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Whither Judicial Dialogue after Convergence? Finding Transnational Public Law in Nomos*-Building*

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Abstract—One of the major themes emerging from the reinvigorated interest in legal comparativism in the burgeoning transnational legal phenomena is the transnational dialogue among judiciaries the world over, namely, the mutual referencing to judicial decisions across jurisdictional boundaries. This article aims to rethink the role of transnational judicial dialogue in the development of transnational public law by drawing upon Robert Cover's discussion of the relationship between *nomos* and narratives. It is argued that the convergent legal doctrines and principles channeled through transnational judicial dialogue are "jurispathic" as they only generate "thin" transnational values with little power of persuasion. To contribute to the thriving of transnational public law, judicial dialogue should look beyond comparative constitutional jurisprudence, shifting the focus away from the convergence of constitutional doctrines to the building of a transnational *nomos*. By moving from the mutual learning of doctrines to the comparative articulation of *nomos*-making narratives—the way a specific doctrine or a legal principle is understood and gains its meaning in its legal culture—in transnational judicial dialogue, comparative constitutional law can enable a robust transnational public law enriched with meanings, which hold the key to persuasion.

Keywords—judicial dialogue, transnational jurisgenesis, *nomos* and narratives, transnational public law, law and community, general principles of law

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I. INTRODUCTION

Comparative law is redrawing conceptual boundaries in legal thinking. Public law is not impervious to this comparative new wave. With the new light cast by comparative law, international law scholarship is seeing a comparative turn.[1] While the emergence of "comparative international law" seems to reflect a broad move from universalism to pluralism and nationalism in world politics and legal scholarship,[2] the disenchantment with universal values is not the only impetus behind comparative law's new renaissance. As a new convert to legal comparativism,[3] comparative constitutional law is seeking, *inter alia*, to discover "transnational constitutional practices" through comparative studies of constitutional documents and judicial doctrines.[4] Along the lines of convergence,[5]

[1] *See* ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 1-3, 19-27 (2017).
[2] *See id.* at 11-12.
[3] *Compare* WILLIAM TWINING, GLOBALISATION AND LEGAL SCHOLARSHIP 21 (2011), *with* RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 77-78 (2014).
[4] *See*, *e.g.*, Rosalind Dixon, *Proportionality & Comparative Constitutional Law versus Studies*, 12 LAW & ETHICS HUM. RTS. 203 (2018). Such attitude towards comparative constitutional law indicates what Ran Hirschl calls "the comparative reference approach" oriented towards "self-reflection or betterment through

comparative constitutional law and global constitutionalism turn out to be fellow travellers,[6] while instances of "judicial dialogue" are fascinating constitutional lawyers.[7] To them, judicial dialogue—understood as mutual references to foreign case law between the apex courts in constitutional interpretation[8]—seems to play a key role in the emergence of "transnational public law" amid the burgeoning of what Nicole Roughan calls "transnational legal phenomena."[9]

In this article, I propose to rethink the role of transnational judicial dialogue in the development of a robust global rule of law as alluded to by the changing relationship between distinct legal orders amid this transnational legal process.[10] Notably, the migration of legal principles and doctrines from one jurisdiction to another had already existed long before the more recent transnational legal phenomena got under way.[11] Also, the use of foreign law—especially case law—by domestic courts is not a new discovery in comparative law.[12] Nor are all the fundamental legal principles with (nearly) universal recognition channeled through domestic judiciaries.[13] Instead of comprehensively tackling the use of

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analogy, distinction, and contrast." *See* HIRSCHL, *supra* note 3, at 232-44.

[5] "Convergence" is one of the three "postures" Vicki Jackson identifies among domestic apex courts towards foreign or international jurisprudence. The other two gestures are "resistance" and "engagement." *See* VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010).

[6] *Compare* Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 258, 263-73 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009), *with* David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005). *See also*. NEIL WALKER, INTIMATIONS OF GLOBAL LAW 15-16, 39-42 (2015).

[7] *See*, *e.g.*, ANDRÉ NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 224-43 (2011); Anne.-Marie Slaughter, *A New World Order* 66, 69-82 (2004); Christopher McCrudden, *Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499 (2000). *Cf.* David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523 (2011). For a discussion of the idea of dialogue in both international and domestic contexts, see Doreen Lustig & J.H.H. Weiler, *Judicial Review in the Contemporary World: Retrospective and Prospective*, 18 INT'L J. CONST. L. 315, 336-37 (2018).

[8] Despite various understandings of judicial dialogue, "[o]ne of the many ways [it] is most often being used is when judges refer to foreign case-law in constitutional interpretation." Carla Zoethout, *On the Different Meanings of Judicial Dialogue*, 10 EUR. CONST. L. REV. 175, 175 (2014).

[9] NICOLE ROUGHAN, AUTHORITIES: CONFLICTS, COOPERATION, AND TRANSNATIONAL LEGAL THEORY 73 (2013).

[10] *See id.* at 73.

[11] *See generally* Vlad Perju, *Constitutional Transplants, Borrowing, and Migrations*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1304 (Michel Rosenfeld & András Sajó eds., 2012).

[12] *See*, *e.g.*, Harold Hongu Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 45-46 (2004).

[13] Examples include the presumption of innocence in criminal proceedings and the prohibition on torture.

foreign law by domestic courts in general and the various channels through which fundamental legal principles become globally received, my goal in this article is modest. As transnational public law is seen as emanating from judicial dialogue, I aim to provide a prognosis of the character of transnational public law by drawing upon the distinction Robert Cover made between jurispathic and jurisgenerative law in his inspirational discussion of the relationship between *nomos* and narratives.[14] As will be further discussed, through Cover's lens, a legal order is jurispathic if law is reduced to legal precepts rendered by courts with the underlying narratives that give meaning to it left out. To be jurisgenerative, a legal order needs to look beyond the precepts rendered by judicial authorities and to envisage a shared normative universe, i.e., a *nomos* in which the legal prescriptions and institutions are intelligible only when read together with their surrounding narratives from outside the legal profession.

Based on the foregoing jurispathic-jurisgenerative distinction in the character of the legal order, I argue that the cross-fertilization of legal principles and the convergence of doctrines at the core of the practice of judicial dialogue are "jurispathic." To contribute to the making of a robust transnational public law,[15] judicial dialogue should look beyond comparative constitutional jurisprudence, shifting the focus away from the convergence of constitutional doctrines to the building of a transnational *nomos*.[16] By moving from the mutual learning of doctrines to the comparative articulation of *nomos*-making narratives in judicial dialogue, comparative constitutional law can enable a robust global rule of law enriched with meanings, which hold the key to persuasion.

To provide a prognosis of the character of transnational public law, I start with an engaged analysis of Jeremy Waldron's new *jus gentium* and its corresponding model of

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[14] *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983).

[15] Judicial dialogue is not the only way that leads to the emergence of transnational public law. Nor does what emerges from judicial dialogue necessarily represent transnational public law. *See* WALKER, *supra* note 6, at 55-130. Acknowledging such conceptual gaps, my present focus is on the issues concerning the alliance of judicial dialogue and the making of transnational public law.

[16] For a different critique of constitutional convergence, see Rosalind Dixon & Eric A. Posner, *The Limits of Constitutional Convergence*, 11 CHI. J. INT'L L. 399 (2011).

judicial dialogue as a case in point as it provides a sophisticated jurisprudential account of how *transnational* public law is emerging from judicial dialogue (II).[17] After disclosing that transnational public law emanating from current practices of judicial dialogue is thin and short of meaning, I then examine the relationship between law and community in the making of transnational public law. Drawing upon Cover's discussion of narrative, the meaning of community, and *nomos*, I provide a prognosis of the jurispathic character of transnational judicial dialogue (III). I conclude with a cautionary note on the pragmatist attitude towards the global rule of law (IV).

II. MAKING LAW BY NORMATIVE CONVERGENCE

To shed light on the state of the transnational legal norms emerging from judicial dialogue, I first track the changing role of "the general principles of law"—a recognized source of international law[18]—in the world legal order as is transfigured as a new *jus gentium* in Waldron's jurisprudential work on the use of foreign case law in domestic courts.[19] Discovering that the general principles of law are turning into the deposits of transnational law, I then discuss the adoption of proportionality analysis in Taiwan to illustrate the character of transnational public law emanating from judicial dialogue.

