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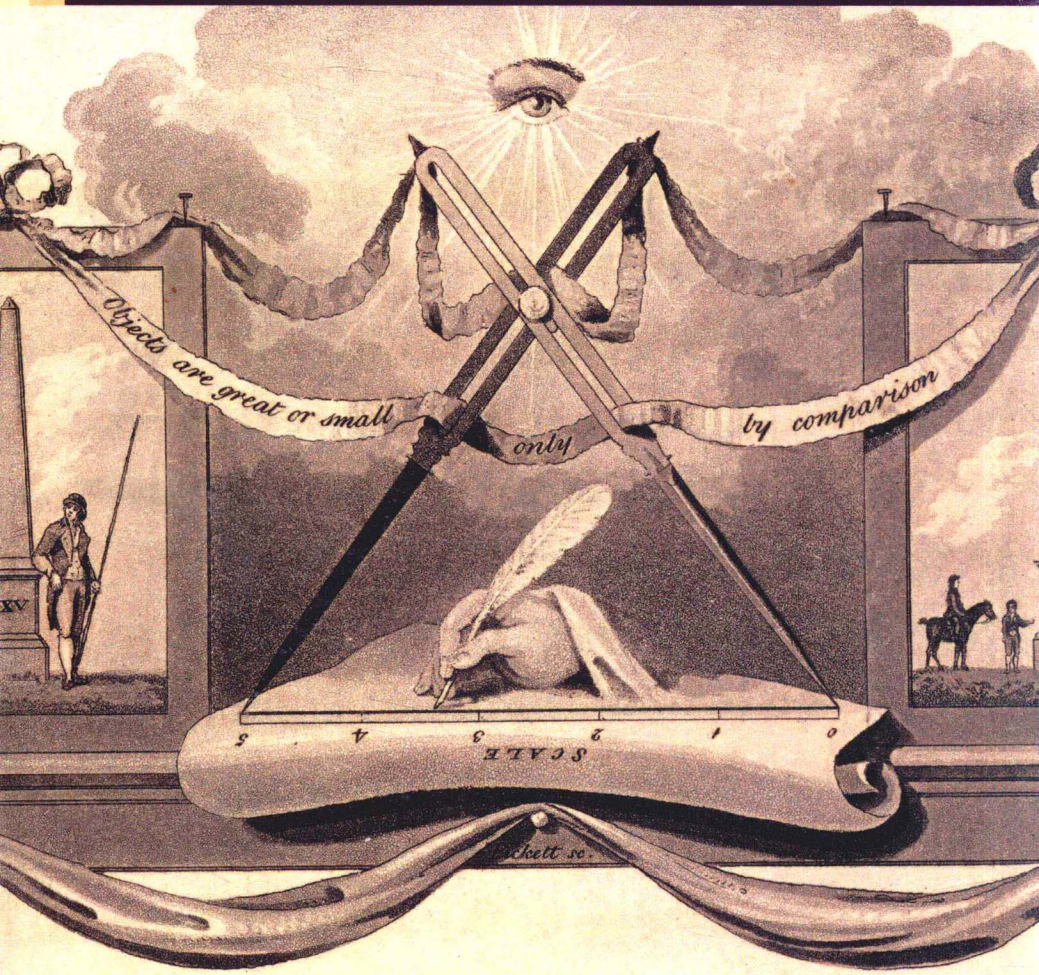

Moshe Cohen-Eliya and Iddo Porat

PROPORTIONALITY AND CONSTITUTIONAL CULTURE

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In this book we draw on several of our prior writings. Chapter 1 draws in a small part on "American balancing and German proportionality: the historical origins" (2010) 8 Inst. J. of Const. L. 263. Chapter 2 draws heavily on the same article. Chapter 3 relies heavily on "The hidden foreign law debate in Heller: proportionality approach in American constitutional law" (2009) 46 San Diego Law Review 367. Chapter 5 draws on segments of our "Judicial minimalism and the double effect of rules and principles" (2012) 26 Canadian Journal of Law and Jurisprudence 283, and Chapter 6 draws heavily on "Proportionality and the culture of justification" (2011) 59 American Journal of Comparative Law 463. We thank the publishers for their permission to draw liberally from these pieces.

