The Normative Foundation of Proportionality

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ABSTRACT

"Understanding the normative foundation of proportionality requires distinguishing between the reasons explaining its incorporation and content in legal systems and the reasons justifying its validity as membership in the legal system. The explanatory reasons include instrumental and substantive rationality, which underpin two additional explanatory considerations, namely justice and the protection of fundamental rights. However, these reasons do not address the justification for proportionality's membership in legal systems. After rejecting Alexy's thesis that proportionality logically derives from the existence of principles in legal systems and the argument that proportionality is a logical consequence of the rule of law, I conclude that the normative foundation of proportionality — except where explicitly enshrined in constitutional texts or derived from precedent — rests in customary law. This conclusion is grounded in the reiterated use of the principle by the legal community — particularly, though not exclusively, by courts — along with the accompanying conviction of its binding nature.

KEYWORDS

Proportionality; Balancing; principles; Rationality; Rule of law; Customary law

§ 0.º Introduction

1. The topic of proportionality has generated extensive literature that addresses a wide range of questions. These include the nature of proportionality, the type of norm at stake—whether it is a rule, a principle, or a *tertium genus*—and its function—does proportionality serve to regulate the exercise of competence norms in creating law, to establish preferences, or something else entirely? Another set of questions concerns its structure and content. Is proportionality constituted by the three canonical tests of suitability, necessity, and proportionality in the narrow sense? Or is it perhaps limited to the first two? Alternatively, might it include additional tests, such as the legitimacy of the end or reasonableness? Moreover, what, precisely, do these famous three tests translate to in practice?

Despite all these doubts, given the extensive treatment and use of proportionality by the legal community across numerous legal systems, one would at least expect some agreement on the "foundation" or "source" of the norm of proportionality. While there is little controversy regarding the *existence* of a norm of proportionality in most legal systems, there is surprisingly little consensus on this preliminary issue. A brief review of the literature reveals several possible "foundations" of proportionality[1], including:

(a) the idea of justice;
(b) democracy;
(c) the rule of law;
(d) the prohibition of arbitrariness;
(e) equality;
(f) human dignity;
(g) fundamental rights; and
(h) the principled structure of fundamental rights' norms.

The problem starts with the ambiguity surrounding what is meant by the "foundation" of proportionality. Does it refer to the reason explaining the norm's creation, another principle that teleologically underpins it, or the title of membership qua validity that connects it to legal systems? A review of the literature reveals a conflation of these three analytically distinct aspects[2].

2. The main aim of this paper is to identify the *source* of the norm of proportionality's membership in legal systems. The answer to this question

[1] Listing some of the possible "foundations" of the norm of proportionality, among others, see Bernal Pulido (2007, 599); Barak (2012, 211); Clérico (2009, 26); Canas (2017, 353). Some authors even advocate for *composite foundations* based on several of the possible foundations mentioned (among them, for example, see Bernal Pulido (2007, 600); Clérico (2009, 27). It should be noted, however, that on a metaontological level, such strategies invariably prove fruitless for the simple reason that the possibility of isolating several points of communion or conceptual connection between proportionality and various of the aforementioned foundations does not, in itself, establish the existence of a norm of proportionality. As will be seen, at best, such existence would have to constitute a *logical consequence* of one or several of the commonly identified foundations, meaning it would have to result from a logically valid inference; mere conceptual association is insufficient.

[2] The ambiguity in the discourse on proportionality does not stop here. For instance, claims can be found suggesting that proportionality can be understood simultaneously "as a legal principle, as a governmental objective, and as a structured approach to judicial review" (see Jackson, 2015, 3098). The problem with such statements lies in the fact that proportionality is always a legal norm, even though it can be applicable in the context of legislative, executive, or judicial activity.

requires, first and foremost, explicitly distinguishing between the reasons that *explain* the generalized (and growing) incorporation of the norm of proportionality into legal systems, as well as the content almost always ascribed to it, and the reasons that *justify* its membership in those systems.

Indeed, as will be demonstrated, especially in the constitutional context, it is very common for authors to attempt to establish conceptual relationships with other legal concepts, functions, or principles, such as RATIONALITY, the protection of fundamental rights, or the rule of law, to assert the foundation or source of proportionality. Some authors propose foundations such as human dignity or equality, despite the absence of any discernible conceptual relationship to the norms in question. In other cases, they rely on highly contested substantive contents of concepts like DEMOCRACY, from which they can ostensibly derive connections to almost anything, thereby inferring any normative content they believe *should* belong to legal systems. However, mere conceptual relationships are not sufficient conditions to justify the membership of norms in legal systems. Similarly, linguistically indeterminate legal concepts, such as the rule of law or democracy, cannot serve as a kind of "magic hat" from which legal norms can be extracted at will by scholars. Fortunately, scholars lack the authority to create legal norms.

From the analysis of the various reasons that effectively *explain* the incorporation and the content usually ascribed to proportionality, I will argue that only rationality and the protection of fundamental rights and freedoms have significantly contributed to this outcome.

Curiously, despite the extensive literature on the foundational question of proportionality, aside from Alexy's attempt to deduce it logically from his "theory of principles," scholars have rarely, at least explicitly, questioned the *source of law* that justified the membership of such a norm in the respective legal system. The reason for this omission may stem from the intuition that a concept as complex, pervasive, and influential as proportionality could hardly have such a straightforward foundation as creation through custom or judicial precedent. However, in the scientific domain, simplicity is a virtue. Moreover, as noted earlier, this intuition conflates the reasons explaining the emergence and content of proportionality with those justifying its incorporation into legal systems.

