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978-1-107-00858-8 - Proportionality: Constitutional Rights and their Limitations

Aharon Barak

Excerpt

[More information](#)

Introduction

This book reflects the constitutional theory developed following the Second World War. It reflects an expansion of the concept of constitutional law,¹ a blurring of the lines between constitutional and private law² as well as the development of purposive interpretation.³ This modern constitutional theory also recognizes positive constitutional rights alongside the negative ones,⁴ and stipulates a wider judicial review on the law's constitutionality.⁵ It is based on the fundamental distinction between recognizing the scope of the constitutional rights and their limitations.⁶ Two key elements in developing this modern constitutional theory are the

¹ See L. Weinrib, "The Postwar Paradigm and American Exceptionalism," in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006), 83; M. Kumm, "Who's Afraid of the Total Constitution?," in A. J. Menendez and E. O. Ericksen (eds.), *Arguing Fundamental Rights* (Dordrecht: Springer, 2006).

² See D. Friedman and D. Barak-Erez (eds.), *Human Rights in Private Law* (2001); T. Barkhuysen and S. Lindenberg (eds.), *Constitutionalisation of Private Law* (2006); D. Oliver and J. Fedtke (eds.), *Human Rights and the Private Sphere: A Comparative Study* (2007).

³ A. Barak, *Purposive Interpretation in Law* (Sari Bashi trans., Princeton University Press, 2005), 83.

⁴ See below, at 422.

⁵ See E. McWhinney, *Judicial Review in the English-Speaking World* (University of Toronto Press, 1956); D. W. Jackson and C. N. Tate (eds.), *Comparative Judicial Review and Public Policy* (1992); A. Stone Sweet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford University Press, 1992); C. N. Tate and T. Vallinder (eds.), *The Global Expansion of Judicial Power* (1995); A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, 2000); M. Shapiro and A. Stone Sweet, *On Law, Politics and Judicialization* (Oxford University Press, 2002); R. Prochazka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (Budapest: Central European University Press, 2002); T. Koopmans, *Courts and Political Institutions: A Comparative View* (Cambridge University Press, 2003); R. Hirsch, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004); V. Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (New Haven, CT: Yale University Press, 2009). For a criticism of judicial review, see below, at 490.

⁶ See below, at 19.

Cambridge University Press

978-1-107-00858-8 - Proportionality: Constitutional Rights and their Limitations

Aharon Barak

Excerpt

[More information](#)

notions of democracy and the rule of law. The concept of proportionality stems from these two notions. This book seeks to analyze that concept.

Proportionality has different meanings in various contexts. This book focuses on one meaning in particular – the proportionality of a limitation applied within a democratic system, on a constitutional right by a law (a statute or the common law). For that, we must assume the very existence of such constitutional rights⁷ and their legal origin (either explicitly or implicitly) in a constitutional text. The book examines the situations in which a law may limit such a right in a constitutionally recognized manner. The limitations that may be imposed on a constitutional right will be analyzed, as well as the limits of these limitations.

This is an analytical essay on the limitations of constitutional rights in a constitutional democracy.⁸ The discussion must therefore include the

⁷ See W. Newcomb Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning,” in W. Wheeler Cook (ed.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (New Haven, CT: Yale University Press, 1919); H. L. A. Hart, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford University Press, 1982), 162; R. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977); D. Lyons (ed.), *Rights* (1979); J. Waldron (ed.), *Theories of Rights* (1984); J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986); L. W. Summer, *The Moral Foundation of Rights* (Oxford University Press, 1987); C. Santiago Nino, *The Ethics of Human Rights* (Oxford University Press, 1991); J. Waldron, *Liberal Rights: Collected Papers 1981–1991* (Cambridge University Press, 1993); J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994); M. H. Kramer, N. E. Simmonds, and H. Steiner, *A Debate over Rights: Philosophical Inquiries* (Oxford University Press, 1988); C. Wellman, *An Approach to Rights: Studies in the Philosophy of Law and Morals* (Dordrecht: Kluwer Academic Publishers, 1997); F. M. Kamm, “Rights,” in J. Coleman and S. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002), 476; W. A. Edmundson, *An Introduction to Rights* (Cambridge University Press, 2004); G. W. Rainbolt, *The Concept of Rights* (Dordrecht: Springer, 2006); C. Gearty, *Can Human Rights Survive?* (Cambridge University Press, 2006); M. J. Perry, *Toward a Theory of Human Rights: Religion, Law, Courts* (Cambridge University Press, 2007); P. Eleftheriadis, *Legal Rights* (Oxford University Press, 2008).