CONTENTS

Introduction

American constitutional lawyers have been asking themselves in recent years more and more whether US constitutional law is as relevant and influential in the global scene as before.[1] They are worried at what some term the waning influence of American constitutional law, and the apparent rise in influence of other legal systems – in particular Germany, Canada and the European Union – as the focal point for inspiration and emulation by emerging constitutional systems.[2] This question is related to two other questions that have preoccupied American constitutional law in the past decade or so – whether American constitutional law is exceptional in being fundamentally different than other constitutional systems,[3] and whether American constitutional lawyers and judges should look at foreign law when interpreting and applying the American Constitution.[4]

[1] See, e.g., Adam Liptak, "US court is now guiding fewer nations" (2008) *New York Times*, September 18, 2008 (quoting Princeton Professor Anne-Marie Slaughter: "[O]ne of our great exports used to be constitutional law. We are losing one of the greatest bully pulpits we have ever had.").

[2] David Law, "The declining influence of the United States Constitution" (2012) 87 N.Y.U.L. Rev. 762.

[3] Such resistance is often termed "American exceptionalism," a coinage that can be traced back to Alexis De Tocqueville, *Democracy in America* (J.P. Mayer ed., George Lawrence trans., New York: Anchor Books, 1969) 455–6 (1835). The literature on American exceptionalism is vast. See, e.g., Steven G. Calabresi, "'A shining city on a hill': American exceptionalism and the Supreme Court's practice of relying on foreign law" (2006) 86 B.U. L. Rev. 1335; Harold Hongju Koh, "On American exceptionalism" (2003) 55 Stan. L. Rev. 1479, 1483; Michael Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton, NJ: Princeton University Press, 2005); Georg Nolte (ed.), *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005) 49.

[4] Compare Anne-Marie Slaughter, "A global community of courts" (2003) 44 Harv. Int'l L.J. 191, 201–2; Jeremy Waldron, "Foreign law and the modern ius gentium" (2005) 119 Harv. L. Rev. 129 with Richard Posner, "No thanks, we already have our own laws" (July–August 2004) Legal Aff. 40; Charles Fried, "Scholars and judges: reason and power" (2000) 23 Harv. J.L. & Pub. Pol'y 807, 819.

While these questions seem to preoccupy recent American constitutional literature, an entirely different set of questions dominates European constitutional literature. European constitutional lawyers are concerned predominantly with one thing – proportionality! Whether you are a German constitutional lawyer, an Italian, a French or an English one, you will invariably have been debating and talking about the proportionality doctrine as part of your work. Indeed not only if you are a European scholar. This would probably be true if you were a Canadian, Australian, Indian, Israeli, or a Chinese lawyer. Almost every discussion of constitutional law in these countries seems to touch at some point on proportionality, and the academic literature on proportionality has by now spawned a plethora of articles and books.[5]

Proportionality is a German-bred doctrine that structures the way judges decide conflicts between rights and other rights or interests, basically requiring that any interference with rights be justified by not being disproportionate. It consists of four (or three, depending on your perspective) stages: whenever the government infringes upon a constitutionally protected right, the proportionality principle requires that the government show, first, that its objective is legitimate and important; second, that the means chosen were rationally connected to achieve that objective (suitability); third, that no less drastic means were available (necessity); and fourth, that the benefit from realizing the objective exceeds the harm to the right (proportionality in the strict sense). In addition to its simplicity, two important features of proportionality also stand out: it is standard-based rather than categorical, and it is results-oriented rather than being a formal and conceptual doctrine.

Due in part to these characteristics, proportionality has spread dramatically into national legal systems far and wide and is considered to be one of the most prominent instances of the successful migration of constitutional ideas. As we will show in Chapter 1, within a few decades, it traveled from its original birthplace in Germany, through the

[5] To mention just a few: Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, Julian Rivers trans., 2002) 66; Nicholas Emiliou, *The Principle of Proportionality in European Law; A Comparative Study* (London: Kluwer, 1996); David Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004); Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge: Cambridge University Press, 2009); Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012); Aaron Baker, *Proportionality under the UK Human Rights Act (Human Rights Law in Perspective)* (Oxford: Hart Publishing, 2012).

jurisprudence of the European Court of Human Rights (ECtHR), to all of Western Europe and Canada, followed by its widespread adoption in Eastern Europe, Latin America, and many legal systems elsewhere, such as South Africa, Israel, and India. In most of the adopting legal systems, moreover, proportionality has been incorporated as a central method of constitutional analysis. It is viewed as infusing coherence into the entire constitutional system, applicable to all types of rights and interests, and spreading sometimes even to other branches of the law.