A. *General Principles of Law as New* Jus Gentium*: Judicial Dialogue and the Emergence of Transnational Public Law*

Ian Brownlie noted that "[general] principles [of law] often play a significant role as part of the legal reasoning in decisions,"[20] though it has not received much attention in the

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[17] JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS (2012).

[18] Article 38 (1) of the Statute of the International Court of Justice (I.C.J.) (hereinafter the I.C.J. Statute). For present purposes, I replace "the general principles of law recognized by civilized nations" with "the general principles of law" unless otherwise specified.

[19] Despite his suggestions that "customary international law" is one of the sources in the "law of nations" that informs a new *jus gentium*, Waldron focuses on "general fundamental maxims of the common law…that have their foundation in universal law administered in all civilized countries." *See* WALDRON, *supra* note 17, at 63-67, 189-94.

[20] IAN BROWNLIE, THE RULE OF LAW IN INTERNATIONAL AFFAIRS: INTERNATIONAL LAW AT THE FIFTIETH

jurisprudence of the I.C.J. or its predecessor since it was formally codified as a primary source of international law in 1920.[21] Notably, the formal recognition of the general principles of law as a primary source of international law gives expression to the domestic court's contribution to international lawmaking through its reasoning and the continuing liaison between comparative law and international law.[22] Situating the emergence of common legal principles from the judicial reasoning of domestic courts in what he calls "intertextuality," Waldron argues that a new *jus gentium* , or rather, new general principles of law, is emerging through the mutual references of foreign case law between domestic apex courts.[23]

According to Waldron, given that some fundamental principles or doctrines such as the ban on torture and the proportionality doctrine are widely adopted in treaties and national legislation, national courts the world over are frequently faced with the interpretation of the same legal concept, despite the textual variations in legal provisions.[24] Notably, such intertextuality does not only result from the domestic incorporation of international treaties. With more and more legal concepts migrating from one national legal order to another, common legal principles and doctrines find their presence in diverse jurisdictions.[25] Thus, interpretations of such common principles rendered in the decisions of various national judicial bodies function as differently-styled paraphrases of an international treaty clause or a shared principle—say, the ban on torture—as applied to the case at hand.[26] Through their interpretations of the same legal concept or principle, national courts contribute to the

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ANNIVERSARY OF THE UNITED NATIONS 23 (1998).

[21] *Compare* BIN CHENG, GENERAL PRINCIPLES AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS at xxxi-xlii (1953), *with* HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW 93-94 (2014). Article 38 (1) (c) of the I.C.J. Statute, which provides for "the general principles of law," is the successor to Article 38 (3) of the Permanent Court of International Justice (P.C.I.J.) Statute of 1920.

[22] According to Lord Phillimore, the main drafter of Article 38 (3) of the P.C.I.J. Statute, the "general principles of law" refer to those "accepted by all nations *in foro domestic*." CHENG, *supra* note 21, at 24-25 (citation omitted). *See* Jaye Ellis, *General Principles and Comparative Law* 22 EUR. J. INT'L. L. 949, 953-59 (2011).

[23] WALDRON, *supra* note 17, at 158-60.

[24] *Compare* the European Convention on Human Rights Article 3 ("inhuman or degrading treatment or punishment"), *with* the U.S. Constitution Amendment VIII ("cruel and unusual punishments"). *See* WALDRON, *supra* 17, at 146-47, 158-61.

[25] *See generally* THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2006).

[26] *See* WALDRON, *supra* 17, at 160-61. *See also* THIRLWAY, *supra* note 21, at 120-22, 124.

continuous elaboration on international humanitarian and human rights law and other common principles.[27]

Considering the inter-jurisdictional effect of judicial interpretations on common principles in the context of intertextuality as characterized above, Waldron further argues that domestic courts may be obliged to take regard of how the same legal concept has been interpreted by their counterparts in foreign jurisdictions.[28] By adopting this practice, domestic courts virtually take part in an inter-jurisdictional dialogue when they discriminatingly study the interpretations other courts have given of the same legal concept with an eye towards the best rendering of their own counterpart in domestic law.[29] More importantly, where a (virtual) consensus materializes on the interpretation of a legal concept from this engaged judicial dialogue,[30] the prevalent rendering of the legal concept in question is not merely a particular instance of legal interpretation as it gives expression to the general principle that underpins judicial reasoning about the legal concept engaged. According to Waldron, such judicial consensus should be regarded as holding "persuasive authority" that commands the consideration of a domestic court when the same legal concept comes before it in the same way as a domestic precedent does under the doctrine of *stare decisis*.[31] Specifically, it is obligatory for judges to refer to foreign judicial decisions when a (virtual) consensus has formed on a given legal issue as looked at by different jurisdictions. Though a cross-jurisdictional consensus on judicial doctrines and legal principles is not binding on domestic judiciaries, it must be considered because of the weighted value attached to its status as persuasive authority.[32] Failing to refer to such foreign judicial decisions around which a cross-jurisdictional consensus has formed, judges effectively commit an

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[27] *See also* McCrudden, *supra* note 7, at 528-29.

[28] *See* WALDRON, *supra* note 17, at 155-67.

[29] *See* WALKER, *supra* note 6, at 94; McCrudden, *supra* note 7, at 528-29. *See also* WALDRON, *supra* note 17, at 80. *But cf.* NOLLKAEMPER, *supra* note 7, at 240-43.

[30] How to decide when a consensus is formed is a complex question. *See* WALDRON, *supra* note 17, at 187-202.

[31] *Id*. at 62. *See also* SLAUGHTER, *supra* note 7, at 75-78; McCrudden, *supra* note 7, at 512-16.

[32] WALDRON, *supra* note 17, at 84.

appealable legal error in their ruling in the same way as they ignore relevant precedents.[33]

Thus, the convergent judicial doctrines and legal principles extracted from comparative studies of law through judicial dialogue effectively acquire the status of law on a par with domestic judicial precedents even if the former are not rooted in any particular domestic legal system.[34] With intertextuality, the role of comparative law in the process of making and amending the case law on the widely adopted legal concepts or principles through judicial dialogue is more of a component of transnational lawmaking than a source of international law.[35] Judicial dialogue in the form of mutual reference to foreign judicial decisions by domestic courts paves the way for a new *jus gentium*, as Waldron calls it, sitting astride the divide between international law and domestic law.[36]

It deserves emphasis that Waldron's new *jus gentium* is not a general theory of the use of foreign case law by domestic courts. Rather, it is meant to give a jurisprudential account of the conditions under which reference to foreign judicial decisions becomes obligatory. After all, the persuasive authority of the new *jus gentium* is a variety of *legal* authority, as will be made clear later. Before we delve into the authoritative, systematic, and normative character of the new *jus gentium*, suffice it here to note that Waldron attributes the status of a non-institutionalized body of legal principles to this new *jus gentium*,[37] prefiguring the prototype of transnational public law of which proportionality is the darling example.

B. *Many Laws with Little Meaning: Proportionality and a Story of Betrayal*

One of the most celebrated examples of transnational lawmaking through the convergence of judicial doctrines is the adoption of "proportionality analysis" by a variety of jurisdictions

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[33] *Id*. at 62.
[34] *See id*. at 48-49, 59-62.
[35] *See also* Jan Klabbers, *Law-making and Constitutionalism*, *in* JAN KLABBERS ET AL.,THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 81, 99-100 (2009).
[36] WALDRON, *supra* note 17, at 24-75.
[37] *See id.* at 48-75.

around the globe.[38] Despite variations among jurisdictions,[39] the core of the proportionality doctrine is a "structure" under which judges adjudicate the validity of an act of public authorities in light of the rights safeguarded in the law.[40] Focusing on the question whether the public interest pursued by the impugned act is proportionate to the harm inflicted on the rights concerned, the key component of this reasoning structure is balancing: if the former outweighs the latter, the impugned rights-limiting act is valid.[41] Thus, the proportionality principle is credited with providing a clear framework of analysis within which the reasonableness of a rights-limiting act by public authorities can be carefully examined without risking judicial arbitrariness.[42] Apart from its structural feature, the doctrine of proportionality is distinctive for its conception of rights. Instead of standing as "trumps," rights amount to a requirement for justification on the part of public authorities.[43] Under the framework of proportionality, rights function as a programme whose contextual implementation is integral to the legitimacy of the modern state.[44] The worldwide spread of

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[38] KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS 13-45, 178 (2012); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 73 (2008).