⁸ On constitutional democracy, see C. H. McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, NY: Cornell University Press, 1947); A. Sajo, *Limiting Government: An Introduction to Constitutionalism* (Budapest: Central European University Press, 1999); J. Elster and R. Slagstad (eds.), *Constitutionalism and Democracy* (1988); D. Greenberg et al. (eds.), *Constitutionalism & Democracy: Transition in the Contemporary World* (1993); L. Alexander (ed.), *Constitutionalism: Philosophical Foundations* (1988); J. Kis, *Constitutional Democracy* (Budapest: Central European University Press, 2003); W. F. Murray, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Baltimore, MD: Johns Hopkins University Press, 2007); M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism* (2007); K. S. Ziegler et al. (eds.), *Constitutionalism and the Role of Parliament* (2007); P. Dobner and M. Loughlin, *The Twilight of Constitutionalism?* (Oxford University Press, 2010).

INTRODUCTION

3

well-entrenched notion of democracy itself,⁹ as well as of the rule of law.¹⁰ Both are central to the understanding of constitutional limitations. Both are given a broad interpretation in these pages. The two are well connected in that the rule of law entails the law of rules and the rule of values underlying fundamental democratic ideals (such as the separation of powers and the independence of the judiciary). At the heart of these values we find constitutional rights, and their limitations. And at the heart of these limitations we find the concept of proportionality. A limitation on a constitutional right by law (statutory or common law) will be constitutionally permissible if, and only if, it is proportional. The constitutionality of the limitation, in other words, is determined by its proportionality.

Proportionality, therefore, can be defined as the set of rules determining the necessary and sufficient conditions for a limitation of a constitutionally protected right by a law to be constitutionally permissible. According to the four sub-components of proportionality, a limitation of a constitutional right will be constitutionally permissible if (i) it is designated for a proper purpose;¹¹ (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfillment of that purpose;¹² (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation;¹³ and finally (iv) there needs to be a proper relation (“proportionality *stricto sensu*” or “balancing”) between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.¹⁴

Certain aspects of proportionality arise in circumstances that do not limit a constitutional right by statute. One of those aspects is the use of proportionality in interpretation. The interpreter often finds himself with a need to determine the scope of the governmental authority. This is true, for example, when the interpreter needs to determine the scope of a government minister’s authority to provide or refuse a license as provided in a law. Regarding the question of authority, the interpreter must interpret the law’s language along with its purpose. In determining the purpose, the interpreter should balance professional freedom with the public interest, which makes up the law’s foundation and its purpose at a high level of abstraction. This balancing is carried out by interpretive analogy from

⁹ See below, at 214. ¹⁰ See below, at 226.

¹¹ For a discussion on this sub-component, see below, at 245.

¹² For a discussion on this sub-component, see below, at 303.

¹³ For a discussion on this sub-component, see below, at 317.

¹⁴ For a discussion on this sub-component, see below, at 340.

Cambridge University Press

978-1-107-00858-8 - Proportionality: Constitutional Rights and their Limitations

Aharon Barak

Excerpt

[More information](#)

the proportionality *stricto sensu* element. This is interpretive balancing.¹⁵ It differs from the all-encompassing proportionality which is discussed in this book. It is limited to only one of proportionality's elements – *stricto sensu* (balance). It deals with the interpretation (meaning) of the law and not with its constitutionality (validity).

