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presented as "necessary," if the purpose they serve is defined in wide enough terms" (Lerche 1961, 20). Proportionality in the strict sense must be added to the least restrictive means test, "if the principle of necessity is not to lose all substance" (ibid.).

From Svarez to Lerche, then, one finds a remarkable continuity in doctrinal commitment to developing a proportionality-based account of rights. Germany's constitutional judges echoed this commitment from the earliest days of the post-war order. The Bavarian Constitutional Court applied a LRM test to statutory restrictions on state constitutional rights in 1949,[22] and by 1956 had asserted that the Proportionality Principle was implied by the very nature of the rights guaranteed in the Bavarian constitution, combined with the "*Rechtsstaat*" principle.[23] The GFCC moved almost as quickly. Indeed, by the close of the 1950s, the GFCC had elaborated the familiar multi-stage PA framework,[24] albeit without citing authority or giving a rationale for its application. To this day, the Court has not explicated the source of proportionality. As Dieter Grimm (Justice on the GFCC, 1987–1999) puts it: "The principle was introduced as if it could be taken for granted" (Grimm 2007, 387).

If the Court were to justify its move to PA today, we would argue, it would invoke these considerations: the priority of rights, given the recent Nazi past; the structure of rights, taking account of the modern welfare state and commitments to social democracy; and the rationality of the proportionality principle as a well-theorized general principle of law that "flows," in Grimm's words, "from the rule of law or the essence of fundamental rights" (ibid., 385), and confers basic legitimacy on the system as a whole.

In any event, in the 1960s, the GFCC's invocations of PA became more confident and the structure of its analysis more formalized. In 1963, the Court suggested that it would deploy PA to all cases in which a right is restricted[25] and, in 1965, it announced, with no supporting citations, that "in the Federal Republic of Germany, the principle of proportionality possesses constitutional status."[26] In 1968, the GFCC declared proportionality to be a "transcendent standard for all state action" binding all public authorities.[27] While, at this time, the Court did not always employ all the steps of PA to decide a case, especially when proportionality was only one of the legal issues raised, in subsequent cases it took care to be explicit about how it would use the different elements of PA.

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[22] Bayerischer Verfassungsgerichtshof [BayVerfGH] [Bavarian Constitutional Court] July 7, 1949, 1 II Entscheidungen des Bayerischen Verfassungsgerichtshofs [BayVerfGHE] 64 (76, 78) (F.R.G.).

[23] BayVerfGH Dec. 28, 1956, 9 II BayVerfGHE 158 (177); see also Stern 1993, 171.

[24] In *Apothekenurteil*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 11, 1958, Entscheidungen des Bundesverfassungsgericht [BVerfGE] 7, 377 (404–05)(F.R.G.).

[25] BVerfG June 10, 1963, BVerfGE 16, 194 (201) (1963).

[26] BVerfG December 15, 1965, BVerfGE 19, 342 (348–49). In this case, the court found that a lower court violated the plaintiff's constitutional rights by not considering whether the pre-trial detention of the plaintiff, a 75-year-old retired admiral charged with murder in connection with an order he gave during World War II, was consistent with the principle of proportionality.

[27] BVerfG March 5, 1968, BVerfGE 23, 127 (133).

The impact of the GFCC's rights jurisprudence on German law and politics has been deep and pervasive. For various reasons, virtually every major policy issue that arises will eventually make it to the Court, in the form of a rights claim. The voluminous literature on the "judicialization" of the German legislative process[28] focuses on the pedagogical authority of the Court's rights jurisprudence in legislative processes (a politics of anticipatory reaction that takes place *during* the legislative process). PA undergirds judicialization, because it leads the court to put itself in the shoes of policymakers, and then to walk through their decision-making processes, step-by-step, evaluating constitutional legality of decisions along the way. The result has been the production of a relatively detailed set of proscriptions about how legislators and administrators should behave, if they wish to exercise their authority lawfully in virtually all important policy domains. In the shadow of proportionality review, and particularly balancing in the strict sense, German lawmakers engage in meaningful constitutional deliberation, and systematically so.