That said, apart from the cases of Constitutions and other more recent normative texts that explicitly incorporate proportionality, as well as the

rarer cases of introduction by precedent—as occurred with the Canadian Supreme Court—I will argue that the reason that invariably justifies proportionality's membership in legal systems is custom, as evidenced beyond any doubt by the repeated institutional practices of applying the principle and the acceptance of its bindingness.

3. To this end, in Section §1, I will discard reasons such as supra-positive law, democracy, and equality, which, although frequently cited in doctrine and jurisprudence, fail to adequately explain or justify the existence or content of proportionality in legal systems. In Section §2, I will briefly identify and analyse the explanatory reasons for proportionality, focusing on rationality and the protection of fundamental rights. Finally, in Section §3, I will examine the primary justificatory sources of proportionality. In Section 3.1, I will begin by analysing and rejecting Alexy's complex argument that proportionality is a conceptual implication of the theory of principles. Subsequently, in Section 3.2, I will explore the typical sources of law, ultimately concluding that customary law provides the most convincing foundation for proportionality's membership in legal systems.

§ 1.º What does not explain or justify proportionality in legal systems

4. First and foremost, it is essential to reject the theses that classify the norm of proportionality as one of the "general principles of law." According to such theses, the validity of proportionality would be explained by its inclusion in supra-positive natural law[3]. However, this position faces a significant meta-theoretical issue: it relies on a specific theory of law—natural law—which falters if that theory does. Moreover, not everyone accepts the natural law explanation of law—myself included.

Even those who assert that the general principles of law constitute principles that are part of legal systems, regardless of their explicit inclusion in

[3] In this sense, for example, see Ossenbühl (1993, 152); Grabitz (1973, 568); on the subject, in a sense close to what I claimed, see Bobbio (2016, 229). Moreover, aside from the fact that proportionality does not overlap with norms governing interpretation, as many of these authors suggest, the predicate "general" adds nothing of explanatory to its understanding—thus, Perez Luño (1997, 19) is correct in characterizing them as a "legal mythology," devoid of dogmatic value. Also criticizing the association proportionality to the general principles of law, see Bernal Pulido (2007, 512).

the formulations of positive law[4], fail to clarify the source of their validity. This leaves the question open: what is the source of the general principles of law's membership in legal systems?

In light of these considerations, I argue that proportionality, like any other legal norm, is a human construct, originating from the minds and pens of the legal community[5]. Its existence and content are grounded in social facts, emerging from the actions and attitudes of this community. This modest claim also explains why proportionality is not universally present in all legal systems and why its content varies.

Finally, as will become evident, the widespread and growing acceptance of proportionality is best explained by a much simpler reason: its inherent conceptual relationship with the concept of RATIONALITY.

5. Secondly, it is essential to promptly dismiss the thesis that the norm of proportionality finds its foundation in the concept of DEMOCRACY. The concept of democracy—at least as understood here in its formal sense[6]—refers broadly to the mechanisms through which a politically organized community exercises decision-making authority over itself. For example, in representative democracies, the competence to create legal norms is conferred upon authorities that are democratically elected for this purpose.

However, when examining the contrast between the content and function of proportionality and democracy, it becomes clear that proportionality does not stem from democracy. Rather, it serves as a *limit* on the exercise of democratic authority, including the legislative power to create law[7].

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[4] See Crisafulli (1941, 166).

[5] In a similar sense, referring to a "doctrinal instrument" that is not "discovered," but rather "constructed," see Petersen (2017); also referring to "doctrinal construction," see Sweet and Mathews (2019, 5). It is certain that, considering the contingency of law, no norm is discovered but always constructed. In reality, "doctrine" is only part of the community of agents who, as will be seen, contributed to the *construction* of proportionality as we know it today.

[6] Which also means that, apart from fundamental rights that inherently depend on the ideal of democracy, such as the right to vote, it does not make sense to assert that the concept of democracy includes fundamental rights as a substantive element. This is especially true if one considers that such a claim could lead to the problematic assertion that the content of the concept of DEMOCRACY might itself become contradictory. On these ideas, see Barak (2012, 218). Moreover, it would hardly be a sound conceptual strategy to base the foundation of proportionality on a substantive concept of democracy, particularly given its theoretical contestation.

[7] On this possible foundation, with similarities to what was stated in the text, see Lepsius (2020, 98–99); Barak (2020, 214); Jackson (2015, 3108); Canas (2017, 356–357). A different conclusion would not arise for authors who, more generally, emphasize the ambivalent relationship between constitutional adjudication and democracy, noting that it both contributes to democracy by controlling restrictions on fundamental rights and influences the democratic process (for example, see Lübbe-Wolff (2016, 19).

Thirdly, the same applies to the theses that argue proportionality finds its foundation in HUMAN DIGNITY or EQUALITY, as these concepts are typically understood within constitutional systems. Human dignity, on the one hand, translates into a norm prohibiting the violation of individual autonomy or, more specifically, the instrumentalization of human beings[8]. As such, no conceptual link to proportionality can be discerned. Equality[9], on the other hand, constitutes a norm that, in its formal dimension, prohibits the unequal treatment of equal situations. While equality and proportionality are both secondary norms—that is, they regulate the exercise of power-conferring norms—their content is fundamentally different. Consequently, it is unclear how one could derive from the other[10].

