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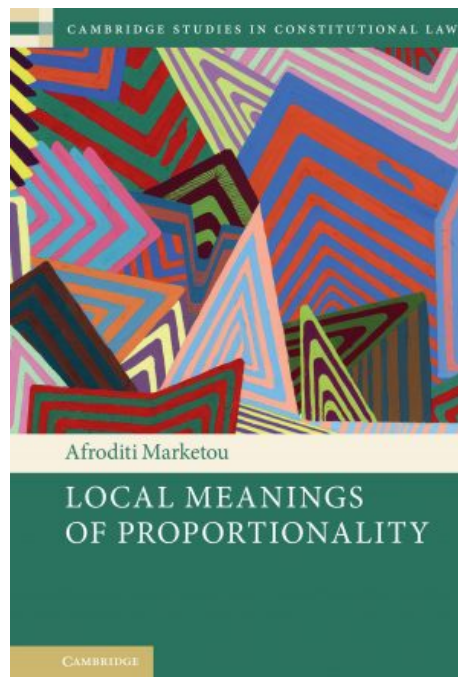
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Local Meanings of Proportionality: Exploring the Culturally Specific Logic of Proportionality in French, English and Greek Public Law

by Afroditi Marketou | July 2021



Proportionality increasingly dominates legal imagination. Its spread, accompanied by a global paradigm of constitutional rights, appears to be an irresistible natural development. Today, proportionality is perceived as a model of legal reasoning or even an emerging global grammar of constitutional adjudication.

During the last decades, it has been at the core of a prescriptive human rights theory first developed in the work of Robert Alexy and claiming universal application. In comparative law, proportionality is a commonly used example of a legal transplant that attests to the convergence between legal systems, if not globally, at least within Europe.

This book was inspired by the intuition that even though courts and lawyers around the world increasingly reason in proportionality terms, they do not necessarily apply the proportionality model, neither do they subscribe to the

in the use of proportionality. This is due to the widespread assumption that when legal actors around the world use proportionality terminology, they refer to the principle of proportionality as applied in Germany or to the model theorised by Alexy and his followers. Taking a different tack, I argue that identifying the different local meanings of proportionality is crucial to making sense of its spread, to assessing the success of the Alexyan model and to appraising the possibility of convergence between legal systems.

Following theoretical and methodological developments in comparative law, intellectual history and cultural anthropology, I propose to see proportionality as an instance of legal discourse, as a way of speaking that legal actors around the world have found convenient for formulating legal arguments. This entails a shift in the focus of research, from proportionality as a principle or a model of reasoning to proportionality as language. Through an in-depth study and comparison of the use of proportionality language by legal actors in France, England and Greece, this book shows that the different local meanings of proportionality reflect the legal cultures in which they evolve, local paths of cultural change and local patterns of Europeanisation.

Attention to judicial practice reveals that, even when received in different contexts, proportionality is not always used as a pronged framework for balancing constitutional rights neither does it necessarily have a standardising effect on legal cultures, as the mainstream literature seems to assume. Very often, structural features of the Alexyan proportionality model, like balancing or reasoning in prongs, are absent from judicial reasoning. In certain cases, it is even more fundamental features of proportionality that are missing. In its early version as the principle of the *bilan coût-avantages* in the French Council of State case law, for instance, proportionality was not directly connected to rights. In its version as the *contrôle de proportionnalité*, it

the local construction and evolution of proportionality. It is already apparent in the use of the transnational idiom of proportionality itself, which, before the 1970s, did not exist as a legal language in the contexts studied. That being said, local concepts, distinctions and taboos affect the version of proportionality that legal actors will adopt. Hence, proportionality is understood as a method of review in France, as a head of review in England and as an overarching principle in Greece. It is constrained by the taboo of *opportunité* in France and of *σκοπιμότητα* in Greece, while its spread was long hindered by the taboo of merits review in England.

Local versions of proportionality are not simply deviant or deficient applications of an ideal model. They express local imagination, myths, rituals and representations. Their examination unravels the different ways in which legal actors view the world from within the law. Local versions of formalism shape local 'legal formants' and set local criteria for evaluating legal arguments, according to which different versions of proportionality will succeed or fail to capture local legal imagination. For instance, proportionality as an arithmetic equation succeeded in providing a French theory of judicial balancing in the context of the *bilan coût-avantages* case law. However, it initially failed to do so in England. This is because, in contrast to their 'optimistic' civil law colleagues, common lawyers are doubtful as to the possibility of resolving moral-legal issues on the basis of facts and numbers. While in France, law is perceived as a kind of rational and scientific knowledge, in England, law represents an ensemble of fragmented commandments. In the common law, coherent legal knowledge is not obtained through theoretical constructions, but by reference to Parliament's will. As for Greek lawyers, they have their own original way for establishing coherence among legal fragments: through the translation of foreign theories and debates.

Legal knowledge and meaning are locally constructed. In the different settings studied, legal actors have attached

ming from other disciplines and has been expected to rationalise public policy choices. In England, proportionality has corresponded to a continental theory. As such, initially it was rejected by judges but promoted by anti-Diceyan scholars and lawyers, who aspired to rationalise the bits and pieces of the common law around standards of substantive justice. Finally, Greek legal theory has always conceived of proportionality as a transplant. Its transfer from Germany and Europe has been expected to modernise the Greek polity.

Proportionality expresses local paths of cultural change, local ways of expanding the reach of law and negotiating its autonomy with regard to other discourses. The reasons for its spread differ across jurisdictions. It has not always been about the optimisation of fundamental rights or about social integration of minorities. Proportionality enhanced the 'administrativisation' of constitutional law in France; the rise of common law constitutionalism in England; and the Europeanisation of Greek public law. While the themes of modernisation, rationalisation and Europeanisation have offered a common background to the evolution of proportionality, these terms themselves are understood very differently in different settings.

By exploring the culturally specific logic of proportionality discourse in France, England and Greece, *Local Meanings of Proportionality* seeks to unravel the worldviews and mentalities of the lawyers that use it. Beyond the transplant versus culture controversy, the book enriches our understanding of the relationship between law and its social context. Beyond the common law and civil law cleavage, it provides an in-depth comparison of French, English and Greek judicial review, rendering some core features of these systems accessible to non-initiated readers. The last part of the book provides insights as to the different visions of Europe underlying different phases of European integration and thus enriches our understanding of the process of integration through law.

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