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The American University in Cairo

School of Global Affairs and Public Policy

PROPORTIONALITY V. CATEGORIZATION:

THE ISSUE OF JUDICIAL BALANCING OF RIGHTS

A thesis submitted by

Akram Abdel-Monem

To the Department of Law

Spring 2023

in partial fulfillment of the requirements for
the MA Degree in International Human Rights Law

THE AMERICAN UNIVERSITY IN CAIRO
الجامعة الأمريكية بالقاهرة
Graduate Studies

PROPORTIONALITY V. CATEGORIZATION: THE ISSUE OF JUDICIAL BALANCING OF RIGHTS

A Thesis Submitted by

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to the

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Graduate Program

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DEDICATION

To all of those who stand for their values, principles, dignity, and righteousness…

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I would like to thank professor Hani Sayed for his invaluable and thought provoking academic help starting from crafting and developing the idea of this thesis till writing the conclusion. I would like to express my gratefulness and appreciation for his sagacity, rectitude and, for sure, his engaging classes. I would also like to thank professor Thomas Skouteris and professor Jason Beckett for their unwavering dedication for their field which is obviously represented in their interesting and captivating classes.

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The American University in Cairo
School of Global Affairs and Public Policy Department of Law

PROPORTIONALITY V. CATEGORIZATION: THE ISSUE OF JUDICIAL BALANCING OF RIGHTS

Akram Abdel-Monem
Supervised by Professor Hani Sayed

ABSTRACT

The fact that there is a constant conflict between individual rights and state or social interests has historically provoked the question of how to balance or harmonize such conflicting interests? On what basis shall the legislator or the judge decide in favor of this or that right in his legislation or judgement? Where shall we, for example, draw the line between the right to freedom of expression and the right to protect one's honor and reputation? How could the legislator find the compromise between the state duty to protect fetus life and its obligation not to interfere with woman's right to privacy and bodily autonomy? Throughout history, judges, theorists, and legal scholars has tried to answer such a question of balancing. The very basic question has resulted in multiple theories of rights and sparked controversies among law scholars and philosophers. Despite such a debate has never been settled, it has resulted, within the practical contemporary legal jurisprudence, in two main judicial-made devices of balancing: Proportionality Analysis (PA), and the American Levels of Scrutiny. In the quest of finding the best balancing standard, judges and legal scholars has always contrasted such two methodologies. Each side contends that one of the two methodologies is better than the other in terms of objectivity, coherence, or predictability. The question in such debates has always been which of both methodologies could achieve the concord between the conflicting interests without encroachment of individual rights or threatening state interests. This paper is revisiting the debate asking the same question not to find a positive answer, but to develop a critique of both methodologies. It argues that although each methodology might have some advantages that lacks in the other, a major flaw of intuitiveness and irrationality is inherent in both of them. The paper concludes by drawing the attention towards the significance of acknowledging the irrationality thereof and the importance of developing what Cohen has called a "critical theory of values."

KEY WORDS: Judicial Review, Judicial Reasoning, Proportionality, Categorization, Levels of Scrutiny, Rights Adjudication, Balancing of Rights, US Constitutionalism, Margin of Appreciation, Incommensurability.

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INTRODUCTION

In his concept of law and its relationship with the society dean Roscoe Pound argued that law is a tool that pursues a "social engineering." According to him, the end of law is to achieve the justice through developing a concord between individual and social or public interests. However, as Felix S. Cohen criticized him, Pound has never answered the question of "which interests are more important than others or how a standard of weight or fineness can be constructed for the appraisal of interests."[1]

The fact that there is a constant conflict between individual rights and state or social interests, or even between individuals each other's rights has historically provoked the question of how to balance or harmonize such conflicting interests? On what basis shall the legislator or the judge decide in favor of this or that right in his legislation or judgement? For example, where shall we draw the fine line between the right to freedom of expression and the right to protect one's honor and reputation? Do states have a duty to prohibit abortion in order to protect fetus life or it has an obligation not to interfere with woman's right to privacy and bodily autonomy? How shall a state find the compromise between such two conflicting interests or rights? Throughout history, judges and scholars of legal philosophy and jurisprudence has tried to answer such a question of balancing. The very basic question has resulted in multiple theories of rights and sparked controversies among law scholars and philosophers. Although such a debate has never been settled, it has resulted, at least in the contemporary legal jurisprudence, in two main judicial-made methodologies of balancing between rights; Proportionality Analysis (PA), and the American Levels of Scrutiny or Categorization methodology. Proportionality analysis has emerged in mid-20th century as a judicial-made tool through which judges could balance between two conflicting human rights, or between a constitutional right and a state interest. Such a tool has been created in Germany then moved and spread from Germany to other states in Europe such as the UK, then it has moved to states in other continents such as Canada, New Zealand.. etc., finally, it has been transplanted in some international regimes; Namely, the European Union (EU), the European Convention on Human Rights (ECHR) in the case law of the ECtHR. Proportionality has evolved to be the most dominant legal tool in deciding cases of rights limitations. As some scholars argued

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1 Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, Columbia Law Rev., Vol.35 No.6, 848 (1935).

proportionality is currently "the new orthodoxy in human rights law" and that we are living in the "age of proportionality."[2] On the other hand, the American categorization is a methodology of judicial review that was created by the US Supreme Court. It is based on dividing the constitutional rights into three categories. These three categories are typified by the different levels of 'judicial scrutiny' attached to each of them. The three categories are; rights whose limitation invites 'strict scrutiny'; rights whose limitation invites 'intermediate scrutiny'; and rights whose limitation invites 'minimal scrutiny.'[3]

Scholarly debates in their quest of finding the best balancing methodology has always compared such two methodologies; proportionality and categorization. Each side contends that one of the two methodologies is better than the other in terms of objectivity, coherence, or predictability. The proponents of proportionality, for example, are arguing that proportionality analysis steps better guarantee rationality of judicial reasoning process and, as a result, it upholds the legitimacy of the court and the judicial review process as a whole. On the other hand, categorization defenders are advocating that the American levels of scrutiny is the better in terms of predictability. According to them, it protects the fundamental rights (such as some types of expression) through requiring the government to prove a "compelling state interest" for the court to uphold its limitation measure otherwise the court would strike it down. The question in such scholarly debates has always been which of both methodologies could achieve the concord between the conflicting interests with "the least frictions and waste", using the words of dean Pound?[4] Or, to put it differently, which of both methodologies could achieve a better protection of individual or human rights? That is exactly the main question of this research paper. However, contrary to most of the concerned contemporary debates, this paper is not trying to find a positive answer to the question. Rather, it develops a comprehensive critique of both methodologies and of the question itself. This paper argues that although there is a variation in the technicalities of each methodology which end up with some advantages of each one that lacks in the other, both methodologies do not protect the adjudication process from the judicial intuitiveness. Both proportionality and categorization are based at the end of the day, in some point, on an unconscious or irrational and subjective judicial reasoning

2 Francisco J. Urbina, A CRITIQUE OF PROPORTIONALITY AND BALANCING, Cambridge University Press, 2 (2017).

3 Aharon Barack, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, Cambridge University Press, 510 (2012).

4 James A. Gardner, *The Sociological Jurisprudence of Roscoe Pound (Part I)*, 7 Vill. L. Rev. 13 (1961).

even if it pretends the opposite. That is, instead of the endless debates on whatever methodology has more advantages or better in terms of rationality and objectivity, it is better to acknowledge the abstract fact that both methodologies do not have the complete answer of the question. Building on Cohen's criticism of dean Pound and other sociological and realistic scholars' lack of comprehensive theory of values, this paper argues that the contemporary endless contrast of judicial review methodologies is just postponing the problem of intuitiveness and the postponement of such problem is "equivalent to its repudiation", using the words of Cohen.[5]

In developing such a critique, the first chapter of this paper is discussing the issue of judicial activism and the quest of rational judicial review mechanism. It proposes the question of whether the rationalization of judicial review is a possible thing. It also discusses the idea of legislating from the bench and asks whether this phenomenon could be avoided drawing on the opinions of the scholars of the American constitutionalism. The second chapter is making an account of the historical origins of the proportionality as an orthodoxy in the contemporary human rights adjudication. It traces its origins in the writings of the German jurist *Carl Gottlieb Svarez*, its application by the German courts, then its transplantation in other regimes and jurisdictions. The second part of the chapter is making an empirical comparative analysis between the proportionality as applied by the ECtHR and the Categorization as applied by the US Supreme Court. The aim of such a comparison is not to outweigh one of the both methodologies in favor of the other, but to emphasize the high similarity of the court's conclusions, particularly in the era of post WWII, at the same time of them using the two different methodologies. The third and last chapter of this paper is dedicated to the critiques that have been directed to both methodologies particularly the proportionality main critique of incommensurability and the obfuscation of moral consideration of the rights in balance. The paper concludes by drawing the attention towards the significance of acknowledging the lack of rationality of both methodologies and the importance of developing what Cohen has called a "critical theory of values."

5 Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, Columbia Law Rev., Vol.35 No.6, 848 (1935).

I. ON JUDICIAL ACTIVISM AND THE QUEST OF A RATIONAL JUDICIAL REVIEW MECHANISM

It is agreed that rights, in general, are not absolute; they are in a constant conflict with each other or with public interests. Such a conflict necessitates the fact that there shall be some sort of balancing between those conflicting rights. For example, the right to freedom of expression is confined by the others' right to good reputation, or by the public interest of national security, public morals, or public order. Judicial review and rights balancing mechanisms has been largely debated in the scholarship of Constitutional Law and International Human Rights law. After the WWII, the world has witnessed notable developments in the human rights protection systems on both levels; domestically, and internationally. On the domestic level, almost every state now has adopted a rights-based constitution or a bill of rights that defines exactly its basic protected human rights and its limitations criteria. While on the international level, multiple international human rights instruments has been adopted in which different rights were mentioned with their limitation clauses. The common thing in such different human rights instruments is that they almost have adopted the same way of limitation; For example, article 29(2) of the Universal Declaration of Human Rights provides that;

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Almost all of the human rights instruments, domestic or international, has adopted such a drafting mechanism; after prescribing the contours of the right itself, there is a clause defining the legitimate purposes of the limitation and sometimes, explicitly, provides that the restricting measure shall be 'proportionate' with such a pursued aim. In applying such limitation clauses courts, whether international tribunals or supreme constitutional courts, have adopted different balancing tests with different structures. However, the main balancing test used by the courts all over the world is the 'proportionality test.' Such a test does not have a consistent meaning or application between courts (as further discussed in Chapter II). Nonetheless, it is generally accepted that a measure restricting an individual right is proportionate 'if it pursues a legitimate purpose; if the measure is rationally

connected to the purpose; if it is the least restrictive of all equally effective means; and if it is not disproportionate in the strict sense.'[6]

Against this background, 'skepticism'[7] or the denial of judicial objectivity which undermines the legitimacy of the judicial review or judicial activism and its conformity with the democratic values has been controversially debated.[8] *Waldron*, for example, asked whether judges should have the authority to strike down legislation 'when they are convinced' that it violates individual rights. He argues that judicial review is being attacked because it, firstly, distracts the society, when people disagree about rights, with side issues such as their interpretation of the texts and their commitment to the precedents. Secondly, judicial review, in his opinion, undermines the 'cherished' political democracy principles as representation and equality when it privileges the small number of unelected and unaccountable judges to have the final say in rights discourse.[9] On the contrary, *Dean Machin* has argued, in response to *Waldron*, that the 'circumstances of politics' or, in other words, the disagreement about justice have considerably fewer consequences for the proper role of judicial review than what *Waldron*'s meant by his contribution.[10]

Through revisiting this debate, this chapter aims at discussing, generally, the issue of the judicial review with special focus on the rationality and balancing. It traces the quest of finding a rational methodology of judicial review, and tries to answer the question of whether 'Rationality' of judicial balancing is a possible thing. In this chapter I argue that such quest of rationality has resulted in two main methodologies; the four-stage Proportionality Analysis (PA), and the American Categorization or 'levels of scrutiny'. Both methodologies have played an essential role in shaping the human rights adjudication domestically and internationally. However, the 'culture

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6 Niels Petersen, PROPORTIONALITY AND JUDICIAL ACTIVISM: Fundamental Rights Adjudication in Canada, Germany, and South Africa, Cambridge University Press, 2 (2017).

7 For more on the meaning of Skepticism and the approaches against it see, Davor Šušnjar, PROPORTIONALITY, FUNDAMENTAL RIGHTS, AND BALANCE OF POWERS, Martinus Nijhof Publishers, 17 (2010).

8 Juliano Z. Benvindo, ON THE LIMITS OF CONSTITUTIONAL ADJUDICATION: Deconstructing Balancing and Judicial Activism, Springer, 135 (2010); Jeremy Waldron, *The Core of the Case Against Judicial Review*, Yale L.J., Vo. 115 No. 6, 1246 (2006); Mark Tushnet, TAKING THE CONSTITUTION AWAY FROM THE COURTS, Princeton University Press, 6 (1999); David S. Law, *A Theory of Judicial Power and Judicial Review*, Geo. L.J, Vol. 97, 723 (2009); Dean Machin, *Democracy, Judicial Review and Disagreements About Justice*, Legisprudence, Vol. 3 No.1, 43 (2009).

9 Jeremy Waldron, *The Core of the Case Against Judicial Review*, Yale L.J., Vo. 115 No. 6, 1353 (2006).

10 Dean Machin, *Democracy, Judicial Review and Disagreements About Justice*, Legisprudence, Vol. 3 No.1, 44-45 (2009).

of proportionality' has been manifested as the most rational judicial balancing methodology while, in my view, it has major flaws and subjectivity issues (discussed in Chapter III). In the same context, the American Categorization model of scrutiny was presented as the best alternative for proportionality analysis while it also has its own flaws (discussed briefly in Chapter III). Scholars are usually divided between those two strands; the first, on one hand, is about adopting proportionality analysis with some enhancements regarding its structure to overcome its flaws. While the second, on the other hand, are the American scholars who are not convinced by the appropriateness or the suitability of the levels of scrutiny doctrine and suggest incorporating some features of proportionality analysis into the American constitutional law jurisprudence as a solution of the problems thereof. Hence, this chapter is divided into two sections; the first is focusing on the issue of judicial activism and subjectivity; the quest of a rational balancing tool. The second section is making an account of the Proportionality Analysis and Categorization as the main rivals in the battle of rights balancing methodologies.

1. The Quest of a Rational Judicial Review Between Judicial Activism or 'Legislating from the Bench' and Subjectivity:

Why is it important to establish a rational and consistent methodological tool to balance between rights? The fact that there is a need to establish a consistent and rational balancing tool comes from the fact that there is always a conflict between different human rights or between individuals rights and state/ social interests. Such a conflict often recalls the question of how "just" is the legislation or the instrument that regulates the limitation of the right under scrutiny. In *Hart*'s discussion of "justice principles" and the difference between 'just laws' and 'justice in administration of laws' he argued that;

> The general principle latent in these diverse applications of the idea of justice is that individuals are entitled in respect of each other to a certain relative position of equality or inequality.. Hence justice is traditionally thought of as maintaining or restoring a *balance* or *proportion*, and its leading precept is often formulated as 'Treat like cases alike' ; though we need to add to the latter 'and treat different cases differently'. So when, in the name of justice, we protest against a law forbidding colored people the use of the public parks, the point of such criticism is that such a law is bad, because in distributing the benefits of public amenities among the population it discriminates between persons who are, in all relevant respects, alike… though 'Treat like cases alike and different cases differently' is a central element in the idea of justice, it is by itself incomplete and, until supplemented,

> cannot afford any determinate guide to conduct. This is so because any set of human beings will resemble each other in some respects and differ from each other in others and, until it is established what resemblance and differences are relevant, 'Treat like cases alike' must remain an empty form. To fill it we must know when, for the purposes in hand, cases are to be regarded as alike and what differences are relevant. Without this further supplement we cannot proceed to criticize laws or other social arrangements as unjust.[11]

Therefore, as Hart explained, knowing when cases are to be regarded as alike and when they are to be regarded as different is a fundamental element in the idea of justice. In the same context, knowing why judges have outlawed a limitation measurement or upheld it is a fundamental element in reasoning rights cases and therefore in the idea of justice. That is to say, without a rational and normative balancing methodology between conflicting rights adjudication will lost any legitimacy.

In order to discuss the issue of balancing and rationality v. subjectivity, a preliminary question shall be settled; what do we mean by 'judicial activism'? Should the judge be 'active' or 'passive'? And what are the implications of being as such? What does subjectivity means and Is 'legislating from the bench' an inventible phenomenon?

a. What Does 'Judicial Activism' Mean?

According to *Mark Tushnet*, the expression 'activism' has been controversially debated among scholars. The controversy, according to him, could be understood in light of the scholarly dispute on the meaning of 'activism'. Activism in the American constitutionalism could be said to describe the large number of judgments that struck down legislations as unconstitutional. It might also be said to describe the degree of willingness of the judges to overrule their precedents. Or it may be said to mean the judicial departure from the original meaning of the constitutional text.[12] Through describing this controversy *Tushnet* tried to figure out the baseline against which we could measure

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11 H. L. A. Hart, THE CONCEPT OF LAW, 2nd ed…., 159 (1994). In his discussion of the open texture rules he explained the reason why we have to resort to such a general wording language in formulating the legal texts (It is, however, important to appreciate why, apart from this dependence on language as it actually is, with its characteristics of open texture, we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, a fresh choice between open alternatives. Put shortly, the reason is that the necessity for such choice is thrust upon us because we are men, not gods. It is a feature of the human predicament (and so of the legislative one) that we labor under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim), 129.

12 Mark Tushnet, *The United States of America*, IN JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS (Edited by Brice Dickson), OUP, 416-417 (2007).

the 'activism' of the judicial decisions. It seems that he agrees that activism could be invoked regarding the decisions which expand or interpret the statutes or the constitution in an unexpected manner.[13]

In the same context, *Lawrence Alexander* introduced another understanding of the 'Judicial Activism' where he described his general unease with the word 'activism' itself for its inability to describe the exact intention of its user. He argues that such a word is usually used pejoratively or as a 'complaint' about the judicial behavior while it is indeed required for a judge to be 'active'. Thus, he contends that we need a better term to capture a valid complaint as it is not acceptable also for the judiciary to be 'passive'.[14] However, *Alexander* has divided judicial activism meaning into two types; 'judicial usurpation', and 'judicial abdication'. For the latter he noted that although it is a serious matter for which judges shall be condemned, it is not the common meaning of judicial activism. Thus, he went to explain the former. He argued that judicial usurpation happens when judges follow and apply norms of 'their own making.'[15] To better illustrate this, *Alexander* has differentiated between rules and standards; the rules are determinate in their meaning. They do not need further judicial interpretive input for them to be applied to the facts of the case. However, standards are, said *Alexander*, the exact opposite of the rule;

> A standard invites those subject to it to apply and act upon first-order practical reasoning within boundaries fixed by rules. If people have differing values, then the verdicts of their practical reasoning will differ and thus so will their application of the same standard. Marxists and monarchist can all agree on what a stop sign requires; they will likely disagree over the meanings of standard-like terms such as "reasonable," "fair," and "just."[16]

Thus, judges, when applying standards, they have to use the first-order reasoning in order to give meaning (or their own meaning) to such values contained in the standard. The problem, according to *Alexander*, is not in the mere use of constitutional standards by judges. Rather, the problem

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13 Mark Tushnet, *The United States of America*, IN JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS (Edited by Brice Dickson), OUP, 416-417 (2007).

14 Lawrence A. Alexander, *Judicial Activism: Clearing the Air and the Head*, IN JUDICIAL ACTIVISM AN INTERDISICPLINARY APPROACH TO THE AMERICAN AND EUROPEAN EXPRIENCES, Springer Publishing, 15 (2015).

15 Lawrence A. Alexander, *Judicial Activism: Clearing the Air and the Head*, IN JUDICIAL ACTIVISM AN INTERDISICPLINARY APPROACH TO THE AMERICAN AND EUROPEAN EXPRIENCES, Springer Publishing, 16 (2015).