§ 2.º The explanatory reasons of proportionality: Rationality and protection of fundamental rights

6. The brief considerations outlined in the previous section highlight that the search for a foundation or source for proportionality—almost always rooted in *essentialist* reasoning, as it was a *natural kind*—has led scholars to propose any concept that appears to have a connection with it. However, as noted, identifying the foundation of a norm within a legal system cannot be reduced to a mere conceptual relationship.

In addition to the clarification of what might be meant by "foundation," addressing the question at hand should begin by identifying the explanatory reasons underlying the norm of proportionality—that is, the reasons why the legal community has come to adopt it. While this inquiry inevitably involves a speculative dimension, framing the issue in this way makes it immediately evident that *rationality* is the primary reason behind the legal community's creation of a norm such as proportionality[11].

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[8] Arguing that human dignity would constitute the foundation of proportionality, see Dürig (1956, 117). At best, if understood as a prohibition on infringing upon individual autonomy, it could serve as an explanatory reason for proportionality, as it is generally related to fundamental rights. However, within Dürig's own theoretical framework and the absolutist manner in which he conceptualized human dignity, it is unclear to what extent proportionality could be connected to human dignity.

[9] In this sense, among others, see Huster (1983, 164).

[10] Distinguishing between the principle of proportionality and equality, see Sampaio (2023, 653).

[11] In a similar sense, identifying as the "most powerful root" of modern notions of proportionality

The structure and content of proportionality can be briefly reconstructed as follows: Its antecedent involves a relationship between a deontic means (e.g., a rule or legal decision) and a legal end (e.g., the constitutional principle mandating the protection of the environment), represented as a "means → end" relationship. Proportionality operates with a mandatory deontic modality, meaning it restricts the exercise of legal powers under specific conditions. Regarding its consequent, proportionality prohibits the use of deontic means that are (i) unsuitable, (ii) unnecessary, or (iii) disproportionate in the narrow sense. Specifically: (i) a means is unsuitable if it cannot, even minimally and abstractly, contribute causally to achieving the desired ends as intended by the deciding authority; (ii) a means is unnecessary if there is an alternative that is less restrictive on the affected principle and at least as effective, if not more so, in achieving the desired end; and (iii) a means is disproportionate in the narrow sense if, after comparing the intensity of the restriction with the concrete importance of fulfilling the end, it is determined that the benefits of the chosen means do not outweigh the costs imposed on the restricted principle[12].

Indeed, a careful examination of the principle of proportionality reveals that it largely derives from the idea of *instrumental rationality*, as it assumes the adoption of means that facilitate the achievement of chosen ends. As Von Wright (1993, 173) asserted long ago, the concept of rationality can be divided into *formal* or *structural rationality*, which is "teleologically oriented" and involves elements of logic, reasoning about the means-ends relationship, and empirical truth or certainty, and *substantive rationality* (or "*reasonableness*"), which is "value-oriented" and concerns what is correct and good[13].

Focusing on formal or structural rationality—particularly the presupposition that effective means must be chosen to achieve desired ends—reveals its connection with the norm of proportionality. The norm's application depends on verifying the means→ends relationship. As an indisputable aspect of formal rationality, the requirement to choose means structurally appropriate for desired ends explains why legal operators and scholars

and balancing the idea that law must be "useful" and, therefore, "teleologically rational," which would relate to the subordination of means-ends relationships to "mandates of economy," see Jansen (2011, 59); also connecting proportionality to rationality, see Harbo (2015, 201).

[12] See Sampaio (2023, 692).

[13] See also Alexy (2010, 6-7).

assert the existence of a legal norm mandating the selection of effective means. To do otherwise would simply be irrational. This corresponds to suitability and necessity.

As previously noted, practical rationality encompasses the criteria of substantive rationality, which holds that actions should be guided by values to achieve what is right and/or good. This includes the principle that, when faced with two alternatives, we should choose the one for which there is greater reason[14]—corresponding to proportionality in its narrow sense.

From the perspective of substantive rationality, two additional explanatory reasons underpin the norm of proportionality: the idea of justice and the protection of fundamental rights[15].

First, at a broader level, the idea of justice serves as an explanatory reason for proportionality. Justice is commonly understood to require proportionality, as the concept of JUSTICE is intrinsically tied to substantive rationality—the principle of choosing what is right or value-drivenly good[16].

Second, at a more specific level, the protection of fundamental rights and liberties explains the development of proportionality. With the recognition and incorporation of fundamental rights into constitutional texts, it became natural to establish normative criteria for identifying unacceptable interferences with these rights. Historically, proportionality has been closely associated with the recognition of individual autonomy, originating in German police law of the late 18th century, where it served to control restrictions by the executive power on individual freedom.[17].

While the preceding discussion helps us understand, with significant epistemic power, the reasons behind the legal community's formulation of what we now know as proportionality, it does not, however, address its

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[14] In a similar sense, see Alexy (2010, 7).

[15] It is no coincidence that numerous authors associate the principle of proportionality with the idea of justice, from which would arise the prohibition of excessive sacrifices of liberty. For example, see Jakobs (1985, 52); Deschling (1989, 118).

