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Proportionality and Constitutional Cultures in Europe: Reflections on a Comparative Law Approach

Afroditi Marketou*

This short paper, a work in progress, invites the reader to reflect on a particular approach on comparative law through the example of the principle of proportionality rhetoric. I will situate the comparative law and culture approach among the vast literature on proportionality and on comparative law and develop the main theoretical and methodological assumptions that underpin it. After presenting the mainstream discourse on proportionality and fundamental rights (1), I will explain how a comparative study of the practice of proportionality in national jurisdictions could serve as an empirical basis for articulating a counterargument (2). In the last section (3), I will briefly present the basic features of the “law and culture” approach in the comparative study of legal transfers and how such an approach is concretely applicable to the comparative study of domestic practices on proportionality.

1. The mainstream discourse: the spread of proportionality, its function in the global constitutionalism narrative and the role of comparative law

Born in German administrative scholarship at the end of 18th century, proportionality doctrine was elaborated and established as a method of judicial review with the creation of administrative courts. It migrated in constitutional law after the Second World War, in parallel with the process of “judicialization” of politics and of “constitutionalization” of private and administrative law. By the end of ‘60s, proportionality was consecrated as a constitutional principle in the jurisprudence of the Federal Constitutional Court. Germans conceived proportionality as a framework, a pronged-structure for balancing conflicting constitutional rights. In the following decades, courts in liberal constitutional democracies all over the world interpreted their constitution as guaranteeing the principle of proportionality. The doctrine, together with a new discourse on fundamental rights, spread in Europe and in many other places, such as Canada, Turkey, South America, South Africa, Israel and New Zealand. Except from the area of domestic public law, it is also applied in international and humanitarian law. During the ‘70s, the European Court of Human Rights and the European Court of Justice established proportionality as a necessary condition for the validity of rights’ limitations.¹

* Ph.D. researcher in Law, European University Institute; visiting researcher in Law, London School of Economics and Political Science.

¹ On the spread of proportionality, see Aharon BARAK, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge Studies in Constitutional Law (Cambridge: Cambridge University Press, 2012), 175–210. See also Alec STONE SWEET and Jud MATHEWS, “Proportionality Balancing and Global Constitutionalism,” *Columbia Journal of Transnational Law* 47 (2008): 97–111, who provide a strategic analysis of the success of proportionality doctrine.

Hence, we have entered the “age of balancing”² in constitutional law. Proportionality is “a universal criterion of constitutionality”,³ “a foundational element of global constitutionalism”⁴ and “a suitable candidate for construing a global grammar of constitutionality.”⁵ According to Möller, it is “the central concept in contemporary constitutional rights law”.⁶ Though the American exceptionalism still resists local pressures for its adoption, there is a general idea shared by constitutional lawyers that occidental democracies are converging to a common constitutional model, in which proportionality has a central role. Proportionality has become somewhat of a constitutional “*grande idée*”, a conceptual center-point for a global constitutional discourse.⁷

Proportionality’s “success” has generated enthusiasm and has led to far-reaching claims concerning its merits as a judicial method *per se*. At the level of legal practice, it is commonly considered a corollary to the rule of law, democracy and constitutionalism. In 1985, Alexy’s *Theory of Constitutional Rights*⁸ offered a comprehensive systematization of the proportionality doctrine and anchored it to a more solid theoretical background and to a new paradigm of fundamental rights. Alexy’s theory, still a reference for studying and debating proportionality, has found many defenders all over the world, who have refined it and developed it in many ways and adapted it to their legal context. Alexy and his followers purport to offer a reconstruction of the practice of constitutional courts, that is, an account that “fits” this practice while it coherently “justifies” it. They purport to describe a “proportionality structure” for assessing the impacts of public decisions on fundamental rights. This structure is deemed to be objective and neutral as to the particular substantial political moral theory that one adopts. They maintain that proportionality emphasizes the need for justification of public action and allows the judge to engage in a public practical reasoning that is structured and transparent. Thus, they tell us, proportionality leads to a better protection, to an “optimization”, of rights. Simultaneously, it favors the participation of individuals in the political process through their engagement in the judicial procedure.⁹ Of course many objections have been raised to this success story.¹⁰ Yet, they remain an exception to the general wave of enthusiasm for “one of the

² Alexander ALEINIKOFF, “Constitutional Law in the Age of Balancing,” *Yale Law Journal* 96, no. 5 (April 1987): 943–1005.

