2024 | ISSUE 4
ISSN 2184-7649

UNDECIDABILITIES AND LAW

THE COIMBRA JOURNAL FOR LEGAL STUDIES

Legality and Proportionality in the Performance of Law

2024 | ISSUE 4
ISSN 2184-7649

UNDECIDABILITIES AND LAW

THE COIMBRA JOURNAL FOR LEGAL STUDIES

Legality and Proportionality in the Performance of Law

ISSUE EDITOR:
MAREK ZIRK-SADOWSKI
UNIWERSYTET ŁÓDZKI (UNIVERSITY OF ŁÓDZ)

Undecidabilities and Law – The Coimbra Journal for Legal Studies (ULCJ)
a Scientific Law Journal of the University of Coimbra Institute for Legal Research (UCILeR).

In a time highlighted by the quest for the Master Algorithm, several major juridically relevant societal problems resist significantly the predetermination of a unique solution and open a huge spectrum of perspectives and operatories. The title Undecidabilities suggests directly this resistance (as we know, in computation complexity theory, an undecidable problem is the one for which "it is proved to be impossible to construct an algorithm to a correct yes-or-no answer"!), whilst simultaneously considering the permanent renovation of the questions and the plurality of answers which those problems allow, which means considering the instability of cultural and linguistic contexts (justifying a permanent attention to differences, if not différances, as well as to authentic "clauses of nonclausure").

Each volume of our Journal will be dedicated to one of these societal problems and this context of resistance to unique languages and solutions, seriously taken in a reflective horizon that crosses dogmatic and meta-dogmatic legal discourses with the challenges of extra-legal perspectives and approaches.

CONTACTS
University of Coimbra
Institute for Legal Research (UCILeR)
University of Coimbra,
Faculty of Law of University of Coimbra

geral@ij.uc.pt

URL
impactum-journals.uc.pt/
undecidabilitiesandlaw

EDITION
COIMBRA UNIVERSITY PRESS
Imprensa da Universidade de Coimbra
Email: imprensa@uc.pt
URL: http://www.uc.pt/imprensa_uc
http://livrariadaimprensa.uc.pt

DESIGN
Carlos Costa

PRINTING

ISSN
2184-7649

E-ISSN
2184-9781

DOI
10.14195/2184-9781

The coordination by IJ/ UCILeR of this publication is being held as part of the project 'Social Challenges, Uncertainty and Law: Plurality | Vulnerability | Undecidability' of the University of Coimbra Institute for Legal Research (funded by FCT – Foundation for Science and Technology – Project UIDB/04643 UCILeR).

Contents

Editorial

DOI | 10.14195/2184-9781_4_0

Legality and Proportionality in the Performance of Law: Introduction

Marek Zirk-Sadowski

Uniwersytet Łódzki
ORCID: 0000-0003-1740-0863

ABSTRACT
This introduction identifies the thematic core of the fourth volume of *Undecidabilities and Law* (the counterpoint between legality and proportionality in the context of juridically relevant practical performance) and anticipates the diverse contributions which constitute its seven chapters.

KEYWORDS
Principle of proportionality, legality, defeasibility, balancing, ecoproportionality, *rule of law*, tragic cases

The fourth volume of *Undecidabilities and Law* is dedicated to the relationship between legality and proportionality in the context of practical performance (or realization) of law. To explain this thematic core, attention be paid primarily to its two crucial dimensions – legality and proportionality –, both relevant for academic considerations in the field of the conflicting demands of political philosophy and legal philosophy, but also important for practical-normative dogmatic approaches, as well as for the process of interpreting the law in practice by law-enforcing Authorities.

The principle of proportionality is one of the fundamental principles used in various branches of law, including administrative, civil and criminal law. Its purpose is to ensure that measures taken to achieve a certain goal are adequate, necessary and do not exceed what would be reasonable

to achieve that goal. This principle is intended to protect the rights of the individual and prevent the excessive use of legal measures. However, this does not change the fact that part of the doctrine, for various reasons, considers the proportionality test to be an imperfect tool, consequently raising criticism concerning not only the (theoretical) construction of the principle of proportionality itself, but also the practice of its application, which, in their view, is flawed.

Legal theory emphasizes as fundamental the requirement that a certain measure is appropriate to achieve the intended purpose. There must be a functional and logical relationship between the means and the end. If there are alternatives that are less restrictive regarding individual rights, they should certainly be preferred. Sometimes we distinguish the principle of proportionality in the narrower sense: this means that it is sufficient that the benefits of the measure are proportional to its negative effects on the individual.

A plausible separate group is formed by issues related to the application of the principle of proportionality by the courts. There are several dangers. The main one is the non-uniformity of jurisprudence, because the proportionality principle itself can be interpreted differently by different courts, leading to non-uniform rulings. Judges may have different opinions on what is "proportionate" in a given situation. Assessing whether a measure is adequate, necessary and proportionate often requires a complex analysis of the facts and circumstances of the case. Another problem for judges is the difficulty of balancing different interests. The application of the principle of proportionality in the realm of human rights can be complicated because different values and interests often have to be taken into account, which can lead to conflicts. Finally, due to the relationship between different jurisdictions, different legal systems may interpret and apply the principle of proportionality differently, which can lead to difficulties in international legal cases.

It is clear from the works presented in this volume that legality and proportionality –in the context of the process of realizing the "essence" of the law– are two issues that are both sensitive for academic deliberation and important for the process of interpreting the law in adjudication (or for the institutionalized practice of the bodies applying the law). The postulate of taking proportionality into account in the realization of the principle of legality is a suggestion backed by very extensive theoretical and philosophical-legal analyses, part of which concern the articles presented in this volume.

In this volume, the Authors examine the problem of taking into account the relationship between the claims of legality and proportionality whilst respecting the necessary relationship between the corresponding aspirations: this means on one hand taking into account (within the framework of sentencing, i.e., considering the issues of interpretation and application of law) that the concept of legality can be self-restrained by the law which conceptualizes the order of proportionality in the implementation of the public interest; this means on the other hand that the experience of application cannot forget the contemporary phenomena of multicentricity, i.e. the necessary interconnection of national and supranational orders, their mutual interpenetration, as well as their internalized sharing of common axiological bases – for which national jurisprudence should remain responsive.