[39] *Compare* Grant Huscroft et al., *Introduction*, *in* PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 1, 2-3 (Grant Huscroft et al. eds., 2014), *with* Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383 (2007). *See also* NIELS PETERSEN, PROPORTIONALITY AND JUDICIAL ACTIVISM: FUNDAMENTAL RIGHTS ADJUDICATION IN CANADA, GERMANY AND SOUTH AFRICA 80-82 (2017). Oliver Lepsius notes that the focus of German legal reasoning on normative issues rather than fact explains why German courts and academics tend to concentrate on balancing vis-à-vis suitability and necessity, which require a close examination of fact and empirical evidence. Oliver Lepsius, *The Quest for Middle-Range Theories in German Public Law*, 12 INT'L J. CONST. L. 692, 707-08 (2014).

[40] *See* MÖLLER, *supra* note 38, at 179-205; PETERSEN, *supra* note 39, at 80.

[41] MÖLLER, *supra* note 38, at 15; Stone Sweet & Mathews, *supra* note 38, at 88-90; AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 340, 378 (2012). *Cf.* MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 16-23 (2013); Grimm, *supra* note 39, at 393-95. Notably, balancing may exist between two competing constitutional rights. *See* BARAK, *supra*, at 342. For present purposes, I focus on the balancing of constitutional rights and public interest.

[42] MÖLLER, *supra* note 38, at 179; Stone Sweet & Mathews, *supra* note 38, at 87-88; Vlad Perju, *Proportionality and Freedom—An Essay on Method in Constitutional Law*, 1 GLOBAL CONSTITUTIONALISM 334, 339-40, 350-56 (2012). *See also* BARAK, *supra* note 41, at 377-78.

[43] *See* Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 LAW & ETHICS HUM. RTS. 141 (2010). *See also* MÖLLER, *supra* note 38, at 2; PETERSEN, *supra* note 39, at 80; Mark Antaki, *The Rationalism of Proportionality's Culture of Justification*, *in* PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING, *supra* note 39, at 284.

[44] *See* ALEXANDER SOMEK, THE COSMOPOLITAN CONSTITUTION 106-09 (2014); Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS, *supra* note 25, at 84, 96-97. *Cf.* PETERSEN, *supra* note 39, at 189-91; Perju, *supra* note 42, at 360-66.

proportionality analysis is thus presented as the prime example of transnational public law and global constitutionalism.[45]

Yet, the seemingly universal appeal of proportionality analysis as a doctrinal model raises fundamental questions about its character and the current condition of transnational public law. Taiwan's reception of the proportionality principle illuminates the limits of proportionality in the pursuit of general principles through constitutional convergence. Before proportionality was explicitly adopted by the courts as a judicial doctrine of administrative law in the 1980s, a few German-educated Taiwanese academics had already introduced this German legal concept to Taiwan.[46] Foreshadowing other jurisdictions that later adopted proportionality analysis,[47] the early focus of Taiwanese legal academics was on its doctrinal formulation without much regard for its underlying German historico-cultural matrix.[48]

The pathological reception of proportionality in Taiwan manifests itself in the betrayal of justification in one of the most infamous cases ever decided by the Taiwan Constitutional Court (TCC): Interpretation No. 263 (1990). That decision concerned the constitutionality of a provision of a (now repealed) special criminal code under which kidnapping for ransom alone incurred a mandatory death sentence. A criminal defendant was thereby sentenced to death. As the abstract review-oriented TCC lacked jurisdiction to review individual

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[45] *See generally* ALEC STONE SWEET & JUD MATHEWS, PROPORTIONALITY BALANCING AND CONSTITUTIONAL GOVERNANCE: A COMPARATIVE AND GLOBAL APPROACH (2019). Whether the United States stands as an exception to the proportionality/ balancing-mediated global model of adjudication is an ongoing debate. *Compare* MÖLLER, *supra* note 38, at 17-20, *with* Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797 (2011). *See also* COHEN-ELIYA & PORAT, *supra* note 41, at 14-22; Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere But Here?*, 22 DUKE J. INT'L & COMP. L. 291, 293, 297-98 (2012).

[46] *See*, *e.g.*, Liaw Yih-nan (廖義男), *Zhiye yu Jingji Fa* (企業與經濟法) 153-55 (1980). The pedigree of proportionality analysis traces back to the judicial doctrine of Prussian administrative law in the nineteenth-century. *See* COHEN-ELIYA & PORAT, *supra* note 41, at 10, 25-27.

[47] *See* Stone Sweet & Mathews, *supra* note 38.

[48] *See*, *e.g.*, Jau-Yuan Hwang, *Development of Standards of Review by the Constitutional Court from 1996 to 2011: Reception and Localization of the Proportionality Principle*, 42 (2) NAT'L TAIWAN U.L.J. 215-58 (2013) (in Chinese, with English abstract); Cheng-Yi Huang & David S. Law, *Proportionality Review of Administrative Action in Japan, Korea, Taiwan, and China*, *in* COMPARATIVE LAW AND REGULATION: UNDERSTANDING THE GLOBAL REGULATORY PROCESS 305 (Francesca Bignami & David Zaring eds., 2016). For the German historico-cultural conditions of proportionality analysis, see JACCO BOMHOFF, BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE 72-121 (2013).

adjudications on the basis of their conformity with the constitution as the German Federal Constitutional Court does in the proceedings of constitutional complaints (*Verfassungsbeschwerde*),[49] he petitioned the TCC to review the constitutionality of the impugned provision instead of the death penalty imposed on him. The TCC upheld that cruel and unusual provision only by looking beyond the scope of the special criminal code and taking account of the sentencing mitigation provision in the General Criminal Law.[50]

It is noteworthy that the petitioner explicitly pleaded with the TCC to apply proportionality analysis as implied in article 23 of the Constitution.[51] While the TCC did not reference proportionality or article 23, proportionality did not slip the judicial mind, either. In line with its practice of adopting foreign legal doctrines without attribution,[52] the TCC made its controversial ruling under the imported model of proportionality analysis without naming it. The TCC first held the legislative purpose of such severe criminal punishment to be the maintenance of social order, which is one of the recognized legitimate purposes in the limitation of fundamental rights under article 23 of the Constitution. It then proceeded to determine the constitutionality of the impugned mandatory death penalty provision in terms of balance. In essence, the TCC ruled that the impugned mandatory death penalty provision in the special criminal code concerned was not as severe or peremptory as it appeared. Rather, in light of the sentencing mitigation provision in the General Criminal Law, the mandatory death penalty provision could nonetheless be moderated in the sentencing stage. Taken together, the impugned provision allowed a balance to be struck between the legislative goal and the actual sentence.[53]

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[49] *See* Tzu-Yi Lin et al., *Seventy Years On: The Taiwan Constitutional Court and Judicial Activism in a Changing Constitutional Landscape*, 48 HONG KONG L.J. 995, 1023-24 (2018).

[50] The official English translation of Interpretation No. 263 is available at <http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=263>.

[51] Article 23 of the Constitution provides: "[a]ll the freedoms and rights enumerated in the preceding articles shall not be abridged by law except such as may be *necessary* to prevent infringement upon the freedoms of others, to avert an imminent danger, to maintain social order, or to promote public welfare" (emphasis added). The constitutional petition in relation to Interpretation No. 263 is available at <http://cons.judicial.gov.tw/jcc/zh-tw/jep03/show?expno=263> (in Chinese).

[52] *See* Law & Chang, *supra* note 7, at 560.

[53] This can be seen as an instance of proportionality in sentencing. *See* E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS

The way the TCC reached its conclusion merits closer examination. The TCC held the statutory provision for a mandatory death penalty to be constitutional only after reading it in conjunction with the general sentencing mitigation provision in another statute. Along this line of reasoning, even a legal provision for torture would have been proportionate and constitutional as it could still be moderated by the same sentencing mitigation provision in the General Criminal Law. Seen in this light, the TCC's conclusion as to the balance of the impugned provision did not result from the process of legal justification. Rather, the TCC came to that conclusion through an exercise of judicial rationalization. Proportionality, which had been received in Taiwan as a way to enhance the protection of fundamental rights,[54] was thus turned from an essential of the legitimacy of rights-limiting public acts into a doctrinal cover for a cruel and unusual punishment in the hands of the TCC. To put it differently, proportionality did provide the public authorities with the semblance of legitimacy with respect to the provision for mandatory death penalty but not by requiring the public authorities to justify the impugned provision with reason—if such justification is ever conceivable. Rather, the TCC conveniently legitimated the public authorities for the cruel and unusual punishment in the name of proportionality.