Rights and balancing have also been crucial to the "constitutionalization" of the private law, initiated by the GFCC's ruling in *Luth* (1958).[29] According to the Court—following the doctoral dissertation of Günter Dürig[30] —the "value system" expressed by the *Grundgesetz*, and in particular its system of rights, "influences all spheres of law." As a result, "every provision of the private law [i.e., the various codes, especially the Civil Code] must be compatible with this system [...] and every such provision must be interpreted in its spirit." Private law judges must do so through balancing. When they fail to strike a proper balance between rights and other legal interests, they violate "objective constitutional law," and thus the rights of individuals. The ruling created a new cause of action, against the civil law judge, which the GFCC would hear through the constitutional complaint procedure. As subsequently developed, the *Lüth* line of jurisprudence means that "all private law is directly subject to constitutional rights"—and therefore to balancing—radically enhancing the presence of constitutional rights, and the GFCC, in German private law.

4 Diffusion

In this Section, we examine how judges, in three national and three international systems, came to adopt PA. We are interested here in how judges represent what they are doing when they turn to PA, and if and how PA gets "constitutionalized" as a meta-principle of judicial governance. We will not attempt to survey all of the similarities and differences observed when we examine the use of PA comparatively, across these systems. One finding deserves emphasis in advance. In each of the

[28] The classic study is Landfried (1984). See also Kommers (1994, 470); Landfried (1992).

[29] BVerfG January 15, 1958, BVerfGE 7, 198.

[30] In the 1950s, Dürig was the principal proponent of the view that the GG set out "an objective order of values" that penetrated every aspect of the legal order. We thank Robert Alexy for alerting us to Dürig's contribution.

systems examined, judges adopted PA to deal with the most politically salient, and potentially controversial, issues to which they could expect to be exposed. In our view, this is powerful evidence for arguments made in Section 2 of this paper.

As important, proportionality's impact has not been confined to the judiciary. To different degrees across our cases, legislatures and executives have adapted to the adoption of PA in ways that reinforce its status as a constitutional commitment. The exact shape and scope of these developments depend heavily on the particular institutional structures and legacies onto which PA has been grafted. A complete account of how non-judicial actors internalize proportionality into their own decision-making procedures lies beyond the scope of this article. Nonetheless, it is clear is that such internalization can and does occur, with important consequences for our understanding of "judicial" authority *vis à vis* "political" authority.

4.1 National Legal Systems

From a comparative law perspective, PA exhibits a viral quality, spreading relatively quickly from one jurisdiction to another. In post-1989 Central and Eastern Europe, for example, virtually every constitutional court has adopted PA on the German model; most did so all but immediately, citing the case law of the GFCC and the European Court of Human Rights as authority (Sadurski 2005).[31] PA is also gaining ground in Central and South American legal systems, and citations of Alexy in law journals are on the rise. In this Section, we focus on the cases of Canada, South Africa, and Israel, partly because these systems have not historically been much influenced by German or Continental law.

4.1.1 Canada

The Canadian Supreme Court adopted proportionality analysis in the mid-1980s as the technique for deciding rights claims under Canada's Charter of Rights and Freedoms. The Charter contains an extensive catalog of rights and an invitation to courts to review statutes for infringements of those rights. Under Section 1, the Charter "guarantees" rights *subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*[32]

The Court first clearly laid out the terms of proportionality analysis in Regina v. Oakes (1986).[33] At issue was a provision that created a rebuttable presumption that a person found to be in possession of drugs was, in fact, trafficking the drugs. Oakes

[31] Sadurski (2005, 263–87, 267) devotes an entire chapter to proportionality, noting that: "The Courts in Central and Eastern Europe have clearly followed the path of the proportionality doctrine as developed by their Western counterparts, and in particular the European Court of Human Rights." Sadurski discusses the use of PA by the courts of Bulgaria, Croatia, Lithuania, Slovakia, Slovenia, Czech Republic, Poland, Estonia, Hungary, Romania, but the list is not exhaustive.

[32] Canadian Charter of Rights and Freedoms § 1 (emphasis added).