[16] According to Schlink (2012, 719), the connection between the just and the proportional can be traced back to Aristotelian thought, according to which the distribution of certain goods in society, such as money, honour, etc., should follow a proportionate relationship to respective merits. Of course, it is not possible to "deduce" a norm of proportionality from the concept of justice, even when it is embedded in legal texts (see Bernal Pulido, 2007, 695-606).

[17] See Jansen (2011, 59, 67). It should be emphasized once again that this is only an explanatory reason, lacking any foundation for the theses according to which the concept of proportionality would be "implied by the legal nature of fundamental rights". On this possibility, see Bernal Pulido (2007, 601); Canas (2017, 358).

normative foundation[18] — specifically, the source for its membership into current legal systems.

§ 3.º The justificatory reasons as normative foundation of proportionality

7. Having identified the reasons that explain the content and widespread recognition of the principle of proportionality in contemporary constitutional systems — distinguishing these from the reasons that justify its incorporation into legal systems — it is now the moment to examine the potential candidates for the normative foundation of proportionality's validity qua membership.

First, due to its doctrinal significance, I will begin by analysing the complex argument advanced by Alexy and his followers, who derive the principle of proportionality from the "theory of principles." After rejecting this hypothesis for several reasons, I will briefly revisit how norms are incorporated into legal systems. Next, I will examine the possibility that proportionality is a logical consequence of the principle of the rule of law. Upon dismissing this hypothesis, and aside from clear cases where proportionality is explicitly created by normative authorities with the competence to do so, I will trace its justificatory foundation back to the source of customary law.

3.1. A complicated story: conceptual implication from the theory of principles

8. Alexy and his followers have attempted to derive proportionality conceptually from the existence of principles within legal systems[19].

[18] Likewise, affirming the need to find a foundation in the Constitution for proportionality, see Schlink (2012, 729); Barak (2012, 211). Some authors affirm the need for the foundation of proportionality to be *normative*, although it can be drawn from any normative domain, such as that of morality (see Tremblay, 2009, 7). It should be noted, however, that disregarding possible relations between law and morality, moral reasons can only serve the function of explaining the creation and incorporation of norms into legal systems. At best, they could constitute a negative condition of admission. Consistently with the positivist perspective adhered to, the normative foundation of proportionality must be internal to the respective legal systems.

[19] Even stating that this is the dominant conception in the doctrine, see Borowski (2003, 129).

According to the German philosopher, there exists a "relationship of reciprocal implication" between the norm of proportionality and the *principled norms* that confer fundamental rights[20]. More specifically, proportionality is implied by principles as "mandates of optimization"—norms that require their content to be fulfilled to the greatest extent possible, given factual and legal possibilities. These principles are applied through balancing, which in turn implies the principle of proportionality. This suggests that the three tests of proportionality—suitability, necessity, and proportionality in the narrow sense—are logically deduced from the optimizing structure of principles. Therefore, rejecting the "theory of principles" would also require rejecting proportionality[21] .

Alexy's reasoning, which expresses the conceptual relationship of implication, seems to rest on the following premises:

> (1) According to the theory of principles, principles constitute mandates of optimization;
> (2) Principles are applied through balancing, an element of proportionality;
> (3) The optimal realization of principles is ensured by proportionality;
> *Therefore,*
> (4) Proportionality follows from the theory of principles.

Setting aside the apparent circularity in the thesis that proportionality and the theory of principles are mutually implicative, as well as the fallacy of undue generalization—that all fundamental rights derive from principles (for example, the fundamental right not to be tortured appears to function as a rule rather than a principle)—all the premises of Alexy's reasoning are problematic.

Premise (1) depends on the acceptance of the claim that principles conceptually have the structure of "mandates of optimization." However, this is a highly debated issue, and I believe there are strong reasons to reject this thesis[22]. For instance, it seems inadequate for accounting for constitutional permissions—such as the freedom of expression, for which it makes little

[20] See Alexy (2019, 59).
[21] See Alexy (2019, 59).
[22] Also noting that a different definition of principles would lead to a different conclusion regarding proportionality, see Möller (2007, 453).

sense to argue that there is a mandate to optimize. Furthermore, the thesis partially relies on a pragmatic criterion external to the structure of norms, asserting that principles are distinguished from rules by their method of application—not subsumption, but balancing. In my view, principles are better distinguished from rules by the *nonspecificity* and *genericity* of the actions they regulate[23].

Premise (2) is false for two main reasons. First, balancing is an intellectual operation used to resolve conflicts that cannot be settled by the conflict-norms of the legal system. It can also be employed to resolve conflicts between rules when no other conflict norm is applicable. This is clearly demonstrated by Alchourrón's (1991) well-known example of a conflict between the rules "it is obligatory to stop the vehicle at a red light" and "it is forbidden to stop the vehicle near a military facility." This conflict arises only when a vehicle is at a red light near a military facility, and the light turns red, creating a normative conflict that cannot be resolved by lex superior, lex specialis, or lex posterior. Second, the conceptual assimilation of balancing to proportionality is unfounded. It is crucial to distinguish between balancing and the principle of proportionality — or even the test of proportionality in the narrow sense. While balancing is an intellectual operation aimed at establishing normative preferences, proportionality is a norm, and proportionality in the narrow sense is simply one of the three components of proportionality's content. Although proportionality in the narrow sense involves an operation of measurement — namely, the weighing of the concrete intensity of interferences with principles — this differs fundamentally from balancing, which is an operation designed to determine normative preferences.