Manuel Atienza draws our attention to the role performed by the assumptions of positivist legal theory that need to be taken into account in the study of the problem of the relationship between legality and proportionality. According to his view, defeasibility and balancing are concepts that reflect intrinsic characteristics of legal systems, emphasizing the need for flexibility in law to accommodate the unpredictability of human behaviour. The Author reminds us that Herbert Hart suggests that legal concepts cannot be strictly defined by necessary and sufficient conditions, as they often require an "unless" clause to the account for exceptions that defeasibility allows. According to the Author, this notion is echoed in the work by Stephen Toulmin, who applied similar reasoning to argumentation, highlighting the importance of exceptions in both legal and philosophical contexts. The idea that legal norms may have implicit exceptions is foundational to understanding how law operates in practice. Manuel Atienza notes that balancing, closely related to defeasibility, serves as a mechanism to navigate conflicts between competing legal principles and rights. The Author reminds us that Robert Alexy has been influential in articulating the concept of balancing within legal theory, particularly in the context of fundamental rights. He distinguishes between rules, which provide definitive guidance, and principles, which require a balancing approach due to their inherent flexibility. In his reflections, the Author recognises that this distinction is crucial for legal practitioners, as it underscores the necessity of deliberation in complex cases where strict application of rules may lead to unjust outcomes. The interplay between defeasibility and balancing is essential for the evolution of legal systems, particularly in the

context of constitutionalism and the protection of fundamental rights. Legal reasoning must account for both the authoritative nature of laws and the moral and philosophical underpinnings that justify them. As legal systems increasingly recognize the importance of implicit exceptions and the need for balancing, they become more adaptable to societal changes and the complexities of human behaviours. Ultimately, Manuel Atienza recognizes that these concepts, taken as integral to legal practice, can enhance the pursuit of justice while maintaining the necessary structure of Law**.**

The theme of the relationship between proportionality and normativity is also considered by Jorge Silva Sampaio. According to the Author, the concept of proportionality in legal systems has sparked extensive debate regarding its nature, function, and foundational sources. Scholars have explored whether proportionality is a rule, principle, or something else, and its role in regulating legal norms, establishing preferences, or serving other purposes. Despite the widespread acknowledgment of proportionality across various legal frameworks, there remains a lack of consensus on its foundational basis, with potential sources ranging from justice and democracy to human dignity and fundamental rights. The ambiguity surrounding what constitutes the "foundation" of proportionality complicates discussions, as it can refer to the reasons for its creation, underlying principles, or its validity within legal systems. The paper aims to clarify the reason for appearance of proportionalities in legal systems by distinguishing between the reasons for its incorporation and the justifications for its validity. It critiques the tendency of some scholars to link proportionality to concepts like democracy or equality without establishing a clear conceptual relationship. The Author argues that rationality and the protection of fundamental rights are the primary reasons for the adoption of proportionality, emphasizing that mere conceptual connections are insufficient to justify its membership in legal systems. The analysis reveals that proportionality is a human construct grounded in social facts, which explains its varying presence and content across different legal systems. Ultimately, the paper concludes that the normative foundation of proportionality is rooted in customary law, evidenced by its consistent application and acceptance within legal communities. While some legal systems explicitly incorporate proportionality into their constitutions, many others recognize it through judicial practices that reflect a commitment to its binding nature. This reliance on custom not only accounts for the historical development of

proportionality but also supports its subsequent formal inclusion in legal texts, highlighting the importance of customary practices in establishing the validity of legal norms.

A relatively new issue is the application of proportionality in times of climate crisis, which is sometimes called ecoproportionality. This problem is taken up by Alexandra Aragão, who introduces the new concept of ecoproportionality. For the Author the principle of ecoproportionality is essential in balancing environmental protection with competing interests, particularly in the context of the Anthropocene, where human activities significantly impact the Earth's ecosystems. This principle emphasizes that legal decisions must align environmental needs with the actions taken to address them, ensuring fairness and justice in environmental law. According to the Author, as humanity's understanding of ecological processes has evolved, so too has the necessity for legal frameworks that prioritize sustainable outcomes, particularly in light of the urgent challenges posed by climate change and ecological degradation. Understanding ecoproportionality involves visualizing it as a balance scale, where one side represents economic development and the other pristine natural environments. This metaphor highlights the need for sustainable decision-making that considers both environmental and non-environmental values. In the European Union, ecoproportionality is a guiding principle in public decision-making, requiring that environmental impacts be assessed and alternatives explored to ensure that development does not come at the expense of ecological integrity. The integration of environmental considerations into various policies is crucial for achieving a high level of protection and promoting sustainable development. The urgency of the climate and ecological crises necessitates a shift in how ecoproportionality is applied, moving from a balanced approach to one that prioritizes environmental protection. The "do no significant harm" principle serves as a critical legal tool to prevent environmental degradation while promoting sustainable investments. The paper concludes that, as the recognition of climate emergencies grows, the interpretation of ecoproportionality must evolve to emphasize environmental-positivity, where human activities actively contribute to restoring and enhancing the environment. This evolution is vital for addressing the pressing challenges of our time and ensuring a sustainable future for all.