The set of rules that make up proportionality are a legal construct which reflect a constitutional methodology justifying limitations on constitutional rights.¹⁶ Proportionality's nature does not suggest a neutral approach towards constitutional rights. The concept of proportionality is not indifferent to the limitations of rights. On the contrary, it is based on the need to protect them. Indeed, the limitations that proportionality imposes on the realization of constitutional rights, as well as the rights themselves, draw their authority and content from the same source.¹⁷ Thus, proportionality determines the proper level of protection for constitutional rights in a constitutionally rights-based democratic society. Proportionality emphasizes the importance of reason and justifying limitations on constitutional rights.¹⁸

This book is the product of both legal thought and legal practice. It reflects my considered views about proportionality over the years, including the comparative study of the subject. It also reflects the experience of judging. For twenty-eight years I served as a Justice on Israel's Supreme Court – first as an Associate Justice, then as a Vice-President, and finally as the Supreme Court President. Even before fully understanding the concept of proportionality, I ruled in accordance with its precepts. However, in the last fourteen years of my judicial career, I wrote dozens of Supreme Court opinions explicitly applying the concept of proportionality, as did my colleagues on the bench. This book is based on this judicial experience.

Although my judicial experience is limited to Israel's legal system, this book is not so narrow. On the contrary, it attempts to provide a universal understanding of the concept of proportionality in constitutional democracies. It reflects the law of many legal systems where proportionality is frequently applied. I am hopeful that countries with constitutional rights will be able to make use of this book in understanding their own approach towards proportionality. The same should apply to other legal systems – such as those of the United Kingdom, New Zealand, and

¹⁵ See below, at 72. ¹⁶ See below, at 458. ¹⁷ See below, at 166.

¹⁸ See *S. v. Makwanyane*, 1995 (3) SA 391, § 156. On the “culture of justification,” see below, at 458.

Cambridge University Press

978-1-107-00858-8 - Proportionality: Constitutional Rights and their Limitations

Aharon Barak

Excerpt

[More information](#)

INTRODUCTION

5

Victoria, Australia – where human rights are not on a constitutional level, but the courts are still authorized to determine whether their limitation is proportional. Although such a determination does not render the law unconstitutional, it fully applies the rules of proportionality as analyzed in these pages.¹⁹

The goal of this book is not to describe the legal reality surrounding proportionality in various countries' constitutional law. The intention is not to compare the use of proportionality in different legal systems. Rather, the goal of this book is to present an analytical model of the legal institution dubbed proportionality. The appeal to comparative law is meant to substantiate the model presented herein. It is meant to show that this is not only a theoretical model disconnected from reality. It aims to convince that this theoretical model is accepted in comparative law, which draws from it and influences its development.

Every study of proportionality must recognize Alexy's influence.²⁰ His contribution to the understanding of the rules of proportionality and their development is very significant. This is particularly the case in civil law legal systems; but now also true in common law systems thanks to the excellent translation by Professor Julian Rivers of Alexy's book which deals with, amongst other matters, proportionality,²¹ as well as Rivers' comprehensive introduction to that book.²² While Alexy's influence is clear on many of this book's pages, the opinion herein diverges from him on some of the key issues relating to proportionality. It is sufficient to

¹⁹ See below, at 72. See also D. Jenkins, "Common Law Declarations of Unconstitutionality," 7 *Int'l J. Const. L.* 183 (2009).

²⁰ See R. Alexy, *A Theory of Constitutional Rights* (J. Rivers trans., Oxford University Press, 2002 [1986]); R. Alexy, "Individual Rights and Collective Goods," in C. Nino (eds.), *Rights* (New York University Press, 1989), 168; R. Alexy, "Jurgen Habermas's Theory of Legal Discourse," 17 *Cardozo L. Rev.* 1027 (1996); R. Alexy, "On the Structure of Legal Principles," 13(3) *Ratio Juris* 294 (2000); R. Alexy, "Constitutional Rights, Balancing, and Rationality," 16(2) *Ratio Juris* 131 (2003); R. Alexy, "On Balancing and Subsumption: A Structural Comparison," 16(4) *Ratio Juris* 433 (2003); R. Alexy, "Balancing, Constitutional Review, and Representation," 3 *Int'l J. Const. L.* 572 (2005); R. Alexy, "Thirteen Replies," in G. Pavlakos (ed.), *Law, Rights, and Discourse: The Legal Philosophy of Robert Alexy* (Portland, OR: Hart Publishing, 2007), 345; R. Alexy, "On Constitutional Rights to Protection," 3 *Legisprudence* 1 (2009). For studies reviewing Alexy's work, see A. J. Menendez and E. O. Eriksen (eds.), *Arguing Fundamental Rights* (2006); G. Pavlakos, (ed.), *Law, Rights, and Discourse: The Legal Philosophy of Robert Alexy* (2007).