Consequently, premise (3) is also false. Principles are not mandates of optimization, and proportionality does not determine the (in)applicability of principles. Instead, it establishes a normative criterion to distinguish between admissible and inadmissible outcomes in decision-making. Specifically, proportionality regulates the exercise of discretion by excluding disproportionate alternatives when authorities engage in balancing.

The challenges faced by the thesis under consideration are, however, even greater. Even if one were to charitably accept the premises of the

[23] See Lopes (2017, 471); Sampaio (2023, 237).

reasoning as true, the conclusion that proportionality is implied by the theory of principles would never logically follow from those premises. In fact, the reasoning not only commits a logical fallacy — a *non sequitur* — but also, more specifically, the naturalistic fallacy. The problem, as is readily apparent, lies in the fact that proportionality constitutes a norm. In these terms, the reasoning attempts to derive a normative conclusion — the norm of proportionality — from a set of factual premises. For this reason, in order for Alexy to infer proportionality from the theory of principles, the argument would necessarily have to include at least one normative premise, or else it would violate Hume's Guillotine.

The problem primarily lies in the conceptual confusion between balancing and proportionality. As has already been established, while balancing is an intellectual operation aimed at establishing normative preferences — specifically, identifying the norm applicable in cases of irresolvable normative conflicts within the legal system — proportionality is a norm that regulates this balancing process. It indicates which outcomes of balancing — such as disproportionate legal rules or decisions — are constitutionally inadmissible. Therefore, the relationship of implication exists only with the operation of balancing, not with the norms that guide the balancing activity.

Strictly speaking, regardless of the logical possibility of conceiving legal systems without principles and equipped with conflict norms that exhaustively resolve all normative conflicts — systems which, realistically, are at best highly improbable — the inclusion of principled norms in modern legal systems, given their generic and conflict-prone structure, necessitates an intellectual operation to resolve irresolvable intra-systemic normative conflicts, such as constitutional conflicts: namely, balancing[24]. In other words, if any relationship of implication could be attributed to the principled structure — assuming the inclusion of principles in modern

[24] Recently, Vitalino Canas (2017, 374) proposed a possible new foundation for proportionality, namely that of what he calls the "*prima facie* constitution". According to the author, this involves both the fact that the "constitutional reality" is "complex and pluralistic" and that the "constitutional texture" is "extensive and filled with vague and indeterminate concepts," which would support a plurality of "competing claims," leading to the proliferation of constitutional conflicts and imbuing the constitution with a prima facie character, thus justifying the need for "harmonization instruments," in the author's language. However, disregarding now the fact that it is not the norms that are prima facie, but their applicability — this applies to all norms, not just principles—this thesis only survives Hume's guillotine if "harmonization" is reduced solely to the intellectual operation of balancing, and not to proportionality itself. The author himself states that the concept of "prima facie constitution" is "descriptive" (382), meaning that it could never be used to extract a norm like proportionality.

legal systems — it would be the necessity of an intellectual operation for autonomously establishing normative preferences[25].

By contrast, the manner in which balancing judgments are legally regulated depends on the norms incorporated for this purpose in each legal system, and is thus contingent, as is the case with all legal norms[26].

In summary, notwithstanding the conceptual relationships that may be established between proportionality and other norms or concepts, the foundations analysed above are, apart from explaining what led the legal community to formulate the norm we now call proportionality, merely philosophical approximations without any normative force. This means that the validity, qua membership, of the proportionality norm in legal systems is no different from other norms: either proportionality results from a source of creation authorized by the respective rule of recognition, or it constitutes a logical consequence of a norm belonging to the respective legal system.

3.2. A simpler story: the validity *qua* membership of proportionality

9. The analysis and rejection of various hypotheses regarding the foundation of proportionality's membership to legal systems has led us to the commonly known topic of the "sources of law." As proportionality is a norm, its incorporation into a legal system naturally depends on one of the sources of law recognized within that particular legal system.

Let us briefly examine how norms are incorporated into legal systems before proceeding to analyse the case of proportionality.

10. Validity, understood as membership in the set of legal norms, depends on other norms that govern normative creation. It is therefore a commonplace notion that a norm is valid in this sense if it satisfies the following conditions:

> (a) it was created by an authority competent to do so within the respective legal system;
> (b) it has not been derogated by a competent authority; and

[25] Obviously, this is not to say that balancing is "internal" to principles, as sometimes seems to resonate from Alexy's thought, since it constitutes an intellectual operation external to the structure of norms. In the same sense, see Barak (2012, 237).

[26] In a similar sense, although seeming to qualify proportionality as a way of solving conflicts, see Barak (2012, 237, 241).

(c) it does not conflict with another valid norm, in cases where the system can resolve the conflict by determining the defeated norm to be invalid (e.g., conflicts between statutory rules and constitutional principles).

Consequently, membership in the system jointly depends[27] on:

(a) *admission norms*, which establish the necessary conditions for normative validity, corresponding to the forms of legal creation ("sources of law") accepted by the rule of recognition of each legal system; and
(b) *expulsion norms*, which establish the conditions under which valid norms cease to be so, specifying the means by which a norm may lose its validity (e.g., derogation, "desuetudo", etc.).[28]

In accordance with this framework, from the perspective of admission, Romano-Germanic legal systems typically recognize the creation of legal norms through:

(a) authorities endowed with legislative competence; and
(b) customary practices.