Two papers in this volume directly address the problem of the relationship between proportionality and legality. Milena Korycka-Zirk emphasizes that

the rule of law is fundamentally anchored in the legality of state actions, which must adhere to established legal norms and principles. This adherence ensures that state bodies operate within the confines of the law, similar to individuals. The interplay between legality and proportionality is crucial, as the legality test assesses whether actions are lawful, while the proportionality test evaluates the balance of interests involved. Together, these principles create a framework that protects individual autonomy against the potential overreach of state power, emphasizing the importance of justice based on individual rights rather than majority interests. Legalism, as articulated by thinkers like John Locke and Max Weber, emphasizes the subordination of state Authority to the law, relying on a bureaucratic structure that operates within a defined legal framework. The Author recognizes that this model prioritizes the application of law based on established norms, often sidelining the ethical considerations that may arise in complex legal scenarios. The challenge lies in reconciling the rigid application of legalism with the nuanced demands of legal principles, particularly when it comes to weighing conflicting rights and interests. The application of legal principles, especially in the context of individual rights, necessitates a more flexible approach that acknowledges the interpretive discretion of legal authorities. Ultimately, the principles of legalism and proportionality work in tandem to limit state power and protect individual rights. While legalism provides a formal structure for governance, proportionality ensures that any limitations on rights are justified and balanced against the need. Ana Raquel Moniz explores in turn the problem of the principle of proportionality in the context of the relationships between *Rechtsstaat* and *rule of law*. According to the Author, the concepts of *Rechtsstaat* and *rule of law* have historically been interpreted in various ways, reflecting a complex interplay of legal, political, and philosophical ideas. Central to these concepts is the limitation of state power, ensuring that this power is bound by law and accountable to citizens. The principles at stake emphasize in fact the protection of individual rights and the necessity of a legal framework that governs the relationship between the state and its citizens. The evolution of this idea has seen different interpretations across cultures, particularly in German, English, and French contexts, each contributing with unique perspectives on the relationship between law and governance. In England and the United States, the rule of law is closely tied to the development of common law and constitutional frameworks that prioritize individual liberties and the

accountability of public authorities. The English model emphasizes the historical evolution of legal principles through judicial decisions, while the American system underscores the supremacy of the Constitution and the role of judicial review in maintaining checks and balances. Both systems reflect a commitment to ensuring that governmental powers are exercised within the bounds of law, protecting citizens from arbitrary actions by the state. Ultimately for the Author, the principle of proportionality has emerged as a critical element in contemporary discussions of *Rechtsstaat* and *rule of law*, serving as a standard for evaluating the legitimacy of governmental actions. This principle requires that any restrictions on rights must be necessary, suitable, and balanced against the benefits they seek to achieve. However, the application of proportionality is complex and often influenced by evolving legal interpretations and political contexts. As new authoritarian regimes adopt democratic rhetoric, the foundational principles of constitutionalism face challenges, highlighting the ongoing struggle to uphold the rule of law in a changing global landscape.

The problem of proportionality was also examined in the dimension of court cases. Referring to the analysis conducted by Manuel Atienza, Claudia Toledo asks the following question: are there really tragic cases? The Author discusses the complexities of legal argumentation, particularly in distinguishing between easy and hard cases within the framework of a Democratic Rule of Law. Easy cases are those where the law provides clear answers through statutes and precedents, while hard cases arise when legal provisions are ambiguous, conflicting, or incomplete. The Author emphasizes the importance of rationality in legal discourse, asserting that judges must base their decisions on sound reasoning rather than personal beliefs to avoid arbitrariness. The theories of legal argumentation, particularly those of Robert Alexy, are highlighted as essential for understanding how legal discourse operates within this context. The concept of tragic cases is introduced, where legal decisions may require sacrificing fundamental values, leading to dilemmas without clear correct answers. Manuel Atienza's conclusions about tragic cases suggest that judges must choose the lesser evil when faced with such dilemmas, indicating a limitation of legal rationality. However, the Author seems to argue against this notion, positing that tragic cases are better understood as collisions of fundamental rights principles, where one principle may outweigh another without violating the legal system. The Author contends that legal decisions must still be

grounded in rational argumentation, regardless of the complexity of the case. Ultimately, the text asserts that while legal discourse may not always yield a single correct answer, it must still adhere to standards of correctness and rationality. The interplay between institutional arguments (positive law) and non-institutional arguments (moral, ethical, and pragmatic considerations) is crucial in justifying legal decisions. The Author concludes that in a Democratic Rule of Law, the principles of correctness, rationality, and human rights are intertwined, reinforcing the necessity for legal decisions to be both justified and grounded in rational discourse.

Barbara Janusz-Pohl takes up the question of the limits of admissibility of so-called rulings radically based on proportionality and verging on judicial lawyering, but in situations where they reinforce the important principle of fair trial. The article discusses the implications of the Court of Justice of the European Union's (CJEU) ruling in the EncroChat case, particularly regarding the admissibility of evidence under the European Investigation Order (EIO). It introduces the concept of constitutive rules, which are essential for understanding evidentiary actions in criminal law. The analysis highlights the evolution of these rules, tracing their origins from the works of philosophers like J. Searle and their adaptation by Polish legal scholars, ultimately leading to a new framework for interpreting legal actions and their consequences. The CJEU's ruling in the EncroChat case is pivotal as it establishes a new constitutive rule concerning the admissibility of evidence obtained in violation of EU law. The court emphasized the importance of protecting defendants' rights and ensuring fair trial standards, asserting that evidence collected unlawfully must be excluded from criminal proceedings. This ruling not only clarifies the procedural requirements for issuing an EIO but also reinforces the principle of effectiveness in EU law, mandating that national courts disregard evidence that infringes upon the rights of the accused. In conclusion, the Author posits that the recognition of constitutive rules by the CJEU enhances the legal framework surrounding evidentiary actions, providing a clearer basis for sanctions related to violations. This development is significant for legal interpretation and practice, as it legitimizes the imposition of nullity sanctions even in the absence of explicit statutory provisions. The integration of constitutive rules into the discourse on legal actions represents a methodological advancement, ensuring that the rights of individuals are upheld within the EU's legal system.