16 Lawrence A. Alexander, *Judicial Activism: Clearing the Air and the Head*, IN JUDICIAL ACTIVISM AN INTERDISICPLINARY APPROACH TO THE AMERICAN AND EUROPEAN EXPRIENCES, Springer Publishing, 16 (2015).

arises when judges use the standards to struck down legislations adopted by the elected legislature members because, when doing so, they are 'claiming that their first-order practical reasoning is superior to that of the legislators.'[17]

Such a problematization of the 'judicial activism' is, alternatively, addressed in *Bruce Peapody* contribution in which he defined and defended the concept of 'legislating from the bench' in the American legal context. *Peabody* tried to emphasize that the expression 'legislating from the bench' was highly used by politicians and scholars in the US as a general criticism of the judicial behavior there. However, the expression was not used in the same meaning; that is, politicians and scholars have used the term in different contexts that, according to *Peabody*, needs some sort of categorization and scrutinization.[18] By 'legislating from the bench', *Peabody* argues that politicians may mean; firstly, the 'judicial policy interference' or the participation of the courts in policy issues which are deemed to be the jurisdiction of the legislature or the administrative bodies not the judiciary. In other words, politicians mean areas where judges have a 'tradition of being deferential to other decision makers.'[19] In this sense we could conclude that *Alexander* conception of 'judicial activism' somehow equals *Peabody* understanding of 'legislating from the bench' (although he distinguishes between them as explained later). Secondly, another meaning of the critique of 'legislating from bench' is the method deployed by judges in reaching the conclusions. Politicians and scholars criticize judges for using 'legislative' ways in their reasoning by describing it as 'legislating from the bench'. For example, the Supreme Court's approach of consulting public opinion in capital punishment cases such as *Atkins v. Commonwealth of Virginia*.[20] The reason for this critique is that judges by using such methods are claiming legislative authority they do not obtain. They are 'simply us[ing] their high positions to impose by fiat that which should be determined through the democratic process.'[21] A third critique, mentioned by *Peabody*, that is usually described as 'legislating from the bench' by politicians concerns the

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17 Lawrence A. Alexander, *Judicial Activism: Clearing the Air and the Head*, IN JUDICIAL ACTIVISM AN INTERDISICPLINARY APPROACH TO THE AMERICAN AND EUROPEAN EXPRIENCES, Springer Publishing, 16 (2015).

18 Bruce G. Peabody, *Legislating From the Bench: A Definition and A Defense*, 11 Lewis & Cark L.Rev., 196 (2007).

19 Bruce G. Peabody, *Legislating From the Bench: A Definition and A Defense*, 11 Lewis & Cark L.Rev., 197 (2007).

20 Bruce G. Peabody, *Legislating From the Bench: A Definition and A Defense*, 11 Lewis & Cark L.Rev., 200 (2007).

21 Mark R. Levin, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA, Regnery Publishing Inc., 60 (2005).

content and the scope of the judicial decisions; where the content or the scope are too detailed or too far away from the words of the interpreted legislation or constitution so as to develop policies through their detailed and expansive decisions. Fourthly, some scholars use the expression to describe the court's approach of responding to 'political forum or specific interest groups' demands. In this context, *Peabody* mentioned some studies that argued that courts tend to take into their account the interests of a 'pluralist society' in choosing their docket or taking their decisions.[22] The courts in this case as Justice *Harlan* wrote in *Reynolds v. Sims* become 'a general haven for reform movements.'[23]

Although *Peabody* admits the conflation and overlapping between 'legislating from the bench' and 'judicial activism', he still differentiate between them. He contends that judge could engage in an 'activist' behavior without legislating from the bench. At the same time, he might be legislating from the bench without being activist. For him, activism could be institutional activism or precedent activism. Both types of activism could be practiced while perceived in the realm of traditional judicial norms rather than legislative ones.[24] In my opinion, aside from the examples mentioned by Peabody, the overlapping and conflation between both concepts is much more difficult for any attempt to distinguish between them.

From this debate, it could be concluded that activism or legislating from the bench in the sense of *Alexander*'s term 'Judicial Usurpation' is something inevitable in the business of judging. However, such usurpation is not an unlimited power. It is, rather, confined to the areas of gaps in legislations or constitutions (interstitially), to use the words of Justice *Oliver W. Holmes*. In *Southern Pacific v Jensen*, *Holmes* wrote in his dissent emphasizing that 'without hesitation [...] judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.'[25] I do agree with *Holmes* philosophy of judicial activism and self-restraint

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22 Bruce G. Peabody, *Legislating From the Bench: A Definition and A Defense*, 11 Lewis & Cark L.Rev., 206 (2007).

23 *Reynolds v. Sims*, 377 U.S. 533, 625 (1964) (Harlan, J., dissenting). Cited in Bruce G. Peabody, *Legislating From the Bench: A Definition and A Defense*, 11 Lewis & Cark L.Rev., 207 (2007).

24 Bruce G. Peabody, *Legislating From the Bench: A Definition and A Defense*, 11 Lewis & Cark L.Rev., 208 (2007).

25 *Southern Pacific v Jensen* 244 US 205, 221 (1917). (J. Holmes Dissenting). For more details on the 'molar and molecular motions' see, Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, William Mary Law Rev., 33-34 (1995).

which he applied and stuck to it through his long lasted judicial career.[26] Through the following part I argue that such inevitability of judicial activism has lead judges and scholars to justify and rationalize such 'usurpation' of other branches jurisdictions through extensively using the proportionality analysis and categorization and through developing what is called the 'proportionality's culture of justification'.

b. Rationalization of Judicial Review?

In fact, any debate on balancing between rights and rationality of the adopted balancing methodology in the judicial review process is by default, and in part, a debate on the legitimacy of the court. Legitimacy is said to be a fundamental source of judicial power.[27] According to *Petersen*, there are two types of court's legitimacy; the diffuse legitimacy, and the specific legitimacy. As to the specific legitimacy, *Petersen* means the public acceptance of the court's judgement in a specific high profile case, while the diffuse legitimacy is the public acceptance of the legitimacy of the court as an institution; that is, its role within the constitutional system of the state. It reflects the public respect of the court institutionally. *Petersen* believes that such two concepts of legitimacy are intertwined as the diffuse legitimacy is inevitably affected by the specific legitimacy. For example, when the court issues a controversial judgement, people may still accept its application as long as the court's diffuse legitimacy is well-established. However, he believes that when the court insist on its controversial attitude in their judgements, which is not accepted by the public opinion, it may loses part of its diffuse legitimacy or its acceptance as an institution. Consequently, it might faces hegemonical attempts from the political branch such as what happened with the US Supreme Court after its series striking down of *Franklin D. Roosevelt*'s "New Deal" legislations.[28] Consequently, judges are usually in a quest of preserving their 'legitimacy' or their public image as 'neutral arbiters'. One of the essential techniques of doing so is their quest of adopting a rational reasoning methodology. As *Alec S. Sweet* puts it the court 'defends its behavior normatively.'[29] By normatively, *Sweet*, meant that the court is using the 'constitutional text' as the one and only

26 See justice Holmes dissenting opinion, *Vegelahn v. Gunter & others*, Supreme Judicial Court of Massachusetts, 167 Mass. 104 (1896); Frederic R. Kellogg, OLIVER WENDELL HOLMES, Jr., LEGAL THEORY, AND JUDICIAL RESTRAINT, Cambridge University Press, 127 (2007).

27 Niels Petersen, PROPORTIONALITY AND JUDICIAL ACTIVISM: Fundamental Rights Adjudication in Canada, Germany and South Africa, Cambridge University Press , 64 (2017).

28 Niels Petersen, PROPORTIONALITY AND JUDICIAL ACTIVISM: Fundamental Rights Adjudication in Canada, Germany and South Africa, Cambridge University Press , 61 (2017).

29 Alec S. Sweet, GOVERNING WITH JUDGES, OUP, 200 (2000).

reasoning material upon which they bases their judgement. In other words, the court by this tactic is trying to deny the fact that they are affected in their decisions by other second-order reasoning factors such as the political context of the dispute.[30] In my opinion, I believe that using the proportionality analysis and/ or the categorization (in the American context) is part of such tactic deployed by the courts to rationalize their methodology of review and to protect their image of neutrality and deny any doubt of subjectivity.

Rationalization of balancing, in my view, is part of a broader shift in constitutional law globally which *Etienne Mureinik* has called the shift from a 'culture of authority to a culture of justification.' *Mureinik* used such an expression to explain the shift of the African constitutional transformation from the apartheid era to the new era of democracy, and rule of law after adopting the interim constitution in South Africa.[31] A shift to a new culture 'in which every exercise of power is expected to be justified.'[32] Such a justification is, at its core, a justification related to the reasonableness and rationality of the measures deployed by the government authorities and at the same time by the courts which review the constitutionality of the authority's measures.[33] Proportionality as a standard-based doctrine was developed, whether nationally or internationally, to work as a balancing tool in the 'justification culture' the same way in which categorization doctrine was used in the American constitutional law. Thus, because constitutional judges, when striking down any legislation as unconstitutional, are facing the legislature authority and contradicts with their assessment of the legislation, they tend to 'rationalize' their balancing (review) tools. That is to say, when judges balance between individual rights and state interests they are in a constant attempt to remain away from any political dubiousness. Hence, 'If it [the court] bases such a decision on the balancing stage of the proportionality test, it has to justify why its valuation of the competing interests at stake is superior to the valuation of the legislature.'[34] On the national level, proportionality has played a vital role in establishing the legitimacy of the legal systems through providing judges the flexibility required to freely develop doctrines and to freely

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30 Alec S. Sweet, GOVERNING WITH JUDGES, OUP, 200 (2000).

31 Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*,10:1 S. Afr. J. Hum. Rights, 32 (1994).

32 Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*,10:1 S. Afr. J. Hum. Rights, 32 (1994).

33 Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, Am. J. Comp. L. Vol. 59 No. 2, 467 (2011).

34 Niels Petersen, PROPORTIONALITY AND JUDICIAL ACTIVISM: Fundamental Rights Adjudication in Canada, Germany and South Africa, Cambridge University Press , 68 (2017).

decide their intensity of review and intervention taking in consideration all relevant factors such as the public opinion and political concerns. On the international level, proportionality (or Margin of Appreciation as used by the ECtHR), as *Cohen-Eliya* and *Porat* put it, 'helped to secure the reputation of the European Court of Human Rights as a sensible and careful institution, thus serving to advance its legitimacy in its formative years.'[35]

Accordingly, through the following section a brief introductory account of the two doctrines; Proportionality Analysis and Categorization (Levels of Scrutiny) is to be made.

2. Proportionality and Levels of Scrutiny as 'Rational' Judicial Review Methodologies:

a. Proportionality Analysis:

Most of the contemporary constitutions/ human rights conventions worldwide include a chapter where the fundamental rights of citizens are set forth and protected. The text of such articles not only set forth the contours of the rights protected, but also (usually) stipulates for the criteria of any possible limitation of such a right. Take for example article 10 of the European Convention on Human Rights (ECHR) which stipulates that;

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The first paragraph of this article provides for the nature, the extent, and the beneficiaries of such a protection (Everyone). The second paragraph is setting the limitation criteria of the right to freedom of speech. It provides that such a right may be 'subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society.' The

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35 Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, Am. J. Comp. L. Vol. 59 No. 2, 468 (2011); Howard Yourow, *The Margin of Appreciation in the Dynamics of the European Human Rights Jurisprudence*, Conn. J. Int'l L. Vol. 3:111, 153-154, 159 (1996).

text, then, mentions the legitimate purposes for which the right might be limited by a legislation. Such a limitation is subject to the judicial review through employing the 'Proportionality Analysis'.

As earlier explained in this chapter, Proportionality Analysis is a methodological judicial-made tool employed by the courts to answer a question of whether the legislation enacted and imposed by the competent state authority to limit the realization of a protected constitutional right is 'proportionate' with the legal purpose aimed by such a limitation or not. This question, formulated as such, incapsulates the main parts of the proportionality test; legitimate purpose, suitability or rational connection between the purpose and the limitation measure, necessity of the means, and a proportionality between the benefits of achieving the purpose and the harm of limiting the right. Through the following paragraphs a brief account of the meaning of each subtest of the Proportionality Analysis and its function is to be made. Since the proportionality doctrine, as we mentioned before, has no one fixed meaning among its exponents, we have built most of this part on the conception of proportionality according to one of its most famous defenders; *Aharon Barak*.[36] However, our brief introductory is also pointing out some of the inherent flaws of *Barak*'s conception of Proportionality Analysis. (explained in more details later in Chapter III.)

i . Legitimate Purpose:

The legitimate purpose is the first component in the proportionality test. It is, according to the majority of PA exponents, a threshold test that does not contain any kind of balancing between two values.[37] It is the answer of the first question in the four-stage proportionality test; Whether there is a legitimate purpose for limiting that right or not. In another words, whether such a limitation is, as mentioned in article 10 of the ECHR, 'prescribed by law and are necessary in a democratic society.' For example, when the state make law to limit the right to freedom of speech, the first question that the court has to answer is whether there is a proper purpose for that limitation; whether the limitation is prescribed by a clear and precise 'law' that was enacted properly, and whether such a limitation is permissible in a 'democratic society' or according to the values of democracy and the rule of law. According to *Barak*, it is a threshold requirement which means that

36 Aharon Barack, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, Cambridge University Press, (2012).

37 Aharon Barack, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, Cambridge University Press, 246 (2012).

it needs an answer of (yes or no). No further scrutiny or analysis is needed in this first step. What does 'values of democracy' means exactly in the context of the 'proper purpose'? The answer to this question is to be found in the text of the constitution itself. Democratic system of government is now enshrined in most of the modern constitutions worldwide. Democracy is said to include two main elements; people's will, and the democratic values including the human rights and rule of law.[38] The application of the ECtHR to the concept of 'necessity in a democratic society' could be better understood through its case law. For example, in *S.A.S. v. France* the ECtHR held that France banning of face veil is not in violation of the ECHR because it was a proportionate measure to achieve the aim of 'living together' in the society. 'living together' is, then, one of the characteristics of the 'democratic society'. Consequently, the court found that the purpose of the law banning the niqab which is 'protecting the minimum requirements of life in society' was a proper purpose in the sense of the democratic values protected by the ECHR.

According to *Barak*, proper purpose shall not be confused with the fourth component of proportionality; the balancing component (or proportionality in the strict sense). Because in the this level of scrutiny the court is required to ask whether the purpose of the law limiting the right is proper or not as a 'threshold'. The court is neither required to balance between the benefits or consequences of achieving that purpose in comparison with the harm may take place to the right, nor required to search the necessity of that law for achieving that purpose as those two questions are conducted in later components of the proportionality.[39] However, through reading the ECtHR case law it could be noticed that *Barak*'s concept of 'Proper purpose' does not have the same meaning or content in the ECtHR. It appears that the court is confusing the balancing component with the proper purpose component.

The considerations that might be invoked to justify the legitimacy of the limitation purpose shall be based on two aspects according to *Barak*; the democratic values, and its urgency or importance. Regarding the democratic values aspect the most pertinent value to the proper purpose component is the constitutional rights vis-à-vis the public interest. Considerations of public interest include

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38 Aharon Barack, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, Cambridge University Press, 251 (2012); See also, Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, Cal. L. Rev. Vol. 86 No. 3, 429 (1998).

39 Aharon Barack, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, Cambridge University Press, 248 (2012).

the continued existence of the state, national security, public order, tolerance, protection of a person's feelings, and other interests that are not constitutional rights. It is important for the continuance of the state itself. Hence, the law is proper, according to *Barak*, if it aims at achieving one of those contents of public interest. Moreover, 'a law's purpose would be recognized as proper if it demonstrates sensitivity to the notion of human rights within the overall social scheme. It was also noted by the Court that a purpose is proper if it was meant to create a foundation for the shared experience of individuals that is a part of the democratic experience, and to create a social framework to protect and advance human rights.'[40]

Regarding the second element of the proper purpose which is the urgency *Barak* maintained that it is necessary to conduct such a test in this stage because it is of no sense to delay this test to the fourth stage while it is apparent from the outset that the purpose is not urgent. Thus, it would be much better to determine this issue during the threshold examination of a proper purpose. Although *Barak* has created a well-structured contribution on the 'proper purpose' component of the Proportionality Analysis, it seems that he has focused his great deal of effort to 'rationalize' this component so as to keep it away from subjectivity doubts. However, in my view, it seems that he has not achieved a great success because the component, in its entirety, is heavily dependent on the discretion of the judge despite such a well-crafted structure.

ii . Suitability (Rational Connection):

This element means that the means used for achieving the purpose of the law would rationally lead to the realization of such a purpose. It does not mean that the means used shall lead to full realization of the purpose, rather the requirement is that the legislative means sufficiently advance the purpose limiting the constitutional right and that there is a proportionality between the means chosen and the proper purpose pursued. Hence, the question before the court in this stage is whether the means used to achieve the purpose is rationally advancing this purpose or not? Is it suitable to the purpose pursued? Again the problem of irrationality approach maintained by *Barak* appears in this second component of proportionality. In his discussion of the problem of uncertainty about the means used by the legislation and whether such means will certainly achieve the purpose or not *Barak* has determined that the test shall not based upon 'certainty'. Accordingly,

40 Aharon Barack, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, Cambridge University Press, 259 (2012).

the rational connection is not based on the notion that the means chosen realize the proper purpose in complete certainty. However, a 'marginal' realization alone is not sufficient in his opinion. Therefore, there is a minimum level of certainty required for the means used by the law for the realization of the rational connection component. The question is, what is this level of certainty required? And what is the criteria defining such a level? According to *Barak* the evaluation is also based on the shared life-experience of the society, as well as the knowledge provided by science. 'Mainly, the test is based on logic and common sense.'

As to the question of what is the exact time of making such assessment of the certainty of the means used to achieve the proper purpose? The answer is not clear as *Barak* maintained that '[t]he examination of the rational connection should be continuous. There is no determining point in time. Rather, every point of the limiting law's life is relevant; the rational connection must exist throughout the law's entire lifespan. The issue of constitutionality accompanies the law throughout its existence.'[41] The problem here in my view is that the test does not seem to be based on a fixed parameters, rather it is based on a mere discretion.

iii . Necessity:

Necessity means that the legislator shall choose a mechanism or means that would least limit the human right under the limitation. The legislator shall choose between all those means that may realize the purpose of the limiting law. Thus, if there is another law or another mechanism that could advance the same purpose by the same degree without limiting the human right then the means is unproportionate. The necessity for the means determined by law comes, therefore, from the fact that no other hypothetical alternative exists that would be less harmful to the right in question while equally advancing the law's purpose.

It is worthy to say that the necessity test here is not meant to answer the question of whether the purpose is necessary or not because this test comes after deciding that the purpose is proper. Thus, while examining the requirements of necessity, there is no room for an examination of the constitutionality of the law's purpose. The necessity test does not require a minimal limitation of the constitutional right; it only requires the smallest limitation required to achieve the law's

41 Aharon Barack, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, Cambridge University Press, 312 (2012).

purpose. This requirement has a counterpart in the US supreme court which is that the law limiting the constitutional right shall be 'narrowly tailored' to achieve the purpose. In fact, the wording of 'narrowly tailored' is much better than 'necessary'. It indicates the American doctrine's tendency to limit the blurry standards in the area of the fundamental rights where they apply the "strict scrutiny" test as later explained.

iv - Proportionality in the Strict Sense (*Stricto Snesu*):

This component is the most important one in the Proportionality Analysis. It means that the conclusion of the aforementioned tests shall not be disproportionate, in its entirety, with the harm incurred upon the society or the individuals from the constitutional right limitation. That is, in order to justify a limitation on a constitutional right, a proper relation shall exist between the benefits gained by fulfilling the purpose and the harm caused to the constitutional right from obtaining that purpose. Therefore, it requires a balancing of the benefits gained by the public and the harm caused to the constitutional right through the use of the means selected by law to realize the proper purpose. In illustrating this component Barak has mentioned an example that perfectly illustrate what this component aims at;

> Assume a law that allows the police to shoot a person (even if this shooting would lead to that person's death) if it is the only way to prevent that person from harming another's property. This law is designed to protect private property, and therefore its purpose is proper. The means chosen by the legislator are rational, since it advances the proper purpose. According to the provision's own words, it can only be triggered when no other means exist to protect the property without hurting a human life. Therefore, the law meets the necessity test as well. However, the provision is still unconstitutional because the protection of private property cannot justify the taking of human life.[42]

The difference between this component and the necessity one is that necessity only measures whether the proper purpose could be achieved through another means or mechanism that cause lesser harm or no harm at all to the right. however, this component is evaluative to the consequences of limiting the human right. It assesses whether the consequences, all in all, are acceptable and proportionate or not. Accordingly, this test is balancing the benefits compared to

42 Aharon Barack, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, Cambridge University Press, 343 (2012).

the harm. It requires proportionality between the benefits gained by the law's policy and the harm it may cause to the constitutional right.