I hasten to add that the critical point I make of the TCC's forgotten past case law is not down to its affirmation of death penalty, mandatory or not.[55] What is troubling about the case is the way the TCC reasoned in an attempted justification under the structure of proportionality analysis. It is true that proportionality analysis is not aimed at achieving a particular result such as the abolition of death penalty. Its objective is to provide a "formal structure" under which the legitimacy of the state is conditioned by the justification it gives

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129-68 (2009).

[54] *See* Chien-Chih Lin*, I-CONnect Symposium: The 70th Anniversary of the Taiwan Constitutional Court–The Evolution of Proportionality in Taiwan Constitutional Jurisprudence*, INT'L J. CONST. L. BLOG (Dec. 14, 2018), http://www.iconnectblog.com/2018/12/i-connect-symposium-the-70th-anniversary-of-the-taiwan-constitutional-court-the-evolution-of-proportionality-in-taiwan-constitutional-jurisprudence/.

[55] Decided in 1990 when Taiwan was still in its early stage of democratic transition, Interpretation No. 263 foreshadowed the later Interpretation No. 476 (1999), which explicitly upheld the constitutionality of death penalty in general under the proportionality doctrine. The official English translation of Interpretation No. 476 is available at <http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=476>.

of its rights-limiting act.[56] Nevertheless, as the TCC's mandatory death penalty case suggests, it is not clear whether the formal structure of proportionality analysis itself subjects the legitimacy of the state along with its rights-limiting act to more exacting scrutiny or inadvertently lends itself to the legitimation of some draconian state acts.[57]

Notably, further studies of subsequent interpretations have shown that the overall record of the TCC in its invocation of proportionality as the doctrinal model has not been particularly reassuring. Not only has proportionality failed to strengthen the protection of constitutional rights,[58] but its application is also criticized for falling "short of necessary reasoning" and thus characterized as "casual."[59] In sum, the meaning of proportionality analysis as signified in its tying the legitimacy of modern states to the model of rights as a requirement for justification has been diluted, if not distorted, in its reception in Taiwan.

As noted above, the principle of proportionality analysis has been praised as exemplary of how the pursuit of constitutional convergence through judicial dialogue has incubated transnational public law. Taiwan's pathological deployment of proportionality by no means suggests the failure of proportionality but is nonetheless revelatory of its character,[60] suggesting that beneath the surface of the convergence of legal principles and judicial doctrines in judicial dialogue lies a divergence of meanings. Taiwan's example shows that detached from the institutional and cultural context where they originated and fully developed,[61] the formal structure of proportionality and balancing risks being turned into an empty shell on foreign soil.[62] When migrating, proportionality and balancing may not always result in pivoting the legitimacy of the state on the justification of rights-limiting acts. As a convergent judicial doctrine, the principle of proportionality is reduced to a judicial

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[56] *See* PETERSEN, *supra* note 39, at 80.
[57] *See* Francisco J. Urbina, *A Critique of Proportionality*, 57 AM. J. JURIS. 49, 79-80 (2012).
[58] *See* Huang & Law, *supra* note 48.
[59] Hwang, *supra* note 48, at 257-58.
[60] The TCC's deployment of proportionality and balancing in the mandatory death penalty case illustrates more of the issues surrounding how transnational public law resulting from judicial dialogue is susceptible to abuse than those concerning the idea of judicial dialogue itself.
[61] *See* BOMHOFF, *supra* note 48, at 190-243.
[62] *Cf.* PETERSEN, *supra* note 39, at 80.

technique in the administration of constitutional litigation.[63]

If proportionality analysis, a prime example of transnational public law, still suffers from the dearth of meaning as discussed above, what causes this meaning-impoverished transnational legal world? To answer this question, we need to delve into the way the legal character of transnational public law is conceived.

III. NARRATIVE ARTICULATION, TRANSNATIONAL JUDICIAL DIALOGUE, AND *NOMOS*-BUILDING

To explore the underlying causes of the current condition of transnational public law, I first revisit judicial dialogue, with a focus on the character of such transnational lawmaking. After revealing the reconceived relationship between law and community in the making of transnational public law, I then draw upon Cover's idea of *nomos* and show why transnational lawmaking processes are jurispathic. Based on the distinction between jurisgenerative and jurispathic lawmaking activities, I suggest that judicial dialogue be reoriented towards the articulation of global *nomos* as illustrated in a new approach to the proportionality doctrine.

A. *Law and Community in a New Key: Judicial Dialogue and Transnational Epistemic Communities*

As noted above, Waldron presents his new *jus gentium* as a non-institutionalized body of legal principles with all the authoritative, systematic, and normative attributes of law. The way Waldron finds systematicity, normativity, and authority in the new *jus gentium* is revelatory of the making of transnational public law and its character.[64]

To make a case for the systematic character of the new *jus gentium*, Waldron first parts company with other legal philosophers, shifting attention from "dynamic" to "static"

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[63] *See* COHEN-ELIYA & PORAT, *supra* note 41, at 129-32; Perju, *supra* note 42, at 367.
[64] WALDRON, *supra* note 17, at 48-75.

systematicity.[65] The systematic character of the new *jus gentium* thus lies in the "*content*" of legal norms materializing in the horizontal legal universe, not the "*source*" of law within a vertical normative order.[66] After giving an account of the internal normativity and systematicity, Waldron returns to the question of authority with another jurisprudential shift. From an external perspective, he asks: "what normative force does the mere fact of a consensus have?"[67] To reformulate the question, why should we attribute any weighted value of persuasiveness to the cross-jurisdictional legal consensus? Standing apart from those who justify judicial dialogue on pragmatic grounds,[68] Waldron further complements his jurisprudential inquiry with a sociological probe into the way the new *jus gentium* forms and thus gives away the true colors of transnational lawmaking.[69]

It is noteworthy that while Waldron argues that all the courts the world over can take part in judicial dialogue in the legal pursuit of justice,[70] he does not justify the persuasiveness of the virtual consensus-based transnational law on the Condorcet's jury theorem-based argument for majoritarian decision-making.[71] Rather, it is the process of judicial dialogue that underpins the authority of the new *jus gentium*. According to Waldron, at the core of the mutual reference by courts across jurisdictions that gives rise to the new *jus gentium* is the underlying reasoning of judicial rulings.[72] Thus, it is the way the judge tackles the case at hand and reasons about the issues engaged that enables a judicial ruling to acquire persuasive authority.[73] Furthermore, he observes of judiciaries the world over approaching similar legal questions in a shared lawyers' method that centers on

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[65] Waldron attributes the distinction between the dynamic and static systematic character of law to Hans Kelsen. *Id*. at 68-69.

[66] *Id*. at 68 (emphasis added).

[67] *Id*. at 59-60.

[68] *See*, *e.g.*, CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 165-79 (2009).

[69] WALDRON, *supra* note 17, at 74.

[70] While only the legal consensus that forms among "civilized countries" matters in terms of transnational law, Waldron suggests that it is open to other countries that are still falling behind on the rule of law and other attributes of legal civilization. *See id.* at 190-214.

[71] *Id*. at 83-89.

[72] *Id*. at 93.

[73] *Id*. at 61.

"abstraction and analysis."[74] The understanding and knowledge of legal issues acquired in this lawyer's way constitutes what he calls "a specifically *legal* episteme."[75] Notably, the legal episteme does not guarantee the right answer, let alone truth.[76] Yet, when a virtual consensus has already formed around a legal issue, its underlying legal episteme shared by lawyers can inform the judiciary in the future of whither the lawyer's way may lead in the face of a similar question.[77] In other words, consensus stands as a global persuasive authority to the judiciaries facing the same problem in the way accepted scientific knowledge is the "prescriptive starting point" for scientists attempting to break new ground in the cosmos of science.[78] In both science and law, consensus seems to function as "a[n]…agreed disciplinary benchmark."[79] But, why?

