Clérico, Laura, "The migration of proportionality: narratives and questions", en: *This Century´s Review. Journal for rational legal debate*. Frankfurt/Main, No. 2, 2018, pp. 40-45.
https://www.thiscenturysreview.com/ ISSN 2195-3422

The narratives of the migration of the proportionality test and some missing points: provoking new contextual questions.

Laura Clérico

Much has been written about the migration of proportionality, as a form of constitutional rights adjudication, from Germany to all around the world. Proportionality seems to have bought a one way ticket. The narrative is not written all the way around. For example, it does not sufficiently include the transformation of proportionality 'as it crosses the border'. Or, it does not sufficiently include whether the idea of proportionality has 'deeper indigenous roots than one might think, deeper even than the prevalence of citations to nondomestic sources would indicate´, as Mark Tushnet warns in general regarding the research in the field of constitutional comparative law. I will take the case of Argentine constitutional praxis and sustain that one cannot explain the discussion about the reception/rejection of the modern test of proportionality there as a matter of pure transfer from Germany to Latin America. In doing so, I will address later, what could be a "matter" of migration, and which interactions (or not) are producing at the constitutional and human rights praxis in Latin America. Therefore, I will distinguish the idea of proportionality from the structured test of proportionality as a methodology. This delimits the matter that could be transferred. Additionally, it serves me to point out, what in the narrative of the transfer seems to be opaque: the importance of the sequence of the steps in the German proportionality test. I will conclude that narratives of migration should pay more attention to the context of the so called 'receipted´ practice. The 'narrative' of the migration of proportionality should buy a round trip ticket.

I. Two narratives about the travels of proportionality

There are at least two narratives. The first one seems to have to deny the migration. The second one highlights it as a successful export construct. The first one sustains that proportionality is an answer to a legal problem that seems to be 'universal'. Modern constitutions contain rights but allow the legislature to limit these rights. Additionally, the limitations of the rights have limits. The limits are formal and material. The first one is the mandate of legality, i.e. the limitation must be 'prescribed by law'. The second one is related to the content of the limitation. It must not be arbitrary. Therefore, Schlink concludes that 'there 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… Once it is understood that an authority's reach is extensive but also limited, without the limits being specified, the principle of proportionality serves as an instrument for reconciling both: the extensive reach with the unspecified limits. What

Clérico, Laura, "The migration of proportionality: narratives and questions", en: *This Century´s Review. Journal for rational legal debate*. Frankfurt/Main, No. 2, 2018, pp. 40-45.
https://www.thiscenturysreview.com/ ISSN 2195-3422

other definition of the non-arbitrary way could the court have devised?' Certainly, one can discuss if the idea is universal. But, for the purpose of this work, it is enough to conceive it as part of a grammar of modern constitutional law. This can explain the application of other ´similar´ tests by the courts even before the development of the proportionality test by the German Constitutional Court.

The second narrative tells us that the modern test of proportionality was developed by means of decisions by the German Constitutional Court after the Second World War. From there it travelled to many parts of the world. This narrative seems to be exaggerated. Similar tests, although not as well structured as the German one, were applied even before the foundation of the German Constitutional Court. For instance, the reasonableness test was applied by the Supreme Court in Argentina from 1930 to 1970 to review limitations to rights and control of administrative discretion. A *reconstruction* of the case law showed it as a test with two steps (the suitability test and the proportionality test in the narrow sense). Additionally and since December 1983, after the last military dictatorship, the Supreme Court performs an intensive judicial review of laws that restricted rights. This can be described as an explicit attempt to a broader program transforming a culture of authoritarianism into a culture of justification. But the motor of this transformation at the judicial level was not seen as a problem about discussing the structured 'methodology' of proportionality, but as a matter of material rights theory. This was fundamental to define the intensity of the scrutiny of the justification of the state action under the form, for example: the more the restriction of the right in question touches a central question of the autonomy of a person, the more intensive must be the scrutiny of the state justification. Reasonableness test in this strong sense has been there. Therefore, if the *discussion* about the *modern* German proportionality test found fertile soil there, it was because of its resemblance to the local solutions to the problem.

II. Some other missing points in the narrative of the migration of proportionality. The *sequence* of the structured test of proportionality.

Certainly, whoever examines the justification of a limitation of a right, tests the sufficiency of the justification. However, this does not explain how to evaluate sufficiency. It gives little clues about the 'methodology'. This delimits the matter that could be transferred: the *structured* 'methodology' of proportionality, but not the general considerations about the test of the sufficiency – whatever the name of the test may be.

According to many legal scholars, the *standard* structure to the test is well developed at the analytical level in German theory of law. The test presupposes a preliminary step to frame the issue: the affected right, the intervention of the right, and the legitimacy of the public

aim. Later, the test as such includes three stages: (1) whether the right-infringing measure is suitable for achieving a legitimate public aim or right (suitability test); (2) whether the State could have achieved the aim by measures less restrictive to the rights in question (necessity test). Finally, (3) the proportionality test in the narrow sense relates the intensity of interference of one right to the importance of satisfying the other one. Here, I focus on the *sequence* in the stages of proportionality to identify different variations of proportionality: the sequential and exclusionary (1); the sequential and accumulative (2) and the global assessment (3).