The two constitutional discourses – the American and the European/global one – seem therefore almost disconnected. The literature on proportionality usually does not draw on US experience and literature, as US law does not use the proportionality test, and the American discussion on foreign law and on its exceptionalism usually does not discuss proportionality and, instead, concentrates on differences between the USA and Europe in terms of specific rights and their interpretation. Indeed proportionality, despite its immense importance outside the USA, hardly appears as a central issue in American legal academic literature.[6]

This book is an attempt to bridge this gap and talk to both the European and American audiences. It does so by comparing proportionality to its counterpart in American constitutional law – balancing. While not as structured as its European counterpart, and consisting of only one stage the American balancing test which, as its name suggests, consists of balancing rights with other rights and interest, captures the same basic function as proportionality, and is identical with the most important stage of proportionality (proportionality in the strict sense).

The book attempts to do something that is missing in both American and European current literature. It seeks to provide a comprehensive and culturally sensitive comparison between these two pivotal doctrines, including a discussion of their analytical similarities, historical origins, and embeddedness within their respective political and philosophical culture – the US culture (for balancing) and the German culture (for proportionality).

This comparison reveals fascinating lessons on the influence of context, history, and culture on the understanding of these two central legal

[6] For rare such instances see Vicki C. Jackson, "Being proportional about proportionality" (2004) 21 Const. Commentary 803; Alec Stone Sweet and Jud Mathews, "Proportionality, balancing and global constitutionalism" (2008) 19 Colum. J. Transnat'l L.72, 162; Alec Stone Sweet and Jud Mathews, "All things in proportion? American rights doctrine and the problem of balancing" (2011) 60 Emory L.J. 101.

concepts and, conversely, also illuminates the differences between the two constitutional cultures as they are reflected through the differences between the two doctrines. Our conclusion would be that despite important analytical similarities, legal, political and philosophical culture in America and Germany, bring about quite a different understanding and role for balancing and proportionality within their respective cultures.

The comparison also reveals important lessons with regard to projects of universalization and convergence in constitutional law and with regard to the unresolved tension in constitutional law between universalism and particularism. Proportionality is the archetypical universal doctrine of human rights adjudication. Although obviously varying in different countries and settings, its main aspiration and leading characteristic is its ability to spread and its universal applicability and straightforward structure. Going back to the issues that preoccupy American constitutional lawyers, American exceptionalism, and the wariness that the USA is losing its constitutional dominance in the global arena, these issues are related to the American reluctance to adopt proportionality and join the global move towards convergence and coherence around this doctrine. The fact that the USA does not adopt proportionality could be one of the reasons for its waning influence on other constitutional systems, as they cannot communicate with American jurisprudence in the same constitutional language. Particularly owing to the fact that the USA does have a similar doctrine – balancing – universalists see this American reluctance as based on parochialism, isolationism, and the maintaining of unnecessary barriers for US global integration. Some early signs on the side of the judiciary may also attest to a willingness to see American law as already comprising proportionality, therefore making its adoption much easier. As US Supreme Court Justice Breyer wrote in 2008: "Contrary to the majority's unsupported suggestion that this sort of 'proportionality' approach is unprecedented, the Court has applied it in various constitutional contexts, including election-law cases, speech cases, and due process cases."[7]

Our analysis, however, stresses the embeddedness of both balancing and proportionality within their respective legal and political cultures and, therefore, can both provide reasons why the convergence has not occurred as of yet, and also information about the difficulties of such

[7] *District of Columbia* v. *Heller*, 554 US 570, 690 (2008) (Breyer, J., dissenting).

possible convergence, and the possible ramifications it might have for the adopting legal system.