Informed by "the cosmopolitanism of scientists,"[80] Waldron suggests that judiciaries with a "lawyer's mentality" and shared "lawyerly thinking" constitute a global "intellectual community" of legal professionals.[81] As a scientific breakthrough begins with a dialogue with accepted scientific knowledge (i.e., the old consensus) and rests on its own acceptance by the global community of scientists as a new consensus,[82] the progress in legal knowledge in the pursuit of justice pivots on the global community of legal professionals.[83] Resulting from the continuing debate and critical scrutiny in the global pursuit of legal knowledge, a virtual consensus on a given legal issue among judiciaries the world over deserves some weight in any national court's decision on the same issue while it is constantly subject to further reflection.[84] Through the transnational process of consensus-forging judicial dialogue, the Waldronian *jus gentium* acquires the static systematicity in content and

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[74] *Id*. at 94-96.
[75] *Id*. at 93.
[76] *Id*. at 93, 105.
[77] *See id*. at 93-100.
[78] *Id*. at 101.
[79] *Id*. at 100-01 (quotation omitted).
[80] *Id*. at 100.
[81] *Id*. at 94, 98.
[82] *See generally* Uri Shwed & Peter S. Bearman, *The Temporal Structure of Scientific Consensus Formation*, 75 AM. SOC. REV. 817 (2010).
[83] *See* WALDRON, *supra* note 17, at 105.
[84] *See id*. at 100-08.

doctrine.[85]

More importantly, with the increase of intertextuality as discussed above, a national court's ruling on a shared legal principle is likely to be subjected to the scrutiny of foreign judiciaries and the wider legal community. Thus, decisions of various jurisdictions on the same legal principle are effectively under constant review by their peers in the transnational legal community. In a word, peer review underlies the process of judicial dialogue in the making of transnational legal rules and principles, resembling the way the body of scientific knowledge forms.[86] This underpins the analogy Waldron draws between law and science.[87]

Yet, what emerges from the transnational process of lawmaking as discussed above appears to be a counter-image to the conventional view of judicial lawmaking. According to Bruno Latour, who has produced perceptive ethnographical studies of different fields of knowledge—including law and science, judicial lawmaking stands in contrast with the formation of scientific knowledge.[88] While scientific knowledge forms in the dialogue in which scientific discovery is open to constant scrutiny among peer scientists with its truthfulness pivoting on its acceptance by the epistemic community,[89] judicial lawmaking in its traditional domestic context is oriented towards the settlement of cases before the court.[90] Seen in this light, Waldron's new *jus gentium* is akin to scientific knowledge under the watch of peer scientists. The making of transnational public law as manifested in the new *jus gentium* is directed at the approval of the epistemic community of legal professionals instead of the collective judgment of the political community that traditional judicial lawmaking is meant to mobilize.[91] Thus emerges a reconceived relationship between law and community. Moreover, as the closeness of his new *jus gentium* to a science-inspired image of law suggests, it comes as no surprise that Waldron ties the making of transnational public law to

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[85] *Id*. at 96-98.
[86] *Id*. at 105.
[87] Waldron emphatically distances himself from a variety of scientific conceptions of law as represented by Christopher Gottfried Leibniz, Immanuel Kant, and Christopher Columbus Langdell. *See id*. at 95-97.
[88] BRUNO LATOUR, THE MAKING OF LAW: AN ETHNOGRAPHY OF THE CONSEIL D'ÉTAT (Marina Brilman & Alain Brilman Pottage trans., 2002).
[89] *See id*. at 204-09.
[90] *Id.* at 205.
[91] *Id*. at 258-64, 269-70, 276-77.

reason,[92] reflecting a broader attitude towards what underpins the concept of community in the transnational legal setting.[93] To Waldron, transnational public law appears to be born of reason and free of will and is thus anchored in an epistemic community, not a political community.[94]

At first glance, the foregoing view ostensibly corresponds to the conventional relationship between law and community: a legal order speaks to the community in which it forms, evolves, and operates.[95] The transnational legal community is to transnational law as a national community is to its legal order. Yet, the resemblance is only apparent.

It is true that as Friedrich Carl von Savigny contended, jurists gain privileged access to the law with their lawyer's mindset.[96] Yet, the law and its underlying principles that Savigny's model jurists could "perfect" and of which they would have unparalleled command remain rooted in the broader community.[97] In contrast, the making of transnational public law as characterized above lies in the various and diverse forms of dialogue taking place in the transnational communities of professionals and in the networking of experts.[98] As a result, transnational (public) law shapes up "as a self-conscious development and a reflexive process" within the professionals-driven, expertise-oriented transnational epistemic community of lawyers, judges, and legal academics.[99] In sum, a novel relationship between law and community emerges from the transnational setting: transnational law speaks to the epistemic community of legal professionals, not the general community.

Should we cheer about the making of transnational public law through and within

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[92] WALDRON, *supra* note 17, at 108.
[93] Jeffrey L. Dunoff, *A New Approach to Regime Interaction*, *in* REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 136 (Margaret A. Young ed., 2012).
[94] WALDRON, *supra* note 17, at 108.
[95] *See* RONALD DWORKIN, LAW'S EMPIRE 211-16, 225-30 (1986).
[96] *See* Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C.L. REV. 837, 852-54 (1990).
[97] *See id.* at 852-58. *But cf.* JAMES Q. WHITMAN, THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA 120-21 (1990).
[98] WALKER, *supra* note 6, at 52.
[99] *See id.* at 53-54.

epistemic communities freed of will? Is the meaning-impoverished world of transnational public law as noted above down to this professionals-driven, expertise-oriented rationalist lawmaking? Cover's insightful work on narrative, the meaning of community, and *nomos* will help us to see the light.

B. *Departing Jurispathic Epistemic Communities: Narratives and Transnational* Nomos

In "Nomos *and Narrative*," Cover provided a critique of interpretation in the judicial decision-making process in the modern state. According to Cover, the law not only exists in but also envisages a whole world, or rather, a shared normative universe we inhabit, i.e., a *nomos*, of which "[t]he rules and principles of justice, the formal institutions of the law, and the conventions of a social order are… but a small part."[100] To understand the legal institutions or prescriptions, we need to relate those legal precepts to "the narratives that locate [them] and give [them] meaning."[101] Thus, the discovery of meaning in law is more of the understanding of the legal order than the interpretation of the legal precepts as it requires not only understanding the legal precepts but also reading the underlying narratives.[102]

Yet, under the influence of "imperial virtues," Cover noted that the practice of judicial interpretation does not have much room for narratives.[103] In a pluralist society with differing constitutional visions, Cover observed, the judge tends to seek refuge in technical rules so that he can avoid important but sometimes divisive issues and continue to play his purported neutral role on the one hand.[104] On the other, the imperial virtues steer the judicial discourse characteristically towards objectivity and universalism at the expense of

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[100] Cover, *supra* note 14, at 4-5. For another understanding of *nomos*, see CARL SCHMITT, THE *NOMOS* OF THE EARTH IN THE INTERNATIONAL LAW OF THE *JUS PUBLICUM EUROPAEUM* 67-79 (G.L. Ulmen trans., 2003).

[101] Cover, *supra* note 14, at 4.

[102] *See id.* at 6.

[103] *See id.* at 60-68. *See also* Ming-Sung Kuo, *Politics and Constitutional Jurisgenesis: A Cautionary Note on Political Constitutionalism*, 7 GLOBAL CONSTITUTIONALISM 75, 81-87 (2018).

[104] Cover, *supra* note 14, at 60. Both the technical rules governing the jurisdiction of courts and the general legal grounds of the judicial power, which Cover included under the rubric of "jurisdiction," enable the judge to parry such controversial issues. *Id*. at 54.

ethos and of particulars pertaining to individual cases.[105] More importantly, the imperial character of the judicial process reflects the shared attitude towards the meaning of law among judges and other legal professionals. Though a judicial decision contains information about the factual background of the case under scrutiny, it is treated as distinct from law in the judicial proceedings.[106] And, it is the general and abstract character of the inferred legal principle and doctrine that comes to lawyers' attention.[107] As judges tend to take their decisions as the product of legal knowledge and direct the judicial discourse towards the epistemic community of legal professionals instead of speaking to citizens,[108] there is virtually no place for narratives in such judicial discourse. To Cover, the exclusion of narratives entails the jurispathy of the judicial decision-making process.[109]

Before delving further into Cover's prognosis of jurispathy, we need do justice to judicial lawmaking in which the practice of interpretation is directed towards understanding the meaning. While the present-day judge focuses attention on the extraction of the general principles and doctrines from technical rules, the meaning of the principles and doctrines emanating from judicial decisions is the focus of legal professionals in an extended process of judicial lawmaking. A judicial decision in and of itself does not control the meaning of the principles and doctrines it enunciates. Its meaning only transpires when it is turned into the object of scrutiny among legal professionals after the case is closed.[110] Only when it receives further commentary and critique in the latter stage can its enunciated principles and doctrines be endowed with meaning in terms of their real-world impact.[111]

Yet, this extended process of judicial lawmaking is a far cry from Cover's envisaged *nomos* in which jurisgenesis thrives.[112] With the building of a *nomos* in mind, Cover

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[105] *See id*. at 13-16.