Although *Barak* deals with this component as the most important one because it assesses the outcome of the other three tests of proportionality as a whole and focuses on the factual results on the ground not only the relationship between the law limiting the right and the purpose of this limitation, it still have a problem that *Barak* could not propose a convincing solution for; which is the incommensurability and subjectivity or intuition. That is, this is the most component where the unfettered discretion of the judge appears. In replying to this criticism *Barak* contends that while proportionality stricto sensu contains subjective elements, '[t]hese elements operate within limited confines and only in order to achieve proper purposes. Moreover, judicial discretion must fulfill general principles of judicial coherence and judicial consistency.'[43]

In their article replying to *Barak*, *Ariel L. Bender* and *Tal Sela* have illustrated this in the following:

> Although Barak's arguments contain a degree of truth, in the end they cannot obscure the dominant subjective nature of proportionality sensu stricto… In the absence of commensurability, even when all agree about the nature of the benefit and the damage resulting from a certain arrangement, the decision concerning the proper ratio between the benefit and the harm is intuitive and not discursive. Both law and life often present the need to trade one interest for another, when the interests have no common denominator. But this fact does not negate the existence of the problem of incommensurability.[44]

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43 Aharon Barack, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, Cambridge University Press, 486 (2012).

44 Ariel Bender and Tal Sela, *How Proportional is Proportionality?*, I•CON Vol.13 No.2, 542 (2015). The authors in this section gave an example of the incommensurability problem criticizing an important judgement of *Barak* (as a Chief Judge of the Constitutional Court of Israel);

For example, in the important minority opinion handed down by Barak in the Supreme Court ruling on the constitutionality of the Citizenship and Entry Into Israel Act (Temporary Provision), 2003, he found that the statute, which greatly restricted the possibility of citizens of Israel who were married to residents of the Palestinian Authority or of enemy states to unite in Israel with their spouses and children, passed the sub-tests of proper purpose, rational connection, and necessity. But Barak believed that the statute did not comply with the sub-test of proportionality *sensu stricto*, because the damage it entailed to the rights of family life and equality exceeded the added security that the statute could be expected to achieve. By contrast to the long and detailed discussions of the requirements of purpose, rational connection and necessity, Barak's decision that the statute does not comply with the test of proportionality *sensu stricto* was summed up in a few short sentences;

> The added security provided by the sweeping prohibition is not proportional when compared to the added damage which is caused to the family life and the equality of the Israeli spouses. True, the sweeping prohibition brings greater security; but that security is achieved at too heavy a price. True, the chances of increasing security by means of a sweeping prohibition are not "remote and theoretical." At the same time, by comparison to the grave harm to human dignity, the ratio is not proportional.

Incommensurability is one of the main problems which constitutes a crucial critique of proportionality analysis as a balancing methodology. Thus, we will discuss it in more details in Chapter III.

b. Categorization or Levels of Scrutiny As An American Alternative to the PA:

In fact, categorization or the American levels of scrutiny doctrine includes a vast array of rules and exceptions that goes far from the topic of this contribution. However, in this part we try to brief the doctrine, while we will discuss some of its aspects and critiques in more details in Chapter II and Chapter III. Such a methodology of judicial review is created by the US Supreme Court. It is based on dividing the constitutional rights into three categories. These three categories are typified by the different levels of 'judicial scrutiny' attached to each of them. The three categories are; rights whose limitation invites 'strict scrutiny'; rights whose limitation invites 'intermediate scrutiny'; and rights whose limitation invites 'minimal scrutiny.'[45]

i . Strict Scrutiny:

The first category is the category of rights known in American law as fundamental rights. This category includes rights such as freedom of political speech, the rights to demonstrate and to associate, the freedom to exercise religion. The limitation of those fundamental rights is subject to the 'strict Scrutiny' test created by the US Supreme Court. Such a test is the most rigorous level of review and that is why it is applied to a pre-determined group of rights (fundamental rights).[46]

This review applies to both the purposes underlying the limiting legislation as well as the means selected to fulfill that purpose. 'As for the purposes, precedent determines that a law limiting one of the rights in this category would be declared unconstitutional unless it was enacted to justify; 1- A compelling governmental (or state) interest, 2- A pressing public necessity, or a *substantia* state interest. The means used to achieve the purpose should be 'necessary.' This means that they should be 'narrowly tailored' to achieve the compelling interest at stake.'[47] For example, the First

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45 Aharon Barack, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, Cambridge University Press, 510 (2012).

46 Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, U. Pa. L. Rev. Vol. 144, 2424 (1996).

47 Aharon Barack, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, Cambridge University Press, 511 (2012).

Amendment to the American Constitution states that 'Congress shall make no law… abridging the freedom of speech, or of the press.'[48] Upon this article the US Supreme Court has created a well-established doctrine of freedom of speech where they have applied the 'strict scrutiny' test as explained.

The 'narrow tailoring' expression perfectly reflects what the court questions in their analysis; the court in their searching for the government justification of the impugned legislation in the strict scrutiny level is asking some factual questions such as; 'whether the law is indeed narrowly drawn; Does the law further the interest; is the law limited to speech that implicates the interest; does the law cover all such speech; are there less restrictive alternatives that will serve the interest equally well?'[49]

In fact, the main characteristic that distinguishes the 'strict Scrutiny' approach than the proportionality as globally applied is that it has a pre-determined scheme. That is, when the judge is deciding the case he is not neutral, rather he seems to be more right defender. That is totally different from the proportionality approach as applied by the ECtHR for example or as explained by *Barak*. In the latter approach the judge has no limitation to his discretion as there is no predetermination of a set of rights that needs a compelling interest to be limited. The American approach, on its face, seems to be more protective for the fundamental rights because it changes the mindset of both the legislator and the judge. It changes the mindset of the legislator when he enacts a limiting law because he knows well that any legislation limiting a fundamental right must have a 'compelling' interest. Thus, he shall find that interest before enacting the law. On the other hand, such approach changes the mindset of the judge as it limits his discretionary powers. It gives him the justification for being rigorous in his analysis of the interest under scrutiny and it helps the society as a whole in being more respectful to the fundamental rights.

48 First Amendment of the US Bill of Rights.

49 Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, U. Pa. L. Rev. Vol. 144, 2424 (1996).

ii . Intermediate Scrutiny:

The second category 'intermediate scrutiny' is less rigorous than the strict scrutiny one. It is the middle tier of review. This test is applied in another group of rights which includes; the right to equality such as gender discrimination, discrimination against nonmarital children, discrimination against undocumented alien children with regard to education, and regulation of commercial speech, and of speech in public forums.[50] Legislation in this category would pass the intermediate scrutiny test if it was designed to achieve an 'important' or substantial governmental purpose. Moreover, the means used to pursue such a purpose must have a substantial relation with that purpose. In other words, the government's objective must convince the court that such a purpose is factually important not just a legitimate goal and the court must believe that the impugned legislation is substantially connected to realizing that goal pursued.[51]

iii . Rational Basis Test:

This is the minimal level of scrutiny applied by the US Supreme Court. It is applied to the laws which limit the rest of the constitutional rights outside the aforementioned two categories. Those rights include the right to movement outside the country, laws challenged under the due process clause, or other limitations of equality not based on suspect classifications.[52] The court in this test only requires that the law impugned be rationally related to a legitimate government purpose. Hence, any acceptable legitimate purpose is sufficient for the court to upheld the legislation. In this test the burden of proof is upon the challenger of the law not upon the government as the previously mentioned categories. Consequently, the law will be upheld unless the applicant managed to prove or convince the court that there is no reasonable or legitimate purpose for the legislation or that there is no rational connection between the law and the aimed purpose.

Such an American alternative is, like proportionality, facing critiques in the American constitutional law scholarship as long as the European context. Both doctrines are, throughout history, compared to each other in order to answer a question of which provides a better protection to human rights? The answer has never been settled between the proponents of each side. However,

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50 Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 6th edn. Walters Kluwer, 587-88 (2019).

51 Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 6th edn. Walters Kluwer, 588 (2019).

52 Aharon Barack, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, Cambridge University Press, 511 (2012).

the main criticisms that both doctrines face are the inherent judicial subjectivity which each doctrine include, and the incommensurability which proportionality faces more than the categorization doctrine.[53]

In this chapter we tried to setting the floor for the complexities and critiques of the judicial review methodologies; Proportionality Analysis, and its main rival Categorization doctrine. Through explaining the main arguments in the debate of judicial review and subjectivity, we have explained the origins of the contemporary scholarly quest of rationalizing judicial review methodologies; the proportionality and the categorization. Moreover, we have briefly explained the main critique directed towards both doctrines which will be elaborated in more details through next two chapters.

53 Aharon Barack, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, Cambridge University Press, 513, 521 (2012); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 294 (1992).

II. PROPORTIONALITY ANALYSIS IN THE ERA OF GLOBAL CONSTITUTIONALISM: ORIGINS AND MIGRATION, STRUCTURE AND GLOBAL INFLUENCE

Proportionality analysis has emerged in mid-20th century as a judicial-made tool through which judges could balance between two conflicting constitutional\ human rights, or between a constitutional right and a public\ state interest.[54] For example, the right to freedom of speech and the state's interest in protecting minorities or individuals from hate speech. Such a tool has been created in Germany then moved and spread from Germany to other states in Europe such as the UK, then it has moved to states in other continents such as Canada, New Zealand.. etc., finally, it has been used in some international regimes; Namely, the European Union (EU), the European Convention on Human Rights (ECHR) in the case law of the ECtHR, the World Trade Organization (WTO), and the Inter-American Court of Human Rights (IACHR). Proportionality has evolved to be the most dominant legal tool in deciding cases of rights limitations. As *Beatty* puts it "[It] has become the universal criterion of constitutionality".[55] Through this chapter I try to answer the question of how and why proportionality, not anything else, has spread all over the world? Why is it important to focus on such a methodological tool and to question its appropriateness? And What impact does such a diffusion of this mechanism have on the judicial power and human rights globally? I will, firstly, trace the historical origins and migration of proportionality from Germany to other countries and human rights regimes in and outside Europe. I will show that the doctrine is even perceived by some scholars as originated within the U.S. Supreme Court case law.[56] In the second part of this chapter, I will make an account for the different perceptions of the structure of proportionality in different jurisdictions. In the same context, I will focus on proportionality version on the international plane, especially in the ECtHR case law (called Margin of Appreciation "MoA"). In the last part of this chapter, I will demonstrate how proportionality has vested the judicial activism and power globally with all of its current unsettled flaws (as explained in the following chapter).

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54 Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, Columbia J. Transnatl. Law Vol. 47, 97 (2008).

55 David Beatty, THE ULTIMATE RULE OF LAW, OUP, 162.

56 See, Paul Yowell, *Proportionality In United States Constitutional Law*, *In* REASONING RIGHTS COMPARATIVE JUDICIAL ENGAGEMENT; David Beatty, THE ULTIMATE RULE OF LAW, OUP.

1. Historical Origins and Migration of Proportionality Analysis:

a. Historical Origins and Migration Among National Jurisdictions:

Through this part a quick overview of the historical origins and proliferation of the proportionality analysis domestically is to be made. Explaining the technical differences between each jurisdiction and the other is out of the scope of this part. Hence, this part will provide an account for the historical emergence and the origins of the principle in Germany (as the leading jurisdiction), Canada (as an example from Americas), South Africa (example from Africa), and a glimpse of the Asian proportionality. The last section of this part is dedicated to discuss the issue of proportionality in the American constitutionalism.

i. Germany:

In his '*Lectures on Law and State*'[57] known as 'Crown Prince Lectures' given between 1791-1792 *Carl Gottlieb Svarez*, a renowned German Jurist and Philosopher, has introduced the very first notion of 'Proportionality Analysis' when he described the relationship between the state and the individual. He started, as *Rousseau* and *Hobbes* have done in the '*Social Contract*' and '*Leviathan*', by describing the state of nature where individuals lives in an uncontrolled society; where the unrest and confusion prevails and 'in which there is no security of property or rights, no uninterrupted enjoyment of natural freedom, consequently no true happiness can take place.'[58] *Svarez* concludes that the individuals consequently leaves that state of nature and establishes a civil society under a common leader. He continues to describe that such a leader does not derive his authority from a divine source, rather it is derived from a contract by which the individuals of the state have renounced some of their rights and freedoms and subjected themselves to the orders of the regent for the sake of their own common happiness. *Svarez* elaborated on the objectives of limitation of individuals freedom and obviously argued that any limitation shall be 'necessary' to guarantee the freedoms and promote happiness for all;

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57 See, Carl Gottlieb Svarez, VORTRÄGE ÜBER RECHT UND STAAT (Hermann Conrad & Gerd. Kleinheyer eds., Westdeutscher Verlag 1960); Aharon Barack, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, Cambridge University Press, 177 (2012); A. Stone Sweet and J. Mathews, *Proportionality, Balancing and Global Constitutionalism*, 47 Colum. J. Transnat'l L., 99 (2009).

58 Carl Gottlieb Svarez, VORTRÄGE ÜBER RECHT UND STAAT (Hermann Conrad & Gerd. Kleinheyer eds., Westdeutscher Verlag), 64 (1960).

> From this it follows directly that when men emerged from the state of natural equality and united themselves into civil societies under a common head, they in no way intended, nor could they have intended, to renounce their natural liberty altogether… but that the purpose of civil society, and therefore of the state, could only be to remedy the imperfections of the state of nature, and to limit the liberty of the individual so far as is *necessary to secure the liberty of all* against disturbances and impairments, in order to promote their happiness.[59]

In fact, this was not the first time for *Svarez* to mention the proportionality analysis. About Eight years earlier, in 1783, *Svarez* has mentioned the proportionality analysis in a lecture given to the *Wednesday Society* '*Mittwochsgesellschaft*'. It was a group of German liberal intellectuals, in which *Svarez* was a member, which took part in the social debate about a new Prussian legislation on the censorship and freedom of expression at the time. *Svarez* expressed his opinion in a lecture called '*Vorschläge zu Census Gesetzen*' (proposals on censorship laws). He believed that censorship practice shall be organized explicitly in a comprehensive body of legislation that defines exactly the basis and the limitations of such a censorship. 'It seems to me', he wrote,

> a matter of the utmost importance that censorship, if its existence is accepted as *necessary*, should be organized according to principles *which do not unnecessarily impede freedom of thought*, the spirit of investigation, and enlightenment in general, *and which as far as possible remove all elements of arbitrariness from it*.[60]

Svarez later has made another foundation for the doctrine of proportionality in the drafting of the provision concerning police powers in the Prussian General Law of 1794 (*Allgemeines Landrecht*). Article 10 II 17 of that law, reads: "The office of the police is to take the *necessary* measures for the maintenance of public peace, security, and order…"[61]. Using the word 'necessary' in such contexts have provided the courts with the required textual ground to employ the doctrine of proportionality in their assessment of the necessity of the police and administrative measures a century later.

Through the nineteenth century the Prussian Higher Administrative Court (*Oberverwaltungsgericht*) has appeared as a leading judicial institution in Germany that developed a range of constitutional and administrative law principles. Proportionality Analysis was one of

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59 Carl Gottlieb Svarez, VORTRÄGE ÜBER RECHT UND STAAT (Hermann Conrad & Gerd. Kleinheyer eds., Westdeutscher Verlag 1960), 65.

60 Eckhart Hellmuth, *Enlightenment and Freedom of the Press: The Debate in the Berlin Mittwochsgesellschaft*, 1783–1784, History, Vol. 83, No. 271, 432 (July 1998).

61 A. Stone Sweet and J. Mathews, *Proportionality, Balancing and Global Constitutionalism*, 47 Colum. J. Transnat'l L., 101 (2009).

such principles which was based upon the 'necessary measures' article of the Prussian General Law of 1794 in reviewing police measures against individuals.[62] Through the nineteenth century the principle of proportionality had been improved and refined by the efforts of the jurists and judiciary at the time.[63]

After the adoption of the German Basic Law 1949, unlike The Weimar Constitution (1919-33), the fundamental rights were higher than the legislations; so that they could not be overridden by the ordinary statutes. The German Basic Law has also established The German Federal Constitutional Court (GFCC) to protect those fundamental rights against state measures and statutes. Individuals had the right to file suits directly before such a court. Some of the renowned jurists who were the developers of the principle of proportionality theoretically throughout the nineteenth century have been appointed as judges in the GFCC. Their appointment was crucial in the developing process of the proportionality as a constitutional principle.[64] Through the following two decades the GFCC has adopted the proportionality principle in almost all of the rights restriction measures cases. Moreover, it has applied the principle in the private law sphere starting from 1958 in the famous *Lüth* case.[65]

ii . Canada:

In Canada there is no clear evidence that proportionality test was, from the outset, influenced by the German proportionality approach or even by the European Court of Human Rights' approach (ECtHR). However, some jurists argued that the Canadian approach, adopted in *Oakes*,[66] was in fact influenced by the ECtHR proportionality specially after the adoption of the Canadian 1982

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62 A. Stone Sweet and J. Mathews, *Proportionality, Balancing and Global Constitutionalism*, 47 Colum. J. Transnat'l L., 101 (2009).

63 See, A. Stone Sweet and J. Mathews, *Proportionality, Balancing and Global Constitutionalism*, 47 Colum. J. Transnat'l L., 102-104 (2009); Moshe Cohen-Eliya and Iddo Porat, PROPORTIONALITY AND CONSTITUTIONAL CULTURE, Cambridge University Press, 24 (2013); Gebhard Bucheler, *Proportinality as a General Principle of Law*, *IN* PROPORTIONALITY IN INVESTOR-STATE ARBITRATION, Oxford University Press, 35 (2015).

64 See, A. Stone Sweet and J. Mathews, *Proportionality, Balancing and Global Constitutionalism*, 47 Colum. J. Transnat'l L., 105 (2009). "In hindsight, one sees the hugely important role that legal scholars played in elevating proportionality to a constitutional principle. They refined the concepts that courts employed, and provided the rationales for proportionality's expansion."

65 See, 7 BVerfGE 198 (1958), *IN* COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS, Thomson West US, 824 (2003); See also, A. Stone Sweet and J. Mathews, *Proportionality, Balancing and Global Constitutionalism*, 47 Colum. J. Transnat'l L., 111 (2009).

66 See, *R v Oakes*, [1986] 1 SCR 103.

Bill of Rights. *Aharon Barack* has adopted such an opinion depending on some Canadian jurists analysis.[67] In *Oakes* case Chief Justice *Dickson* has written the very first application of the proportionality analysis in the history of the Canadian Supreme Court. He did not mention the ECtHR or the German court's precedents in his judgement. However, he adopted a very similar approach. *David E. Oakes* was accused of possession of drugs for the purpose of trafficking on the basis of article 8 of the *Narcotic Control Act* which provided that if a person is found in a possession of a drug, he is presumed to have intended to traffic in it. In this case The Supreme Court was faced with the question of whether or not s. 8 of the Narcotic Control Act violated s. 11(d) of the Charter and was therefore of no force and effect. The court found that another issue inherent in that main question which is whether or not s. 8 of the Narcotic Control Act was a 'reasonable' limit prescribed by law and justified in a free and democratic society according to s. 1 of the Charter. The court found that article 8 is unjustified limitation because it runs against the presumption of innocence prescribed in S11(d) of the Canadian Charter 'by requiring the accused to prove he is not guilty of trafficking once the basic fact of possession is proven..'.[68] In their analysis the court adopted 'a form of proportionality test' where Justice Dickson emphasized that;

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"… Second, once a sufficiently significant objective is recognized, then the party invoking S.1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test"… There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance."[69]

According to *Hovius* the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) have substantial influence on the wording of

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67 See, B. Hovius, *The Limitation Clauses of the European Convention on Human Rights: A Guide for the Application of Section 1 of the Charter?*, 17 Ottawa L. Rev. 213 (1985); B. Hovius, *The Limitations Clauses of the European Convention on Human Rights and Freedoms and Section 1 of the Canadian Charter of Rights and Freedoms: A Comparative Analysis*, 6 Y. B. Eur. L. 105 (1987).

68 *R v Oakes*, [1986] 1 SCR 103.