³ David M. BEATTY, *The Ultimate Rule of Law* (Oxford; New York: Oxford University Press, 2004), 162.

⁴ STONE SWEET and MATHEWS, “Proportionality Balancing and Global Constitutionalism,” 160.

⁵ Matthias KLATT and Moritz MEISTER, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012), 3.

⁶ Kai MÖLLER, “Balancing and the Structure of Constitutional Rights,” *ICON* 5, no. 3 (2007): 13.

⁷ Clifford GEERTZ, *The Interpretation of Cultures: Selected Essays*, 2000 ed (New York: Basic Books, 2000), 3, citing Susanne Langer.

⁸ Robert ALEXY, *Theorie der Grundrechte*, Suhrkamp, 1985.

⁹ See for example the work by Mattias KUMM, “Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement,” in *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart, 2007), 131; “The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review,” *Law and Ethics of Human Rights* 41, no. 2 (2010): 141.

¹⁰ See for example Stavros TSAKYRAKIS, “Proportionality: An Assault on Human Rights?,” New York School Jean Monnet Working Paper Series, no. Paper 9 (2008), www.JeanMonnetProgram.org.

most successful legal transplants in the second half of the twentieth century”.¹¹

Much more than a “correct” method of judicial reasoning, in Alexy’s theory, balancing and proportionality are deemed to be a *conceptual necessity* for the application of constitutional principles.¹² Beatty has gone so far as to characterize proportionality the ultimate rule on which the whole legal system is based.¹³ Barak argues that, “while proportionality is not the only way to realize constitutional rights, it is by far the best way available.”¹⁴ In other words, there is a tendency to perceive proportionality as the most adequate method for human rights adjudication, if not *the only* adequate method. Its non-application or its deviant application in comparison to Alexy’s model, or to the German model more generally, are perceived as *pathologies*. They are imputed to institutional or other particularities of the system where proportionality operates. They must be overcome insofar as they impede the effective protection of fundamental rights.

Comparative research plays an important role in the proportionality rhetoric, since it purports to offer an empirical basis for its claims.¹⁵ However, the methodology of mainstream comparative studies on the matter is quite poor and seems to be lacking any plausible epistemological basis. Scholars are usually limited to a frantic search for similarities, only selecting examples that confirm their hypotheses in a “cherry picking” way,¹⁶ and even distorting the meaning of local practice in their attempt to cram it into the pre-constructed categories of their coherent reconstructions. The only theoretical assumption underpinning such studies is that of an unsophisticated functionalism. Taking for granted a common function and meaning for law and the legal discourse in the systems they study, functionalist scholars suggest that similar problems could receive similar answers and comparative study should be committed either to the search for the best solution in every case or to the explanation and prevision of difference according to a list of variable factors. This kind of unsophisticated functionalism is often combined with a wider universalist conception of law, society and moral values.¹⁷

¹¹ Mattias KUMM, “Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. A Review Essay on A Theory of Constitutional Rights,” *International Journal of Constitutional Law* 2, no. 3 (July 1, 2004): 574, 595.

¹² Cf. Robert ALEXY, *A Theory of Constitutional Rights*, trans. Julian RIVERS (Oxford; New York: Oxford University Press, 2002), 66 ff.; Robert ALEXY, “Constitutional Rights, Balancing and Rationality,” *Ratio Juris* 16, no. 2 (June 2003): 131–40. This necessary connection between principles and proportionality balancing has been criticized by MÖLLER, “Balancing and the Structure of Constitutional Rights,” 458. Aharon BARAK also rejects the necessity of the connection between balancing and principles. Cf. *Proportionality*, 240–1.

¹³ BEATTY, *The Ultimate Rule of Law*.

¹⁴ BARAK, *Proportionality*, 226.

¹⁵ Cf. for example BARAK, *Proportionality*; Kai MÖLLER, *The Global Model of Constitutional Rights*, Oxford Constitutional Theory (Oxford: Oxford University Press, 2012).

¹⁶ Ran HIRSCHL, “The Question of Case Selection in Comparative Constitutional Law,” *The American Journal of Comparative Law* 53, no. 1 (Winter 2005): 153.