Additionally, in common law systems, there is typically also:

(c) norm creation through precedent.

Finally, in addition to norms *explicitly* contained in normative formulations created in accordance with the rules of recognition of each legal system, as previously noted, the identification of norms belonging to legal systems includes one final possibility derived from the respective rule of recognition:

(d) the *implicit membership* through a *logical inference* based on norms already within the system[29].

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[27] See Alchourrón and Bulygin (2012, 111); Hart (2012, 99-100); Raz (2009a, 150).

[28] In a similar sense, see Iturralde Sesma (2003, 123-124).

[29] Distinguishing, in the context of norms resulting from formulations created by competent authorities or those that are a logical consequence of other norms belonging to the system, between explicit and implicit norms, see Guastini (2016, 236-237, 355). Paradigmatically, within the framework of the rule of recognition, see Alchourrón and Bulygin (2012, 111); Bulygin and Mendonca (2005, 47).

In short, norms that constitute "logical consequences" of other norms belonging to the legal system are also part of it[30], if, and only if, they are derived from explicitly stated norms through *logically valid reasoning* (i.e., deductive reasoning), whose premises are exclusively explicit norms. For example, from an explicit norm that establishes that "adults have the right to vote," and another explicit norm according to which "people who are eighteen years old are adults," it is possible to logically deduce a third implicit norm according to which "people who are eighteen years old have the right to vote"[31].

Consequently, depending on the legal system in question, the "normative foundation" of proportionality can only rest on one of the three modes of law-making typically recognized in legal systems, or it must logically result from an existing norm within that legal system.

11. Considering that the rule of law is perhaps the most commonly cited normative foundation for the principle of proportionality by courts[32] and scholars[33] — especially in the German context—particularly in cases where proportionality is not explicitly enshrined in the constitution and thus constitutes an implicit norm, it is important to assess whether such theses might have a kernel of truth. However, as stressed, such a thesis would only be valid if, and only if, the membership of proportionality in the system were the result of a logically admissible deductive inference from the principle of the rule of law[34].

Now, disregarding the fact that the normative nature of the rule of law is not self-evident—since the concept often appears descriptive[35] — it can

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30 See, for example, Wróblewski (1992, 77-78).

31 See Guastini (2016, 356).

32 Among many others, noting that the German Constitutional Court grounds proportionality on the rule of law and the "essence of fundamental rights," notwithstanding that the constitution does not expressly refer to it, see Borowski (2003, 129); Grimm (2007, 385); Schlink (2012, 730); Merten (2009, 535-536). The decision usually cited in this regard is BVerfGE 19, 342 - Wencker. Regarding references in this sense made in Portuguese constitutional jurisprudence, see Canas (2017, 368).

33 In this sense, among others, see Hesse (1999, 148); Hirschberg (1981); Deschling (1989, 14); Grabitz (1973, 584); based on a series of theoretical-conceptual assumptions that are difficult to sustain (that the rule of law has constitutional pedigree, that it includes fundamental rights, that it is based on a balance between fundamental rights and public interest, that balancing is carried out through restriction clauses, and that these are based on proportionality), see Barak (2012, 226). In Portugal, for example, see Gomes Canotilho (2003, 457); Miranda (2012, 302); Alexandrino (2017, 75-76); Novais (2019, 96); and in a somewhat naive way, Sampaio (2015, 182).

34 And not, as is sometimes suggested, 'by definition' — in this sense, see Novais (2019, 10).

35 Illustratively, Article 2 of the Portuguese Constitution states that "[t]he Portuguese Republic is a rule of law (...)."

be argued, from a conceptual perspective, that the rule of law is concerned with the objective of *guiding human behaviour*. This requires legal norms to be (i) general, (ii) public, (iii) intelligible and as clear as possible, (iv) relatively stable, (v) prospective and not retroactive, (vi) consistent with each other, and (vii) not prescribing behaviour that is alethically impossible[36]. Under this formulation, one can say that the principle of the rule of law logically implies the *principle of legal certainty*, which, in its objectified form, demands the predictability of state action. Unfortunately, the same cannot be said for the principle of proportionality, whose content refers to the prohibition of choosing deontic means that are unsuitable, unnecessary, or disproportionate to achieve the desired legal ends. This is because the disproportionality of legal norms or decisions is not related to the objective of regulating human behaviour, but rather to the substantive negative evaluation of acts and their respective deontic contents, which constitute excessive restrictions — typically on principles, especially those that protect fundamental rights and freedoms.

In summary, even through this reconstruction, it cannot be said that the principle of proportionality belongs to legal systems by virtue of the principle of the rule of law. This becomes evident, ultimately, because while many legal systems recognize the existence of the principle of the rule of law, they do not necessarily recognize the principle of proportionality.

12. The previous conclusion does not present issues regarding the foundation of proportionality in legal systems that explicitly enshrine it in their respective constitutional (or statutory) texts. In these cases, the norm of proportionality becomes part of the legal system as it is explicitly included in the normative formulations produced under the terms set by the respective rule of recognition of the legal system, which (e.g.) grants the constituent authority the competence to create the constitution.