Generalizing the conclusions of this volume, it can be said that the linking of the concept of legality with the principle of proportionality is intended, on the one hand, to modernize the classically understood principle of legality. However, it should, on the other hand, be added that a proper understanding of the theory of legal principles and discretion (in assessing the proportions and in reducing one principle at the expense of another) must adopt a framework that does not deviate from the canons of legality. The considerations of the Authors of this volume confirm the belief that it is archaic to consider the functioning of the state on the simple basis of legality (or legalism). In particular, the courts must take into account the most essential substantive basis for determining the principles of lawful state action, that is, for determining the proper balance between the public interest and the protection of the subject's individuality. This is particularly important especially when we are confronted with the socially dominant legal narrative that finds expression in the act of the legislature. The principle of proportionality as a basis for controlling the acts of the legislature in terms of maintaining the proper standards of the relationship between public interest and individual interest cannot, for the sake of maintaining democratic standards, be excluded from the analysis of the rule of law. It is stressed that a new dimension of this control is eco-subsidiarity. Thus, state action on the basis and within the limits of the law must mean that the essence of this boundary must be determined by the optimizing nature of the principles protecting individual autonomy. This boundary (concerning the protection of individual rights and freedoms and its jurisprudential consecration) is a barrier against the omnipotence of public authority, whenever this does not respect the proper proportions in limiting individual autonomy.

Thematic core

Defeasibility and Balancing

Manuel Atienza

Faculty of Law, University of Alicante
ORCID: 0000-0001-6569-1402

DOI | 10.14195/2184-9781_4_1

ABSTRACT

"Defeasibility" and "balancing" are expressions introduced in recent times to deal with longstanding legal phenomena, which in the context of the constitutional state acquire a special prominence. What is at issue, in fact, is the necessity to recognise exceptions implicit in the norms, in order to provide the legal system with the flexibility needed to maximise the chances of finding a correct—just—answer without abandoning the legal system; and (which to a large extent is another aspect of the same phenomenon) to resolve difficult cases (those for which there is no predefined rule, but only principles) argumentatively, by resorting to a procedure, balancing, the use of which does not necessarily imply an exercise in arbitrariness, although it does involve certain risks that recommend a prudent and limited use of this resource. The last part of the paper summarises the ideas that legal theorists and practitioners should bear in mind in order to understand and make proper use of these two controversial but indispensable notions.

KEYWORDS

Balancing, defeasibility, rules and principles, implicit exceptions, constitutional state

1. Introduction. New names for traditional concepts

Defeasibility and balancing are more or less new names for phenomena that are not new; they could not be, because they are closely related to basic features of legal systems and legal practice.

Let us start with "defeasibility". The expression (defeasibility) was introduced into legal theory at the end of the 1940s by Herbert Hart in one of his first writings: "The Ascription of Responsibility and Rights" (Hart, 1948). It is a work that Hart did not want to publish again later, but for reasons that do not seem to have had anything to do with this notion, but

This article was written as an activity of the research project RECOGNISE (Legal Reasoning and Cognitive Science): https://www.unibo.it/en/university/who-we-are/mission-and-values/european-projects-education-and-training/recognise-legal-reasoning-and-cognitive-science; https://www.dirittoequestionipubbliche.org/page/2023_dq-recognise/index.htm.

rather with that of ascription or, more precisely, with an excessively wide conception of ascriptivism, of the weight assigned to the ascriptive use of language, which entailed (Hart reached this conclusion as a consequence of various criticisms that were directed against his writing) a risk of incurring in reductionism (*vid* Lacey, 2006, 146)[1]. In fact, it seems that Hart was "unusually proud throughout his life" of having found something that showed the importance of paying attention to the legal use of language in order to develop notions of general philosophical interest (Lacey, 2006, 144).

Hart's "discovery" is relatively simple, and he explains it with the clarity and elegance that always characterised him. It is that certain legal concepts, such as 'contract' or 'trespass', and, more generally, many of the most typical ones in criminal law, cannot be completely understood (defined) in terms of necessary and sufficient conditions, but rather that it is indispensable to include in their characterisation an "unless" clause:

> In consequence, it is usually not possible to define a legal concept such as 'trespass' or 'contract' by specifying the necessary and sufficient conditions for its application. For any set of conditions may be adequate in some cases but not in others and such concepts can only be explained with the aid of a list of exceptions or negative examples showing where the concept may not be applied or may only be applied in a weakened form". (Hart, 1948, 174)

In a later essay (*vid*. Chiassoni, 2019, 233, note), the conditions that would go behind the "unless" clause are classified by Hart into two categories:

---

[1] Anna Pintore, in a 1990 book (Pintore, 1990), considers that work of Hart to represent an initial and "deviant" stage from a path that leads (fundamentally in *The Concept of Law*) to "una concepción que comúnmente se considera cerrada y iuspositivista del Derecho y de los conceptos jurídicos" (p. 9). According to Pintore, the defeasibility of legal concepts that Hart defends here (and which would be something different from conceptual vagueness) takes us to an image of the law "como un sistema abierto, carente de límites" (p. 15). Hart, again according to Pintore, would have abandoned, in his mature stage, that idea of law "no como un sistema y menos aún como un sistema cerrado de reglas y de conceptos" (p. 18) which, however, would have been assumed by someone like Neil MacCormick, who would represent (it is important to remember that Pintore writes in 1990), a "third way" between hartian positivism and dworkinian principialism; and, to carry out that operation, MacCormick would be based precisely in the defeasible character of legal concepts (p. 183 et seq.). Anyway, the development of that notion in MacCormick's work is found in "Defeasibility in law and logic", in Z. Bankowski, I. White and U. Hahn, *Informatics and the Foundation of Legal Reasoning*, Kluwer, Dordrecht, 1995 (which later was part of MacCormick's book *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, Oxford University Press, 2005).

excusing conditions or invalidating conditions. But what is perhaps more interesting to highlight here is that Hart thought that there was no word in ordinary English to account for this feature, and his choice of "defeat" or "defeasible" was, in fact, a consequence of his familiarity with legal practice (of his experience as a lawyer), and also shows what has already been pointed out: that the careful analysis of legal language can have a more general scope:

> This characteristic of legal concepts [needing the 'unless' clause] is one for which no word exists in ordinary English. The words 'conditional' and 'negative' have the wrong implications, but the law has a word which with some hesitation I borrow and extend: this is the word '*defeasible*' used of a legal interest in property which is subject to termination or '*defeat*' in a number of different contingencies but remains intact if no such contingencies mature. In this sense then, contract is a defeasible concept". (Hart, 1948, 175)

About a decade later, Stephen Toulmin, in a book that is often considered as the beginning of studies on "informal logic", *The uses of argument* (Toulmin, 1958), introduces the same idea to account for a typical feature of argumentation, as he understands it[2].

