



The University of Hong Kong  
Faculty of Law

## Proportionality and the Culture of Justification

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Business, Israel; Cheng Chan Lan Yue Distinguished Visiting  
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Room 7.23, 7/F, Cheng Yu Tung Tower, Centennial Campus  
The University of Hong Kong

To register: <https://goo.gl/9n2hQR> // For enquiries: [coria@hku.hk](mailto:coria@hku.hk)

This talk reviews several functional explanations that have been given to the dramatic spread of proportionality and suggests an intrinsic one. It argues that proportionality is a requirement for justification, which represents a profound shift in constitutional law on a global level. Following South African scholar Etienne Mureinik, it is argued that the shift is from a culture of authority to a culture of justification. At its core, a culture of justification requires that governments should provide substantive justification for all their actions, i.e., justification in terms of the rationality and reasonableness of every action and the trade-offs that every action necessarily involves. The talk identifies several features of Western constitutional systems that have evolved after World War II, and that support the culture of justification. These include a broad conception of rights, a broad approach to constitutional interpretation with an emphasis on principles and values rather than on text, low barriers to substantive review, and no legal “black holes”. Most importantly in terms of our review, it involves a two-stage form of judicial review, identifying the infringement of the right, and justifying the infringement, with an emphasis on the second stage of justification. The talk suggests two preliminary historical explanations for the rise of the culture of justification. One is its connection to the rise of the human rights ideology which developed after WWII, and which provided a response to the threats of nationalism and populism. The other is its roots in the optimistic belief in rationality and reason that can be traced to the nineteenth-century German legal science movement. The gradual shift towards proportionality and the culture of justification can be characterized as a shift towards an administrative model of constitutional law, which we term the “administrization” of constitutional law.

**Prof Moshe Cohen-Eliya** is the President of the College of Law and Business (as of 2015). Prior to his service as the President, he was the dean of the law school at the College (2010-2015). He is the founder and editor-in-chief of the journal *Law & Ethics of Human Rights* (2007-2012). He graduated from the Hebrew University, magna cum laude (1993); earned his LL.D. from the Hebrew University (direct track) (2000); did his post-doctorate at Harvard law school as a fellow with the Human Rights Program (2002-2003); and was a faculty fellow at the *Edmond J. Safra* Center for Ethics at Harvard University (2009-2010). Prior to joining the faculty (2000), he worked as a lawyer for the Association for Civil Rights in Israel (1994-1999) during this period he appeared before the Israeli Supreme Court in constitutional cases. He is the co-author of *Proportionality and Constitutional Culture* (Cambridge University Press, 2013) (with I. Porat).