¹⁷ For an interesting account and evaluation of functionalist approaches, cf. Michele GRAZIADEI, “The Functionalist Heritage,” in *Comparative Legal Studies: Traditions and Transitions*, ed. Pierre LEGRAND and R. J. C. MUNDAY (Cambridge, U.K.; New York: Cambridge University Press, 2003), 100–127. The most well-known and influential functionalist comparative study is the one by Konrad ZWEIGERT and Hein KÖTZ, *An Introduction to Comparative Law* (Amsterdam; New York: North-Holland Pub., 1977).

Proportionality scholars often seem to share these assumptions in their studies. For example, Schlink affirms that “[t]here is nothing inherently German about the roots of the principle of proportionality, nor is the introduction of the principle into other constitutional contexts a transfer of a German principle. It is a response to a universal legal problem.”¹⁸

2. *A counterargument: proportionality and constitutional cultures, even in Europe*

Functionalist approaches have been subject to vigorous criticism in comparative private law and in theory of comparative law, and not without reason. Most reactions are raised from the proponents of an “expressivist” comparative trend, which has found its most extreme expression in Legrand’s “European Legal Systems are Not Converging.”¹⁹ First of all, at a level of legal dogmatics, functionalism is attacked for poorly describing practice. This is mainly due to its lack of consideration of difference, rejecting anything that controverts its presumptions and categorizations. From a normative point of view, functionalists are accused for a tendency of occidento-centrism; that is, a tendency to perceive occidental values and rules as natural and universal, and thus wanting to impose them to other peoples in the name of “modernization”, “harmonization” or “globalization”. Thus, functionalism fails to sufficiently respect and account for “the Other”. At a more philosophical level, the instrumental view of rules, law, and comparative law shared by functionalists has been criticized as too reductionist and as totally neglecting law’s particular connection with local sentiments and traditions, in other words, law’s its symbolic value and local meaning.²⁰

However, as far as proportionality is concerned -if not constitutional law more generally- the cultural turn in comparative legal studies has not received sufficient attention.²¹ No one would negate, though, that culture affects the form that proportionality will take in a

¹⁸ Bernhard SCHLINK, “Proportionality (1),” in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel ROSENFELD and András SAJÓ (Oxford, UK: Oxford University Press, 2012), 729.

¹⁹ Pierre LEGRAND, “European Legal Systems Are Not Converging,” *International & Comparative Law Quarterly* 45, no. 1 (1996): 52–81. For a critical reading of Legrand’s approach cf. David NELKEN, “Comparatists and Transferability,” in *Comparative Legal Studies: Traditions and Transitions*, ed. Pierre LEGRAND and R. J. C. MUNDAY (Cambridge, U.K.; New York: Cambridge University Press, 2003), 440 f., where also an interesting account of the relevant debates. See also David NELKEN, “Using Legal Culture: Purposes and Problems,” in *Using Legal Culture*, ed. David Nelken, JCL Studies in Comparative Law, no. 6 (London: Wildy, Simmonds & Hill, 2012), 1–51.

²⁰ See for example, NELKEN, “Comparatists and Transferability,” 440 f.; Roger COTTERRELL, “Is It so Bad to Be Different? Comparative Law and the Appreciation of Diversity,” in *Comparative Law: A Handbook*, ed. Esin ÖRÜCÜ and David NELKEN (Oxford; Portland, Or: Hart, 2007), 133–54; Gunther TEUBNER, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences*, 61 *Modern Law Review* 11 (1998). Cf. also Roger COTTERRELL, “Comparative Law and Legal Culture,” in *The Oxford Handbook of Comparative Law*, ed. Mathias REIMANN and Reinhard ZIMMERMANN (Oxford: Oxford University Press, 2006), 710–37.

²¹ See, as exceptions, the interesting paper by Vlad PERJU, *Constitutional Transplants, Borrowing, and Migrations*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, January 9, 2012), <http://papers.ssrn.com/abstract=1982230>; Margit COHN, “Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom,” *American Journal of Comparative Law* 58 (2010): 583.

particular legal system, as proportionality affects certain features of the local culture. More generally, what the mainstream approach impedes us from seeing is the particularity and contingency of proportionality as they describe it. The fact that law is seen as balancing, as well as the fact that proportionality is chosen as a method for balancing, *in itself* is not neutral. It constrains in a particular way legal argumentation, as it creates new possibilities for it. Most importantly, it has a symbolic value, a *meaning* of its own. This should be a main concern of comparative research focused on the legal transfer of proportionality. That is, to show that proportionality as described in the Alexyan theory is neither the only nor the best way of fundamental rights adjudication; it is nothing but *a* method, a form of discourse connected to a particular, transnational cultural context.