69 Peter Hogg, CONSTITUTIONAL LAW OF CANADA, 3rd Edition, 866-67 (1992).

section 1 of the Canadian charter. Therefore, he argues that the Canadian Supreme Court is, by result, influenced by the case law of the ECtHR and the Human Rights Commission. However, *Hovius* also points out that differences are likely to exist between the approach of the ECtHR and the approach of the Supreme Court of Canada because, for example, what is considered 'necessary in a democratic society' in Germany or Italy may not be considered so in Canada and vice versa.[70] In his subsequent article concerned with the 'comparative analysis' between the limitation clauses of the ECHR and S. 1 of the Canadian Charter, *Hovius* demonstrated that the Canadian courts have mentioned cases from ECtHR in their analysis of the S. 1 requirements of the limiting legislation. Section 1 has required that the limiting measure shall be 'prescribed by law.'[71] Hence, the Canadian Courts, in their analysis of such a requirement in 1984,[72] have explicitly referred to the ECtHR *Sunday Times* decision in emphasizing that 'a norm cannot be regarded as law unless it is formulated with sufficient precision to enable a person to regulate his conduct.'[73] Consequently, it could be said that although proportionality analysis in Canadian Courts was not influenced by the European approach from the outset, they have explicitly adopted some aspects of the European approach in subsequent judgements. Moreover, it could be argued that the similarities between the wording of the Canadian Charter and the ECHR have reinforced such migration of the analysis.

iii . South Africa:

In South Africa, article 33 of the interim constitution and article 36 of 1996 constitution provides for the extent and nature of the limitation of the fundamental rights. From the drafting of the text one could notice that the constitution has explicitly adopted a four-stage proportionality analysis. Article 36 of the 1996 constitution provides that;

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and

70 B. Hovius, *The Limitation Clauses of the European Convention on Human Rights: A Guide for the Application of Section 1 of the Charter?*, 17 Ottawa L. Rev. 260-61 (1985).

71 Section 1 of the Canadian Charter reads "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

72 See, R v Saint John News (1984) 16 DLR (4th) 248,253 (NBQB). [Cited in B. Hovius, *The Limitations Clauses of the European Convention on Human Rights and Freedoms and Section 1 of the Canadian Charter of Rights and Freedoms: A Comparative Analysis*, 6 Y. B. Eur. L. 20 (1987)].

73 B. Hovius, *The Limitations Clauses of the European Convention on Human Rights and Freedoms and Section 1 of the Canadian Charter of Rights and Freedoms: A Comparative Analysis*, 6 Y. B. Eur. L. 20 (1987).

> democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including;
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.[74]

In fact, the significance of both the interim constitution and the 1996 constitution is that both have put an end to the previous apartheid and unequal system in South Africa and set the grounds for a new system where the rule of law, equality and other values of the democratic society are to be entrenched. *S v Makwanyane*[75] was the first case where the constitutional court has applied the first proportionality test analysis. In this case the two accused persons were convicted on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances. They were sentenced to death on each of the counts of murder. Then, the Appellate Division dismissed their appeals against the convictions concluding that their crimes shall receive the most rigorous sentence permitted by the law. Hence, they have resorted to the Supreme Constitutional Court. The main question presented to the court was whether the death penalty violates sections 9, 10 and 11(2) of the 1993 constitution, which guaranteed every individual the right to life, the right to dignity and the right to be free from torture and cruel punishment? The court found that the death penalty was indeed unconstitutional.[76] Regarding the court analysis, it was alleged that the court has based their analysis on the Canadian Supreme Court *Oaks* case.[77] This opinion is justified by the fact that the limitation clauses in both constitutions are similar. However, some scholars argued that the court has adopted a different approach than its Canadian counterpart. That is, the court has adopted a broader context of balancing which is not depending

74 See, articles 33 of the Constitution of the Republic of South Africa Act 200 of 1993 and article 36 of the Constitution of the Republic of South Africa, 1996.

75 *S v Makwanyane & Another* 1995 (3) SA 391 (CC) [104].

76 *S v Makwanyane & Another* 1995 (3) SA 391 (CC) [146].

77 *S v Makwanyane & Another* 1995 (3) SA 391 (CC) [105]. "In dealing with this aspect of the case, Mr Trengove placed considerable reliance on the decision of the Canadian Supreme Court in *R v Oakes*"; See also, Stuart Woolman and Jonathan Klaaren, CONSTITUTIONAL LAW OF SOUTH AFRICA, Juta and Company Ltd. 2nd Edition, 34-94.

on a ‘sequential approach’ as adopted by the Canadian and German Courts.[78] It means that the court’s analysis adopted a free approach of balancing that is not following a mechanical step-by-step examination. The court has explicitly decided such an approach later in *S v. Manamela* case;

> It should be noted that the five factors expressly itemised in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list.[79]

Such a global model or ‘judgement on proportionality’ is defined by justice *Sachs* in *Coetzee* case as follows;

> The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct… it also follows from the principles laid down in *Makwanyane* that we should not engage in purely formal or academic analyses,…, but rather focus on what has been called the synergetic relation between the values underlying the guarantees of fundamental rights and the circumstances of the particular case.[80]

Consequently, it could be said that although the African Court is influenced by the Canadian and German proportionality analysis approaches, it has adopted a more nuanced approach called ‘the global model’ of proportionality. Such an approach was criticized as it overreaches the legislature sphere, however it was defended by the court as inspired by and based upon protecting the constitutional norms and values. In my opinion, it seems that the African Supreme Court is adopting ‘all-things-considered’ balancing approach, despite manifested in a ‘structured’ proportionality analysis.

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78 Stuart Woolman and Jonathan Klaaren, CONSTITUTIONAL LAW OF SOUTH AFRICA, Juta and Company Ltd. 2nd Edition, 34-94.

79 *S v. Manamela and Another* 2000 (3) SA 1 (CC) [32]; See also, Niels Petersen, *Proportionality and the Incommensurability Challenge Some Lessons From the South African Constitutional Court*, NYU Public Law & Legal Theory Research Paper Series, Working Paper No. 13-07, 2 (2013).

80 *Coetzee v Government of the Republic of South Africa, Matiso & Others v Commanding Officer Port Elizabeth Prison & Others* 1995 (4) SA 631 (CC) [46] cited in Mordechai Kremnitzer et al., PROPORTIONALITY IN ACTION COMPARATIVE AND EMPIRICAL PERSPECTIVES ON THE JUDICIAL PRACTICE, Cambridge University Press, 217 (2010).

iv . Asia:

Proportionality analysis has emerged in Asia in different countries such as; Taiwan, Hong Kong, South Korea, and Malaysia.[81] Moreover, some scholars have argued that there is a Although it has emerged lately in the past twenty years, some of these countries, such as Hong Kong, has managed to well establish a proportionality analysis approach.[82] For the purposes of this part I will make a brief overview of the proportionality in Taiwan and Hong Kong only as they are the oldest in Asia.

In Taiwan, Article 23 of the Taiwanese Constitution provides that constitutional rights shall not be restricted by law unless it is "necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare."[83] Although the Taiwan Constitutional Court has used the term ‘proportionality’ for the first time in its Interpretation No. 414,[84] It was not yet established as a judicial reviewing doctrine there. The court has established the proportionality doctrine for the first time as part of the interpretation of article 23 of the Taiwan constitution in its interpretation No. 436, where it mentioned explicitly that “the law shall comply with the principle of proportionality under Article 23 of Taiwan's Constitution.”[85] As *Chung-Lin Chen* Maintained the Taiwan Constitutional Court was highly influenced by the German approach from the outset, however as the doctrine becomes more matured in their constitutional law jurisprudence it seems that the court has developed a three-levels scrutiny standard similar to that of the US Supreme Court. Therefore, it could be said that Taiwan Constitutional Court is currently adopting a hybrid system which combined both the European (or German) Proportionality with the US three-tiered scrutiny system.[86]

In Hong Kong, the Hong Kong Court of Final Appeal (CFA) has used the proportionality analysis for the first time in 1999. Previously, in 1992, the court of appeal has introduced the proportionality

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81 Alec Stone Sweet and Jud Mathews, *Proportionality and Rights Protection in Asia Hong Kong, Malaysia, South Korea, Taiwan, Whither Singapore?*, 29 SAcLJ, 774 (2017).

82 See Po Jen Yap, PROPORTIONALITY IN ASIA, Cambridge University Press, 18 (2020).

83 See Article 23 of the Taiwanese Constitution Ammended in 2005 (available at: https://www.constituteproject.org/constitution/Taiwan_2005?lang=en).

84 Po Jen Yap, PROPORTIONALITY IN ASIA, Cambridge University Press, 19 (2020).

85 Chung-Lin Chen, *In Search of a New Approach of Information Privacy Judicial review: Interpreting No. 603 of Taiwan's Constitutional Court As a Guide*, IND. INT'L & Comp. L. Rev., Vol. 20:1, 26 (2010).

86 Chung-Lin Chen, *In Search of a New Approach of Information Privacy Judicial review: Interpreting No. 603 of Taiwan's Constitutional Court As a Guide*, IND. INT'L & Comp. L. Rev., Vol. 20:1, 27 (2010).

analysis in *R v Sin Yau Ming*[87] which was obviously influenced by the Canadian approach. In 1999 the CFA applied the proportionality test in *HKSAR v Ng Kung Siu*.[88] The defendants in this case were charged with violating section 7 of the National Flag and National Emblem Ordinance and section 7 of the Regional Flag and Regional Emblem Ordinance because they have participated in a demonstration carrying a defaced flag of the People's Republic of China (PRC). The court of first instance found them guilty of desecrating the national and regional flags, then they have appealed and won in the Court of Appeal (CA) as the court found that the flags ordinances has violated the right to freedom of expression protected by the ICCPR (provided for in the Hong Kong's Bill of Rights). The government then appealed to the Court of Final Appeals (CFA) which ruled in favor of the government. In so doing, it found that despite the freedom of expression was limited by the flags ordinances, the limitation was 'proportionate' and 'necessary' to protect the 'Public Order' as provided for in article 19 (Para. 3) of the ICCPR. Thus, the ordinances were not inconsistent with the ICCPR and, therefore, were found constitutional. Consequently, it could be said that the Hong Kong approach was based on the Canadian Proportionality while the Taiwanese approach was based, in the outset, on the German doctrine then it has entangled with the US 'levels of scrutiny' approach.

V. Proportionality in the U.S.?

Through the past fifty years, Proportionality Analysis (PA) has become the most dominant tool in judicial rights review domestically and in international human rights adjudication systems as well. However, the situation remains different in the US as the supreme court and the constitutional law jurisprudence has refused to explicitly employ the proportionality analysis in their judicial review cases. Instead, the US supreme court has developed another approach called 'Tiers of Scrutiny' or 'Categorization' which is based upon classifying the constitutional rights into three categories; 'Rational Basis' Scrutiny, 'Intermediate Scrutiny', and 'Strict Scrutiny'. Although the fact that proportionality literature is not common (or not used at all?) neither in the US Supreme Court case law nor in the American Constitutionalism, some constitutional law scholars, such as *Paul Yowell*, *Alec Stone Sweet* and *Jud Mathews*, are arguing that proportionality do exist in the American

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87 See R v Sin Yau Ming [1992] 1 HKCLR 127 cited in Alec Stone Sweet and Jud Mathews, *Proportionality and Rights Protection in Asia Hong Kong, Malaysia, South Korea, Taiwan, Whither Singapore?*, 29 SAcLJ, 789 (2017).

88 See *HKSAR v Ng Kung Siu and Another* (1999) 2 HKCFAR 442.

Constitutional law jurisprudence and in the Supreme Court case law.[89] Nonetheless, some other scholars in their attempts to historicize the scrutiny levels approach of US supreme court have never mentioned the role of proportionality in their narrative.[90]

In the American levels of scrutiny approach the most rigorous test is obviously the strict scrutiny in which the court requires a 'compelling state interest' in order to permit the limitation of the right impugned.[91] Such a test, strict scrutiny, was developed by the court in late 1950s and early 1960s. Before that, the supreme court adopted, as explained by *Yowell*, a 'freestanding balancing test' such as in *Schneider v State* (1939).[92] Where in such a case the court held that "… [A]s cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."[93] In 1957 the court started to form the "strict Scrutiny" test in *Sweezy v. New Hampshire* through requiring, for the first time, that any abridgement of the freedom of speech protected by the first amendment shall be "for reasons that are exigent and obviously compelling."[94] Such a requirement (compelling state interest) was the first prong of the strict scrutiny test, the second prong of the test (Least Restrictive Measure or Narrow Tailoring) was formulated by justice *Brennan* in *Sherbert v. Verner* (1963). In this case justice *Brennan* held that "… For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that *no alternative forms of regulation would combat such abuses without infringing First Amendment rights*."[95] When the strict scrutiny was well-established and practiced by the court, the other levels of scrutiny has

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89 See, Paul Yowell, *Proportionality In United States Constitutional Law*, *In* REASONING RIGHTS COMPARATIVE JUDICIAL ENGAGEMENT, Hart Publishing Ltd, 94 (2014); See also, Jud Mathews and Alec S. Sweet*, All Things in Proportion? American Rights Review and The Problem of Balancing*, Emory Law Journal, Vol 60, 813 (2010).

90 See, G. Edward White, *Historicizing Judicial Scrutiny*, S. C. Law Rev., Vol. 57 Issue 1, 5 (2005). "[T]his Article's narrative begins by describing the connections between republican constitutional theory, the conception of constitutionalism that informed the founders' generation, and the twin principles of judicial review and departmental discretion that lay at the heart of republican constitutionalism… But with the Reconstruction Amendments came a potentially expanded role for the courts as guardians of individual liberties and property rights, which were newly protected against state interference by the Due Process Clause of the Fourteenth Amendment."

91 Paul Yowell, *Proportionality In United States Constitutional Law*, *In* REASONING RIGHTS COMPARATIVE JUDICIAL ENGAGEMENT, Hart Publishing Ltd, 94 (2014); See also, SA Siegel*, The Origin of the Compelling State Interest Test and Strict* Scrutiny, 48 American Journal of Legal History, 355 (2006).

92 Paul Yowell, *Proportionality In United States Constitutional Law*, *In* REASONING RIGHTS COMPARATIVE JUDICIAL ENGAGEMENT, Hart Publishing Ltd, 95 (2014).

93 See, *Schneider v. State*, 308 U.S. 161 (1939).

94 See, *Sweezy v. New Hampshire*, 354 U.S. 262 (1957).

95 See, *Sherbert v. Verner*, 374 U.S. 407 (1963).

become more nuanced in the court afterward case law. The question is where could we find the proportionality roots in the supreme court's jurisprudence? According to *Jud Mathews* and *Alec S. Sweet* the US Supreme Court has used the proportionality analysis *explicitly* for the first time in its history in the judicial-made 'Dormant Commerce Clause' doctrine.[96] Article I, Section 8 of the US Constitution grants Congress the power to "[*regulate*] Commerce with foreign Nations, and among the several States and with the Indian tribes;…."[97]. According to this article Congress has often used such a Clause to exercise some legislative authority over the intrastate commercial activities and also between states and each other. Such a legislative power has resulted in a considerable and ongoing controversy regarding the adequate and accepted balance of power between the federal government and the states. Hence, the Supreme court of the US has intervened in this controversy as a supervisor which constructs the sought after balance. Historically, the Commerce Clause has been viewed as both a congressional legislative power and a States regulatory restriction. In their account of the historical development of the court's dormant commercial clause doctrine *Mathews* and *Sweet* argued that the court has established the doctrine in three main cases and that "the Court's doctrine in the area is all but indistinguishable from [Proportionality Analysis]."[98] In *Willson v. Black Bird Creek Marsh Co.* Justice *Marshal* held that the States have the power to regulate the interstate commerce activities as long as it is under the supervision of the Court and it is in no conflict with any other laws on the subject.[99] Such a judgement was, according to *Mathews* and *Sweet*, the beginning of more developed and nuanced judgements that adopted a proportionality-like doctrine. In *Chy Lung v. Freeman* (1875) the court introduced, for the first time, the *Necessity* step (or the Least Restrictive Measure LRM) in their analysis;

> The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the states... We are not called upon by this statute to decide for or against the right of a state, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad, nor to lay down the definite limit of such right, if it exist… The statute of California goes so far beyond what is necessary, or even appropriate, for this

96 Jud Mathews and Alec S. Sweet*, All Things in Proportion? American Rights Review and The Problem of Balancing*, Emory Law Journal, Vol 60, 813 (2010).

97 Article I, Section 8 of the US Constitution.

98 Jud Mathews and Alec S. Sweet*, All Things in Proportion? American Rights Review and The Problem of Balancing*, Emory L.J., Vol. 60, 814 (2010).

99 *Willson v. Black Bird Creek Marsh Co*., 27 U.S. 252 (1829).

> purpose, as to be wholly without any sound definition of the right under which it is supposed to be justified.[100]

Through the following three decades, the supreme court has asserted the doctrine of LRM, namely, in *Railroad Co. v. Husen* (1877),[101] *Minnesota v. Barber* (1890),[102] and *Reid v. Colorado* (1902).[103] According to *Mathews* and *Stone* the court, through the aforementioned cases (especially the last one), has 'neatly expressed the constituent elements of PA'.[104] However, in my opinion, I do not totally agree with their analysis of the court's doctrine. That is, it seems to me that the US Supreme Court has used a 'freestanding balancing approach' more than a structured Proportionality Analysis.[105] Moreover, we could not derive a consistent PA from the abovementioned judgements bearing in mind the long intervals between each one of them, and that the court has never used the European terminology of the PA. Consequently, although we could say that some elements of Proportionality Analysis, such as the Necessity step, could be found in the American Supreme Court's case law (especially the Dormant Commerce Clause), we could not claim that the current American Constitutionalism is based upon Proportionality Analysis nor could we claim that such used elements was derived from PA. Instead, it could be said that the elements deemed by *Mathews* and *Stone* as part of PA could be deemed, at the same time, as part of the Levels of Scrutiny approach established later.[106]

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100 *Chy Lung v. Freeman*, 92 U.S. 280 (1875).

101 *Railroad Company v. Husen*, 95 U.S. 465 (1877).

102 *Minnesota v. Barber*, 136 U.S. 313 (1890).

103 *Reid v. Colorado*, 187 U.S. 137 (1902).

104 Jud Mathews and Alec S. Sweet*, All Things in Proportion? American Rights Review and The Problem of Balancing*, Emory L.J., Vol. 60, 818 (2010).

105 See, *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970); Patrick C. McGinely, *Trashing the Constitution: Judicial Activism, The Dormant Commerce Clause, and the Federalism Mantra*, Oregon L.R., Vol. 71, 415 (1992).