[33] R. v. Oakes, [1986] 1 S.C.R. 103 (Can.).

claimed that the provision violated his right to the presumption of innocence under Section 11(d) of the Charter.

The Court concluded that the provision constituted a *prima facie* violation of the right to the presumption of innocence, and moved on to consider whether the Narcotics Act was nonetheless a permissible limitation of the right under Section 1. The Court addressed the question using a form of PA. To override a right, a statute must serve an "objective [that] relate[s] to concerns which are pressing and substantial in a free and democratic society," and must further satisfy "a form of proportionality test."[34] And the test, as outlined by Judge Dickson, contained the three steps familiar from German doctrine.[35]

Although *Oakes* is recognized as a landmark case, it introduced the three-step proportionality analysis to Canadian law with relatively little fanfare. The opinion stressed the continuity with a previous case, *Big Mart* (1985), which mentioned proportionality in dicta.

Notably, the *Oakes* Court made no reference to foreign antecedents of its proportionality analysis, and referenced no other authority. The silence here suggests that, rather than resting on a foreign pedigree, the court wishes to present proportionality as a reasoned and sensible approach to the particular problem posed by Charter rights.[36] In any case, it did not take long for the proportionality framework developed in *Oakes* to be accepted as standard operating procedure in Charter litigation. Since the *Irvin Toys* decision of 1989, which announced the *Oakes* framework as "well established,"[37] *Oakes* has been cited in nearly two hundred decisions of the Court.[38]

Judicial decisions tell only part of the story of proportionality's impact in Canada. As in Germany, the Court's Charter jurisprudence has induced significant changes "upstream," requiring other government actors to consider proportionality as part of the legislative process. *Oakes* and related decisions have had, as Janet Hiebert has shown, "an important influence on bureaucratic and political cultures, which became more receptive, or at least more resigned, to the importance of assessing proposed legislation from a Charter perspective" (Hiebert 2004, 1970). Knowing that their actions will be subject to judicial review for conformity with the Charter, legislators and executive-branch actors have an incentive to consider the proportionality of their policymaking, and to build a record of their deliberations, in order to "Charter-proof" their policies (Hiebert 2006, 15. See also Hiebert 2009). And when the Supreme Court has struck down statutes under the Charter, such as a ban on the advertising and promotion of tobacco, Parliament has responded by passing similar legislation, but now accompanied by a record showing Parliament's serious attention to the law's proportionality.

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[34] Ibid., 139.
[35] Ibid.
[36] More recently, the Court has become more open about acknowledging the German influence. See Attorney General of Canada v. JTI-Macdonald Corp., 2007 SCC 30, par. 36.
[37] Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927.
[38] As of June 22, 2009.

Seeing how the government and Parliament have incorporated proportionality standards into the legislative process puts the Supreme Court's Charter jurisprudence in another light. Some commentators have argued that the Supreme Court has become more deferential to Parliament in reviewing legislation since the time of *Oakes*. The charge raises fierce methodological issues but, arguably, one could arrive at exactly the opposite conclusion. As the other branches have taken on responsibility for considering proportionality, as they are socialized into what is a new system of policymaking, the Court has had less of a need to conduct Charter analysis de novo. Further, the Court has made clear that there is rarely a single "right answer" in questions under Section 1: what is crucial to these politics is that the relevant decision-maker makes clear how it has deliberated proportionality.

4.1.2 South Africa

The mid-1990s were years of rapid constitutional development for South Africa, and the constitutionalization of proportionality was among the major outcomes. South Africa's Interim Constitution, ratified in 1993, contained an extensive catalog of fundamental rights, along with a limitation clause reminiscent of Canada's.[39] The Interim Constitution also established South Africa's Constitutional Court and vested it expressly with the power of judicial review.[40]

The new Constitutional Court initially resisted applying PA to the limitation clause, but this resistance evaporated almost immediately. The Court's second case involving the limitation clause, State v. Makwanyane, presented a challenge to the constitutionality of the death penalty. Writing the lead opinion, President Chaskalson found that the statute represented a *prima facie* violation of the constitutional right against cruel, inhuman, and degrading punishments. He then turned to proportionality: "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality."[41] Proportionality, in the court's view, is "implicit in the provisions of [the limitation clause]." The Court then laid out a laundry list of factors that bear on PA, including