[106] *See*, *e.g.*, Geoffrey Marshall, *What Is Binding in a Precedent*, *in* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 503, 504-06 (D. Neil MacCormick & Robert S. Summers eds., 1997).

[107] NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 67-92 (2008). *Cf*. LATOUR, *supra* note 88, at 214-17, 231-35.

[108] *Cf*. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

[109] Cover, *supra* note 14, at 40.

[110] *Cf*. LATOUR, *supra* note 88, at 198-243.

[111] Fiss, *supra* note 108, at 744-45.

[112] Cover's paradimatic jurisgenerative process is associated with insular nomian communities, which serve

located "[t]he transformation of interpretation into legal meaning" in the moment "when someone accepts the demands of interpretation and, *through the personal act of commitment*, affirms the position taken."[113] Commitment is more than consent to or acceptance of a particular rendering of the legal text. Rather, it means "[the projection of] the understanding of the norm at work in our reality … onto the teleological vision that the interpretation implies."[114] The creation of legal meaning thus requires "the objectification of that to which one is committed."[115] According to Cover, this can only be made possible through narratives about "how law…came to be, and more importantly, how it came to be one's own."[116] Moreover, by virtue of narratives, people of all constitutional stripes may take part in the activity of legal (re)interpretation, suggesting the integrative role of the law in community-building.[117] In this way, narratives align the activity of legal interpretation with the discovery of meaning in law, rendering the process of judicial lawmaking itself "jurisgenerative."[118] It is narratives, not the legal episteme, that are generative of the law and give meaning to the legal order.

Juxtaposed to the Coverian legal universe, the predominant model of the legal order in the modern state looks jurispathic as professional and academic lawyers—who stand as the dominant commentators and critics—focus on principles and doctrines in the extended process of judicial lawmaking.[119] Even so, the state legal order remains rooted in the political community and cannot escape the scrutiny of community members as expressed in diverse forms of narratives in which the meaning of the law rendered in judicial interpretations forms, evolves, and thrives. As will become clear, the relationship between the state law and the political community gives hopes for turning the jurispathic legal order

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as the prototype for what he called "paideic legal order[s]." *See* Cover, *supra* note 14, at 14-16, 26-30.

[113] *Id*. at 45 (emphasis added).

[114] *Id*.

[115] *Id.*

[116] *See id*.

[117] *See* Austin Sarat & Thomas R. Kearns, *Making Peace with Violence: Robert Cover on Law and Legal Theory*, *in* LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE 49, 55-60 (Austin Sarat ed., 2001).

[118] *See* Cover, *supra* note 14, at 13-15. For a different understanding of jurisgenerative lawmaking centering on deliberative democracy, see Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1526-32 (1988).

[119] Fiss, *supra* note 108, at 745.

into jurisgenesis. Yet, when we look beyond the national legal order, the situation is different. There, as Walker suggests, we will be witnessing judicial dialogue, the principal "jurisgenerative activity" in the process of transnational lawmaking.[120] At its core is a collective enterprise of legal exposition by professional and academic lawyers focused on facilitating the migration and convergence of legal principles and doctrines.[121] With the underlying narratives as expressed in the domestic context left out, what Walker calls the "jurisgenerative activity" in the expertise-driven process of transnational lawmaking turns out to be jurispathic in the Coverian light, raising issues about the novel relationship between law and community in the transnational setting.

As Roger Cotterrell suggests, the law—which is a field of experience rather than the means of power legitimation—requires embedding itself in the political community to be legitimate.[122] After all, the law finds its force through persuasion with respect to the whole political community, not just the professional community with a shared lawyer's mentality.[123] Through persuasion, the law becomes the political project to which those living under it are committed and in which they thus find meaning.[124] In other words, embedded in the political community, the law rendered in judicial interpretations reveals its meaning and sustains itself when it appears persuasive to the broader community beyond legal professionals. To be sure, the community in and of itself does not make the law legitimate or render judicial interpretations jurisgenerative. Nevertheless, it provides the condition under which jurispathic judicial interpretation can be turned into a genuine jurisgenerative activity with the help of narratives.[125] In contrast, a legal order that focuses on doctrines and principles only rests on a thinned out version of community, whether it is epistemic or

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[120] WALKER, *supra* note 6, at 52. To avoid confusion, I substitute "lawmaking" for what Walker characterizes as "jurisgenerative" unless otherwise specified.

[121] *See also* Antoine Vauchez, *Introduction: Euro-Lawyering, Transnational Social Fields and European Polity-Building*, *in* LAWYERING EUROPE: EUROPEAN LAW AND A TRANSNATIONAL SOCIAL FIELD 1, 9-15 (Antoine Vauchez & Bruno de Witte eds., 2013).

[122] ROGER COTTERRELL, LAW'S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE 92-95 (1995).

[123] *See generally* PAUL W. KAHN, MAKING THE CASE: THE ART OF THE JUDICIAL OPINION (2016).

[124] *See* Cover, *supra* note 14, at 45.

[125] To clarify, a legal system that is jurisgenerative is not a sufficient condition of its legitimacy. For Cover's pessimistic view, see Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

not.[126] Taken out of context, principles and doctrines look like mathematical formulae awaiting application[127] and are thus susceptible to criticism of being too abstract and too general. This is the current condition of law to which professionals-driven, expertise-oriented transnational lawmaking gives rise.

In the face of the jurispathic state legal order in general, Cover urged that the legal discourse extend focus to the underlying narratives that weave legal principles and judicial doctrines into a thick web of normative meanings.[128] As narratives are stories and discourses concerning history and experience, including narratives in the extended process of judicial lawmaking as noted above can reinvigorate the relationship between law and community. On the one hand, non-experts can contribute to the rejuvenation of normative meanings in the lawmaking process through their own narratives about the law;[129] on the other, by broadening the focus to narratives, legal experts can relate themselves to a broader audience.[130] The practice of judicial lawmaking can thus be further turned into jurisgenesis at the core of which lies an endless process of persuasion among the members of the political community.[131] The meaning of law no longer results from an assertion of authority or an exercise of justification. It pivots on persuasion through which a shared world of normative meanings forms.[132] The legal space emerging from this jurisgenerative process intimates a *nomos* in which its inhabitants can relate themselves to judicial discourse/decisions. In this light, a community where the law is embedded is not an epistemic network but instead a shared living space complete with meaning.[133] Viewed thus, the challenge facing transnational public law lies in how it can be reoriented towards *nomos*-building in the transnational legal setting by extending the focus of legal discourse beyond transnational

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[126] *See* WALDRON, *supra* note 17, 140-41.

[127] *See* Anthony D'Amato, *Can Any Legal Theory Constrain Any Judicial Decision?*, 43 U. MIAMI L. REV. 513, 530-34 (1989).

[128] Cover, *supra* note 14, at 6-9; Antaki, *supra* note 43, at 304-05.

[129] *Cf.* Dmitry Epstein et al., *The Value of Words: Narrative as Evidence in Policy Making*, 10 EVIDENCE & POL'Y 243 (2014).

[130] *Id*. *See also* Kuo, *supra* note 103, at 106-09.

[131] KAHN, *supra* note 123, at 99-108, 117-34. For the increasing reference to the notion of identity in judicial reasoning, see Lustig & Weiler, *supra* note 7, at 357-69.

[132] *See* KAHN, *supra* note 123, at 18-87.

[133] Cover, *supra* note 14.

epistemic communities.