The issue arises, however, in legal systems whose constitutional (or other) texts make no express reference to proportionality. This lack of express mention does not prevent courts from consistently applying the norm of proportionality as a normative premise in their decisions, nor does it stop

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[36] In a similar sense, see Celano (2015, 151-152); Raz (2009b, 214). In any case, considering that the rule of law is often summarized as a "laundry list of the properties that a healthy rule of law should have" (see Waldron (2002, 154), it becomes immediately clear that we are dealing with a classic example of an "essentially contested concept," largely due to its "extravagant vagueness," as there is no agreement on the necessary and sufficient properties that would define it.

the legal community from recognizing it as a binding norm of the legal system. Therefore, the key to this seemingly irresolvable conundrum of decades appears to lie in the remaining source of law-making: customary law.

As is widely documented and already mentioned, the "use" of the norm of proportionality, as a "prohibition of excessive means", by the legal community dates back to the German administrative police law of the 18th century[37], where it served as a limit on potential restrictions of executive power over individual autonomy[38]. Since then, especially with the inclusion of fundamental rights and freedoms in the constitutions of post-war and authoritarian regimes, references to the norm of proportionality have multiplied in jurisprudence and doctrine[39], to the point where it is now regarded as a "universal" or "global" constitutional principle[40].

Notably, more recently, proportionality has been *gradually* and *progressively* incorporated into judicial discourse by the German Constitutional Court since the 1960s[41], and today it constitutes an unavoidable norm in the constitutional and legality control of deontic contents in the vast majority of European and American legal systems, as well as in regional (e.g., the European Union) and international legal systems[42]. Unwittingly, authors who explicitly refer to the gradual and progressive judicial use of proportionality[43] are alluding to and demonstrating the fulfilment of the factual or behavioural condition of custom—the *reiterated social practice*.

In fact, the empirical evidence that the norm of proportionality has been used by the legal community consistently, over decades, frequently, and publicly, is unequivocal. Regarding the subjective or internal condition of

[37] On the topic, more recently, see Sweet and Mathews (2019, 60); Barak (2012, 175). See also Canas (2017, 71); Brito (2009, 291).

[38] See Gomes Canotilho (2003, 266).

[39] In addition to all the doctrinal references already made about proportionality, regarding jurisprudence, as an example, cf. the decisions of the German, South African, and Canadian constitutional courts mentioned by Petersen (2017, 80); with exhaustive reference to the decisions of Portuguese Constitutional Court, see Canas (2017, 223); among which, one may highlight the rulings No. 634/93, of November 3; No. 187/2001, of May 2; or, more recently, No. 632/2008, of September 9.

[40] See, for example, Beatty (2004, 162); Klatt and Meister (2012, 1; 2015, 30); Klatt and Meister (2014, 23); Sweet and Mathews (2019, 59); also on the "migration" of proportionality across Europe, see Bernal Pulido (2018, 197); placing proportionality at the centre of what he labels as the "global model of fundamental rights," Möller (2012).

[41] On this, see, recently, Lang (2020, 22). For an empirical analysis of its progressive use by the *Bundesverfassungsgericht*, see Petersen (2017, 80).

[42] See Klatt and Meister (2012, 2).

[43] For example, see Holländer (2011, 210–211).

custom—the conviction of bindingness (or its normativity)—regardless of the best way to conceptualize it, if it is generally understood as the *acceptance* of social practice as constituting an ought to do, translated into a *reflective and critical attitude*[44], it also seems clearly fulfilled[45].

Moreover, despite the various objections raised against proportionality, the literature rarely echoes a complete rejection of the norm; rather, it more restrictively critiques its excessive use or certain components, particularly proportionality in the narrow sense[46]. In this sense, and with a more committed formulation of the internal element, there seem to be no doubts about the internalization of proportionality as both a reason for action and a reason to avoid disproportionately exercising decision-making powers. One can observe a disposition to apply the norm of proportionality, as well as a readiness to criticize deviations from its content and to accept criticism in cases of non-compliance[47]. This is sufficient to demonstrate the existence of acceptance and commitment to the norm of proportionality.

Everything stated so far allows to conclude that, from the perspective of membership according to secondary norms of admission to legal systems, the normative foundation of proportionality is, ultimately, *custom*. In other words, in the vast majority of legal systems, the validity qua membership to the legal system of proportionality is acquired through customary law.[48]

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[44] More specifically, this critical reflective attitude is manifested through a set of *behavioral dispositions*, namely: (i) a general disposition to comply with the demands arising from a certain practice, (ii) a general disposition to criticize deviations from the practice by other agents, and (iii) a disposition to recognize the reasonableness of criticism directed at our own non-compliance with the practice (thus, more generally, referring to the Hartian internal point of view, see Kramer (2018, 61).

[45] Without ever alluding to custom, but with some similarities in referring to the existence of a "normative mechanism" linked to "diffusion and convergence resulting from the development of a normative consensus within an elite group whose claim to authority is based on knowledge," see Sweet/ Mathews (2019, 60).

[46] In a similar sense, see Ossenbühl (1993, 34).

[47] "What can happen, and often does, are legal disagreements at the level of first-order judgments about whether there was compliance or non-compliance with proportionality.