> the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.[42]

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[39] S. Afr. (Interim) Const. 1993. Section 33 provided that fundamental rights may be limited by law of general application, so long as the limitation is reasonable, "justifiable in an open and democratic society based on freedom and equality," and does not "negate the essential content of the right in question." The constitution further provided that limitations on a subset of fundamental rights—including the rights to human dignity, freedom from forced labor, and freedom of conscience—were permissible only when such limitations were "necessary." § 33(1).

[40] Ibid. § 98(5).

[41] S. v. Makwanyane and Another 1995 (3) SA 391 (CC) at 436 (S. Afr.).

[42] Ibid.

Chaskalson explicitly referenced foreign sources of authority for the move, discussing the role of PA in German, Canadian, and European law, noting differences and similarities with the South Africa context.[43]

Although the *Makwanyane* formula treats proportionality as a single-stage, multi-factored balancing, elements of a suitability and a least-restrictive means inquiry are present. The death penalty came up short in the Court's analysis, and was invalidated.[44]

Makwanyane's approach was adopted in subsequent cases. Initially, proportionality was treated more as a pragmatic approach to applying the limitation clause than as an ineluctable principle of law.[45] When South Africa adopted a permanent constitution in 1996, however, the drafters of that document elevated proportionalityto the status of a constitutional principle. The Interim Constitution's limitation clause was revised to incorporate expressly the factors named in *Makwanyane* as elements of PA. Crucially, the Constitutional Court certified that the new Constitution was consistent with the interim document's Constitutional Principles—a necessary condition for the Constitution to take effect.[46] The Court rejected objections that the new limitation clause, Section 36(1), did not comply with international norms on human rights, and hence, with the right guarantees in the Interim Constitution.[47] The Court held Section 36(1) to be valid, essentially because PA defines best practice standards for rights review.

Since the mid-1990s, proportionality has become a cornerstone of the work of South Africa's Constitutional Court. Writing in 2003, Justice Albie Sachs declared that "[p]roportionality and balancing are at the heart of constitutional litigation in our country," and estimated that as many as three quarters of the Court's cases require the justices to engage in a balancing analysis (Sachs 2003). Under Section 36(1)'s proportionality framework, the Court has resolved a number of high profile disputes, including constitutional challenges to the corporal punishment of juveniles, anti-sodomy statutes, felon disenfranchisement, a prohibition on cannabis as applied to Rastafarians, who use it for religious purposes, and a number of criminal procedure rules alleged to burden the presumption of innocence.

In its development since the mid-1990s, "South African limitations jurisprudence has borrowed extensively from Canadian limitations jurisprudence" (Iles 2007, 69). However, PA does not take the exact same form in the two jurisdictions: in particular, the analysis in South Africa is not always conducted in a sequence of discrete

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[43] Ibid., 436–39.

[44] Ibid., 446, 451.

[45] See, e.g., S. v. Williams and Others 1995 (3) SA 632 (CC) at 649. "In S. v. Makwanyane this Court dealt with Section 11(2) of the Constitution on the basis that Section 33(1) is applicable to breaches of that section. I follow the same approach in the present case." (citation omitted).

[46] *Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC). The Constitutional Court was given responsibility for certification by Section 71(2) of the Interim Constitution.

[47] Ibid., 804.

steps. But even if "as part of its overall, nonmechanical assessment, the [Court] does not always disaggregate the various strands of the test," as in Canada, "the least restrictive means part of the test has been perhaps the most important in practice" (Gardbaum 2007, 842).