Lately there is indeed a tendency in scholarship to move away from the universalist vision of human rights, balancing and proportionality and to pay more attention to their local meanings. This is illustrated in recent books and articles by Bomhoff²² and Cohen-Eliya and Porat,²³ as well as the recently published volume on human rights, edited by Douzinas and Gearty.²⁴ The quality of these contributions confirms the value of a law and culture approach in comparative legal studies. Yet, the interest of a research on proportionality in particular still persists, since the majority of them concerns human rights and balancing more generally.²⁵ When analyzing proportionality as a method of balancing, the above studies usually refer to a common European model, due to their focus on the American exceptionalism. Thus, they fail to shed light to the differences that exist *among European systems as well* in the application of proportionality. Moreover, the adoption of an internal point of view in the investigation of domestic proportionality discourses, though coherent with their theoretical and epistemological premises, impedes these scholars from considering the role of influence and legal transfers in the expansion of proportionality rhetoric. Contemporary proportionality literature lacks case studies of the transfer of proportionality terminology in national legal systems. Such studies could be valuable since they are able to provide the empirical basis of a counterargument to the rhetoric on proportionality as a global constitutional “grammar”. They are able to show that proportionality is not a uniform and coherent doctrine, expanding in liberal constitutional democracies around the world and enhancing judicial protection of fundamental rights.

²² Jacco BOMHOFF, “Genealogies of Balancing as Discourse,” *Law & Ethics of Human Rights*, no. 4 (April 2010): 108; J BOMHOFF, *Balancing Constitutional Rights the Origins and Meanings of Postwar Legal Discourse* (Cambridge: Cambridge University Press, 2013).

²³ Moshe COHEN-ELIYA and Iddo PORAT, *Proportionality and Constitutional Culture*, Cambridge Studies in Constitutional Law (Cambridge: Cambridge University Press, 2013).

²⁴ Costas DOUZINAS and C. A. GEARTY, eds., *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (Cambridge: Cambridge University Press, 2014).

²⁵ Proportionality, as a special part of the human rights narrative and as a special framework for balancing, has certain particularities that render its study important, also because of its central role in the fundamental rights and global constitutionalism rhetoric. These are, for example, its formalist origins in Prussian Administrative scholarship, its pronged structure and its scientific terminology. Limiting the study to proportionality is useful at a pragmatic level as well, since it makes its observation, description and comparison easier.

This image is not accurate even for Europe, though the pressures for the adoption of proportionality here have taken a legal-institutional form, through the case law of the ECJ and the ECHR. Even though proportionality terminology is adopted in most, if not all, European domestic contexts, different legal cultures affect proportionality's meaning, form and function differently. Different versions of proportionality observed at the level of domestic practice are not just aspects or imperfect concretizations of a platonic proportionality ideal. "In spite of their identical *nom propre* they are purely internal constructs of each discourse involved. (...) They do not create a new unity of the separate discourses involved, they only link them transcending the boundaries but respecting, even reaffirming them."²⁶ Proportionality, being flexible and indeterminate, reveals the intrinsic logic of the discourse in which it partakes, while it makes easier the observation of variance from one system to another. Differences in the practice of proportionality by courts, then, should be taken seriously, as they can offer important information on local conceptions, meanings, values, *mentalités*. This focus on the concept of culture, further, allows the connection of the research with current theoretical and methodological debates in comparative private law, as well as with developments in other disciplines, especially anthropology and intellectual history.