C. *Towards a Transnational Jurisgenesis: Discovering* Nomos-*Underpinning Narratives through Judicial Dialogue*

It should be noted that the self-claimed "anarchist" Cover held deep skepticism about the jurispathic state law being fully transformed into a *nomos*.[134] Even so, he still held out hope that a narrative-oriented legal commentary and judicial decisions would help to make the state legal order less jurispathic by appealing to the values, memories, and history for persuasion instead of focusing on the sustenance of legal authority. In this way, the state legal order may be steered towards redemption.[135] With this glimpse of hope in mind, let us take up proportionality again to see how the nascent but jurispathic transnational legal order can be reoriented towards a transnational jurisgenesis with the help of narratives.

As noted above, the formal character of proportionality enables it to adjust to various contexts and thus results in its worldwide popularity. The downside of the analytic framework of proportionality is that the same character makes it liable to manipulation. Notably, this deficiency is attributed to the residual subjective component in balancing. Aimed at a more objective proportionality doctrine, formulating balancing as a rule-guided exercise of persuasion appears to be the way forward.[136] From this perspective, persuasion is merged into justification, which is considered the principal appeal of proportionality. Yet, this fails to grasp the key to the persuasiveness of proportionality.

Echoing Cover's critique in "Nomos *and Narrative*," I have argued that a legal precept has no power of persuasion in its own right. Its implementation relies on the fact that its addressees (mainly the members of the political community) find its judicial rendering

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[134] Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 181 (1985).
[135] *See* Cover, *supra* note 14, at 22-35.
[136] *See* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 102-07, 401-14 (Julian Rive trans., 2002). For a critique, see Ming-Sung Kuo, *Resolving the Question of Interscalar Legitimacy into Law? A Hard Look at the Principle of Proportionality in Global Governance*, 31 LEIDEN J. INT'L L. 793, 809-11 (2018).

persuasive in the sense that they would freely live it out.[137] Furthermore, the judicial rendering of a legal precept is not persuasive simply because it is dictated by some predetermined authority.[138] Rather, persuasion comes down to the judgment of individual members of the political community, which reflects their identity and tradition.[139] Only in this way can the citizenry feel ownership of the legal precept and its judicial rendering.[140]

Persuasion is not only essential to the authority of national judicial decisions but also integral to transnational judicial dialogue. As Patrick Glenn points out, one of the missions of comparative law is to facilitate the "distribution of persuasive authority" through understanding of how judgments on authority become persuasive (vis-à-vis authoritative) in distinct legal orders in contact.[141] It is true that the reason-structured justification that passes the peer review of the professional community—transnational or not—makes a judicial decision more persuasive to the public. Nevertheless, justification alone does not guarantee its persuasiveness.[142] As discussed above, the judicial decision is both an act of justification and an exercise of persuasion, while judgment plays a pivotal role in the latter. The attempt to equate the exercise of balancing with an application of a "rule of weight"[143] in proportionality analysis suggests the trend of moving judicial reasoning further in the direction of justification at the expense of persuasion.[144] Still, it ends up being a formal structure, failing to resolve the issues over the malleability of proportionality.[145]

With the component of judgment revealed, the essence of balancing in proportionality analysis can be better appreciated in comparative constitutional law. Notably, when a legal principle applies to a concrete controversy, the same conflicting values may be engaged in different jurisdictions. In the exercise of balancing, however, value conflict is not only

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[137] *See* my discussion of Cover in *supra* III.B.
[138] *But see generally* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979).
[139] KAHN, *supra* note 123, at 58-60.
[140] *See id.* at 51-62.
[141] *See* H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 41-43 (5th ed. 2014).
[142] Antaki, *supra* note 43, at 284.
[143] Frederick Schauer, *Proportionality and the Question of Weight*, *in* PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING, *supra* note 39, at 173, 178.
[144] *See* BARAK, *supra* note 41, at 284; Antaki, *supra* note 43, at 292.
[145] *See also* PETERSEN, *supra* note 39, at 46-47, 49.

resolved by the judiciary but also filtered through the historical context (including the political-legal culture) of the relevant jurisdiction. Choosing between conflicting values thus amounts to a function of how the members of the political community position themselves in the world. This is the question of political identity, which shapes up in the development of political-legal culture.[146] In the final analysis, the success of proportionality and balancing in particular pivots more on the culture of the society where they are employed than on rules.[147]

To make sense of how proportionality works out in some jurisdictions but falls short of persuasion in others thus requires an adequate appreciation of how values are balanced and chosen in the political-legal culture of the jurisdictions concerned. It is narratives that give expression to this cultural process and contribute to the (re)construction of identity.[148] By virtue of narratives, the judicial voice of balancing can be turned into the speech act of persuasion, bridging the gap between the judiciary and the political community.[149] Seen in this light, judicial dialogue may approach proportionality analysis differently. The convergent formal structure will no longer be the focal point. Rather, instances of such analysis as rendered by distinct jurisdictions need to be read together with their underlying narratives as this is how the judgment at the core of proportionality analysis can be made sense of, regardless of the result of balancing in individual cases. In other words, what domestic courts should look up in taking part in the global elaboration on the transnational legal principle of proportionality is not the convergent formal doctrine called proportionality analysis. Rather, it is the diverse values and conflicting interests, as expressed in the underlying narratives of the judgment at the core of proportionality and balancing in individual jurisdictions, that should attract the most attention in transnational judicial dialogue.

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[146] *See* KAHN, *supra* note 123, at 41-45. Niels Petersen suggests that common features of institutional constraints account for the success of proportionality analysis. PETERSEN, *supra* note 39, at 189-91. It is true that institutional constraints are important to the operation of proportionality analysis. Yet, the effect of common institutional features needs to be made sense of in the context where they operate.

[147] Schauer, *supra* note 143, at 184-85. *Cf.* BARAK, *supra* note 41, at 349-50, 359-68; BOMHOFF, *supra* note 48, at 190-234.

[148] *See* Kuo, *supra* note 103, at 105-06.

[149] *Cf.* KAHN, *supra* note 123, at 18-87.

Take a look at the landscape of transnational public law beyond proportionality. When subscribing to a convergent legal principle, the domestic court needs to engage the broader community—the law enforcement officers included—with persuasion and bring out its meaning so that the relevant principle can make sense to the community members. It is not enough for the court just to say to the community, "By subscribing to the convergent legal principle, we are joining the global trend and becoming part of the mainstream."[150] Instead, by looking into the conflicting values and interests as expressed in the underlying narratives in individual jurisdictions, the court can help the community to see the rich normative meanings beneath the convergence of doctrines and principles. Moreover, as a transnational legal principle is manifested in the convergence among culturally diverse jurisdictions, the community that is being introduced to that principle can see which jurisdiction is akin to itself culturally. Furthermore, it can reflect on whether it should join its kin jurisdiction to adopt the relevant principle or why it should go its own way as its court decides.[151] With judicial dialogue reoriented towards narratives, the diverse meanings flowing in distinct jurisdictions under the convergent principle or doctrine can be brought to the surface, enriching judicial dialogue. In this way, transnational public law can find itself embedded in the "meaning compound" consisting of culturally diverse communities out of which a *nomos* can be imagined beyond individual jurisdictions.[152]

Unfortunately, narratives are mostly lost in discussion of transnational public law. I have pointed out that the focus of comparative constitutional jurisprudence has been on the more transferrable parts of judicial opinions: doctrines and principles. Thus, the first step to overcoming this kind of limitation in the transnational law of balancing will be to shift the emphasis from the doctrinal structure and the conceptual framework to the specifics of reasoning in comparative constitutional jurisprudence.[153] Yet, the effect expected of this

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[150] *See* SUNSTEIN, *supra* note 68, at 187-209.

[151] This is similar to what Vicki Jackson calls the posture of engagement but with a different focus. *See* JACKSON, *supra* note 5, at 71-121.

[152] I draw upon the concept of "constitution compound" in conceptualizaing the state of the constitutional order of the European Union. *See* Franz C. Mayer & Mattias Wendel, *Multilevel Constitutionalism and Constitutional Pluralism:* Querelle allemande or querelle d'allemand, *in* CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 127, 128-30 (Matej Avbelj & Jan Komarek eds., 2012).

[153] *See generally* COMPARATIVE CONSTITUTIONAL REASONING (András Jakab et al., 2017).

shift may not come true given the current condition of judicial reasoning. First, non-professional narratives have been mostly kept from entering judicial opinions. To maintain the distance between public opinion and the judicial discourse, the judiciary has also adopted specialist language, ending up staying out of the broad jurisgenerative dialogue on the meaning of the political-legal order. Thus, shifting the focus from the doctrinal structure and the conceptual framework to the specifics of judicial reasoning may only find more justificatory arguments instead of jurisgenerative narratives.