²¹ R. Alexy, *A Theory of Constitutional Rights* (J. Rivers trans., Oxford University Press, 2002 [1986]), 200.

²² J. Rivers, "A Theory of Constitutional Rights and the British Constitution," in Robert Alexy (ed.), *A Theory of Constitutional Rights* (Oxford University Press, 2002 [1986]), xvii.

Cambridge University Press

978-1-107-00858-8 - Proportionality: Constitutional Rights and their Limitations

Aharon Barak

Excerpt

[More information](#)

mention a number of these departures: First, Alexy is of the opinion that, when two constitutional rights shaped as principles are in conflict, or when a constitutional right is in conflict with the public interest, a special constitutional rule is formed that operates on the constitutional sphere and reduces the scope of the constitutional right.²³ In my opinion, such a rule operates only on the sub-constitutional level (statutory or common law), and does not affect the scope of the constitutional right itself. Second, the balancing rule, according to Alexy, compares the importance of the purpose that the limiting law seeks to obtain to the harm (light, moderate, or serious) inflicted upon the constitutional right. Although we agree that the first part of the balancing equation should include the importance of the proper purpose, this should be balanced against the importance of preventing the limitation of the constitutional right. To me, constitutional rights are not of equal importance. The importance of the right in tipping the scale is determined not solely on the extent of the constitutional right's limitation, but rather according to the importance of preventing the harm caused by the limitation. Third, according to Alexy's proportionality concept, the same rule applies in protecting constitutional rights as it does in the protection of public interest.²⁴ My approach draws a distinction between these two notions. Fourth, according to Alexy, the application of proportionality considerations is preconditioned upon the right being shaped as a constitutional *principle*.²⁵ This is not my approach. Thus, proportionality considerations may apply even where the right is shaped as a constitutional rule. The legal source from which proportionality derives is not related to the way the right is phrased (as a rule or principle), but rather to considerations of democracy and the rule of law affecting the text's legal interpretation.

With the "migration" or "transplantation" of proportionality in constitutional law from its birthplace in Germany to many of the world's legal systems, the legal literature on the subject abounds. Many important books and essays are dedicated to it.²⁶ This raises the obvious question – is

²³ See below, at 38. ²⁴ See below, at 364. ²⁵ See below, at 286.

²⁶ See A. de Mestral, S. Birks, M. Both *et al.* (eds.), *The Limitation of Human Rights in Comparative Constitutional Law* (Montreal: Les Editions Yvon Blais, 1986); X. Philippe, *Le Contrôle de Proportionnalité dans les Jurisprudences Constitutionnelle et Administrative Françaises* (Economica-Presses Universitaires d'Aix-Marseilles, 1990); N. Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (London: Kluwer Law International, 1998); Evelyn Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (1999); D. M. Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004); G. Van der Schyff, *Limitation of Rights: A Study of the European Convention and the South African Bill of Rights* (Nijmegen, The Netherlands: Wolf Legal Publishers, 2005);

Cambridge University Press

978-1-107-00858-8 - Proportionality: Constitutional Rights and their Limitations

Aharon Barak

Excerpt

[More information](#)

INTRODUCTION

7

there a need for another book on proportionality? How is this book any different from the many that have preceded it? The answer is that this book is unique in the following four characteristics: First, it does not follow the pattern of analyzing proportionality in one legal system and then comparing it to another; rather, it creates a comprehensive analytical framework of the concept of constitutional proportionality, and it does so against a comparative background. Thus, the book contains a discussion of proportionality in constitutional law in general, while providing several examples from different legal systems in each sub-topic discussed.