The pressures for transformation are not only directed one-way, exercised by cultural structures to the proportionality doctrine. Inversely, the use of proportionality transforms the local culture as well, and it does so in many different ways, depending on the context. Most importantly, I claim that the adoption of proportionality by courts should not be spontaneously celebrated as the first step of a convergence or modernization process. It should not be spontaneously deemed to increase judicial protection of fundamental rights or transparency of judicial reasoning. Nor should it be automatically criticized as a danger for legal certainty and democratic decision making. Each local version of proportionality should be studied and evaluated *on its own*, since in every case it can be connected to different arguments and functions, to different assumptions and symbols, to different outcomes and ideologies. In other words, proportionality is expected to affect in a different way the preexisting practice, to transform differently the local discursive culture. In each context proportionality can be linked to a particular legal ideology, for example one of legal deregulation, or to particular values and ideals, like for example modernization. Scholars' expectations from proportionality's use will be fulfilled or not, to a large extent, *because* of the connection of proportionality to local meanings, sentiments, ideologies and values. To see, then, proportionality's links to each particular legal culture is to better make sense of the differences in its application, of its local "success" or "failure".

²⁶ Gunther TEUBNER, "Two Faces of Janus: Rethinking Legal Pluralism, The," *Cardozo Law Review* 13 (1992 1991): 1458. Teubner refers to the "essential contested" concepts and processes. Though he refers to concepts received in the legal discourse by other discourses, his analysis can be transposed to legal transfers between different national legal systems.

Central questions of the type of study I propose are: How has proportionality been adopted in national jurisdictions? What reactions has it provoked and what are the arguments in favor and against its use? How is its conception by local actors different from the “ideal-type” proportionality described in scholarship and how has this conception evolved over time? Moreover, how does proportionality influence domestic practice in fundamental rights adjudication? What local features of the legal discourse does it irritate or replace? What are the relative advantages and failures of proportionality compared to alternative arguments available in the local discourse? How is proportionality connected to the meaning of fundamental rights and their judicial protection?

3. *Law, culture and legal transfers*

At this point it is useful to clarify certain fundamental assumptions underlying the type of comparative research proposed. I argue that one useful way to understand legal transfers and proportionality in particular is to see them as instances of legal discourse. As such, they operate in the context of a specific *milieu* or intellectual community,²⁷ which shares a specific legal culture. Under this approach, the objective of comparative legal studies is to interpret legal concepts and arguments, to make sense of their use in every case, in short, to reconstruct law’s *meaning*. Concerning legal transfers in particular, the objective of the comparison is also to identify how the transfer interacts with other already existing concepts and arguments in the local discourse and how its meaning changes when it operates in a different context. In other words, the study of legal transfers, like intellectual history, focuses on discursive change.

Therefore, the study proposed implies an important distinction between linguistic forms (particular terms) and their substantive content (their meaning). Just as the term “personality” means different things in law than in social life, identical terms can have different meanings in different *legal* contexts as well. This fundamental distinction is connected to another one, well-known to realists but not so common among scholars adopting an internal point of view to the legal system that they study: the distinction between argument and process of reasoning. Following Bomhoff, one should note that, when judges use proportionality, it does not mean that they *think* under the proportionality framework, as when they do not use any argument does not mean that they do not think at all.²⁸

²⁷ The *milieu*’s boundaries are not necessarily defined by national or state boundaries, though it can be the case (French constitutional lawyers). It can also be supranational (EU lawyers), transnational (proportionality scholars), or intra-national (Scottish lawyers or civil lawyers in Greece). I borrow the vocabulary from Brett. Cf. Annabel BRETT, “What Is Intellectual History Now?,” in *What Is History Now?*, ed. David CANNADINE (New York: Palgrave Macmillan, 2002), 113–31.

²⁸ BOMHOFF, “Genealogies of Balancing as Discourse.”

Legal culture, as the forms and structures of legal discourse, the commonly shared criteria, assumptions, sentiments and conceptions, the source and limits for legal argumentation, provides law with its meaning. It is tightly connected to other forms of culture and has a function of mediation between the legal discourse and the socio-historical context surrounding it. It expresses a particular world view and mentality of the people who share it; it reflects the myths of society.²⁹ Following Geertz, I use the concept of culture in a particular sense, though I am aware that it is not the only possible one. Culture, thus, is the “webs of significance” that people create, develop, change and communicate in order orient and give meaning to their actions and their experience of the world in general.

As interworked systems of construable signs (what, ignoring provincial usages, I would call symbols), culture is not a power, something to which social events, behaviors, institutions, or processes can be causally attributed; it is a context, something within which they can be intelligibly—that is, thickly-described.³⁰

In other words, legal culture has not a causal, explanatory function but it is a context where legal discourse makes sense. Therefore, I do not see legal culture as comprising the patterns of behavior of legal actors or the legal sensitivity of social actors, though these features can be useful in the identification and interpretation of the symbols constituting culture.

