necessary or is not necessary. Let's assume that to protect the climate, the legislature enacts a statute that requires car makers to use very sophisticated and expensive exhaust filters, and let's further assume that the effect of the filters is dubious. If the legislature is entitled to limit the citizens' freedom only if it can prove that the statute helps to pursue the legitimate end, in this case that the filter actually helps to protect the climate, then the statute is unconstitutional. If, on the other hand, the affected citizens have to prove that the statute does not help, then the legislature enjoys the benefit of the doubt and the statute is constitutional.

No country's constitutional jurisprudence, that I am aware of, follows either of these two burden-of-proof rules. They all find flexible solutions in between. They make the burden of proof shift depending on what is at stake. If the citizen's freedom that is to be limited is regarded as crucial for the citizen's autonomy, and if the end that the legislature pursues is

regarded to be of minor importance for the common good, then some constitutional courts require that the legislature demonstrate the effectiveness and necessity of the statute beyond reasonable doubt. If, on the other hand, the end that the legislature pursues is regarded to be important, and if the freedom that is to be limited is regarded to be of minor relevance, then the courts are more generous toward the legislature and allow it to act, even if many questions about the effectiveness and necessity of the statute remain unanswered. Of course there are many ways in which the burden of proof can shift or even be shared by the court itself; there are many degrees of scrutiny; many different notions of what is reasonable and what is unreasonable doubt; many different ideas about what is crucial or at least relevant for the citizen's autonomy; and of what is important for the common good. So it comes as no surprise that different traditions exist regarding how to distribute the burden of proof between the legislature and the citizens.[16]

Different traditions also exist regarding the second problem mentioned: the problem of the unavoidable subjectivity of balancing, the other element of proportionality.[17] One position, taken by the Supreme Court of Canada and also by constitutional scholars around the world, is that there is no reason why justices should put their own subjectivity before the subjectivity of the legislature. When decisions about how to pursue the common good are subjective, then they are political. They need democratic legitimization, and the legislature is democratically legitimized to make them. Only when decisions can be made on objective grounds are experts legitimized to make them. The contrary position, taken most often by other courts and their judges, is that they, the legal experts on the constitutional or supreme courts, because they are appointed by the president or parliament, enjoy at least an indirect democratic legitimacy and furthermore have the wisdom and time to balance more calmly and carefully the crucial conflicts of a society than the legislature, which acts in the turbulence and heat of political battle. And, again, there are many positions in between. Most courts claim the right to control the balancing of

16. *See* ŠUŠNJAR, *supra* note 12, at 83-162 (discussing similarities and differences between the jurisprudence of the German Federal Constitutional Court, the US Supreme Court, the European Council of Human Rights, and the European Court of Justice); Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 390 (2007) (noting the different traditions of the German Federal Constitutional Court and the Supreme Court of Canada); Mathews and Stone Sweet, *All Things in Proportion?*, *supra* note 11, at 813-36 (explaining shifts in the jurisprudence of the US Supreme Court); Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L. REV. 174 (2006) (discussing the jurisprudence of British courts); AHARON BARAK, THE JUDGE IN A DEMOCRACY 226-40 (2006) (expounding on the Israeli experience).

17. *Cf.* sources cited *supra* note 16.

the legislature and replace it by their own balancing and at the same time emphasize their respect for the results of the democratic political process. This means that they interfere not always, but only on those occasions when they feel a specific urge to do so. Naturally, some courts feel this urge on more occasions than others.

One factor in determining both how the burden of proof is distributed between the legislature and the citizens and how activist the courts are when balancing becomes the issue, is the democratic and revolutionary tradition. In France, with its double tradition of a powerful state and a powerful belief in democracy—a belief that, since the French Revolution, brought forth almost as many revolutions and constitutions as there were generations—the people trust the political process and accept only a rather weak judicial control of the legislature. In Germany where, in the eighteenth and nineteenth centuries, the bourgeoisie was too weak to make a revolution and instead invented administrative courts for the protection of the citizens' freedom and property, courts and the law enjoy more trust than the legislature and politics. Germany is also among those countries where the democratic political process led to fascism or communism. These countries share a particular hope that a wise and strong constitutional or supreme court will tame whatever dangerous tendencies the political and legislative process may have.

Another important factor for the distribution of the burden of proof and also for the assignment of the task of balancing is the homogeneity or heterogeneity of the people. The more ethnic and religious conflicts there are, the more it makes sense to shift some of the burden of integration from politics to law and from the legislature to the constitutional or supreme court. Canada and South Africa are accordingly countries with activist courts. It also doesn't come as a surprise that in Israel, where legitimacy as a Jewish state and legitimacy as a democratic state are not in full harmony, the court tries to establish its own legitimacy beyond and independent of politics.

Taking into account all these different shapes and showing all these different facets, does the principle of proportionality still have the distinctive features that allow us to call it a principle? I don't hesitate to say yes. The principle of proportionality is not a simple principle, easily applied and easily yielding answers. It is a complex principle, allowing for different interpretations and modifications. But it structures our reasoning and guides us on our difficult path to find answers.

CONCLUSION

The principle of proportionality has had a fantastic career: from a principle of moral philosophy to a legal principle, from a principle of administrative law to a principle of constitutional law. It has been called the ultimate rule of law,[18] and even though there is no such thing as an ultimate rule of law, the principle of proportionality is definitely a rule at which all courts ultimately arrive. Even the U.S. Supreme Court, shy about using the term, when it engages in means-end-analysis, follows the rule in substance again and again.

Application of the principle has had and will continue to have a standardizing effect on different constitutional cultures. Constitutional cultures with a doctrinal tradition will progressively be transformed in the direction of a culture of case law. The often-praised asset of proportionality analysis is its flexibility; from case to case, facts may be assessed differently and rights and interests weighed and balanced differently. The case-specific configuration of facts, interests and rights becomes more important and more significant than the doctrine that surrounds the case. Judges become more interested in finding the proportional solution for the case than in a decision that fits into established doctrine or helps to modify and refine it. On the other hand, the principle of proportionality has a certain structuring quality and potency that introduces a minimal doctrinal element into constitutional cultures with a case-law tradition.

Another way of viewing this is to say that the principle of proportionality doesn't have a standardizing effect on different constitutional cultures, but rather that it is a standard that constitutional cultures share and that they become more and more aware of over time. It is part of a deep structure of constitutional grammar that forms the basis of all different constitutional languages and cultures. It comes to the surface sooner or later—everywhere and even here.

18. *See* DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004).