Like its Canadian and German counterparts, the South African Constitutional Court also recognizes that the LRM test permits deference to legislative judgments. As academic authorities have noted, "[t]he use of a value-based, context-sensitive standard to determine the reasonable of legislative and other limitations of fundamental rights, which is based on proportionality and balancing, is hardly consistent with the idea of a rigid separation between the legislative and judicial functions" (Botha 2003, 14, n. 5). For its part, the Court expects the parliament to consider the constitutional issues as part of its policymaking process, as the Court emphasized in S. v. Manamela.[48]

4.1.3 Israel

Israel is one of the four countries in the world today without a codified, entrenched constitution.[49] The country nonetheless possesses a Supreme Court that became a powerful actor in high-profile disputes when it began, in the 1980s, to inject rights and doctrines of judicial review into the higher law. In this same period, the Court was in the throes of developing a kind of indigenous, proto-proportionality doctrine. Once the use of PA in other legal systems came to its attention in the 1990s, the Court quickly adopted the standard, German-based framework. It then used PA both for determining when limitations on rights were permissible, and for judging the legality of administrative action. Today, arguably, the Israeli Supreme Court applies PA more consistently and rigorously than any other judicial body in the world.

Israel's most important "proto-proportionality" cases share a similar fact pattern. Regulation 119 of the Defense (Emergency) Regulations, a holdover from the days of the British Mandate, give military commanders wide latitude in taking measures responsive to terrorist acts. In cases challenging these responses as "excessive," such as Hamdi v. Commander of Judea and Samaria (1982)[50] and Turkeman v. Minister of Defense,[51] the Supreme Court adopted a simplified form of proportionality analysis.

Scholarly commentary paved the way for the judicial acceptance of a more fully developed PA. A 1994 comparative piece by law professor (and later, Supreme Court Justice) Itzhak Zamir was the first important piece to focus on the connections between proportionality in German and Israeli administrative law (Zamir 1994, 109,

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[48] S. v. Manamela and Others, 2000 (3) SA 1 (CC) at 41 (O'Regan, J., and Cameron, AJ, diss.). The majority in this case declared its agreement with these principles. 2000 (3) SA 1 (CC) at 20.
[49] The others are Bhutan, New Zealand, and the United Kingdom.
[50] HCJ 361/82 Hamdi v. Commander of Judea [1982] IsrSC 36(3) 439.
[51] HCJ 5510/92 Turkeman v. Minister of Defense [1993] IsrSC 48(1) 217.

130). Concurrently, Aharon Barak's 1994 commentary on Israel's new Basic Law of Human Dignity and Freedom explicitly advocated the *Oakes* proportionality analysis as the method for determining when rights must yield to public law.

In their capacity as Justices on the Supreme Court, the authors of these pieces quickly and forcefully brought this cosmopolitan perspective on proportionality into the law of Israel. Justice Zamir surveyed other jurisdictions' acceptance of proportionality and made a strong pitch for giving it the "proper status and weight" in Israel's law, in Euronet Golden Lines [1992] Ltd. v. Minister of Communication.[52] For his part, as Chief Justice, Barak offered an extensive discussion of the origins and diffusion of proportionality analysis in his Ben-Atiyah v. Minister of Education, Culture & Sports concurrence.[53] Barak even found antecedents of proportionality in Maimonides's injunction to treat illness with powerful medicines only if weaker medicines fail. Ben-Atiyah involved students who had been denied admission to a state program on the grounds that they had attended schools with high levels of cheating. Barak would have overturned the ministry's order on proportionality grounds, while the other two judges decided the case in terms of reasonableness, a lower standard than LRM in Israeli law.

The decisive turning point for proportionality came in United Mizrachi Bank plc v. Midgal Cooperative Village,[54] a landmark in Israeli constitutional law. *United Mizrachi Bank* established the principle of judicial review, and closely linked the exercise of judicial review to proportionality. Writing for himself and six other members of the Court, Chief Justice Barak held that the Court possessed the power to strike down legislation that contravened rights named in the Basic Laws (see Omi 1997, 765). The Knesset could infringe on those rights only with statutes that satisfied the Basic Law's limitation clause, which read: "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."[55] And to satisfy the limitation clause, argued Barak, meant to satisfy the principle of proportionality.