Before moving on to discuss the content of the various chapters we wish to make some preliminary points about the structure of the book and some of the choices that we have made. Several chapters of this book are based on our joint studies on proportionality and balancing over the past few years. We realized at a certain point that what we have produced amounts to a coherent enough message so that we should make an effort to synthesize our work into a more comprehensive narrative. The book thus has the quality of a discussion in layers. Some of the chapters are interrelated and sometimes overlap rather than being hermetically separate, and each looks at the subject-matter from a different angle and adds another layer to the overall picture. Secondly, in constructing this account, we have chosen to concentrate on constitutional systems that best exemplify the inner logic of the two constitutional cultures that we investigate: the USA, on the one hand, and Germany in particular, on the other, but also the Canadian and Israeli legal systems, which strongly manifest the logic of the European-based system. We therefore, necessarily, disregard many of the different contexts in which proportionality is set and the important variances between them. Finally, we do not wish to deny the importance of other, more normative, types of arguments regarding the question of adopting proportionality and its advantages and disadvantages, such as those relying on democracy, judicial legitimacy, and the distinctiveness of rights and interests.[8] Our approach and its emphasis are simply different, in that we stress the crucial relevance of context and social and historical background in understanding the transplantation and migration of constitutional concepts and principles.

After describing in Chapter 1 the rapid spread of proportionality and showing it to be analytically similar to the American doctrine of balancing, we begin in Chapter 2 the process of contextualizing the two concepts by discussing the impact of their different historical origins. We examine the emergence of proportionality in nineteenth-century Prussian administrative law and balancing in early-twentieth-century

[8] Grégoire Webber, "Proportionality, balancing, and the cult of constitutional rights scholarship" (2010) 23 (1) Can. J.L. & Jur. 179–202; Stavros Tsakyrakis, "Proportionality: an assault on human rights?" (2010) 7 ICON 468; Aileen McHarg, "Reconciling human rights and the public interest" (1999) 62 MLR 671, 673; Mattias Kumm, "Political liberalism and the structures of rights," in George Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart Publishing, 2007) 141; Tor Inge Harbo, "The function of the proportionality principle in EU law" (2010) 16 E.L.J. 158, 166 ff.

US constitutional law, showing the widely diverging origins of the two concepts. Proportionality, for instance, originated as an administrative law principle and was only tangentially (if at all) related to private law; balancing, in contrast, developed as part of private law and only later extended into public law. Proportionality emerged as part of an attempt to protect individual rights, whereas balancing was developed to serve the exact opposite purpose: as a check on what was considered the Supreme Court's overzealous rights protection during the Lochner era. Moreover, proportionality evolved in the framework of the formalistic and doctrinal jurisprudence of the Prussian administrative courts and was not part of any anti-formalistic legal movement, unlike balancing, which was a prominent aspect of the Progressivists' anti-formalism revolution.

Chapter 3 deals with culture, setting balancing and proportionality in their political cultures in the USA and Germany, respectively. In contrast to the American atomized conception of the self, German political theory emphasizes the embeddedness of the person in a community that shares common values and expresses solidarity towards all members of that community. Furthermore, American political culture is based on the idea of state neutrality and a deep suspicion of governmental intervention, whereas German political culture assigns the state the far more ambitious purpose of realizing a set of comprehensive social values. Accordingly, the role of proportionality in German constitutionalism is far more central than the role of balancing in US law. Proportionality facilitates the promotion of shared social values and interests as the main mechanism for solving conflicts between values and interests. Yet public wariness of the judiciary and government has led to a far more minor and subsidiary role for balancing in American constitutionalism, where it is limited by a more categorical approach towards individual rights.

In Chapter 4, we discuss constitutional design. In line with several established accounts, we categorize German constitutional design as impact-based and American constitutional design as intent-based. An impact-based constitutional model focuses on assessing and optimizing the constitutional consequences of governmental action, whereas an intent-based model centers on classifying the intention or motive behind governmental action as either permissible or impermissible. Proportionality is a central and inherent mechanism of the impact-based model, since it directly addresses the impact of governmental action. The intent-based model, in contrast, is categorical in nature and, thus, is seemingly altogether incompatible with balancing. But, as we show in this chapter, the US intent-based system in fact allows for balancing to be used in

certain contexts. We identify three forms of balancing in US constitutional law, beginning with balancing as a means of smoking-out illegitimate government intentions, moving to balancing as an exception to categorical rules, and then analyzing a third type of balancing that we identify: uncovering what we term indifference to the violation of a constitutional norm.