106 See, Paul Yowell, *Proportionality In United States Constitutional Law*, *In* REASONING RIGHTS COMPARATIVE JUDICIAL ENGAGEMENT, Hart Publishing Ltd, 95 (2014). "Strict scrutiny was crystallized in First Amendment cases in the late 1950s and early 1960s. Prior to that time the Supreme Court oscillated between (i) treating the First Amendment as an absolute right, seeking to delineate its content and scope, and (ii) applying freestanding balancing tests".

b. Proportionality Emergence and Diffusion on the International Level:

In this part I will make an account of the emergence and diffusion of the Proportionality Analysis on the international plane. For the purposes of this contribution only four examples are demonstrated; Court of Justice of The European Union (CJEU), Inter-American Court of Human Rights (IACtHR), The African Court of Human and People's Rights (ACtHPR), and the European Court of Human Rights (ECtHR). Although PA has been used in more International Courts and Tribunals (ICTs) than such four examples, I have chosen them because they reflect a well-established and effective human rights systems. Moreover, the application of the PA within each one of those institutions have demonstrated reciprocal impact which contributed effectively in the contemporary theories of Constitutional Pluralism, and Global Constitutionalism.

i . Court of Justice of The European Union (CJEU):

The Proportionality principle in the system of the European Union (EU) has been established from the outset in the Treaty of Maastricht. Such a treaty has established the European Union, laid the foundations of the unified currency (Euro) and the criteria of joining the Euro zone, and enhanced the European integration endeavors. Article (3b) of Maastricht Treaty (1992) stipulates that "… [a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."[107] Now, the article has been amended to explicitly stipulates for the proportionality principle as it reads "… 4. 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.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality."[108]

The first case in which the proportionality doctrine was mentioned in the European Court of Justice (ECJ) as a tool used in their analysis was the *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970). In this case the '*Internationale Handelsgesellschaft mbH'* (International Trading Company Ltd.) a German exporting company has filed a lawsuit against the '*Einfuhr- und Vorratsstelle für Getreide und Futtermittel'* (Import and Storage Agency for Grains and Feedstuffs) before the German Administrative Court. AG de

107 See, article (3b) of the Treaty of Maastricht (1992).
108 See, article (5) of the Treaty on European Union (2016).

Lamothe, one of the Advocate Generals of the Court, in his opinion referred explicitly to the proportionality principle and suggested to the Court that it should establish such a principle clearly and explicitly on a provision of the treaty.[109] In this case, The applicant (International Trading Company Ltd.) challenged the Common Agricultural Policy (CAP) of the European Union which permitted exports only after obtaining an 'export licence' by the exporter, on a deposit of money, that could be forfeited if he failed to make the operation during the validity period. The applicant claimed that the licensing system was a disproportionate violation of their freedom to conduct a business under the German constitution as it required a measure (paying a deposit) that was unnecessary to achieve the public interests provided for in article 40 (3) of the Treaty of Rome (Treaty Establishing the European Economic Community EEC). The German Administrative Court has made a reference to the ECJ as it concerned a rule of the CAP. The ECJ started its analysis by searching for the basis of the 'proportionality principle'. The question raised as to what legal source this principle must be taken from in order to be applied against a measure issued by the Community authorities.[110] The court rejected what Frankfurt court previously established; that since the proportionality doctrine could be found in the German Basic Law, community measures may not infringe those constitutionally based rights. Instead, the ECJ held that the measures taken by the community regulations has not violated any fundamental rights and that it was not unnecessary or disproportionate with the aims provided for in article 43 (3) of the treaty. However, before deciding this, the court found that "The validity of measures adopted by the institutions of the Community can only be judged in the light of community law." And that "The law stemming from the treaty, …, cannot because of its very nature be overridden by rules of national law, …, without being deprived of its character as community law and without the legal basis of the community itself being called in question."[111] And that "Respect for fundamental rights forms an integral part of *the general principles of law protected by the court*… 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 the community*."[112] Consequently, it could

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109 AG de Lamothe, opinion in Case (C-11/70) *Internationale Handelsgesellschaft*, 1146 (1970).

110 See, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Case 11/70), ECR Para. 3 (1970).

111 See, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Case 11/70), ECR Para. 3 (1970).

112 See, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Case 11/70), ECR Para. 2 (1970).

be understood that the ECJ has established its assessment of the proportionality of the impugned regulations on the community law; in the form of 'General Principles of law' (which may be, at the same time, stemmed from the domestic principles of the constitutions of the community members but it is not directly based upon them.

Before that case, the ECJ has impliedly mentioned the proportionality principle in *Fédéchar v. High Authority* (1956) when it was deciding on whether the High Authority of European Coal and Steal Community (ECSC) has misused its powers in their decision regarding the regulation of coal prices in Belgium. The court held that the ECSC has used their powers in accordance with article 26 of the Treaty Establishing the European Coal and Steal Community and that there was no misuse of their powers. In such a case the court held that "… in accordance with a generally accepted rule of law a reaction by the High Authority to illegal action on part of the undertakings must be *in proportion* to the scale of that action."[113] And that "It results from article 8 of the treaty that the high authority enjoys a certain independence in determining the implementing measures *necessary* for the attainment of the objectives referred to in the treaty."[114] In *Mannesmann AG v High Authority* (1962) the court has also breifly mentioned the Least Restrictive Measure (LRM);

> It must first be observed that the High Authority, …, has indeed a duty to take account of the actual economic circumstances in which these arrangements have to be applied, so that the aims pursued may be attained under *the most favorable conditions and with the smallest possible sacrifices* by the undertakings affected.[115]

Accordingly, the abovementioned three cases marks the first cases in which the ECJ has used the proportionality doctrine. After such cases the principle was boldly used in subsequent cases and in the later amendments of the EEC Treaty, as mentioned before, it was explicitly mentioned as AG de Lamothe suggested to the court in his opinion in 1970.

ii . Inter-American Court of Human Rights (IACtHR):

The Inter-American Court of Human Rights (IACtHR) along with the Inter-American Commission on Human Rights (IACHR) were established to supervise the human rights within the territories of the 'Organization of the American States' (OAS). The Inter-American Convention on Human

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113 See, Case 8/55 *Fédéchar v. High Authority*, Para. 3 (Keywords) (1956).
114 See, Case 8/55 *Fédéchar v. High Authority*, Para. 2 (Keywords) (1956).
115 See, Case 19/61 *Mannesmann AG v High Authority*, p. 370 (1962).

Rights gave the Court a jurisdiction to make advisory opinions, where it interprets the Convention articles or any other Inter-American Human Rights Convention, and to decide cases of human rights violations referred to it by the states parties to the Convention or by the Commission. The Commission, actually, was established earlier than the IACtHR by a resolution of the Fifth Meeting of Consultation of Ministers of Foreign Affairs in 1959.[116] The court was established later in 1979 by the Inter-American Convention on Human Rights a year after the convention has entered into force. In fact, the Court has faced some difficulties in its first years as the states parties to the Convention were reluctant to collaborate with it. Nevertheless, as the Convention has authorized both the states and the Commission to refer cases to the Court, the Commission was 'the most important provider of work to the court' in its early days.[117] As a result of such reluctance, the Court has delivered its first contentious opinion only in 1988 in the *Velásquez Rodríguez* case.[118]

As to the proportionality doctrine in the court's jurisprudence, Article (30) of the Inter-American Convention on Human Rights has established the permissible restrictions on the rights set forth in the convention as follows;

> The restrictions, … may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.[119]

Compared to the European Court of Human Rights (ECtHR), it is noticeable that the IACtHR has not yet established a consistent or well-defined proportionality or 'Margin of Appreciation' doctrine. Such inconsistency in the proportionality case law of the IACtHR was justified by some scholars in the light of the number and type of cases decided by the court compared to the ECtHR.[120] While the ECtHR has decided about 15000 contentious cases since its establishment in

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116 Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. Rts. Q. 440 (1990).

117 Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. Rts. Q. 448 (1990).

118 See, *Velásquez-Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. No. 4 (1988).

119 See, Article (30) of the Inter-American Convention on Human Rights.

120 Pablo Contreras, *National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights*, 11 Nw. J. Int'l Hum. Rts. 55 (2012); See also, Lucas Lixinski, *Balancing Test: Inter-American Court of Human Rights (IACtHR)*, IN Hélène Ruiz Fabri (ed.), Max Planck Encyclopedia of International Procedural Law, OUP, 1 (2019).

1960s, the IACtHR has only decided about 160 contentious cases.[121] As to the type of cases, while the ECtHR was established in a democratic atmosphere where most of the cases brought before the court concerned a type of rights which called 'qualified rights' such as the right to freedom of speech, and expression, and the right to freedom of religion, the IACtHR has been established in a different context. That is, it was established in 1980s where most of the Inter-American states still had military dictatorships and authoritarian type of governments.[122] Consequently, most of the cases brought before the IACtHR concerned grave breaches of human rights which do not permit any type of discretion or deference to national governments. Hence, the Proportionality analysis has not found a place in the early cases of the court. Nonetheless, we could trace the emergence of Proportionality Analysis in the case law of the court as follows.

The court firstly used the Margin of Appreciation doctrine (MoA) in an advisory opinion in 1984 without referring to its relation with the proportionality analysis. That is, in its advisory opinion on the proposed amendments to the constitutional rules regulating nationality in Costa Rica, the Court found that the amendment required a different period of residence as condition for someone to acquire the Costa Rican nationality. Thus, the Court had to decide whether such variation in treatment was in conformity with the right to equality or not. The Court decided that only if the differences have "no objective and reasonable justification", it could be considered discriminatory and in violation of the American Convention.[123] The Court mentioned the MoA in that "[o]ne here dealing with values which take on concrete dimensions in the face of those real situations in which they have to be applied and which permit in each case a certain *margin of appreciation* in giving expression to them."[124]

In later cases in 2004, the Court has explicitly used the Proportionality Analysis in deciding the national/ domestic discretion in restricting the rights under the Inter-American Convention on Human Rights. Similar to the ECtHR, the Court emphasized that there are three conditions for a

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121 Pablo Contreras, *National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights*, 11 Nw. J. Int'l Hum. Rts. 29 (2012).

122 Pablo Contreras, *National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights*, 11 Nw. J. Int'l Hum. Rts. 29 (2012).

123 See, *Advisory Opinion OC-4/84*, Inter-Am. Ct. H.R. No. 4 (1984).

124 See, *Advisory Opinion OC-4/84*, Inter-Am. Ct. H.R. No. 58 (1984). (cited in Pablo Contreras, *National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights*, 11 Nw. J. Int'l Hum. Rts. 57 (2012)).

state party to restrict a convention protected right; 1- the restriction must be established by law, 2- it shall pursue a legitimate objective under the Convention, 3- it shall be necessary in a democratic society.[125] Recently, the Court, in a different attitude than ECtHR, has added a new condition that restrictions shall be "strictly proportional to the aim pursued, at least for reviewing free speech's restrictions."[126]

As a result, it could be said that the IACtHR has borrowed both the MoA and the proportionality analysis from the ECtHR jurisprudence however, it has differently used the PA doctrine as it recently required a 'strict scrutiny' to permit any restrictions on some types of rights such as the right to free speech as seen above.

iii . European Court of Human Rights (ECtHR):

What does the Proportionality Analysis mean in the case law of the ECtHR? In fact, the ECtHR does not use the term of 'Proportionality' in their rights limitation measures analysis. Instead, the Court use the expression of 'Margin of Appreciation' (MoA). According to *George Letsas* the court uses such a term to express two different meanings; First, the *substantive* meaning which is 'the tension between individual freedoms and collective goals'. Second, the *structural* concept which means that 'national authorities are better placed to decide certain human rights cases, most notably in cases where there is no consensus among Contracting State.'[127] Actually, in my view, the first meaning is what proportionality analysis factually means, while the second meaning is what the ECtHR has added to the concept in view of its role as a subsidiary court that has an obligation to respect the sovereignty of the Contracting parties, and the viability of the European Human Rights system as a whole. *Letsas* argues that the Court has used the MoA in a misleading way to reach the conclusions without indulging in a sound reasoning. That is, when the question of whether the state has violated one of the qualified rights (in articles 8-11 of the Convention) by a limiting measure is raised before the court, it uses the MoA doctrine to 'to make a very general and simple point about non-absoluteness of the Convention rights. It does not and cannot settle the

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125 See, *Claude-Reyes et al. v. Chile, Merits, Reparations and Costs*, Inter-Am. Ct. H.R. No.151, 89-91 (2006); See also, *Herrera-Ulloa v. Costa Rica*, Inter-Am. Ct. H.R. No. 107 (2004), 101.1; *Ricardo Canese v. Paraguay,* Inter-Am. Ct. H.R. No. 111, 95-96 (2004).

126 Pablo Contreras, *National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights*, 11 Nw. J. Int'l Hum. Rts. 67 (2012).

127 George Letsas, *Two Concepts of the Margin of Appreciation*, Oxf. J. Leg, Vol. 26, No. 4, 709 (2006).

question of whether a particular interference with a Convention right is permissible.'[128] Thus, *Letsas* concluded that the Court through using the MoA in such a way is begging the question in a deficient reasoning rather than employing a rational balancing doctrine.[129]

Handyside v. UK was the first case in which the ECtHR has used the MoA doctrine explicitly.[130] *Richard Handyside* is an English publisher who was charged under the Obscene Publications Act 1959 and 1964 for possessing a book (*The Little Red Schoolbook)* that aimed to educate teenage readers about sex. He was convicted of possessing obscene publications for gain under that Act. He applied to the ECtHR claiming breaches of his right to freedom of expression (article 10 of the Convention). The ECtHR held that there was no violation of Article 10 because the interference with the applicant's freedom was 'prescribed by law' and 'necessary in a democratic society… for the protection of morals' under Article 10(2).[131] In doing so, the Court depended on a mixture of what *Andrew Legg* called; 'first-order' and 'second-order' reasons.[132] In my opinion, such a mixture between first-order and second-order reasons reflects the argument of *Letsas* that the ECtHR does have two meanings of the MoA and that they have inextricably intertwined both of the meanings without drawing the fine line between them.

Such an intertwinement could be noticed in the following excerpts from the *Handyside* judgement;

> [48]... the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and freedoms it enshrines... [I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them…

128 George Letsas, *Two Concepts of the Margin of Appreciation*, Oxf. J. Leg, Vol. 26, No. 4, 714 (2006).

129 George Letsas, *Two Concepts of the Margin of Appreciation*, Oxf. J. Leg, Vol. 26, No. 4, 714 (2006).

130 Andrew Legg, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW, OUP, 27 (2012).

131 See, *Handyside v. UK*, No. 5493/72 (1976).

132 Andrew Legg, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW, OUP, 28 (2012). By first-order reasons *Legg* means the merits-based reasons such as; whether the restriction imposed by the executive authority is proportionate with/ necessary for the aims pursued, while the second-order reasons means the reasons which affects the weight of the first-order reasons, however it does not act explicitly on the balance of reasons such as; whether there is a consensus between the European States on that right or not so as to assess the width of the MoA permitted to the national authority regarding their impugned decision (Deference reasons). For more on the debate about 'first-order' and 'second-order' reasons see; Andrew Legg, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW, OUP, 18-19 (2012); See also, J Raz, PRACTICAL REASON AND NORMS, OUP, 37 (1999); Stephen Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OJLS 215 (1987).

> Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.[133]

In the following paragraph it seems that the Court is overturning through emphasizing that;

> 49. Nevertheless, Article 10 para. 2 (art. 10-2) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19) (art. 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court… he Court's supervisory functions oblige it to pay the utmost attention to the principles characterizing a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man… This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.

Handyside case was the first and most notable case establishing the ECtHR doctrine of MoA. The Court continued to use the doctrine in the same way reaching different conclusions without building a coherent or a predictable step-by-step PA as followed by the domestic supreme courts. In *Sunday Times v UK*, [134] for example, the court has assured that contracting states indeed have a margin of appreciation. However, the Court found that Article 10 had been violated on the basis that the measure taken by the General Attorney was not 'necessary'. In this case, UK Attorney General has issued an injunction against the Sunday Times newspaper preventing it from printing details about a book written by a former intelligence official of the UK government. The book had already been published in the US. However, the Attorney General argued that the newspaper's publication would have threatening consequences for UK's national security. The Court found that the interference pursued a legitimate aim, however decided that the injunction was not 'necessary', as the publication had already entered the public domain. Consequently, the court in this case has employed the *substantive* meaning of the MoA more than the *structural* meaning thereof. In other

133 See, *Handyside v. UK*, No. 5493/72, Para. 48 (1976).
134 See, *Sunday Times v UK*, No. 13166/87 (1991).

words, (or in *Legg* words) it has deployed the first-order reasons over the second-order reasons. In anyways, the Court has not defined its structural methodology in using the MoA doctrine.

iv . The African Court of Human and People's Rights (ACtHPR):

In contrary to the ICCPR or the ECHR, the African Charter on Human and People's Rights (ACHPR) does not provide for any criteria for restricting the human rights set forth in the charter. However, the ACtHPR has managed to establish a judicial criteria for rights limitations which is the Proportionality Analysis. The Court has used the Proportionality Analysis for the first time in *Tanganyika Law Society & others V Tanzania* judgement in 2013.[135] It is worthy to mention that such a judgement was the first on merits for the ACtHPR. In this case, the applicants claimed that Tanzania's Eighth and Eleventh Constitutional Amendment Act violated citizens' rights of freedom of association, the right to participate in public/governmental affairs, and the right against discrimination prescribed by articles 2, 10, and 13(1) of the ACHPR. The reason is that such challenged constitutional amendments required any political candidate for any presidential, parliamentary, or local government elections to be a member of a political party. The court found that the Government of Tanzania, through such impugned amendments, had violated its citizens' rights to freely participate in the government directly or through representatives because the amendments have obliged the candidate to belong to a political party.[136] In reaching such a conclusion, the Court has used the PA for the first time. They found that for any restriction measure to be permissible three conditions shall be met; firstly, it shall be prescribed by 'a law of general application'; secondly, it shall pursue a legitimate aim; and thirdly, it shall be 'reasonably proportionate to the legitimate aim pursued'. For the 'legitimate interest' the court held that it 'must be *"proportionate with and absolutely necessary for the advantages which are to be obtained."'*[137] The court had justified its use of the principle through referring to article 27(2) of the ACHPR and it has explicitly cited the ECtHR *Handyside* case and the IACtHR jurisprudence on the PA by mentioning that '[t]his is the same approach with the European Court, which requires a determination of whether a fair balance was struck between the demands of the general interest

135 See, *Tanganyika Law Society & The Legal and Human Rights Society V. Tanzania,* Application No. 011 of 2011, 106-107 (2013).

136 See, *Tanganyika Law Society & The Legal and Human Rights Society V. Tanzania,* Application No. 011 of 2011, 111 (2013).

137 *Tanganyika Law Society & The Legal and Human Rights Society V. Tanzania,* Application No. 011 of 2011, 106.1 (2013).

of the community and the requirements of the protection of the individual's fundamental rights' and that '[a] restriction on rights [according to IACtHR] is authorized only if the legal basis is a legislative act and if the law's content conforms to the ACHR. The Court requires that the restrictions be legal and legitimate. This approach is settled in *Baena Ricardo and others against Panama*.'[138] The Government of Tanzania (respondent) argued that the restricting amendments aimed at achieving a common interest which is 'fostering the national unity', however the court held that 'In any event, the restriction on the exercise of the right through the prohibition on independent candidature is not proportionate to the alleged aim of fostering national unity and solidarity.'[139]

In the same case, the ACtHPR has used the expression of MoA in discussing the 'social need' of the restricting measure where they held that according to the ECtHR decision in *Olsson v Sweden*[140] the Court is not confined to assess whether the MoA was applied in good faith, but they are also entitled to assess whether the reasons given by the respondent state are *relevant and sufficient* 'in the light of the case as a whole' *(as the ECtHR has mentioned in this case)*. In my view, the ACtHPR, through referring specially to the application of the MoA in *Olsson v Sweden*, has adopted the same misleading approach of the ECtHR which was mentioned before.[141] That is, they have blurred their methodology in using the doctrine; whether they are using the *structural* or the *substantive* meaning thereof, and to what extent the second-order reasons has affected the first-order reasons in reaching such a decision.

138 *Tanganyika Law Society & The Legal and Human Rights Society V. Tanzania,* Application No. 011 of 2011, 107.1 (2013); See also, Adamantia Rachovitsa, *Balancing Test: African Court on Human and People's Rights (ACtHPR)*, Max Planck Encyclopedia of International Procedural Law (2020), OUP, Para.9 (2023). Article 27(2) of the ACHPR stipulates that "the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest".

139 *Tanganyika Law Society & The Legal and Human Rights Society V. Tanzania,* Application No. 011 of 2011, 107.2 (2013).

140 See, *Olsson v Sweden* Application No. 10465/83, Judgment, 68 (1988).

141 See above ECtHR…

2- Global Proportionality Model v. US Categorization Model in a Global Constitutionalism Era: Which Provides A Better Protection?

In order to make a comparative study between two mechanisms of rights limitation, one shall precisely delineate the definition of both systems and their role in the practice. However, such a task seems to be impossible regarding the proportionality analysis. The reason is that there is no one fixed or agreed upon definition of that doctrine neither among scholars of constitutional or human rights law, nor among supreme or international courts. Therefore, this section is divided into two parts; the first is dedicated to explain the contours of such a controversy of proportionality definitions, whilst the second will be focused on comparing the practice of different courts, both domestically and on the international level, regarding the right to freedom of speech.

a. Proportionality Definitions Chaos:

In fact, there is no one fixed or agreed upon definition of proportionality among scholars of constitutional or human rights law.[142] However, there is a general understanding that proportionality is a methodological tool made up of four components.[143] It is a judicial made test that aims at answering four questions: 1) Is the measure interfering with the right has a proper/ legitimate aim? 2) Is the measure interfering with the right suitable or has a rational connection with the proper aim? 3) Is the measure interfering with right is necessary to achieve that aim? Is there any less restrictive measure or it is the least restrictive one? 4) Are the social *consequences* of applying the measure interfering with the right *proportional* with the *legitimate aim* targeted by such a measure (proportionality in the strict sense)? Those four questions constitutes the four stages of proportionality analysis in the general understanding of most scholars. According to *Martin Luterán* Proportionality meaning is lost in the jurisprudence and in judiciary because it was 'removed from its natural environment, stripped of its foundational principles, and applied in a new context.'[144] Such transplantation of proportionality has affected its original meaning and

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142 Kai Moller, *Constructing the Proportionality Test: An Emerging Global Conversation*, *in* REASONING RIGHTS COMPARATIVE JUDICIAL ENGAGEMENT, 33…

143 Aharon Barack, Proportionality constitutional Rights and Their Limitations, 131; See also, Kai Moller, *Constructing the Proportionality Test: An Emerging Global Conversation*, *in* Reasoning Rights Comparative Judicial Engagement; G. Huscroft et al., PROPORTIONALITY AND THE RULE OF LAW, Cambridge University Press, 21 (2014).