[48] Claiming that proportionality is a "judge-made principle," see Alec Stone Sweet and Jud Mathews (2019, 2); and that it constitutes a "creature of judicial reflection on fundamental rights in a rule of law," see Thorburn (2016, 308). Nevertheless, the creation of the principle is not limited to judges but is instead distributed among the broader relevant community of agents, as its use is also evident among other officials. At best, it would result from an in foro custom, defined as "custom constituted as law by the practice of legal officials" (see Gardner, 2012, 66). Additionally, legal doctrine has sponsored and contributed decisively to the form in which proportionality is now recognized. Generally referring, in a footnote, that legal systems can encompass the norm of proportionality both when it is expressly mentioned in the constitution and when it has been produced customarily, see Duarte (2021, 29).

It is important, however, to clarify that the reference to the courts practice of applying the norm of proportionality is not intended to suggest that its title of validity is based on *judicial custom*. Rather, it indicates that such institutional practice not only contributes generally to fulfilling the factual condition of precedent but also often serves as the judicial recognition of the existence of a customary norm.

Of course, this is not to say that in legal systems whose rule of recognition also admits precedent as a source of law creation, this could not be the justification for its legal incorporation. For example, it can be argued that, in the specific case of the Canadian legal system, the title of membership of the norm of proportionality is rooted in the judicial precedent constituted by the paradigmatic decisions of the Supreme Court in *R v. Big M Drug Mart Ltd* (1985) 1 SCR, and *R v. Oakes* (1986) 1 SCR[49]. However, this seems to be a more limited case.

Moreover, the conclusion that custom is the main source of validity of proportionality is not invalidated by the fact that more recent constitutional texts invariably make express reference to proportionality[50]. On the contrary, in many of these legal systems, the use of the proportionality norm was already a normative reality that predated such textual inclusion. In this sense, the express inscription in those cases merely formalizes the positive incorporation of a norm that was already a member of the legal system by virtue of custom.

In conclusion, the normative foundation as the title of membership of the norm of proportionality to legal systems invariably traces back to custom, significantly bolstered by judicial practice. This reliance on custom also accounts for the subsequent explicit incorporation of proportionality into legal systems[51].

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[49] Different is the case of legal systems whose rule of recognition also provides for precedent as a source of law creation. In this sense, it can be argued that, in the specific case of the Canadian legal system, the title of validity of the norm of proportionality is rooted in the judicial precedent constituted by the paradigmatic decisions of the Supreme Court *R v. Big M Drug Mart Ltd* (1985) 1 SCR, 352, e *R. v. Oakes* (1986) 1 SCR, 139. Referring generally to the establishment of proportionality in the Oakes case, because it was only at that time that the effect of proportionality in the narrow sense was integrated, see Petersen (2017, 99); Sweet and Mathews (2019, 69).

[50] Even in the Portuguese case, although there are some doubts about the inclusion of proportionality in the constitutional text, the truth is that it is mentioned several times: cf. articles 18, nº 2, 19, nº 4, and 266, nº 2. In the same sense, see Alexandrino (2011, 134).

[51] In an informal discussion, Nogueira de Brito expressed doubts about the thesis of the customary origin of proportionality, particularly due to the implausibility of such a complex normative concept being explained by custom. However, it should be noted that custom does not *explain* the specific contours of the norm's content within legal systems, but rather materializes the *source of law* that

§ 4.º Conclusion

Understanding the normative foundation of proportionality requires, first and foremost, distinguishing between the reasons that explain the incorporation and content of this norm in legal systems and the reasons that justify its validity qua membership to the legal system. The explanatory reasons for the norm of proportionality include the concepts of instrumental and substantive rationality, which underpin two other foundational reasons for its emergence: the pursuit of justice and the protection of fundamental rights. However, as noted, these explanatory factors do not address the justification for proportionality's membership within legal systems.

A first justification for the incorporation of proportionality into legal systems is Alexy's "theory of principles", which seeks to derive it logically from the existence of principles within legal systems. However, not only are all the premises of this argument highly debatable — principles do not seem to be mandates of optimization, both principles and rules are applied through balancing, and proportionality is not a criterion for the application of principles — but it is also unclear how it would be possible to infer a norm from purely descriptive premises.

With this hypothesis dismissed, it is important to emphasize that, like any other legal norm, proportionality belongs to a legal system if, and only if, its incorporation results from one of the sources of law recognized by that legal system rule of recognition—these are usually creation by a competent authority, by custom, or by precedent—or if it constitutes a logical consequence of other norms belonging to the legal system. Although the rule of law is perhaps the most frequently mentioned foundation by scholars and courts, the truth is that it would only serve as such if it were possible to logically deduce proportionality from the rule of law, which is not possible.

An analysis of legal systems that incorporate proportionality reveals that, beyond the more recent cases where it is explicitly enshrined in constitu-

incorporates it into the legal system. As emphasized, the explanatory reasons are primarily rooted in the idea of rationality and the protection of fundamental rights. Interestingly, one might still question whether the content of proportionality, as seen everywhere, is partly the result of *modal constraints* stemming from the way humans are and reason (on the distinction between metaphysical, natural or nomic necessity, and normative necessity, see Fine (2005, 235). That is, whether it is nomically shaped by facts about human nature and our disposition for survival. Giving this explanation for the Hartian thesis of the residual moral content of legal systems, see Toh (2021, 572-573).

tional texts, and the rarer cases, such as the Canadian one, where it results from judicial precedent, it is possible to conclude that both its membership and its content have been developed through custom, that is, through the repeated use of the principle by the legal community—particularly, but not exclusively, through judicial practices—which is undoubtedly accompanied by the conviction of its bindingness.

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