In Chapter 5, we discuss the correlation between balancing and epistemological skepticism and between proportionality and epistemological optimism. In the USA, balancing is often associated with skepticism about human rationality, and with minimalism and pragmatism. Several prominent American advocates of balancing, such as Sunstein, Posner, and, more recently, Chief Justice Roberts, support balancing on these grounds. They conceive it as a legal reasoning that is minimalist in the sense of being limited to the facts of the case at hand and avoiding grand theory, as opposed to sweeping theory and broad generalization, which are associated with judicial maximalism and judicial rules. Proportionality, in contrast, is associated in Europe with notions of expansive interpretation, optimism regarding human rationality and capabilities, and lofty theories such as substantive democracy and universal rights. These differing associations impact how balancing and proportionality are construed, as well as how they are developed in their respective legal cultures, ultimately shaping their meanings as well.

Advancing to a more global level, Chapter 6 argues that proportionality epitomizes the emerging global legal culture, which, following Étienne Mureinik's lead, we term a culture of justification.[9] American balancing, in contrast, is embedded in a political culture that we characterize as a culture of authority. A culture of justification is typical of European democracies – for example, Germany – and Commonwealth countries – such as the UK, Canada, New Zealand, and South Africa – as well as non-European countries, such as Israel. At its core, this culture requires that the government provide substantive justification for all of its actions, in that it must show the rationality and reasonableness of those actions and the tradeoffs they necessarily entail – in other words, the proportionality of its actions. We identify several characteristics of Western constitutional systems that have developed since the Second World War that foster a culture of justification. These include: a broad conception of rights; a constitutional interpretation approach that

[9] Étienne Mureinik, "A bridge to where? Introducing the Interim Bill of Rights" (1994) 10 S. Afr. J. Hum. Rts. 31.

emphasizes fundamental principles and values rather than text; few barriers to substantive review; and no legal "black holes" (areas and actions with respect to which the government is not required to provide justification). Most significant to our discussion is that this type of constitutionalism involves two-tiered judicial review. The first stage focuses on the identification of an infringement of a right, while the second, more crucial, stage of review assesses the government's justification of the infringement.

The culture of authority that is the setting for American balancing is grounded in the government's authority to exercise its power. In this culture, the legitimacy and legality of government action derive from the fact that the actor is authorized to act. Public law, under this conception, focuses on demarcating the borders of public action and ensuring that decisions are made by those authorized to make them. It is thus characterized by categories and bright-line rules and distinctions. Given this, the notion of balancing is in fact foreign to the culture of authority. Consequently, it has been marginalized in this culture and has evolved as a pragmatic doctrine which functions only as a "safety valve" – providing solutions to conflicts that a categorical system cannot adequately contend with.

The discussion in this chapter closes by framing the gradual shift towards proportionality and the culture of justification as a move towards an administrative model of constitutional law. We term this process the "administratization" of constitutional law.

Lastly, in Chapter 7, we consider three possible consequences that incorporating proportionality could have for the domestic constitutional law of the adopting legal systems, particularly in the American context. The first such effect could be the emergence of a "race to the top" in terms of the expansiveness of the judicial construction of rights protection. With constitutional judges increasingly regarding themselves as members of what Anne-Marie Slaughter calls "a global community of courts,"[10] they could tend to compete over who provides more expansive or advanced rights protection. Second, the proportionality doctrine may be accompanied by a certain amount of cultural baggage, "German baggage" to be precise, when it enters the adopting legal system. Examples from Canada and Israel are shown to substantiate this point. Third, proportionality might have an "imperialistic" effect, in that it may

[10] Anne-Marie Slaughter, "Judicial globalization" (2000) 40 Va. J. Int'l L. 1103.

set aside and replace local constitutional doctrines. We do not propose that the importation of proportionality will generate immediate change to the importing legal culture, nor that it will lead to an embracing of values associated with proportionality, at least not in their entirety. Nevertheless, it is possible to discern certain such effects in systems that have adopted proportionality, and the same could possibly apply to the USA were it to eventually adopt proportionality as well.

This book, although discussing doctrines, is more a book on political and legal cultures and their interaction with doctrine. Context and culture should not be overemphasized, for that could lead to conservatism and aversion to change. Yet in view of the sweeping and far-reaching movement towards universalism in modern constitutional law, this book represents a call to take context and culture into consideration and to inquire into their effects.