Barak went on to note that a form of proportionality is recognized in Israeli administrative law, and used comparative examples to show that the move of proportionality from administrative law to the constitutional level has ample precedent in other legal systems. He explained that proportionality began in administrative law in Europe, "and from there spread to the constitutional law of most countries in Europe and outside of it."[56] Barak quoted *Oakes* on the elements of the proportionality test

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[52] HCJ 987/94 Euronet Golden Lines [1992] v. Minister of Communication [1994] IsrSC 48(v) 412.

[53] HCJ 3477/95[1995] IsrSC 49(5) 1, 9. *Ben-Atiyah* was actually published after *United Mizrachi Bank*, but it was argued several months before *United Mizrachi Bank*.

[54] CA 6821/93 [1995] IsrSC 49(4) 221.

[55] The limitations clause was amended in 1994 to permit explicit legislative override of Basic Law provisions.

[56] United Mizrachi Bank [1995] IsrSC 49(4) at 436. Barak specifically mentions Canada and South Africa.

and cites to German authorities.[57] He concluded that the statute met the conditions of the limitation clause.

After it was introduced in *United Mizrachi Bank*, the three-stage proportionality analysis was embraced by Israel's Supreme Court, and its application has not been confined to adjudicating rights claims under the Basic Laws. The *Oakes*-style proportionality test was also applied as a check on administrative actions. The 2004 *Beit Sourik* case demonstrated how much bite PA has attained in Israel's law. The case raised a challenge to plans for the controversial separation fence intended to impede terrorist access to Israel. The proposed route for the fence would separate thousands of West Bank farmers from their fields and would require the seizure of many local inhabitants' lands. The petitioners claimed violations of Israeli administrative law and international law.[58]

Writing for a unanimous three-justice panel, Barak found that the route violated proportionality in the strict sense. Justice Barak ruled that the plans satisfied the first two proportionality sub-tests: the fence was rationally connected to the goal of security, and no alternative route that infringed on human rights less could provide the same level of security. But "the gap" in security between the proposed fence and a less intrusive alternative was "minute, as compared to the large difference" in how the proposed fence and the alternative would affect the lives of inhabitants.

Perhaps because PA was made to do so much work in this decision—the invalidation hinged solely on the balancing test—Chief Justice Barak justified proportionality at some length in his opinion. He described proportionality as a "foundational principle" of law that "crosses through all branches of law." It is part of the "universal" solution to the "general problem in the law" of "balancing between security and liberty." Barak then went on to demonstrate proportionality's doctrinal roots as "a general principle of international law" as well as Israel administrative law. The decision also stressed how similar the PA framework is across diverse legal systems, including international law, common law, civil law, and Israeli law.

The judiciary is not the only branch of government to be affected by the constitutionalization of proportionality in Israel. According to Chief Justice Barak, "the executive branch has internalized the constitutional revolution" (Barak 2006, 19). All government legislation and administrative actions "are carefully evaluated to determine if they pass constitutional muster," and the Attorney General and departmental legal advisers have inculcated the civil service in the framework of rights analysis (ibid.). Chief Justice Barak also writes that "the legislative branch takes the constitutional change seriously," and "exercises great caution on this issue" (ibid.). However, unlike in Canada, Israel's Supreme Court continues to conduct its proportionality analysis de novo, without regard to the judgments of other branches regarding the constitutionality of their actions.

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[57] Ibid.

[58] HCJ 2056/04 Beit Sourik Village Council v. Government of Israel [2004] IsrSC 58(5) 807.

4.2 International Regimes

We now turn to the consolidation of PA in three regimes created by international law: the European Convention on Human Rights, the European Community, and the World Trade Organization. Through their courts, these regimes have evolved important constitutional features, leading scholars to engage lively debates about whether they have been "constitutionalised" in some meaningful way.[59] Regardless of how we respond to this issue, these debates are data. They alert us to the fact that something transformative has happened to which traditional concepts and categories, drawn from comparative or international law and politics, may not easily apply (Walker 2001). In our view, a court that adjudicates conflicts arising from such a normative structure is a court operating in a constitutional mode, inherently, irrespective of how one understands the "constitutional" nature of the regime more broadly. The fact that the high courts of these regimes have embraced PA, a global constitutional standard, supports the point.