In short, what Toulmin proposes there is an approach to argumentation seen as a social interaction, which takes place between a proponent and an opponent (the classic scheme of dialectics). At the beginning of the argumentation, the proponent holds a thesis (*claim*: for example, "Harry is a British subject"), which can be objected to by the opponent; otherwise, there would be no need to argue. If so, if it is objected, then the proponent has to give reasons (*data* or *ground*) in favour of his initial claim, which

[2] It is worth clarifying here that Toulmin's way of understanding argumentation is not that of classic logic, of formal deductive logic. His model, as I will now explain, is that of traditional dialectics, which consists of seeing argumentation as an interaction, as an activity. Juan Carlos Bayón has questioned the idea that legal reasoning is defeasible and, with it, also the need or pertinence of building a type of non-classic (non-monotonic) logic to account for justificatory judicial reasoning. But he understands argumentation, the justifying judicial reasoning, in the sense of classic logic, that is, as "la inferencia con la que se justifica una determinada conclusión acerca del derecho aplicable a un caso individual" (Bayón, 2001, 50). He is right, but Toulmin's idea of defeasibility (of refutability) refers to something different, namely, to the process of argumentation, to argumentation seen from a pragmatic perspective.

are at the same time relevant and sufficient (for example: "Harry was born in Bermuda"). The opponent may now dispute those reasons, those facts, but even if he accepts them, he can require the proponent to justify the step from the *data* to the *claim*. The general statements that authorise said step constitute the *warrant*, that is, a statement that is not descriptive, and that Toulmin explains by making an analogy with the role that a recipe has in the baking of a cake, and once all the ingredients are in place (for example: "A man born in Bermuda will generally be a British subject"). Finally, it is sometimes necessary to show that the guarantee is valid, relevant and of enough weight, which constitutes the *backing* of the argument (in our example: "On account of the following statutes and other legal provisions: …"). Those elements are enough to account for when we have a valid or correct argument. But the *strength* of an argument depends on two other factors that, when added to the previous ones, allow us to obtain a general model of argumentation: the *qualifiers* that graduate the strength with which the *data*, the *warrant* and the *backing* provide support for the *claim* ("most certainly", "presumably", "most likely"...); and the *rebuttals*, that is, the support provided for the claim may stop existing or weaken when certain extraordinary circumstances or certain exceptions occur (for example: "unless both his parents were aliens, or he has become a naturalised American").

Toulmin, by the way, points out that this last element coincides with what Hart had called "defeasibility" in his work. At the same time, he underlines that Hart had shown that this phenomenon had relevance not only in the field of law, but also in the field of philosophy (regarding notions such as freedom of will or responsibility), and suggests what could have been the cause of Hart's discovery: "It is probably no accident that he reached these results while working in the borderland between jurisprudence and philosophy" (Toulmin, 1958, 142).

As a precursor of this notion, in the field of ethics, Toulmin also refers to the thesis defended by David Ross in his influential book, of 1930, *The Right and the Good*, according to which it is necessary to recognise that all moral norms have exceptions. As it is well known, Ross introduced there the distinction between *prima facie* duties and real or absolute duties, in order to account for the (according to him—that is, according to the distinction he introduces—only apparent) conflicts between moral duties. So, for example, the duty to tell the truth or to keep a promise may have an exception in certain circumstances, for instance, in a case in which acting in accordance with these duties would cause a person unjustified harm:

> "If, as almost all moralists except Kant are agreed, and as most plain men think, it is sometimes right to tell a lie or to break a promise, it must be maintained that there is a difference between *prima facie* duty and actual or absolute duty. When we think ourselves justified in breaking, and indeed morally obliged to break, a promise in order to relieve some one's distress, we do not for a moment cease to recognize a *prima facie* duty to keep our promise, and this leads us to feel, not indeed shame or repentance, but certainly compunction, for behaving as we do" (Ross, 1930, 28).

I believe it is important to highlight here some features that Ross underlines in relation to ethics, which contrast what happens in other fields of experience and which would explain the need to introduce the distinction in question. One is that Ross considers that the opinions of the majority of people or of the wise people play a very important role in ethics, and would constitute something like a starting point of the ethical method[3], which could not be said, of course, of the physical sciences, which construct theories and hypotheses that seem to move further, and increasingly further away, from our intuitions about how the physical world is and how it works. Another one is that mathematical notions, such as that of the isosceles triangle, differ from those of an ethical nature, for example: that of correctness, because the former could be defined—we could say—by a set of necessary and sufficient properties: thus, a triangle that has two equal angles is isosceles, independently of any other feature it possesses; but this does not happen in relation to the rightness of acts. And the third characteristic (a consequence of the previous one) is that the (moral) rightness of a particular act (as opposed to its *prima facie* rightness) depends on a set of circumstances[4] or, in other words, the act in question falls under various moral standards, so that according to one (for example, "no lying") it could be wrong, but, according to another, it could be right ("no causing unjustified harm").

---

[3] What Ross defends as a method of ethics, both in that book and in a later book, *Foundations of Ethics* (Ross, 1939), is nothing but a version of the "reflective equilibrium".

[4] "But no act is ever, in virtue of falling under some general description, necessarily actually right; its rightness depends on its whole nature and not on any element in it. The reason is that no mathematical object (no figure, for instance, or angle) ever has two characteristics that tend to give it opposite resultant characteristics, While moral acts often (as everyone knows) and indeed always (we must admit after reflecting) have different characteristics that tend to make them at the same time *prima facie* right and *prima facie* wrong; there is probably no act, for instance, which does good to any one without doing harm to someone else, and *vice versa*" (Ross, 1930, 33-34).