Second, a fundamental part of the book's approach is the perception that the most central component of the proportionality analysis is proportionality *stricto sensu* or balancing.²⁷ This is the component that draws most of the criticism on the concept as a whole. The book attempts to respond to this criticism, while redesigning the balancing tests. For that reason, it places – on both sides of the scale – the term social importance.²⁸ This term focuses on the marginal social importance of achieving the law's proper purpose on the one hand, and the marginal social importance in preventing the harm to the right itself on the other. In addition, in discussing the limitations on rights, the book distinguishes between more and less important rights; as aforementioned not all rights were created equal. It is against this background that the suggestion is made to redefine the rules of balancing by adding – in between the basic balancing rule and ad hoc balancing – a principled balancing rule.

Third, this book emphasizes the methodological aspect of proportionality. To that end, it highlights the distinction between the first stage of the analysis, where the scope of the constitutional right is determined, and the second stage, where the justifications to limit the right are considered. It also notes the distinction between the constitutional nature of the right and the sub-constitutional nature of the limitation of that right. It develops an approach to special instances whereby two constitutional rights conflict. That approach is based on the notion that such a conflict

W. Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht: Springer, 2005); C. B. Pulido, *El Principio de Proporcionalidad y los Derechos Fundamentales* (Madrid: Centro de Estudios Políticos y Constitucionales, 2007); E. T. Sullivan and R. S. Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions* (Oxford University Press, 2008); H. Keller and A. Stone-Sweet (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008); G. Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, 2009).

²⁷ See below, at 340. ²⁸ See below, at 349.

Cambridge University Press

978-1-107-00858-8 - Proportionality: Constitutional Rights and their Limitations

Aharon Barak

Excerpt

[More information](#)

will usually affect only the statutory or common law level; it will not, however, affect the scope of the conflicting constitutional rights. The book also draws a distinction between balancing as one of the components of proportionality (which is relevant to the examination of the constitutionality of laws which limit a constitutional right), and interpretative balancing (which is relevant for the examination of the interpretation of a law whose purpose includes conflicting principles).²⁹ It emphasizes the role of the public interest and the protection of the constitutional right in the framework of the balancing component and rejects the view that it can determine the scope of the constitutional rights. It distinguishes between a limitation of a constitutional right by statute and the common law.

Finally, the book examines several alternatives to proportionality, and analyzes the pros and cons of each.³⁰ According to the book's approach, proportionality suffers from many shortcomings; still, none of the alternatives is better – or even as good as – proportionality itself. Having said that, there are elements of proportionality that should be refined and improved. The book examines and develops some key ideas to do so. Should these improvements be implemented, they would not affect the uniqueness of the concept. However, they may bring the concept of proportionality closer to the approach practiced in the United States.

Any review of the proportionality of a law which limits a constitutional right is based on a three-stage inquiry. In the first stage, one should examine the scope of the protected right. This stage deals with the boundaries of the constitutional right. In the second stage, the question is whether there is a justification to limit the right – i.e., whether the constitutional right's limitation is proportional. It examines the extent of the rights protection. This examination deals with the application of the four components of proportionality. The third stage – which does not deal directly with proportionality – occupies itself with the remedy, should the court decide that one of the components failed. It thus deals with the consequences of the unconstitutionality of a disproportional limitation on a constitutional right. This book is mostly occupied with the second stage (the proportionality of a limiting law). It does not examine the third stage (remedy). It does review the central tenets of the first stage (the right's scope), which are conditions for the application of the rules of proportionality. Accordingly, the book proceeds as follows:

The first part of the book reviews the scope of the constitutional rights (the first stage). The first chapter deals with the basic distinction in modern

²⁹ See below, at 72. ³⁰ See below, at 493.