The Alexyan theory of proportionality can then be described as a transnational narrative shared by an epistemic community of legal scholars and actors in various legal systems. It incites courts, practitioners and sometimes the legislator and all decision-making bodies, to adopt a specific form of argumentation, whose main trait is a specific vocabulary and grammar (“proportionate”, “necessary”, “appropriate”, etc.). This form of argumentation is what these scholars and actors call “proportionality”. Thus, in this discourse proportionality has a *specific* meaning and function: it is a neutral structure for reasonable and transparent decision making and justification of public action. Moreover, it represents a particular conception of rights, law and judicial review: what Kumm has called the “rational human rights paradigm” and the “turn to justification”.³¹ This discursive context operates as a source for legal argumentation while at the same time constrains legal arguments to certain limits; in other words, it reflects a particular *legal culture*. Yet, the contingency of proportionality’s meaning and of its surrounding culture is ignored by the participants in this mainstream discourse. Proportionality rhetoric, together with the more general fundamental rights rhetoric in which it partakes, announces “an a-historical society based on universal standards.”³²

²⁹ LEGRAND, “European Legal Systems Are Not Converging.”

³⁰ GEERTZ, *The Interpretation of Cultures*, 13.

³¹ Mattias KUMM, *Democracy Is Not Enough: Rights, Proportionality and the Point of Judicial Review*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, March 11, 2009), <http://papers.ssrn.com/abstract=1356793>.

³² Horatia MUIR-WATT, “Globalization and Comparative Law,” in *The Oxford Handbook of Comparative Law*, ed. Mathias REIMANN and Reinhard ZIMMERMANN (Oxford: Oxford University Press, 2006), 729.

This universalist trend is thus characterized by a confusion between terminology and meaning: proportionality is deemed to mean the same thing in different historical, political and social contexts, from its emergence in the reasoning of the Prussian Administrative Court to its application in the CJEU citizenship case law. However, a study of the application of proportionality in European domestic contexts shows that, while the principle generally comprises more or less the same prongs, the particular form that it takes varies, even within the same legal system, among its various domains. When inserted to each system, proportionality, together with the “cultural baggage”³³ that accompanies it, interacts with already existing cultural structures, forms and symbols. These enjoy a distinct symbolic value and themselves have a function and meaning in the domestic discourse. Proportionality thus is transformed and moves away from the model described by proportionality defenders, while it affects itself the pre-existing legal structures, forms and symbols. And while in most European countries proportionality is perceived as an element of openness of the legal system to developments beyond national borders, its local *meaning* is still very different. This is because openness provokes itself different reactions and sentiments in different systems. Even more, the local meaning of proportionality depends on the way the domestic scholarship evaluates its contribution to what are perceived as the fundamental challenges for law in the system. These are history and system specific. In France, a fundamental challenge for public action is to establish the separation of powers and to ensure formal equality; in Greece it is to establish representative democracy; in the UK it is constitutional modernization.

Contrary to the transnational narrative, in short, I claim that proportionality is a *particular* form of discourse, characterized only by a special terminology (“proportionate”, “appropriate”, “necessary” etc.) and not by a specific meaning. When inserted to a particular legal system, proportionality’s meaning inevitably changes, since its surrounding context changes.

Law’s meaning is public; it does not always coincide with what legal actors have in mind when formulating legal arguments nor with what the addressees of these arguments finally understand. What every individual actor wants to show or hide when formulating certain arguments, the *motives* of legal actors, is not an object of investigation, at least at a first stage. As Brett neatly observes, “[t]he publicity of language defies its complete appropriation to the purposes of any individual agent.”³⁴ Let’s take the example of an immigrant, married to a UK citizen and expelled according to UK immigration legislation. When the individual contests this public decision before the judge as a disproportionate restriction to his or her right to family life, the judge might decide under the framework of proportionality that the restriction is not disproportionate, because immigration policy is a constitutional competence, delegated by Parliament to the immigration officer who took the reviewed decision. It might be that more generally the judge is

³³ COHEN-ELIYA and PORAT, *Proportionality and Constitutional Culture*, 134.