Furthermore, what we understand today as defeasibility (that rules contain implicit exceptions) has such remote antecedents that they could be placed in the very emergence of philosophy; at least, of practical philosophy. In a way, it is what lies behind Plato's distrust of legislation, of the government of men by means of general rules, as it emerges from dialogues such as *The Republic* (Plato, 1997b [1988]) or *The Statesman* (Plato, 1997a [2000]). In the latter, government by laws (and customs) appears as a kind of rationality of the second best, since "the best thing" says the Stranger (who in the dialogue represents the role usually played by Socrates), "is not that the laws should prevail, but rather the kingly man who possesses wisdom" that is, the wise and good man: the philosopher. And the reason for this would be that "the law could never accurately embrace what is best and most just for all at the same time, and so prescribe what is best. For the dissimilarities between human beings and their actions, and the fact that practically nothing in human affairs remains stable, prevent any sort of expertise whatsoever from making any simple decision in any sphere that covers all cases and will last for all time" (Plato, 1997b [1988], 294a).

And the idea of defeasibility is also one of those underlying Aristotle's presentation of the concept of equity, in one of the most brilliant pages, in my opinion, in the entire history of philosophy of law. Aristotle defends the need to deviate in certain cases from the literal meaning of the law, that is, to introduce an exception, in order to account for the singularities of the specific case, which the legislator could not foresee, due to the "nature…of practical affairs". The text deserves to be quoted at some length:

> "the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which will be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, when the legislator fails us and has erred by over-simplicity, to correct the omission—to say what the

> legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law, viz. that about some things it is impossible to lay down a law, so that a decree is needed. For when the thing is indefinite the rule also is indefinite, like the lead rule used in making the Lesbian moulding; the rule adapts itself to the shape of the stone and is not rigid, and so too the decree is adapted to the facts" (Aristotle, 1984a [1981], 1137b-1138a)[5].

With regard to the other term, "balancing", something very similar could be said, precisely because, in reality, defeasibility and balancing are different aspects of the same reality, instruments, one could say, with which one tries to achieve the same purpose (speaking in abstract terms): to avoid excessive rigidity in the law and to contribute to bringing the law closer to justice.

In recent times, the person who seems to have contributed most to spreading the idea of balancing in legal theory—mainly, in the Latin world—has been Robert Alexy. This notion (the German expression is "Abwägung"), by the way, does not appear in the German author's first work, from 1978, dedicated to legal argumentation (Alexy, 1989), but instead, years later, when he deals with fundamental rights (Alexy, 2002)[6] and introduces the

[5] Nicomachean Ethics, book V, chap. 10.

References to these classical texts can also be found in Schauer (2012), who rightly recalls the importance of courts of equity in the development of law (including, of course, common law).

Curiously enough, the way of understanding defeasibility in law proposed by Alchourrón, what he calls "dispositional approach", is precisely the same as Aristotle regarding equity. According to Alchourrón, the circumstance C can be considered as an implicit exception from the moment of the enactment of a law, even if the legislator did not consider it at the moment, but as long as there are reasons to think that, if he had considered it, he would have introduced it. Alchourrón thinks that many of the conditional sentences in our everyday language (and that is also for legal language) are defeasible: we formulate our sentences for normal circumstances, knowing that in certain situations our sentences will be defeated. And that because "las construcciones condicionales de la forma 'Si A entonces B' son frecuentemente usadas de un modo tal que no se pretende con ellas afirmar que el antecedente A es una condición suficiente del consecuente B, sino sólo que el antecedente, sumado a un conjunto de presupuestos aceptados en el contexto de emisión del condicional, es condición suficiente del consecuente B" (Alchourrón, 2000, 23-26).

[6] The first edition of his Theory of Constitutional Rights is from 1986.

distinction (essentially inspired by Dworkin) between rules and principles. Fundamental rights, for Alexy, are essentially principles. Unlike rules, which would be norms that order something definitely, principles would be characterised as "optimisation commands", that is, norms that order something to be achieved to the highest possible degree, according to the existing factual and legal possibilities. Well, while the application of rules requires subsumptive reasoning, in the case of principles the type of argumentation to be resorted to would be balancing. I will not go now into other details about the way in which Alexy understands balancing (I will say more about this later), but I am interested in highlighting these two points.

The first is that Alexy's conception of balancing has not undergone any change that can be considered essential throughout all these years (about 40, during which it has been discussed *ad nauseam*), but it has undergone some additions and adjustments. One of them consists precisely of the following. In his recent polemic with Poscher (Poscher, 2022), the latter reproaches him, among other things, that principles cannot be conceived as "optimisation commands", simply because an optimisation requirement, following Alexy's definitions, would be a rule: it orders something to be done (whatever the optimisation consists of, that is, the achievement of something "to the highest possible degree") in a definitive manner. Well, to face this criticism (which had already been made in 1990 by Aarnio and by Sieckman), Alexy establishes a distinction between an "optimisation command" and a "command to be optimised" (which is what principles would be), and for that he relies precisely on Ross' differentiation between two types of duties, that was previously mentioned. Therefore, in short, what Alexy holds is that the key distinction to understanding balancing is the one that can be established between two types of duties: ideal duties, *prima facie* or *pro tanto* (fixed in principles), and real duties, definitive or considering all the circumstances of the case (fixed in the rules resulting from the balancing of principles). And the other point I want to make here is that Alexy's elaboration of the method of balancing does not pretend to be anything other than a rationalisation of the way in which the German Constitutional Court and other European courts proceed when solving problems that involve conflicts between rights (between principles): balancing is, one might say, a way of solving those conflicts by moving from the principles to the rule, from ideal duties (which conflict with each other) to the duty considering all the circumstances of the case.

The idea of balancing, under this or another name, has always been present both in the practice of law and in its theorisation, in what has traditionally been called legal methodology. Precisely, one of the most influential methodological directions—not only in Germany, but in all civil law countries—in the 20th century has been the so-called "Jurisprudence of interests", headed by Philip Heck and inspired—inevitably—by the work of the second Ihering. The basic idea (as happens with all anti-formalist directions) is that conflicting, hard cases can arise in law (cases of legal gaps, contradiction, etc.), which cannot be solved simply by applying the legal rules, in accordance with their literal or textual meaning, but instead, to solve them it is necessary to do a "balancing" of the interests at stake; and, in turn, the law itself would be nothing else, for Heck, than what results from an opposition of forces, of interests, which pull in different directions[7].