144 Martin Luterán, *The Lost Meaning of Proportionality*, IN G. Huscroft et al., PROPORTIONALITY AND THE RULE OF LAW, Cambridge University Press, 29 (2014).

results in the contemporary chaos of proportionality definitions. *Luterán* has categorized the current debate about different definitions of proportionality into two main strands; *Proportionality as a balancing*, and *Proportionality between means and ends*. In the first category, *Luterán* divides the scholarship into two opposed groups; those who sees the proportionality as an equivalent to balancing, and those who understands proportionality as non-equivalent to balancing. He, then, mentioned *Julian Rivers* as an example for the second group (the non-balancing conception). *Rivers* argues that such a non-balancing concept of proportionality means, practically, that courts only ask 'whether the means adopted by a state are suitable and necessary to achieve a legitimate aim.'[145] Courts, such as the British Courts, in this conception do not go further in their analysis to struck a fair balance between the means and ends. Rather, they tend to decide the case in a pre-determined way of analysis (in the previous stages of proportionality).

In the second category, *Proportionality between means and ends*, according to *Luterán*, has appeared historically prior to the *balancing* conception. It was seen by the courts as a relationship that shall be struck between the means employed by the authority and ends sought to be achieved. However, according to *Luterán* 'not much attention has been paid by European human rights legal scholars to the concepts of means and ends.'[146] Moreover, there are also some confusion and inconsistencies in the conception of Proportionality as a means-ends relationship. *Luterán* explains such confusion by mentioning an example given by *Michael Fordham* and *Thomas de la Mare* that reveals how they have dealt with 'means and ends' as equivalent to 'cost and benefit' while there is a clear difference between the two methodologies explained by *Luterán* as follows;

> Forced castration [for example] is unjustified not because such an intentional mutilation of men would be a violation of several human rights…, but rather because it would cause more harm than good. Thus, theoretically, if one could conceive of a situation where the benefits of forced castration outweighed the costs..., one would have to conclude that forced castration would be justified according to the methodology of proportionality employed by Fordham and de la Mare.[147]

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145 Martin Luterán, *The Lost Meaning of Proportionality*, IN G. Huscroft et al., PROPORTIONALITY AND THE RULE OF LAW, Cambridge University Press, 29 (2014); Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 C.L.J., 174 (2006).

146 Martin Luterán, *The Lost Meaning of Proportionality*, IN G. Huscroft et al., PROPORTIONALITY AND THE RULE OF LAW, Cambridge University Press, 27 (2014).

147 Martin Luterán, *The Lost Meaning of Proportionality*, IN G. Huscroft et al., PROPORTIONALITY AND THE RULE OF LAW, Cambridge University Press, 28 (2014).

It is clear from the example that the each way of thinking leads to a different conclusion. And that in deciding human rights cases 'cost and benefit' methodology might seems to be against the moral aspect of the human rights adjudication.

On the Practical side, it could be noticed that proportionality has different structures in different jurisdictions. Taking Germany and Canada as an example, the main difference between the Canadian and the German versions of proportionality is about the stage on which the judicial analysis depends more in conducting their scrutiny and adjudicating the constitutionality of the limiting means. That is, in the Canadian proportionality the judicial analysis draws more attention to the earlier stages of proportionality; the proper purpose, rational connection, and necessity analysis. While in the German version of proportionality the Court depends more on the last stage; the balancing in the strict sense.[148] In that regard, *Peter Hogg*, one of the Canadian scholars who defends the Canadian version of proportionality (non-balancing conception), justifies the Canadian approach by explaining that if the measure being examined has successfully passed the first three stages of proportionality, how could it fails the fourth stage (Balancing in the strict sense)? That is, if the law has been judged to have a proper purpose that is sufficiently important to limit the human right in question (first stage), and it has been judged to be suitable or have a rational connection with the sought purpose (second stage), and it has been found necessary to achieve that purpose (the least restrictive means which is the third stage), then how it will not be found proportionate in the strict sense? According to him, passing the first three stages means definitely passing the last stage. Thus, he concludes by saying that the proportionality analysis could be conducted without that fourth stage because its analysis has already been done, generally, in the first three stages and, specially, in the first stage (proper purpose). Therefore, he sees the fourth stage as merely "redundant".[149] Although this is not the opinion of the majority of Canadian scholars or judges about the significance of the last stage,[150] I could say that *hogg*'s opinion sounds

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148 Kai Moller, *Constructing the Proportionality Test: An Emerging Global Conversation*, *in* Reasoning Rights Comparative Judicial Engagement, 34.

149 Peter Hogg, Constitutional Law of Canada, 3rd Edition, 883 (1992).

150 See, Chief Justice Dickson in *Oakes*, [1986] 1 S.C.R. 71 [Oakes] "Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve".

..

a well illustration of the Canadian approach of proportionality as it sheds the light on the difference between the German and the Canadian approaches. On the contrary, *Aharon Barak* has opposed *Hogg*'s opinion by arguing that there is a difference between the function of the first stage (proper purpose) and the function of the fourth stage (balancing in the strict sense). That is, the first stage seeks to delineate the fine line between what is acceptable as a limitation to a human right and what is not acceptable. Thus, it is a "threshold" of legality once the law pass it the court has to move to next step without further weighing. However, the fourth stage is weighing of the outcome of applying the restricting measure. It is an answer to the question of whether the results of applying such a means is proportionate with the harm that incurred upon the right under question or not. "The lack of proportionality does not turn the purpose into an "improper" one; the conflict with the constitutional provision is not a matter of purpose but rather of the means chosen to achieve that purpose, means that limit the constitutional right in a disproportional manner."[151] In my opinion, the difference here is that the Canadian version of proportionality is not like the German regarding the first question (first stage), and that Barack, in his refutation of Hogg's opinion, is dealing with both versions as if they have the same formulation or the same exact first question. Moreover, it seems obvious that Barack is more influenced by the German approach than the Canadian one. The question here is what are the main differences or features of each approach?

One of the main features of the German proportionality is what I call the 'naturalistic' emergence thereof in the German constitutionalism. In fact, proportionality has emerged in Germany before the adoption of the German Basic Law.[152] It was first developed, as explained before, by the German administrative courts where they assessed the police measures that tends to limit individuals liberty or property. The principle was developed naturally by the constitutional court without any textual or constitutional basis.[153] However, the court has tried to institutionalize the principle when they explained, later in 1963, that the origins of proportionality could be derived from the rule of law and "the nature of fundamental rights themselves which, as an expression of

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mentioned in Contra, *Rocket v. Royal College of Dental Surgeons* [1990] 2 S.C.R. 232, where McLachlin J. for Court held that the impugned law (restricting advertising by dentists) pursued a sufficiently important objective (first step) but failed the fourth step. Hogg's refutation of this case analysis → ((Even here, however, the fourth step seemed redundant, because the supporting reasons basically repeated the reasons given under least-drastic-means (third step))).

151 Aharon Barack, Proportionality Constitutional Rights and Their Limitations, 248-49.

152 Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, (….REV), 384.

153 See, Aharon Barack, Proportionality Constitutional Rights and Their Limitations, 179.

the citizen's general right to freedom against the state, may only be limited by public authority to the extent that it is essential for the protection of public interests."[154] On the contrary, one could notice that the Canadian Charter of Rights and Freedoms sets forth in a clear language the principle of proportionality and its determinants.[155] Such a textual variation, in my opinion, has no implication on the approaches of the court towards proportionality in both countries as they both apply the same stages generally. However, in the following paragraphs I will try to discuss the main two differences therein.

The first difference between German and Canadian approaches to proportionality analysis is in the first stage (proper purpose). The first question in the Canadian approach as set forth in *Oakes*[156] is whether the objective of the law is of 'sufficient importance to warrant overriding a constitutional right' or not. By 'sufficient importance' the Canadian court means to answer two questions; the first is what the government's purpose is, and the second is whether the purpose is worthy to override the constitutional right in question. The Canadian court in such a stage, contrary to the German court, does not use it as a mere 'threshold' or preliminary step serves only to identify the objectives pursued by the government. Rather, it uses the first stage as a substantial part of the proportionality test; that is, the court requires the government to prove that it has a pressing and substantial objective. It requires evidence, even little, in order to consider the purpose worthy.[157] On the contrary, in German approach the first stage is not ought to make any balancing or weighing between probabilities. Rather, it seeks only to "serve the purpose of preparing the ensuing means-ends comparison that lies at the heart of PA by identifying the objectives pursued by the government."[158] In his comparative analysis between the Canadian and the German first stage

154 BVerfGE 19, 342 – Wencker, the court continues to emphasis that "A justifiable solution to this conflict between two principles equally important for the rule of law can only be achieved if the restrictions on freedom that seem necessary and appropriate from the point of view of prosecution are constantly countered by the claim to freedom of the accused who has not yet been convicted are constantly countered as corrective. This means that pre-trial detention must be dominated by the principle of proportionality in order and execution; the encroachment on freedom is only acceptable if and to the extent, on the one hand, because of there are doubts about the suspect's innocence based on concrete evidence, on the other hand, the legitimate claim of the state community to complete clarification of the crime and rapid punishment of the perpetrator cannot be secured other than by the suspect being provisionally detained".

155 Article 2 of the Canadian Charter provides for "….".

156 See also, R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R.

157 Mordechai Kremnitzer et al., PROPORTIONALITY IN ACTION COMPARATIVE AND EMPIRICAL PERSPECTIVES ON THE JUDICIAL PRACTICE, Cambridge University Press, 163 (2010).

158 Mordechai Kremnitzer et al., PROPORTIONALITY IN ACTION COMPARATIVE AND EMPIRICAL PERSPECTIVES ON THE JUDICIAL PRACTICE, Cambridge University Press, 37 (2010).

Grimm concludes that "the difference [between both approaches] seems to disappear in practice"[159]. However, in my opinion, the difference between both approaches obviously exists practically. As explained in this part the Canadian approach does require some sort of evidence, even if it is a low hurdle for the government, to the pressing and substantial objective which, as a result, affects the analysis in the following stages. That is why *Hogg* perceived the first stage as important as of the last one.

One more difference between the German and Canadian approaches regarding the first-stage analysis is that the court in the Canadian approach usually moves to the next stages regardless of the result of its analysis. That is, even if the court is skeptical of the government's purpose it moves to complete the remainder stages of the proportionality test.[160] In the German approach the court usually refrains from moving to the following step except after the measure under scrutiny passes the previous one. That is called the 'sequential' approach.[161] It is worthy to note that the German court deviates occasionally from the sequential approach and continues to complete the remainder of the test after it fails the previous stage. It could be said that such a deviation mainly happens when the measure under scrutiny fails the suitability or the necessity stages[162] and this demonstrates the significance of the last stage 'proportionality in the strict sense' in the German approach as explained in details in the following.

The second main difference between German and Canadian approaches is about the way each court perceives the last step of proportionality analysis (i.e. proportionality in the strict sense or balancing). In Germany the court usually leaves the debate of the loss and gains to the last step. It always makes the balance between the importance of the gains obtained by limiting the right and the loss incurred upon the core of the right itself in that last stage after passing the previous legal purpose, necessity, and suitability stages. In addition to that, the German court sometimes entirely avoids the suitability and necessity stages and moves directly to the balancing test.[163] On the other

159 Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, (….REV), 388.

160 See for example, *Eldrige v British Columbia* (Attorney General); *Sauve v Canada (Chief Electoral Officer)* 2002 3 SCR 519.

161 Mordechai Kremnitzer et al., PROPORTIONALITY IN ACTION COMPARATIVE AND EMPIRICAL PERSPECTIVES ON THE JUDICIAL PRACTICE, Cambridge University Press, 44 (2010).

162 Mordechai Kremnitzer et al., PROPORTIONALITY IN ACTION COMPARATIVE AND EMPIRICAL PERSPECTIVES ON THE JUDICIAL PRACTICE, Cambridge University Press, 45 (2010).

163 Mordechai Kremnitzer et al., PROPORTIONALITY IN ACTION COMPARATIVE AND EMPIRICAL PERSPECTIVES ON THE JUDICIAL PRACTICE, Cambridge University Press, 46 (2010). (in explaining the reasons for that it was said that the court does not deem such steps to 'contribute meaningfully in solving the case);

hand, in Canada the court is usually unwilling to engage in a detailed last-step analysis. It makes almost all of the analysis, including the balancing, in the first two steps; the proper purpose, and the 'minimal impairment' or the suitability and necessity.[164] In the proper purpose stage the Canadian approach, as previously mentioned, does not only determines the purpose of the impugned law or measure, but it also examines whether it is sufficiently pressing and substantial to override a fundamental right. Moreover, the court continues its analysis in the second step, necessity and suitability, where it ascertains the suitability of the measure to achieve its end and that it is the least level of impairment to the right. Thus, the implications of the intrusion on the protected claimants are already considered before moving to the last step. That is why *Hogg* contended that the last step is just a redundant of what has been found in earlier stages.[165] In his discussion of the reasons for the Canadian court's reluctance to engage in a last-stage analysis *Grimm* has argued that the court seems to avoid engaging in a political decision-making process. He questions whether engaging in the last step analysis could really put the court in a political spectrum rather than a legal decision-making process. It seems that his answer to that question is in negative. And he gives two justifications for that answer; the first one is that the "two previous steps can only reveal the failure of a law to reach its objective; they cannot evaluate the relative weight of the objective of the law, on the one hand, and the fundamental right, on the other, in the context of the legislation under review."[166] He further explains that opinion by mentioning a hypothetical example of a law that permits shooting a person to death when this is the only way to protect a property right.[167] In fact, such a hypothetical example explains the significance of the

See Also, Niels Petersen, PROPORTIONALITY AND JUDICIAL ACTIVISM: Fundamental Rights Adjudication in Canada, Germany and South Africa, Cambridge University Press , 2-80 (2017). (The most important step in the practice of the court is the last one).

164 See, Lorian Hardcastle, *Proportionality Analysis by the Canadian Supreme Court*, *IN* PROPORTIONALITY IN ACTION Comparative and Empirical Perspectives on the Judicial Practice, Edited by Mordechai Kremnitzer et al., Cambridge University Press, 185 (2020). "Despite the suggestion from the language of Oakes that the final balancing stage may form an important part of the analysis, proportionality in the strict sense is never determinative of the section 1 analysis".

165 In JTI-Macdonald Corp., [2007] 2 S.C.R. 610, para. 46. The Supreme Court itself has admitted that most of the cases are resolved in the issue of minimal impairment however, it defended the importance of the last step because without such a step "the result might be to uphold a severe impairment on a right in the face of a less important objective".

166 Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, (….REV), 396 (2007).

167 Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, (….REV), 396 (2007). "Take the hypothetical case of a law that allows the police to shoot a person to death if this is the only means of preventing a perpetrator from destroying property. In Germany, property is itself constitutionally guaranteed; protection of property certainly is a lawful, even an important, purpose. Shooting a perpetrator to death is a suitable means of preventing him from destroying property. Since the shooting is allowed only if no other means are available,

third step in the German approach, however in my opinion this is not applicable in the Canadian one as it does require some sort of balancing through the previous stages. The second justification given by *Grimm* for his answer is that the court's unwillingness to engage in a political decision making by giving more attention to the last step analysis could be avoided through controlling what is being put into 'each side of scales' when it comes to this last stage. By focusing and discussing only the affected aspects of the right under scrutiny, in a narrow sense, the court will be adequately connected to law and will leave a room for the legislative actions. Through such a 'contextual approach'[168] the court will evade the political spectrum and protect its 'legal' form. *Grimm* concludes by arguing that the Canadian court inaccurately confuses the four stages of proportionality, as compared to the German approach, by asking the wrong questions in each step.

In fact, *Grimm* understanding of the Canadian and German courts approaches regarding the importance of the last step is not convincing. Indeed the last step is more important in Germany compared to Canada. However, in my opinion, more attention should have been given to the structure and the language of the charter of rights in both countries and how the court interprets them. For instance, in Germany the court has interpreted the Article 2(1) of the Basic Law in an extensive manner that includes almost every activity of the individuals in the society.[169] As a result, in my opinion, the German interpretation approach lead the German court, indeed, to use the last step as a required space to construe its decision freely. When the scope of the fundamental rights is too wide that it includes almost everything, the court will definitely seek the proportionality analysis, specially the last step, in order to decide whether there is an infringement of the fundamental right or not. Moreover, the court will need to define the 'core of the right' and the

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the necessity test of the second step is also passed. If one had to stop here, the balance between life and property could not be made. The law would be regarded as constitutional, and life would not get the protection it deserves".

168 See, *Edmonton Journal v. Alberta*, [1989] 2 S.C.R. (One virtue of the contextual approach, it seems to me, is that it recognizes that a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.

It is my view that a right or freedom may have different meanings in different contexts. Security of the person, for example, might mean one thing when addressed to the issue of over-crowding in prisons and something quite different when addressed to the issue of noxious fumes from industrial smoke-stacks. It seems entirely probable that the value to be attached to it in different contexts for the purpose of the balancing under s. 1 might also be different. It is for this reason that I believe that the importance of the right or freedom must be assessed in context rather than in the abstract and that its purpose must be ascertained in context).

169 See *Elfes* decision BVerfGE 6, 32.

'periphery aspects' in each case in order to be able to decide whether the limitation is acceptable or not. This could not be done except in the last stage.[170] On the contrary, the Canadian court does not have such a wide conceptualization of the scope of fundamental rights. Hence, it is not like the German court in its need for the last step. *Grimm,* himself, argued for a narrower understanding of the scope of rights.[171] He criticized the German court for this wide approach as it "shifts the judicial analysis to the justification stage and, therein, to the strict proportionality level where the court's decision making is less predictable than it would be if the protected scope was defined more narrowly."[172]

b. A Comparative Overview of the Proportionality and Categorization in Practice:

The rest of this part is dedicated to a comparative overview of different courts' judgements in two themes of rights balancing cases; the right to freedom of expression, and the right of abortion. I will rely mainly on the case law of ECtHR and US Supreme Court. In this section I try to explain how proportionality and categorization were both applied by the ECtHR and the US Supreme Court leading to different conclusions not because the difference in the methodology of balancing but for other irrelevant factors such as the political backdrop of the case.

I raise the question of whether we could argue that one of the two systems (Proportionality or Categorization) practically provides more protection to the human rights, or strikes a fairer balance between the measures impugned and the ends pursued or even more predictable outcomes while both methodologies where used to reach the exact opposite decisions. This section, therefore, is pursuing to bring the debate on the influence of the institutional and judicial dialogue close to the scholarship of proportionality. That is, I demonstrate that neither proportionality nor categorization is the 'panacea for all ills' or the 'genie' that have the ability to provide the adequate safeguards to the human rights without such an institutional and judicial dialogue (the argument elaborated in Chapter 3).

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170 PROPORTIONALITY PRINCIPLES IN AMERICAN LAW CONTROLLING EXCESSIVE GOVERNMENT ACTIONS,

171 See, BVerfGE 80, 137 [165]-[66] (Dissenting opinion of Grimm);

172 Mordechai Kremnitzer et al., PROPORTIONALITY IN ACTION COMPARATIVE AND EMPIRICAL PERSPECTIVES ON THE JUDICIAL PRACTICE, Cambridge University Press, 52 (2010).

i . Right to Freedom of Speech in the US Supreme Court:

It is agreed that the right to freedom of speech in the American jurisprudence is one of the thorniest rights. Since 1919 and through case-by-case analysis the US Supreme Court managed to establish its criteria in deciding the permissibility of government controlling measures.[173] In this part I am trying to summarize the system of free speech right in the US with focus on how levels of scrutiny (or categorization) methodology was used throughout the different phases of the case law.