4.2.1 The European Community

The Treaty of Rome, which entered into force in 1959, constituted the European Community (EC), the first pillar of the European Union. In 1970, the European Court of Justice (ECJ) took a first step toward recognizing proportionality as an unwritten, general principle of EC law.[60] It derived a necessity requirement (LRM) from a ban on discrimination, without citing source or authority. Today proportionality governs lawmaking and adjudication in virtually every major domain of law established by the Treaty of Rome. Indeed, the consensus among doctrinal authorities is that proportionality is inherent to any proper legal system, and therefore to the EU, being "an expression of the rule of law" (Schwarze 2005).

PA constitutes the foundation of the ECJ's jurisprudence on the four freedoms—free movement of goods, labor, capital, services (and establishment)—and of the Court's approach to indirect sex discrimination (Stone Sweet 2004, 165–70; and generally Chapter 4). It is at the heart of the Community's largely judge-made system of administrative law, and applies to mergers and anti-trust law. PA also dominates the ECJ's approach to the fundamental rights, which the Court incorporated into the Treaty of Rome, during the 1969–1974 period, as "general principles

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[59] See Introduction.

[60] "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." Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel, 1970 E.C.R. 1125, 1136. In *Schraeder*, the Court announced that "the principle of proportionality is one of the general principles of Community law. By virtue of that principle, measures [. . .] are lawful provided that [they] are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. Of course, when there is a choice between several alternatives, the least onerous measure must be used." Case 265/87, Schraeder v. Hauptzollamt Gronau, 1989 E.C.R. 2237 (1989).

of law.[61] The Member States have ratified these moves in various ways, helping to institutionalize proportionality as an overarching, constitutional principle. The ill-fated 2004 European Constitution contained an elaborate, 54-article, Charter of Fundamental Rights. Following the ECJ's lead, Article 52 states:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

The Charter, including Article 52, was part of the package of reforms agreed to by Member States in December 2007 (the Lisbon Treaty). At this moment, the Lisbon Treaty has yet to be ratified, though the EC's organs have announced that they will abide by the agreement as if it were law.

After the consolidation of the ECJ's "constitutional" doctrines of supremacy and direct effect, the emergence of proportionality balancing as a master technique of judicial governance is the most important institutional innovation in the history of European legal integration. Hans Kutscher and Pierre Pescatore were the intellectual leaders in this move. Kutscher, who was a judge on the German Federal Constitutional Court during its crucial foundational period (1955–1969), came to the ECJ in 1970, and served as the President of the ECJ from 1976 to 1980. Pierre Pescatore,[62] left a professorship for the ECJ in 1967, and served on the Court until 1985.

In the EC/EU context, the Court's move to proportionality can be characterized as having "constitutional" importance—or is inherently constitutional—in at least two ways. First, when it deploys PA, the ECJ is doing what constitutional and supreme courts do, namely, managing tensions and conflicts between rights and freedoms, on the one hand, and the power of the EC/EU and of Member States, on the other. Second, harnessed to the "constitutional" doctrines of supremacy and direct effect, PA constitutes a mechanism of coordination between the supranational legal order and national legal orders. When the ECJ first embraced it at the end of the 1960s, proportionality was native to only one Member State: Germany. In its jurisprudence on the free movement of goods, indirect sex discrimination, and other legal domains, the ECJ required national judges to use PA when they reviewed the legality of national law and practice under EC law. As has been documented, some national judges initially resisted this "obligation" (see Stone Sweet 2004, 168–70). As the formalization of the principle of proportionality has proceeded, resistance has been steadily withering, a process reinforced by choices made by the European Court of Human Rights.

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[61] The Treaty of Rome contains no catalogue of rights. The Court cited the ECHR and the "constitutional traditions of the member states" as sources. Case 29/69, Stauder v. City of Ulm, 1969 E.C.R. 419 (1969); Case 4/73 Nold v. Commission, 1974 E.C.R. 491 (1974).

[62] Pescatore, a law professor, mentions proportionality as a general principle of law in a 1970 article, written while he was on the Court (Pescatore 1970, 350).