Moreover, the usual assertion that the balancing method is preferred by those who promote a finalist interpretation of the norms (the anti-formalists) and who are, therefore, opposed to those in favour of a strict, literal, interpretation of the law (the formalists), seems to me to be questionable or, at least, in need of some nuance. And not only because of the usual imprecision with which these terms are usually used ("formalism" and "anti-formalism"), but also because, at least very often, those who are supposed to—those who say they do—take their decisions strictly bound by the law (the formalists or legalists), do not fail to also really consider the interests, the purposes, that are at stake when interpreting a rule and arriving to a decision; in other words, they do not fail to balance. A typical example of this can be found in the famous *Lochner* case, decided by the Supreme Court of the United States in 1905, and which is usually considered (the majority's decision—and its justification—which was opposed—as is well known—by Holmes' dissenting vote—which was not the only one) as the epitome of legal formalism. Well, what was at issue there, as is well known, was whether a New York State law limiting work in bakeries to 10 hours a day and six days a week should be

[7] This is an analogical use of the "parallelogram of forces" method, which shows the result of applying two forces to a (physical) object. In *La jurisprudencia de intereses de Philipp Heck*, the author, María José García Salgado, concludes that "puede verse la Jurisprudencia de intereses como una teoría normativa de la ponderación de intereses, cuya finalidad es proporcionar al juez pautas que le permitan proteger, en caso de conflicto, el interés preferido por el legislador" (García Salgado, 2010, 242). And in a later work she connects these ideas directly with the contemporary discussion on balancing (García Salgado, 2019).

considered constitutional or not. And what I find interesting to remark here is that both the anti-formalist Holmes (who defended the constitutionality of the law) and the majority of the Court (who overturned the law because they considered it unconstitutional) resorted to a ponderative type of scheme, which, by the way, does not imply at all an abandonment of formal logic. As far as the majority is concerned, the ruling is based on the observation that, on the one hand, there is the freedom of contract established in the 14th Amendment of the US Constitution, and, on the other hand, the "police powers" that grant each State of the Union the competence to legislate (and limit freedom of contract) for reasons of health, safety, etc. And what had to be determined then was "which shall prevail — the right of the individual to labor for such time as he may choose or the right of the State to prevent the individual from laboring or from entering into any contract to labor beyond a certain time prescribed by the State"; for reasons that are not to be noted now (and neither whether or not they were justified), the Court opted for the former. And that same balancing scheme (which, I insist, does not imply any distancing from deductive logic, despite some of Holmes' misguided expressions in that respect[8]) is the one used by the dissenting judge, but with an opposite result to that of the majority, since he made the second of the rights prevail or, rather, the reasons in favour of recognising a State the competence to establish those limits to freedom of contract[9].

Finally, as happened in the case of defeasibility, the notion of balancing, of pondering, of weighing the interests, the reasons, of opposite signs and which may be present in certain cases requiring a decision to be taken, is so rooted in the very idea of law that, as is well known, the scales are part of the usual symbolism of the administration of justice: in the deliberation that must take place in conflicting, hard cases, the two sides of the scales represent the places where the arguments, the reasons, for and against, should be placed in order to reach a "balanced" decision. But it is not only that, but also that the scales, the "scales of reason", have been the image that has dominated conceptions of rationality in the West. Marcelo Dascal has studied this metaphor of the scales of reason which, according to him,

---

[8] Particularly in *The Path of the Law* (Holmes, 1897 [1975]).

[9] Hart was right when, commenting on this case, he pointed out that what here "is stigmatized as 'mechanical' and 'automatic' is a determined choice made indeed in the light of a social aim, but of a conservative social aim" (Hart, 1958 [1962], 611).

allows, at least, two interpretations: a "metric" or "algorithmic" one, that leads to a "hard" conception of reason; and another of a "dialectical" nature and which leads to a "soft" conception of rationality. In his opinion, both are complementary, but the second is the one that should be used fundamentally in contingent matters and in matters linked to the notions of "burden of proof" and "presumption". And he illustrates this with a statement by Leibniz (in whose work both senses, both conceptions, of reason would be present), according to which "no one has as yet pointed out the scales [for weighing and evaluating considerations that go against each other until a decision is reached], though no one has come closer to doing so and offered more help than the jurists" (Dascal, 1996, note 24).

2. Defeasibility, balancing and conceptions of law

At the beginning I said that the abundance in law of references to the notions of defeasibility and balancing were related to basic—intrinsic—characteristics of legal systems and legal practice[10]. The examples could be multiplied. Thus, the classic—structural—theory of crime in the criminal dogmatics of continental law could very well be considered as a scheme of defeasibility: a typical action is unlawful unless... and if it is typical and unlawful, then it is guilty unless... Presumptions, the burden of proof, maxims of experience or rules of evidence are constructions that presume something like a legal institutionalisation of defeasibility: if the circumstances X and Y are present, then it is understood that event H has occurred, unless... The same could be said of courts of equity, whose function would be precisely to avoid the bad consequences that the application without exceptions of general rules could have (but without going against the principle of universality—generality is not the same as universality). "Atypical torts" (such as abuse of law, legal fraud or deviation of power) are also examples of the defeasibility of rules and of the use of a balanced reasoning[11]. The procedure for deviating, in general, from a merely literal

[10] According to Guastini, the notion of defeasibility (and of the axiological gap) does not belong to the theory of legal systems, but to that of interpretation (Guastini, 2008, 149). But this can only be understood if it is connected with a certain conception of law—the one that he holds—and to which I will later refer, in critical terms.

[11] *Vid.* Atienza & Ruiz Manero, 2000.

interpretation of a rule involves a balancing judgement (in order to be able to create an exception). Also the "judgement of proportionality" to which jurists very often resort is nothing other than a balancing exercise. The resolution of conflicts between rights—a central problem in the law of the Constitutional State—inevitably involves resorting to balancing. Et cetera, et cetera[12].