In 1917 the Congress has enacted the 'Espionage Act of 1917' which aimed at punishing anyone who hindered the WWI efforts. *Charles T. Schenck*, the secretary of the Socialist Party at this time, published leaflets inciting citizens to refuse enrolling in the draft. *Schenck* was punished by the mentioned act. *Schenck* filed his lawsuit challenging this act *Schenck v. The United States* (1919), Justice Oliver W. Holmes, writing for the court, held that;

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[174]

Although the court upheld *Schenck*'s punishment in this case, the 'clear and present danger' test introduced by Justice Holmes has established the court's criteria in deciding free speech cases at this time. In this case the Court found no violation to the applicant's freedom of speech. They held that the Espionage Act was a proportionate use of Congress authority at wartime. *Holmes* concluded that courts owed greater deference to the government during wartime, even when constitutional rights were at stake. Thus, it was held through this case that the First Amendment does not protect any speech that creates 'clear and present danger' to the national security.

In 1925, the court has elevated the freedom of speech to be a 'fundamental' right in *Gitlow v. New York* (1925).[175] In this case the applicant, *Gitlow*, was a socialist man arrested for distributing a left-wing manifesto that called for strikes and class action against the government of New York. He was convicted under Criminal Anarchy Law in New York for advocating to overthrow the government by force. The applicant filed his case claiming that the mentioned law violated his

173 Elisabeth Zoller, *The United States Supreme Court and the Freedom of Expression*, Ind.L.J. Vol. 84 Issue 3, 888 (2009).

174 *Schenck v. United States*, 249 U.S. 47, 52 (1919).

175 *Gitlow v New York*, 268 U. S. 652, 666 (1925).

right to freedom of speech protected under the First Amendment and arguing that his advocacy did not result in any actions. Although the court held that freedom of speech is a fundamental right, the majority was not persuaded that the applicant deeds were too insignificant to have an impact. Thus, they upheld the Criminal Anarchy Law. The word 'fundamental' was later explained by the court in *Schneider v. New Jersey* (1939) by holding that 'The phrase is not an empty one and was not lightly used.... It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.'[176] It was a preliminary step to introduce the 'strict scrutiny' test later in the freedom of speech cases.

In the same context, in 1951, the Supreme Court upheld the conviction of eleven Communist Party leaders in *Dennis v. United States* (1948) for advocating the violent overthrow of the US government in violation of the Smith Act which criminalized any act of conspiracy to advocate the violent overthrow of the government. The party members claimed that the Act violated their First Amendment rights. The court found that success or probability of success of the advocacy was not necessary conditions to justify restrictions on the freedom of speech. They found that the active advocacy of the defendants created a 'clear and present danger' that threatened the government. [177] Justice Black, in his dissenting opinion, held that;

> They [defendants] were not even charged with saying anything… designed to overthrow the Government. The charge was that they agreed to assemble… and publish certain ideas at a later date: the indictment is that they conspired to organize the Communist Party and to use speech… in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids.[178]

In 1949, *Justice Douglas*, writing for the court, in *Terminiello v. Chicago* (1949) held that 'a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' [179] Therefore, the court decided that Illinois ordinance that criminalized *Terminiello* acts unconstitutional. *Terminiello* was a priest who vigorously criticized political and racial groups in a crowded meeting resulting in acts of violence. He

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176 *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939).

177 *Dennis v. United States*, 341 U. S. (1951).

178 *Dennis v. United States*, 341 U. S. 579 (1951).

179 *Terminiello v. Chicago*, 337 U.S. 4 (1949).

challenged the ordinance of Illinois as violating his right to freedom of speech protected under the First Amendment.

From the previous cases it seems that the court has adopted two different attitudes towards protecting the national security. In *Schenck*, *Gitlow*, and *Dennis* the court upheld the restriction measures, which limited the freedom of speech, as proportionate with the aim pursued (protecting the government/ national security) despite its categorization of the free speech right as 'fundamental' in *Gitlow*'s case. However, the court struck down Illinois ordinance in *Terminiello*'s case holding that the 'function' of free speech is that it 'induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger'[180] despite *Terminiello*'s speech has resulted in overt violence acts. It seems that the court has taken a position against the communist party and the socialists at the time. It was, in my view, a political stance even if it was manifested in a logical reasoning (close and present danger test). Such a rigid stance against Communist thought seemed to be justified by the Courts between 1910s to 1950s when the liberal democracy, as a ruling system, has not been well-established yet. Such a conclusion is supported by the court's attitude in later cases, namely, *Yates v. United States* (1957) and *Brandenburg v. Ohio* (1969). In 1957, the court has mitigated their stance in *Yates v. United States* (1957) where they found that 'advocacies of violent overthrow of the government, obnoxious as they might be, are protected under the first amendment.'[181] And in *Brandenburg* (1969) the court found that Ohio law violated *Brandenburg*'s right to free speech despite that he was a leader in the 'Ku Klux Klan' which has a long history as a right-wing 'Terrorist' group in the US.

The transformative methodology of the US Supreme court started in *Chaplinsky v. New Hampshire* (1942) where the Court has developed a new categorical methodology in deciding free speech cases; that is, they have established three main categories of unprotected speech: obscenity, defamation, and fighting words. It has applied a more lenient level of scrutiny 'intermediate scrutiny' test in such type of 'unprotected' speech instead of the 'strict scrutiny' applied in the previously mentioned 'protected' speech. The Court, then, has moved to a more stable test which is currently prevalent in free speech cases; the 'content-neutral' limitations as opposed to the

180 *Terminiello v. Chicago*, 337 U.S. 4 (1949).

181 *Yates v. United States*, 354 U. S. 298, 344 (1957); Theo Tsomidis, *Freedom of Expression in Turbulent Times Comparative Approaches to Dangerous Speech: The ECtHR and The US Supreme Court*, Int. J. Hum. Vol. 26 No. 3, 384 (2022).

‘content-based’ regulations. The court has applied the strict scrutiny test in any content-based restricting regulation[182], while it applies a more lenient scrutiny test ‘intermediate scrutiny’ in any content-neutral restricting regulations such as the regulations that aim at controlling the time, place, or manner of speech.[183] Such a content-neutral regulations test was first introduced in *Ward v. Rock Against Racism* (1989).

ii . Right to Freedom of Speech according to the ECtHR:

Moving to the methodology applied by the ECtHR in free speech cases it is worthy to mention firstly that the ECtHR is an international court with a different mandate than the US Supreme Court. That is, the ECtHR is working as a subsidiary court to the national judge. It does not have the same superiority or authority over the domestic authorities compared to that of the US Supreme Court over states. Moreover, the ECtHR is a treaty based court confined to the supervision of states parties adherence to the Convention, while the US Supreme Court is a constitutional court in a common law system which has an essential role of shaping and protecting the rights and freedoms in the US. Whereas we bear in mind such differences between both institutions, it is still viable to compare their case law and methodologies regarding some types of rights as they both are courts of law and I believe that comparative analysis is revealing. Therefore, this part is dedicated to make an account of the ECtHR methodology in restricting the right to freedom of speech with a focus on the national security related cases.

In 1957 and 1988, when the European Commission on Human Rights was the competent authority to refer cases to the ECtHR, two cases were dismissed by the Commission as ‘ill-founded’; *Communist Party of Germany v. the Federal Republic of Germany* (1957) and *Kühnen v. Germany* (1998). Both cases were dismissed on the basis of article 17 of the ECHR which prohibits interpreting anything in the Convention as ‘implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth’ in the Convention.[184] In the first case, the German Federal Court had ordered in 1956

182 Examples for the content-based regulations cases where the Court has applied the strict scrutiny test and struck down the regulations are *Sable Communications of California v. Federal Communications Commission* (1989), *Simon and Schuster v. Members of the New York State Crime Victims Board* (1991), and *Boos v. Barry* (1988).

183 Examples for the content-neutral regulations cases where the Court has applied intermediate scrutiny test and upheld the regulations are *Clark v. Community for Creative Non-Violence* (1984), *Thomas v. Chicago Park District* (2002), and *Heffron v. International Society for Krishna Consciousness* (1981).

184 Article 17 of the ECHR.

that the Communist Party of Germany be dissolved and confiscated its assets. The *Party* has filed the case before the Commission against the Federal Republic of Germany claiming the unconstitutionality of article 21(2) of the Basic Law of Germany upon which it was dissolved and claiming violation of his rights to freedom of speech protected under articles 9, 10, 11 of the Convention. However, the Commission found that the case is inadmissible as the Communist Party activities violated article 17 of the Convention.[185] In its decision, the Commission found no need to analyze the applicability of the limitation clauses in articles 9, 10, 11 of the convention as article 17 has a 'more general provision' which was 'designed to safeguard the rights listed [in the convention] by protecting the free operation of democratic institutions.'[186] In the second case *Kühnen v. Germany* (1988), the applicant had disseminated publications attempting to reinstitute the National Socialist Party (which was banned in the previous mentioned case). He was convicted for disseminating material of an 'unconstitutional organization.' The Commission also based its decision on Article 17 and dismissed the case as it was manifestly ill-founded. At this stage of the Court's history there was still no clear doctrine regarding the limitations of the right to freedom of speech, however it seems that the Commission has taken a clear political position against the communist parties in Germany to the extent that it has not engaged in any merit based analysis regarding the limitation clauses of articles 9, 10, or 11 of the Conventions. Rather, it has dismissed the case upon a 'more general provision' which is article 17. Through tracing the court's decisions in similar cases in the past two decades it seems that it has adopted a different doctrine explained as follows.

In 1998, the ECtHR has developed another position regarding the communist parties in Turkey. The Constitutional Court of Turkey, in 1991, has banned the Communist Party of Turkey (TBKP) after it was launched as a formal political party on the basis that it violates the democratic values and threatens the national security. The case was taken to the ECtHR (*United Communist Party of Turkey and Others v. Turkey* (1998)) where the applicants claimed violation of their right of association under article 11 of the convention. In this case the Court found that 'Article 11 had

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185 Article 21(2) of the Basic Law of Germany stipulates that "Parties which, according to their aims and the behaviour of their members, seek bo impair or abolish the free and democratic basic order or to jeopardise the existence of the Federal Republic of Germany, shall be anti-constitutional. The Federal Constitutional Court shall decide on the question of antl-constitutionality."

186 See, EcommHR, *Communist Party of Germany v. Federal Republic of Germany,* App. No. 250:57, 4 (1957).

also to be considered in light of Article 10 – fact that their activities formed part of a collective exercise of freedom of expression in itself entitled political parties to seek protection of Articles 10 and 11.' The court held that exceptions of article 11 are to be construed with 'only limited margin of appreciation, which went hand in hand with rigorous European supervision.' Then the court decided that '[n]o evidence enabling Court to conclude, in absence of any activity by TBKP, that party had borne any responsibility for problems which terrorism posed in Turkey – no need to bring Article 17 into play.' [187] It concluded by finding a violation of article 11.

According to this judgment, the ECtHR has adopted different criteria in deciding the 'necessity' of interfering with the freedom of a political party (which is considered part of freedom of speech also); Firstly, the court decides whether the party abides by the principles of democracy or poses a 'real threat to the state.'[188] Such a general condition pushes the court to delve into merit-based analysis of the political party's agenda, and intentions of its leaders through analyzing their statements and activities. For instance, in the *Socialist Party of Turkey (STP) and Others v. Turkey* (2003) the Court after reviewing the party's political program and its leaders public statements has found that 'the fact that such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy.' And that 'it cannot be ruled out that the statements in issue concealed objectives and intentions different from the ones proclaimed in public. In the absence of concrete actions belying Mr Perinçek's sincerity [Party's leader] in what he said, however, that sincerity should not be doubted.[189] Thus, the Court tries to determine not only the activity of the party, but also whether it has been domestically established that the party concerned advances a hidden agenda that differs from its apparently democratic program.[190]

Consequently, in my opinion, through the comparative analysis of the case law of both courts; the US Supreme Court and the ECtHR the following could be noted; firstly, despite the variance of

187 *United Communist Party of Turkey and Others v. Turkey*, App. No. 19392/92, Judgement (1998).

188 *United Communist Party of Turkey and Others (TBKP) v. Turkey*, Para. 54; Theo Tsomidis, *Freedom of Expression in Turbulent Times Comparative Approaches to Dangerous Speech: The ECtHR and The US Supreme Court*, Int. J. Hum. Vol. 26 No. 3, 385 (2022).

189 *Socialist Party of Turkey (STP) and Others v. Turkey*, no. 26482/95, Paras. 47, 48 (2003).

190 See, Theo Tsomidis, *Freedom of Expression in Turbulent Times Comparative Approaches to Dangerous Speech: The ECtHR and The US Supreme Court*, Int. J. Hum. Vol. 26 No. 3, 386 (2022); see also, *United Communist Party of Turkey and Others (TBKP) v. Turkey, Para. 58; Partidul Comunistilor (Nepeceristi) (PCN) v. Romania, at 56.*

both court's methodologies in deciding the freedom of 'political' speech cases, both courts have taken the same position against the 'communist' parties in the early days of the emerging democratic regimes and values. Secondly, despite the elevation of the right to freedom of speech in *Gitlow* case in the US to the level of 'fundamental' right, the court found that the expressions of *Gitlow* has amounted to imminent clear and present danger. It was clear, as *Holmes* wrote in *Schenck*, that courts owed greater deference to the government during wartime, even when constitutional rights were at stake. Such a position was very similar to using article 17 (instead of indulging in a balancing test based on articles 9, 10, 11) by the European Commission when dealing with the German Communist party. Thirdly, in recent decades both courts have changed their attitude to a more stable and predictable methodology; where they both permitted a larger space for free speech (even in war times in the US) and a narrower discretion for the governments' restrictions.

However, at the same time, it could be argued that the ECtHR doctrine, compared to that of the US Supreme Court, has some inherent subjectivity and intuition. That is, the ECtHR is taking the party's program, its leaders intentions and statements into account when deciding the 'necessity' part of proportionality test (an attitude which was abandoned by the US Supreme Court). Thus, on the contrary, the US Supreme Court doctrine, despite its flaws, is considered in my opinion a more stable system in terms of objectivity and predictability.

Finally, through this comparative analysis of both courts' doctrine I tried to demonstrate that despite both courts are using two distinctive methodologies in restricting freedom of speech in national security cases, both courts have much similar outcomes. The reason for this, in my view, is that both methodologies; Proportionality, and Levels of Scrutiny have inherent flaws. They could not be considered the 'panacea for all ills' or the 'genie' that have the ability to provide all required safeguards to the human rights. This argument is explained and elaborated in the following Chapter.

III. CRITIQUES OF THE PROPORTIONALITY AND CATEGORIZATION:

In this chapter we try to explain in a relatively detailed analysis the main critiques directed to both the proportionality analysis and categorization, with more focus on the critique of the former as a pervasive methodology applied within the domestic and international contexts. The aim of this chapter, at the same time, is not to outweigh either of the two methodologies or ascertain a better protection of human rights to either of them, even if it is, partially, a considered concern. Rather, the main aim of the chapter is to expose the fact that although critiques in both sides, indeed, have their own merits, this is not the sole essential dilemma in tackling the question of human rights protection; neither proportionality nor categorization have the all-inclusive answer of the human rights protection question. The issue as *Martin Luterán* has, truly, argued is that 'contemporary proportionality doctrine,… , is understood… as a genie let loose from the bottle – meant to fulfill any wish. It is striking how much work some believe that proportionality can do. However, …, proportionality cannot meet the many expectations lavished on it; the genie is an illusion.'[191] In this contribution I argue that, in addition to the ongoing scholarly debate on the proportionality v. categorization, a turn to the necessity of a developed theory of institutional democratic dialogue in the interactions between domestic legislatures/ courts and international courts is required in tackling the question of human rights protection. That is, the dichotomy of proportionality v. categorization merely does not have the answer; neither proportionality nor categorization methodologies could meet the expectations of constitutional/ human rights scholarship because, simply put, both of which have their own inherent flaws of judicial subjectivity and intuitiveness. Moreover, both of which comparatively do result, as seen in Chapter II, in much similar results in respect of human rights protection, despite their technical differences.[192] Thus, a proper answer to *Barak* and others'[193] question of 'which of the two [proportionality or categorization] provides human rights with the greater level of protection?' would be, in my view, that neither of which could provide human rights any 'great' level of protection, especially on the international level, without a concomitant dialogue between all of the concerned institutions; the domestic

191 Martin Luterán, *The Lost Meaning of Proportionality*, IN G. Huscroft et al., PROPORTIONALITY AND THE RULE OF LAW, Cambridge University Press, 22 (2014).

192 Robert F. Nagel, *Liberals and Balancing*, 63 U. Colo. L. Rev. 319 (1992).

193 Aharon Barack, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, Cambridge University Press, 513 (2012); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992); Robert F. Nagel, *Liberals and Balancing*, 63 U. Colo. L. Rev. 319 (1992).

legislatures/ governmental branches, and domestic courts from one side, and between those domestic legislatures and courts, and international courts and policy making institutions form another side. As Cardozo has briefly suggested "[t]he choice of methods, the appraisement of values, must in the end be guided by like considerations for the one as for the other."[194] And by "one and the other" he meant the judge and the legislator.

Consequently, this chapter is dedicated to explain, in a reasonable detail, the main critiques directed to the proportionality analysis, and categorization in light of the comparative analysis conducted between them in chapter II.

1- Revisiting the Critiques of Proportionality Analysis:

Through reading the contemporary rights adjudication/ balancing scholarship, one could notice that scholars are divided into two strains; the first, is those scholars who defends the viability of proportionality analysis as a pervasive balancing methodology that have the potential to achieve what is perceived as a 'Global Constitutionalism.'[195] They usually admits the fact that proportionality has some inherent flaws. Consequently, they usually suggest adopting new proportionality analysis models with some enhancements regarding its structure. For example, some scholars propose a proportionality model without balancing (or the proportionality in the strict sense) as they perceive such a step the weakest part in the four-stage proportionality model which needs to be demolished in order to reach the most rational paradigm of proportionality.[196] Some others proposed a proportionality analysis model that combines some features of the levels of scrutiny doctrine applied by the US supreme court. They argued that such a hybrid model would avoid some of the current proportionality flaws such as the inconsistency in judgements.[197] Taiwan

194 Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS, Yale University Press, 113 (1921). Also cited in James A. Gardner, *The Sociological Jurisprudence of Roscoe Pound (Part II)*, 7 Vill. L. Rev., 191 (1961) as a developed answer to the question of how to balance between conflicting interests that was left without answer in the dean Pound's theory of justice.

195 Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, Columbia J. Transnatl. Law Vol. 47, 97 (2008); David Beatty, THE ULTIMATE RULE OF LAW, OUP, 162.

196 See, Jochen Von Bernstorff, *Proportionality Without Balancing: Why Judicial Ad hoc Balancing is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-determination*, *In* REASONING RIGHTS COMPARATIVE JUDICIAL ENGAGEMENT, Hart Publishing, 63 (2014).

197 Theo Tsomidis, *Freedom of Expression in Turbulent Times Comparative Approaches to Dangerous Speech: The ECtHR and The US Supreme Court*, Int. J. Hum. Vol. 26 No. 3, 394 (2022). '… But even if the ECtHR does not want to depart from its current approach, embracing viewpoint neutrality, there are several lessons to learn from the long history of the American court'.

Supreme Constitutional Court, for example, is one of those courts who applied such a hybrid proportionality model.[198]

The second strain, on the other hand, are the American constitutional law scholars who are not convinced by the adequacy or the suitability of the tiered review doctrine in protecting human rights. They usually tend to suggest incorporating some features of proportionality analysis into the American constitutional law jurisprudence. They believe that proportionality analysis is, so far, the best way of rights review, and that American constitutionalism is indeed lacks that way of balancing. They, moreover, contend that adopting such kind of balancing would tackle and remedy the American constitutional practice problems.[199] Some of this strain even argues that the whole substitution of proportionality instead of categorization is the solution of the American Constitutionalism issues.[200] In fact, this section is devoted to analyze the main critiques directed to the proportionality and categorization altogether with a focus on the critique of the proportionality as a pervasive methodology domestically and internationally. Through revisiting such critique, I argue that both strains of scholarship have their own merits and that enhancing each methodology through adopting some features of the other will not necessarily result in better outcomes.

a. Incommensurability:

The main line of criticism directed to proportionality is that it entails balancing between two or more incommensurable values. That is, in order to balance between competing interests, or between an individual right and a public or state interest, there shall be a common standard or denominator between them. Such a common denominator could not be established since those competing principles or interests are incommensurable.