Even so, this does not mean that the making of transnational public law through judicial dialogue has reached a dead end. As suggested above, judiciaries are not the only actors. Rather, transnational lawmaking involves other legal professionals—including legal academics—who help to shed light on the meaning of judicial opinions. Making sense of the doctrinal structure and the conceptual framework and the accompanying justificatory arguments is certainly part of this illuminating process. And, this has been the current focus of comparative constitutional law in the pursuit of constitutional convergence. Yet, academics can also contribute to the illumination of the meaning of judicial opinions by engaging with non-judicial narratives beyond comparative constitutional jurisprudence. To see how a foreign court's judicial opinion is not just one of the instances of carrying out a convergent constitutional doctrine or principle but rather functions as a speech act of persuasion in the relevant community, the broad narrative context in which the opinion is rendered must be brought to the fore.[154] This is where legal academics can help, only with their commentary reoriented towards the narratives left out of judicial opinions.

Take proportionality one last time. In response to the concerns over its malleability, some scholars have suggested that the focus of proportionality analysis shift from the normative stage of balancing to the more empirically oriented test of necessity. With the help of comparative law, an objective test of necessity can be gleaned from a global survey of whether, for example, the ban on full-face veils in public places is necessary to achieve the

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[154] *See also* KAHN, *supra* note 123, at 37-39.

goal of enhancing public security.[155] While the proposed global survey of what objectively constitutes necessity rests on the rationality of "large numbers,"[156] it will still find difficulty persuading the broader community. Community members may well continue to wonder why a similar measure adopted by the state is necessary in a concrete situation; law enforcement officials may resist the court-defined objective test of necessity, despite paying lip service to such a test. Proportionality may still carry on and result in decisions in conformity with the global trend. Yet, its meaning is still wanting. The objective approach to necessity amounts to a jurispathic doctrinal restatement.

Instead, we should not miss the fact that the seemingly empirical questions concerning necessity are always considered and answered through a culturally mediated cognitive framework.[157] Thus, in contrast to the forgoing approach based on numerical rationality, the influence the political-legal culture and the resulting identity exert on what constitutes necessity or suitability should be brought to the fore alongside the proposed global survey. As comparative law scholarship has pointed out, culture, tradition, and identity are at the center of legal comparativism since each legal order represents "*a way of knowing*,"[158] which not only suggests a " particular epistemolog[y]" but also reflects a "*mentalité* []" and "a distinctive mindset."[159] Comparative constitutional law is no exception. And, the distinctive ways of knowing of individual legal orders mediate the cognition of what constitutes necessity or suitability.

Unfortunately, ways of knowing, particular epistemologies, *mentalités*, and distinctive mindsets are those currently left out of judicial dialogue. Yet, legal academics can help to illuminate how issues concerning the necessity of a forceful measure are tackled in individual legal orders under the formal structure by looking up the extrajudicial underlying narratives. Judicial decisions can thus be situated in their respective narrative contexts, while the broader

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[155] *See also* Dixon, *supra* note 4.
[156] *See* HIRSCHL, *supra* note 3, at 162-63, 193-94.
[157] *See generally* ELIAS G. CARAYANNIS & ALI PIRZADEH, THE KNOWLEDGE OF CULTURE AND THE CULTURE OF KNOWLEDGE: IMPLICATIONS FOR THEORY, POLICY AND PRACTICE (2014).
[158] Nicholas Kasirer, *Bijuralism in Law's Empire and in Law's Cosmos*, 52 J. LEGAL EDUC. 29, 32 (2002).
[159] *Id*. at 36.

community the domestic judiciary aims to persuade finds itself in a cross-cultural conversation, making the foregoing shift of attention in comparative proportionality part of a general jurisgenerative move in transnational public law.

In sum, a thick comparative proportionality analysis in judicial dialogue requires looking beyond the convergence and divergence in constitutional jurisprudence, while transnational public law cannot thrive without connection with communities outside the legal profession. Thus, the focus of transnational judicial dialogue should be on the articulation of jurisgenerative narratives where the meaning compound consisting of culturally diverse communities finds itself.[160] Reoriented towards "the meeting…of traditions" instead of the cross-jurisdictional convergence of legal rules and doctrines,[161] judicial dialogue can help to pave the way for a thick, meaning-rich, transnational *nomos* in the development of transnational public law.

IV. CONCLUSION

Legal space has extended far beyond national jurisdictions.[162] With the world order undergoing great transformation, the rule of law has been conceived of in transnational or even global terms.[163] Comparative law, especially comparative constitutional jurisprudence, is seeing a renaissance in the pursuit of the global rule of law.[164] Through their legal training and professional experience, judges are regarded as specializing in judging underpinned by practical reasoning and the philosopher-lawyer's mind.[165] Their decisions and opinions provide the point of access to the normative worlds of individual jurisdictions. Moreover, with their shared professional experience and training background, judges are expected to gain a deeper sense of the meaning of decisions made by their

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[160] *See also* GÜNTER FRANKENBERG, COMPARATIVE LAW AS CRITIQUE 227-33 (2016).
[161] *Cf.* GLENN, *supra* note 141, at 49-53.
[162] *See* WALKER, *supra* note 6.
[163] *See id*.
[164] *See* Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570, 2592-95 (2004).
[165] *See* DAVID ROBERTSON, THE JUDGE AS POLITICAL THEORIST CONTEMPORARY CONSTITUTIONAL REVIEW 1, 382 (2010).

counterparts in other jurisdictions. Studying each other's decisions not only nurtures judicial reasoning but also helps to develop normative convergence on contemporary rule of law issues. Transnational judicial dialogue is thus regarded as the herald of a transnational legal universe.

Yet, the making of transnational pubic law through this process has raised many questions. One of them is the thinness of the rule of law it breeds. Taking the question of thinness seriously, my analysis aims to provide a prognosis of the challenge facing the nascent transnational public law. Situating the emerging transnational public law in the recent wave of legal comparativism, I have drawn on Cover's discussion of *nomos*, narratives, and jurisgenesis to shed light on the state of transnational judicial dialogue. Sharing Cover's concern over the jurispathic character of modern judicial lawmaking, I have argued that supporters of judicial dialogue have focused too much on how to reach cross-jurisdictional normative convergence. Judicial dialogue molded thus amounts to expert deliberation in a grand judicial symposium, heralding a transnational professional community rather than a transnational *nomos*. From out of this process of judicial lawmaking we see a jurispathic transnational public law full of legal norms but without much meaning.

To turn this jurispathic transnational legal order into a prospective transnational *nomos*, I have further noted that transnational judicial dialogue should be reoriented towards *nomos*-building. Aided by comparative constitutional law scholarship, how judicial decisions have been susceptible to the narrative-underpinned norm-(re)making processes in each jurisdiction can be revealed. Recast in such terms, transnational judicial dialogue can help to make judicial reasoning jurisgenerative in two senses. First, dialogue-oriented courts will be more engaged in the articulation of *nomos*-sustaining narratives in individual jurisdictions, so that their foreign counterparts can get access to the underlying meanings of their decisions. Second, meaning-generative narratives embedded in individual jurisdictions can come across each other through transnational judicial dialogue with the help of legal academics looking beyond judicial decisions, contributing towards the emergence of a transnational *nomos*. Though such an imaginary jurisgenerative judicial dialogue still falls short of a deeper transnational *nomos* in Cover's sense, the narrative-rich practice of

transnational public law engendered by it can contribute to transnational *nomos*-building.

To many enthusiasts of the global rule of law and transnational public law, the transnational *nomos* envisaged in this article may appear too distant to bear on the present world order. Apparently, a thin version of transnational public law at hand is better than a thick one that is yet to come. Perhaps this is a more practical approach to moving forward with the transnational project. The question is: what kind of normative world can we make of such a transnational legal order? The odds are that a network of legal signs and codes without humanity will emerge from a world full of legal norms with little meaning.[166] A normative world like that is jurispathic and alien to those living under it. The making of transnational public law should envisage a better world than that alien space.

[166] *See* Paul W. KAHN, FINDING OURSELVES AT THE MOVIES: PHILOSOPHY FOR A NEW GENERATION 119-21, 125-26 (2013).