Cambridge University Press

978-1-107-00858-8 - Proportionality: Constitutional Rights and their Limitations

Aharon Barak

Excerpt

[More information](#)

INTRODUCTION

9

constitutional theory between the scope of the constitutional right³¹ and the justification for its limitation.³² From this basic distinction, the notions of “relative rights” and “absolute rights” may also be drawn. The chapter analyzes these notions and emphasizes that most constitutional rights are relative – rather than absolute – in nature. That relativity entails that limitations may exist on their legal realization. The chapter analyzes the characteristics of these limitations and concludes with the examination of the question of whether a relative constitutional right is a *prima facie* right or a definite right. The second chapter reviews the parameters for determining the scope of the constitutional right. These parameters are interpretive in nature.³³ The chapter briefly discusses constitutional purposive interpretation, while emphasizing both the importance of the constitutional text (either explicit or implicit) and the constitutional purpose. The discussion stresses the importance of a comprehensive comparative perspective to these questions. The approach here is that a constitutional right should be examined through a “wide lens,” and that its scope should not be restricted due to considerations of either public interest or the constitutional rights of others. Both the public interest and the constitutional rights of others should be considered, but only in the next stage of the inquiry – that considering justifications for possible limitations on the right itself. The third chapter examines situations where one constitutional right conflicts with another. According to this approach, the solution to such a conflict is not on the constitutional level (the rights’ scope is not affected by the conflict); rather, the solution is in the sub-constitutional realm (that is, the constitutionality of the law limiting one constitutional right in order to protect the other may be affected).³⁴ The fourth chapter examines the conditions to determine that a law (statutory or common law) has in fact limited a constitutional right. Here, I review the distinction between limitations placed on a constitutional right and the amendment of a constitutional right.³⁵ The book’s first part ends with the fifth chapter, which analyzes the principle of legality according to which a limitation on a constitutional right must be carried out by a law whose authority can be traced back to the constitution itself (the “authority chain”). The chapter then reviews the special issues which arise out of a common law limitation upon a constitutional right.³⁶

The second part of the book examines more closely the nature, role, function, and origins of proportionality. The sixth chapter defines

³¹ See below, at 19.³² See below, at 20.³³ See below, at 45.³⁴ See below, at 87.³⁵ See below, at 99.³⁶ See below, at 118.

Cambridge University Press

978-1-107-00858-8 - Proportionality: Constitutional Rights and their Limitations

Aharon Barak

Excerpt

[More information](#)

proportionality and reviews several methods for the limitation of constitutional rights.³⁷ It examines situations where the constitution is silent about such limitations and where it explicitly acknowledges that rights can be limited by a law – but without saying anything else about the nature of such a law or the conditions it should meet. The conclusion is that in both situations such a law must be proportional. The chapter emphasizes the close connection between the constitutional right and its limitations. It highlights the importance of proportionality as the proper rule for evaluating both the justification for limitations on a constitutional right and the protection of constitutional rights. The chapter ends with an analysis of the “override” clause, which appears in several constitutional texts, and its relationship with proportionality. The seventh chapter reviews the historical origins of proportionality.³⁸ It follows the concept’s migration (or transplantation) – from its beginnings in Germany to Continental Europe and then on to the rest of the world. The eighth chapter examines the legal sources of proportionality³⁹ and specifically reviews four of them, namely: democracy, the rule of law, the shaping of a constitutional right as a principle, and constitutional interpretation. After analyzing each of these sources, my conclusion is that each may independently suffice to provide legitimacy to the concept of proportionality – but none is able to provide actual content to proportionality itself.

The third part is the book’s main part: It examines each of the components of proportionality. The ninth chapter examines the “proper purpose” component.⁴⁰ It examines its nature, legal sources, and content. The chapter differentiates between a purpose relating to the protection of the constitutional rights of others and one relating to the protection of the public interest, such as the continued existence of the state and its existence as a democracy, national security interests, public order, justice, tolerance, sensitivity to the feelings of others, and the promotion of objective constitutional values that reflect the subjective constitutional rights. The chapter then examines the degree of urgency regarding proper purposes and the ways to prove such in court. The tenth chapter examines the “rational connection” component.⁴¹ The chapter concludes with an assessment of the importance of this component. The eleventh chapter examines the “necessity” component. Here, the book reviews the nature of this requirement, its elements and importance.⁴² A considerable part of the discussion is dedicated to the question of “overbreadth” coverage and

³⁷ See below, at 133. ³⁸ See below, at 175. ³⁹ See below, at 211.

⁴⁰ See below, at 245. ⁴¹ See below, at 303. ⁴² See below, at 317.