³⁴ BRETT, “What Is Intellectual History Now?,” 123.

ideologically in favor of a conservative immigration policy and covers his or her decision by using the proportionality framework in a deferential way. It might even be that he or she did not like the particular individual's nose. The judge's reasoning, however, as expressed in the judicial decision, will tell us nothing about it in most cases. Fortunately, the judge's private beliefs on immigration or noses, complicated and difficult to uncover as they are, are *not* the object of the comparative study proposed.

This is a fundamental difference with institutional or political analyses of law that seek social or political reasons behind judicial decisions and legal discourse more generally. Taking a more contextualist point of view, I consider that the meaning of an argument can be reconstructed by taking into account the *possibilities* of the discourse in which this argument is inserted, in the particular historical context in which the argument is expressed.³⁵ However, albeit public, the meaning of legal arguments is not universal; instead, it is relative, depending on what local actors perceive as the main functions of the legal discourse and on how they evaluate the contribution of the argument to these functions, compared to alternative arguments. So, in order to understand the meaning of an argument it is important to identify the local criteria for evaluation, to examine how legal actors react to the argument according to these criteria and how they distinguish it from alternative arguments.³⁶ For example, in the UK proportionality has been perceived as a judicial method *different* or even opposite to *Wednesbury* unreasonableness. Variably but coherently applied, it was for long deemed to express a request for equity and fairness in administrative law that the pragmatic application of the *Wednesbury* standard could not express.

Things get more complicated, since the proportionality doctrine and the more general fundamental rights rhetoric of which it is part usually *add themselves another local criterion* of evaluation of legal arguments: the protection of fundamental rights. Indeed, in the domestic sphere just like in the transnational context, proportionality is perceived and promoted as a principle of protection of fundamental rights, as an expression of the turn to justification, or as a principle opening up the domestic legal system to other discourses. In other words, proportionality's spread and success as a terminology in domestic legal contexts is closely connected to the success of *the particular transnational perception* of proportionality promoted by Alexy and his followers.³⁷ In

³⁵ The importance of the context has been defended by a contextualist approach in intellectual history, mainly expressed in the works of Skinner and Pocock.

³⁶ Jacco BOMHOFF, "Comparing Legal Argument," in *Practice and Theory in Comparative Law*, ed. Maurice ADAMS and Jacco BOMHOFF (Cambridge; New York: Cambridge University Press, 2012), 74 f.

³⁷ Yet, how do we make things comparable? Namely, if law, legal culture and the meaning of proportionality are locally specific, how can we make abstractions and say that certain forms of argument are part of the "transnational proportionality rhetoric" in all the systems studied? Following Bomhoff, a "minimally functionalist" approach, presuming a shared *substantial* content between legal discourses in the various systems, is necessary in order to make the comparison possible ("Comparing Legal Argument", cited above). While the choice of the countries makes it easy to accept certain arguments as legal, certain persons as judges and certain texts as judicial decisions in all the systems studied, the problem still remains for proportionality.

these cases, the spread of proportionality indeed leads to a certain convergence of the legal cultures that it affects. However, the “automatically” positive evaluation of proportionality in the systems in which it is received is based on another fundamental confusion: between argumentation and reasoning. The defenders of proportionality in domestic systems contend that, when judges or other public authorities use proportionality, they also *reason* under the proportionality framework, which leads them to take seriously fundamental rights. Nonetheless, this should not be taken for granted. The particular function and outcomes of proportionality finally depends on its connection with legal ideologies, which are locally and culturally specific. Therefore, despite the superficial convergence, local differences remain and always find ways of expression; they might be expressed in the particular form of application of proportionality or in the particular meaning of other surrounding concepts, like fundamental rights or balancing.

Like all comparative studies focused on culture, the enquiry proposed fluctuates between the internal and the external point of view, the functional and the symbolic, the form and the substance, the static and the dynamic, the generalization and the particularity in the theoretical “translation” of cultural constructions. Limits are negotiated continuously. The comparison of domestic European cases, however, is worth it. It unfolds the domestic legal culture as a factor affecting practice but also as an aggregate, affected by dominant ideologies.³⁸ This polyvalent nature of legal culture impacts upon the meaning and outcomes of proportionality in every case and relativizes enthusiasm for what is considered one of the most “successful” transplants in contemporary constitutional law.

³⁸ For the distinction between culture as a variable and culture as an aggregate, see again the work of NELKEN (n 20).