198 See, Alec Stone Sweet and Jud Mathews, *Proportionality and Rights Protection in Asia Hong Kong, Malaysia, South Korea, Taiwan, Whither Singapore?*, 29 SAcLJ (2017).

199 See, Jud Mathews and Alec S. Sweet*, All Things in Proportion? American Rights Review and The Problem of Balancing*, Emory Law Journal, Vol 60, 797 (2010). 'PA, while not a cure-all for the challenges faced by rights-protecting courts, avoids these pathologies [weakness pathologies resulting from the application of tiered review in the US] by providing a relatively systematic, transparent, and trans-substantive doctrinal structure for balancing'.

200 Donald L. Beschle, *No More Tiers? Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases*, Pace L. Rev. Vol. 38 No. 5, 384 (2018).

According to *Francisco Urbina*, 'Incommensurability only implies that, when confronted with an incommensurable choice, rational determinacy cannot be achieved through a quantitative comparison of the alternatives.'[201] According to him, most of the scholars that addressed the issue of incommensurability in proportionality analysis, including *Barak*, have misunderstood or oversimplified the issue.[202] Moreover, when they admits the issue and tries to refute its objections, they rarely assess its real seriousness or threats to the whole balancing doctrine. Thus, *Urbina* tried to explain in details the meaning of 'incommensurability in choice' and the difference between it and the incommensurability in general through the following example;

> Imagine I want to buy a house. Suppose the relevant question here is what is the best house for me to live in, and that this in turn depends on two variables: I want a house that is pretty, and that is big. Imagine that there are only two houses available, and that money is not an issue – I can have any house I choose, but I can choose only one (imagine, for example, that a benefactor will give me the house that I choose). House A is pretty but small; and house B is big but ugly. The two relevant properties (beauty and size) provide content to the idea of the kind of house that would be the best for me. The properties are irreducible to each other – a house does not become pretty by being very big, or big by being very pretty.

Through this example we could understand that the elements which are considered in evaluating the best house between the houses in the choice (size, and beauty) are incommensurable. Thus, the houses could not be ranked or classified in terms of which constitutes the best house because if we could rank them according to their 'size', they cannot be ranked according to their beauty as beauty is not a measurable thing. *Urbina*, then, argued that although there is incommensurability in choice in this example, choice still possible between houses. However, the choice in this case is called 'rational undetermined choice' as he explains;

> Continuing with my example, if the only relevant criterion for choosing between houses A and B is to choose the best house, and if what constitutes the best house is determined by the degree of realisation of the two irreducible properties of beauty and size, then the decision will be rationally underdetermined.[203]

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201 Francisco J. Urbina, A CRITIQUE OF PROPORTIONALITY AND BALANCING, Cambridge University Press, 40 (2017).

202 Aharon Barack, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, Cambridge University Press, 482 (2012).

203 Francisco J. Urbina, A CRITIQUE OF PROPORTIONALITY AND BALANCING, Cambridge University Press, 42 (2017).

However, *Urbina* continues to explain what is usually misunderstood by other scholars in understanding the issue of incommensurability in proportionality analysis; that is, balancing is only impossible if, and only if, the two alternatives from which we are supposed to choose one could not be ranked according to one kind of relation; 'one based on a quantitative assessment on which alternative realises to a greater degree a relevant property.'[204] However, there are always other ways (not quantitative) to compare between the alternatives (the two competing interests). Hence, the problem of incommensurability only arises when there are two alternatives that could not be assessed except through quantitative incommensurable attributes; just like the 'beauty' in the previous houses example.

Urbina, then, proposed two crucial questions regarding the issue of incommensurability in proportionality analysis. The first question; 'does incommensurability imply that rational choice is impossible whenever incommensurable alternatives are at stake?'[205] The answer, simply put, is in negative. 'Rational' choice, indeed, still possible whenever incommensurable alternatives are at stake. The issue of incommensurability arises when the criteria upon which the judge decide requires realization of 'different irreducible properties.' As *Urbina* argued, realizing each property could be done in a rational way, however the problem is that each property (size, or beauty in the houses example) is irreducible to each other; they are both essential in deciding the case. Thus, as long as there is a rationality behind choosing one of the properties, there could be a reason for choosing that property or preferring it to the other, 'even if this reason is not a conclusive one.' Therefore, rational choice is still viable when the incommensurability issue arises. Consequently, '[t]he decision is *rational* (in that it is made for a reason) and *reasonable* (in that it is sensible to all the relevant reasons that bear on the situation).'[206] In other words, the incommensurability criticism is not a criticism directed to any decision made upon choosing from incommensurable alternatives simply because choosing from incommensurable alternatives. Rather, it is a criticism of dealing with those incommensurable alternatives as if they are commensurable or through blurring and obscuring the problem at all and that leads us to the second question.

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204 Francisco J. Urbina, A CRITIQUE OF PROPORTIONALITY AND BALANCING, Cambridge University Press, 42 (2017).

205 Francisco J. Urbina, A CRITIQUE OF PROPORTIONALITY AND BALANCING, Cambridge University Press, 45 (2017).

206 Francisco J. Urbina, A CRITIQUE OF PROPORTIONALITY AND BALANCING, Cambridge University Press, 46 (2017).

The second question presented by *Urbina*, which is more significant here, is; 'Does incommensurability ground an objection against the proportionality test?' The answer to this question is in positive. In answering this question *Urbina* focused on *Robert Alexy*'s theory of proportionality where *Alexy* understood rights as principles (or optimization requirements). According to him, incommensurability arises when there is a conflict between the rights (which realization is of irreducible alternatives) and there are attempts to determine which alternative has a better realization of that right. However, Alexy has not proposed a solution of the incommensurability issue.[207] In his proportionality model he proposes three levels of scrutiny that distinguishes between serious, moderate, and relatively minor infringements, on the one hand, and very important, moderately important, and relatively unimportant gains on the other. 'Using this scale, one may identify clear-cut cases to which such a rationally-guided balancing exercise may be applied. When the infringement is serious and the gains are relatively minor, a measure is clearly disproportionate.'[208] *Alexy*, then, puts what is called 'a priority rule' or a precedence rule according to which the judge could choose between the competing principles; that is, the principle has a precedence when it would be realized to a greater level than the opposing principle through the decision in its favor. However, the problem in this rule is that it blurs the incommensurability objection as it deals with the properties that realize the principle as if they were commensurable but this is not the case. As *Urbina* puts it;

> This priority rule would be justified only if the degrees of satisfaction of the principles at stake were commensurable, since, if this were the case, realising the principle that would be satisfied to a greater degree would yield 'more' of the same relevant property than realising the rival principle. But since the degrees of satisfaction of the competing principles are incommensurable, the priority rule is not justified.[209]

The situation in *Alexy*'s theory typically recalls what *Justice Scalia* famously discussed in *Bendix Autolite Corp. v. Midwesco Enterprises Inc.*; '[T]he scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is

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207 Francisco J. Urbina, A CRITIQUE OF PROPORTIONALITY AND BALANCING, Cambridge University Press, 54 (2017).

208 Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice* A review Essay on *Theory of Constitutional Rights* by Robert Alexy, I.CON Vol.2 No.3, 581 (2004).

209 Francisco J. Urbina, A CRITIQUE OF PROPORTIONALITY AND BALANCING, Cambridge University Press, 55-56 (2017).

longer than a particular rock is heavy.'[210] However, *Alexy*'s rationally-guided balancing exercise is just adding more obfuscation to the problem of incommensurability. That is, in my view, the main issue of the proportionality analysis (specially the last step 'proportionality *stricto sensu*') that most of the proponents are not taking seriously. They even develop mechanisms that are, in fact, blurring the problem not facing it. Moreover, from the previous analysis it seems that subjectivity objection is an inherent and inevitable objection which is concomitant to the incommensurability. That is to say, whenever there is an incommensurability between the properties which are essential in realizing the right in question, the judge will end up using intuitive and subjective arguments to choose between such incommensurable alternatives even if they were the result of deploying a structural or 'rationally-guided' methodology. In the same context, in categorization methodology such a problem of incommensurability arises when each side of the case perceives his right as a fundamental right that deserves the court's protection. The court in such cases is faced by the critique of subjectivity and abuse of discretion.[211]

b. Proportionality and Moral Considerations:

Obscuring the moral consideration of human rights issues is one of the crucial critiques directed to proportionality and it is, in my view, one of the consequences of the incommensurability issue at the same time. The quest of the scholars to find a rational methodology to overcome the problem of incommensurability has produced another issue which is perverting human rights aspects or the moral considerations in the humans rights adjudication. As *Stavros Tsakyrakis* put it; 'With the balancing approach, we no longer ask what is right or wrong in a human rights case but, instead, try to investigate whether something is appropriate, adequate, intensive, or far-reaching.'[212]

To better illustrate the issue *Tsakyrakis* mentioned what *David M. Beatty* wrote in his famous book defending the proportionality methodology;

> Telling black children they cannot be educated in the same schools as white students is brutally offensive to their dignity and self-worth in a way that forcing whites to share their class-rooms is not. Segregationists may be deeply offended by having to mix with

210 *Bendix Autolite Corp. v. Midwesco Enterprises Inc.*, 486 US 888, 897 (1988). Cited in Aharon Barack, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS, Cambridge University Press, 483 (2012).

211 Clarke D. Forsythe, ABUSE OF DISCRETION THE INSIDE STORY OF ROE V. WADE, Encounter Books (2013).

212 Stavros Tsakyrakis, *Proportionality: An assault on human rights?*, I • CON Vol. 7 No. 3, 487 (2009).

> people with whom they want no association, but their stature and status in the community is not diminished by their forced integration.[213]

Beatty has used three landmark cases in the American Supreme Court history: *Lochner,*[214] *Brown v. Board of Education,*[215] *and Roe v. Wade*,[216] to refute the criticism of inconsistency and unprincipledness that was directed by the American Constitutional law scholars against those judgments. He argued that in responding to such critique pragmatists, through considering proportionality as part of their vocabulary and analysis, 'could tell a more consistent, less political story' about those decisions.[217]

Beatty argued that Proportionality analysis could offer a methodology to overcome the 'partisanship' of the critique directed to the three mentioned landmark cases;

> Rather than testing whether these cases were resolved in ways that are perceived to be politically correct, pragmatists, looking at them through the lens of proportionality, would say the Court got it right every time… on each of these occasions, …, the great majority of them [the justices] remained faithful to the constitution and the ultimate rule of law.[218]

However, what was missing in *Beaty*'s analysis of *Brown v. Board of Education* through the proportionality lenses is that he underestimated the value of the moral consideration in the alternatives from which the court has to choose. He defended the court ruling, as proportional, because the harm to black children inflicted upon them through segregation policies outweighed the harm inflicted upon whites from integration. Thus, he considers the decision proportional in that way of thinking which means that if, according to another moral standards, the harm inflicted upon whites from integration outweighed the harm of black children the segregation policy would be proportional. Here we could understand the issue of proportionality; 'It erodes these rights ' distinctive meaning by transforming them into something seemingly quantifiable.'[219]

Consequently, the problem proportionality Analysis (specially the last step 'Proportionality in the strict sense') is that it obfuscates the moral considerations which are considered a core of human rights issues. It moves the discourse from its ordinary realm: the legislative and governmental

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213 David M. Beatty, THE ULTIMATE RULE OF LAW, OUP, 186 (2004).
214 *Lochner v. New York*, 198 U.S. 45 (1905).
215 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

216 *Roe v. Wade*, 410 U.S. 113 (1973).
217 David M. Beatty, THE ULTIMATE RULE OF LAW, OUP, 185 (2004).
218 David M. Beatty, THE ULTIMATE RULE OF LAW, OUP, 185 (2004).
219 Stavros Tsakyrakis, *Proportionality: An assault on human rights?*, I • CON Vol. 7 No. 3, 488 (2009).

authority to the court. Thus, it deprives the community from an indispensable debate and compels the court to subjectively take a side which is usually perceived a political one. As *Tsakyrakis* puts it; '[i]t may be that our judges are worried about moral disagreements and that is why they try to bypass the moral arguments by masking their reasoning in neutral language. However, the best way to resolve our disagreements is to spell them out and openly debate them.'[220]

i . The Issue Exacerbates on the International Plane:

The situation of Proportionality worsen when applied on the international level. The problem of necessity test (the third element of proportionality) becomes a serious issue when we trace its application by the ECtHR. This third element, as seen before in Chapter I, means that the measures undertaken are necessary in the sense that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation. However, on the international level the courts (ECtHR for example) are functioning with respect to the 'sovereignty' of the states parties to the ECHR. Hence, the court does not apply this element with the same intensity in all cases. As *Patricia Popelier & Catherine Van De Heyning* argued;

> The ECtHR in some cases suggests that not choosing the least onerous measure does not necessarily entail a violation of the ECHR or, more bluntly, explicitly rejects the test … [T]he Court only ascertains whether the option chosen by the member states is compatible with the Convention, but the scrutiny as to whether less intrusive measures were provided falls within the ambit of the domestic courts. Alternatively, the ECtHR's approach towards the least onerous test might be the result of the Court's margin of appreciation doctrine.[221]

Such a serious problem of necessity test in the proportionality application on the international plane leaves the question of how to develop a more protective mechanism for human rights on the international level within such a global acceptance of the doctrine of proportionality unanswered. It also raises another question that is how could we decide the 'European consensus' required to give the national authorities a wide margin of appreciation? When could we say that there is a consensus on that matter or there is no consensus? As held in *S.A.S v. France*,[222] for example, the two dissenting opinions held that there is indeed a consensus among the European states against

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220 Stavros Tsakyrakis, *Proportionality: An assault on human rights?*, I • CON Vol. 7 No. 3, 488 (2009).

221 Patricia Popelier & Catherine Van De Heyning, *Procedural Rationality: Giving Teeth to the Proportionality Analysis*, Eur. Cons. L. Rev. Vol. 9 No. 2, 234 (2013).

222 *S.A.S. v. France* [2014] ECHR 695.

the necessity of banning full-face veils in European countries and put weight on the fact that human rights institutions and organizations opposed the ban, while the majority thereof found that there is no European consensus hence they held that France has properly acted within its "wide" margin of appreciation. Such a vague and blurry scheme upon which the ECtHR is applying the proportionality doctrine adds more weaknesses to its already existed flaws of irrationality and incommensurability.

2- Categorization is Relatively Predictable.. but?

If we compared the situation of proportionality analysis with the American levels of scrutiny doctrine, it could be noted that such a critique of uncertainty is less problematic than the case in proportionality doctrine. The reason is that levels of scrutiny doctrine has a pre-determined scheme. That is, when the judge is deciding the case he is not neutral, rather he is taking the side of defending the right in question (at least in the Strict Scrutiny). That is totally different from the proportionality approach as applied by the ECtHR, for example, or as explained by *Barak*. In the latter approach the judge has no limitation to his discretion as there is no predetermination or a hierarchy of a set of rights that needs a compelling interest to be limited. The American approach, despite its subjectivity and intuitiveness, could be seen as more protective for the fundamental rights because it changes the mindset of both the legislator and the judge. It changes the mindset of the legislator when he enacts a limiting law because he knows well that any legislation limiting a fundamental right must have a 'compelling' interest. Thus, he shall find that interest before enacting the law. On the other hand, such approach changes the mindset of the judge as it limits his discretionary powers to some extent. It gives him the justification for being rigorous in his analysis of the interest under scrutiny and it helps the society as a whole in being more respectful to the fundamental rights.

However, the American levels of scrutiny doctrine does not go without predictability and coherence challenges and criticism. That is, such a categorization of rights into three tiers (strict scrutiny, intermediate scrutiny, and rational-basis scrutiny) could be changed at any moment according to the changing political, moral, or cultural ideologies of the majority of justices at the bench. The recent overruling of *Roe v. Wade* could be a typical example of such uncertainty issue of the categorization doctrine.

In *Dobbs v. Jackson Women's Health Organization* the court has overruled *Roe v. Wade* and *Planned Parenthood v. Casey* holding that the US constitution does not confer a right to abortion. The court undermined the constitutional protection established by Roe v. Wade which interpreted the 14th amendment in a way that includes the abortion as a 'fundamental right' which deserves a strict scrutiny review. In *Dobbs v. Jackson,* the court authored by the 'originalist' Justice *Samuel Alito* held that "a law regulating abortion… must be sustained if there is a rational basis on which the *legislature could have thought* that it would serve legitimate state interests."[223] The shift from strict scrutiny to rational-basis review has been criticized by the dissenters. The three dissenters *Justice Breyer, Justice Sotomayor, and Justice Kagan* held that;

> The right Roe and Casey recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception… In turn, those rights led, more recently, to rights of same-sex intimacy and marriage… They are all part of the same constitutional fabric, protecting autonomous decision making over the most personal of life decisions… The lone rationale for what the majority does today is that the right to elect an abortion is not "deeply rooted in history": Not until Roe , the majority argues, did people think abortion fell within the Constitution's guarantee of liberty… The majority could write just as long an opinion showing, for example, that until the mid-20th century, "there was no support in American law for a constitutional right to obtain [contraceptives]."... So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.[224]

It could be noted that the main argument of the majority was based upon their conservative and originalist interpretation of the 14th amendment of the US constitution. When the drafters wrote it, they did not mean to confer a right to abortion. Hence, the problem of uncertainty and unpredictability of categorization could be seen. The dissenters, moreover, have emphasized the threat of such a ruling to the constitutional protection granted to other rights that constitute "part of the same constitutional fabric, protecting autonomous decision making over the most personal of life decisions."

223 *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. at 2284.
224 *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. at 2319.

CONCLUSION

This paper has tried to answer the long debated question of which methodology is better in achieving human rights protection through developing a comprehensive critique of both proportionality and categorization as judicial-made rights balancing methodologies, which is based primarily on denying the importance of that question. Through revisiting such a scholarly debate, one could notice that scholars are divided into two sides; the first side, is those scholars who advocate for the objectivity of the proportionality analysis as a pervasive balancing methodology. Although they admit that proportionality has some inherent flaws such as the subjectivity of the last step (proportionality *stricto sensu*), all of what they do is that they usually suggest some adjustments to that model as totally eliminating such a step (proportionality without balancing). The second side, on the other hand, are the American constitutional law scholars who also admits the problem of the categorization. However, all they do is that they usually tend to suggest incorporating some features of proportionality analysis into the American constitutional law jurisprudence. They believe that American constitutionalism is indeed lacks that way of balancing. Some of this side even argues that the whole substitution of proportionality instead of categorization is the solution of the American Constitutionalism issues.[225] Through contrasting this debate the paper has argued that both strains of scholarship have their own merits and that such a debate is indeed endless because enhancing each methodology through adopting some features of the other will not necessarily result in better outcomes. Although there is a variation in the technicalities of each methodology which end up with some advantages of each one that lacks in the other, both methodologies do not protect the adjudication process from the judicial intuitiveness. Indeed, proportionality and categorization are based on irrational and subjective judicial reasoning even if both pretends the opposite through the structured scheme thereof. Building on what *Martin Luterán* has, truly, argued that "proportionality cannot meet the many expectations lavished on it; the genie is an illusion[,]" this paper has argued that neither proportionality nor categorization could meet the many expectations lavished on them.

We conclude by recalling what Benjamin Cardozo has argued in answering the question of which value shall the judge prefer over the other in the process of balancing between conflicting interests:

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225 Donald L. Beschle, *No More Tiers? Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases*, Pace L. Rev. Vol. 38 No. 5, 384 (2018).

> If you ask how he [the judge] is to know when one interest outweighs another, I can only answer that he must get this knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator work and his [the judge]. The choice of methods, the appraisement of values, must in the end be guided by like considerations for the one as for the other.[226]

Building on Cohen's previously mentioned criticism of dean Pound's lack of a comprehensive theory of values, this paper argued that the contemporary endless contrast of judicial review methodologies is just postponing the problem of intuitiveness not developing a solution thereof and that we better focus the attention on developing what Cohen has called a "critical theory of values."[227]

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226 Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS, Yale University Press, 113 (1921). Also cited in James A. Gardner, *The Sociological Jurisprudence of Roscoe Pound (Part II)*, 7 Vill. L. Rev., 191 (1961) as a developed answer to the question of how to balance between conflicting interests that was left without answer in the dean Pound's theory of justice.

227 Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, Columbia Law Rev., Vol.35 No.6, 848 (1935).