1. Test of proportionality sequential and exclusionary. The German version.

In this version, the test includes the subtests of suitability, necessity, and proportionality in the narrow sense. However, the difference lies in their sequential and exclusive character: one sub-test each time. At the same time, the failure to comply with one sub-test excludes the other ones. If the means is not suitable, then the restriction of the right is not proportional as a whole. The test does not go on. The advantage lies in its structure and sequence. It orders the argumentation in a clear way. The disadvantage, at first glance, lies in its exclusionary character. Considerations of all arguments that speak for and against the restriction of the right are not exhausted. This leads to two consequences: a) to a reduction in rationality; and, b) to a loss of importance on the tests of suitability and necessity. To address the former, the German legal doctrine and jurisprudence tends to apply suitability in a weak sense. It suffices that the means promotes the end in some way. Regarding the necessity tests, the alternative means should be equally suitable and at the same time less restrictive in comparison to the applied means. They exclude not much. Therefore, the proportionality in the narrow sense is the main step of the test, since all the arguments can be used for or against the restriction on the right there. So the first two tests lose relevance. It is no coincidence that few restrictions to rights have been found not to be proportional just because they are not suitable or not necessary. Consequently, the sequential and exclusionary version of the test of proportionality loses weight. Nevertheless, the sequential order has advantages as it makes no sense to ask if the means can promote the end, if the measure has no end because it is not legitimate.

2. Test of proportionality sequential and accumulative

The sub-tests of proportionality are considered as individual and having different steps. But, the failing of one sub-test does not lead to the end of the process. This structured and sequential approach seems to be applied by the Interamerican Court of Human Rights (IA CtHR) or the Constitutional Courts of Colombia and Peru. For example, in the Kimel case held by the IACtHR (2008), it became clear that the state measure is a too restrictive

Clérico, Laura, "The migration of proportionality: narratives and questions", en: *This Century´s Review. Journal for rational legal debate*. Frankfurt/Main, No. 2, 2018, pp. 40-45.
https://www.thiscenturysreview.com/ ISSN 2195-3422

'means' after the necessity test. The state measure in this case is a broad criminal definition of defamation to promote the right to reputation. The Court held that there is an alternative means: a clear and accurate enough definition of defamation that excludes the punishment of the right to criticize a public official in the exercise of his functions. Nevertheless, the Court examined whether the restriction is proportionate in the narrow sense. Thus, a *serious* restriction on the freedom of expression outweighs the *moderate importance* of fulfilling the right to reputation of a judge. The freedom of expression in this case was in the form of a historian's and journalist's critique based on an investigation into the proceedings on a case regarding "issues of critical public interest." On the contrary, the judge in this case must bear and endure criticism with respect to the way that he exercises his public duty: 'such as occurs when a judge investigates a massacre in the context of a military dictatorship, as occurred in the present case.' Why does the IACtHR apply all subtests of proportionality, although it was clear that the means was not necessary? It satisfies a rationality postulate (analytical perspective). It exhausts the consideration of all relevant arguments. Additionally, it is ´a contribution to the development of case law on this matter and to the appropriate protection of human rights´ (dogmatic level). The Court also has an interest in showing the States (institutional level) that laws are not compatible with the appropriate protection of human rights. In this vein, the sequential and accumulative version of the test serves better to the double mission of the IA Court HR, not only concerned with providing justice in concrete cases, but also developing human rights standards.

3. Overall assessment: interactions between the reasonableness' test and the proportionality as an analytical framework?

Some decisions of Latin American Courts perform an overall assessment to test the sufficiency of the restriction of a right, like in general in Argentina under the frame of the reasonableness test. The test is neither clearly structured nor sequential in advance. It does not differentiate among various elements. Nevertheless, one can reconstruct with some efforts the presence of the three sub-tests, or of some of them in the argumentation. This differs from the structured approach of the IACtHR or of the Constitutional Court of Colombia.

But, what is the reason behind the avoidance of an explicitly structured approach of reasonableness or possibly proportionality? At least two possible answers arise: a radical one about the interplay between the court and other branches, and a moderate one about the variable intensity of control. First, assuming that the structured proportionality constrains judicial discretion, avoiding a formal adoption of a structured approach may mean that the Court wants to preserve to itself a wide margin of discretion: the Court controlling the

Clérico, Laura, "The migration of proportionality: narratives and questions", en: *This Century´s Review. Journal for rational legal debate*. Frankfurt/Main, No. 2, 2018, pp. 40-45.
https://www.thiscenturysreview.com/ ISSN 2195-3422

balancing of other agencies but without binding itself through a structured approach. The second hypothesis sustains that the court holds a deferential position towards the legislative and executive in matters that concern, for example, the limitation of economic rights (like the right to contract, the right to exercise industry and business, the right to property). Therefore, they did not test the justification through the lenses of the less alternative means, as in the jurisprudence of the Argentine Supreme Court from 1930 to 1960. In contrast, the three subtests can be more easily reconstructed, when the Court applied a more intensive test in matters dealing with the right to privacy, autonomy, and identity from 1983 to 1989 or since 2003.

III. Some final considerations

In this contribution, I addressed the issue of the types of discussions, which the so-called migration of proportionality has to produce. First of all, the sequence of the steps was less noticed in the explosion of the narrative about the migration of the German proportionality test. This seems to be crucial in the German constitutional version of the test. However, it is not the case in other practices. This reveals two things. On the one hand, the migration of proportionality is limited. On the other hand, highlighting these re-interpretations or the (implicitly) rejection of the structured methodology are a window of opportunity to pose new questions to old issues. For instance, Latin American Courts are well known for ruling on constitutional rights. Nevertheless, some of these Courts reject to tell in advance the method of rights adjudication to justify the decision in a fully structured and explicit way. All in all, this work makes a strong argument to show how the discussion (reception or rejection or transformation) of the test of proportionality is influenced by the specific context in which it is performed.