But, at the same time, all those statements may be more or less obvious, depending on one's conception of law. And the way of understanding those notions and of assigning them a role of greater or lesser significance in the theory and practice of law is also dependent on that—on how one conceives the law. Moreover, I have the impression that much of the (very abundant) literature on defeasibility and balancing that exists today is at risk of focusing on rather irrelevant issues or, in any case, of little interest, simply because many of the authors of all those texts do not seem to be aware (or are not aware to an adequate extent) of the main conclusion that is drawn from what I pointed out in the previous section. It is that law is, above all, a social practice, an activity, aimed at the satisfaction of certain ends and values. And practical questions (in the sense of traditional practical reason) cannot be solved in the same way as would be appropriate for problems posed in the empirical sciences or in the formal sciences; which does not mean, beyond that, that empirical or formal knowledge can be disregarded in the resolution of practical problems. But what seems fundamental is to realise that law, morality or politics are "rational enterprises" (to use Toulmin's expression) with their own peculiarities, and hence the importance of paying attention to the way in which we argue within those practices. And, when this is done, the result is that the concepts involved cannot always be defined by a set of necessary and sufficient properties, the correct answer to a moral (or legal) case requires carrying out an analysis that takes into account what Ross called toti-resultant attributes and not parti-resultant attributes (*vid.* Ross, 1930, note 5, and 28), because—to use the poetic expression of the Platonic dialogue— "nothing in human affairs remains stable", but instead "the nature of practical affairs" means that not all the circumstances of future cases can be foreseen. Hence, the task of governing human behaviour by means of rules cannot be done by

[12] Schauer gives many examples of defeasibility in law, some of them characteristic of common law. See Schauer, 2012, 79.

resorting exclusively to classificatory (subsumptive) operations, but instead, it is sometimes necessary to deliberate, to use balancing; in other words, to generate new rules in a coherent way, respecting the established system, but including in that system the reasons underlying the rules, that is, the purposes and values that underlie them. To put it extremely synthetically, the phenomena of defeasibility and balancing can only be properly understood if law is fundamentally considered as a social practice, as an activity, and not exclusively as an object, that is, as a type of reality consisting simply of a set of statements, a normative system. And it is not that the normative system is not part of law, but rather, that it is a necessary, but not sufficient, component. Law is not only a (coercive and dynamic) system of norms but, above all—to put it in Ihering's terms—means to an end; norms (and coercion) constitute (indispensable) organisational means for the achievement of that end, for the satisfaction of certain social needs[13].

The latter (the post-positivist conception) constitutes, in my opinion, the most appropriate way of understanding law, especially if what is pursued is to account for the rights of the Constitutional State and the era of globalisation. But, of course, it is not the only existing one, and not even the dominant one.

It is, for example, very different from the one held by Niklas Luhmann, which seems to continue being a considerable influence on sociologists (and theorists) of law. Although I do not believe that Luhmann's schemes have ever served to satisfactorily explain legal phenomena, it could nevertheless be accepted that they capture some features of law in the age of legal positivism that have nevertheless become, so to speak, obsolete. For example, the process of positivisation of law which has been taking place (in some European countries or countries of European influence) since the beginning of the 19th century, implied, according to him, that the legitimisation of law would no longer depended on any material element, but exclusively on procedure; but that—I would say—has been clearly refuted in recent times with the introduction in Constitutions of declarations of fundamental rights (and the institutionalisation of constitutional courts) which precisely set a limit to the very idea of positivisation: the law is not

[13] Recall Ihering's definition of law: "Law is the sum of the conditions of social life in the widest sense of the term, as secured by the power of the State through the means of external compulsion" (Ihering, 1913 [1961], 380).

established and valid simply, or in all cases, by virtue of a decision that can be transformed at any time (vid. Luhmann, 1977 and Luhmann, 1990, spec. 115 et seq.): the law cannot have any content. And the same could be said of his thesis of the progressive autonomisation of law and its configuration as an autopoietic system, which is self-regulating and self-reproducing regardless of the other social subsystems and guided solely by the idea of reducing complexity; on the contrary, the evolution of our legal systems goes towards making more and more permeable the boundaries between law and politics, morality, economy... All of which explains, in my opinion, that even though the phenomenon of defeasibility and the use of balancing have always been an important aspect of legal practice, it could be said that nowadays their weight has increased considerably. Therefore, a conception such as Luhmann's, which is "obsessed" with the value of security, which leaves little room for "openness" to ideas of justice, and which sees—we could say—law almost exclusively in terms of rules, does not seem to be functional in relation to the legal systems of our time[14].

But post-positivism is also not the dominant conception in contemporary legal theory. In particular, it is not so in the Latin world where, on the other hand, there has been much discussion in recent times about defeasibility and about balancing, and also about whether the vindication (or recognition) of these phenomena implies or not the abandonment of legal positivism. Thus, Riccardo Guastini (par excellence representative of the "realist" positivism of the Genoese school) considers that defeasibility of legal norms has nothing to do with legal positivism, despite what the following reasoning seems to suggest: "El positivismo pretende que el derecho sea identificable independientemente de cualquier valoración moral. Pero, si las normas jurídicas son derrotables, su contenido no puede ser identificado sin valoraciones morales. Entonces el proyecto científico del positivismo está destinado al fracaso: para identificar el derecho es preciso suponer valoraciones morales". However, this reasoning is not valid, according to him, among other things, because it leads to the following confusion: "Una cosa es identificar algo —concretamente un texto normativo— como derecho, una cosa muy distinta es determinar su contenido

[14] Although perhaps that cannot be said of the last Luhmann, according to whom the legal form just as we know it would have been a "European anomaly" linked to the Nation-state, but which would stop being functional in relation to the law of the global society. On this see. Campos, 2023, chap. 1.

normativo: qué está ordenado (permitido, prohibido), a quién, en cuáles circunstancias. El positivismo jurídico dice simplemente que la *primera* de estas dos cosas se puede hacer sin valoraciones, no dice nada sobre la segunda. El positivismo metodológico *no* es, y tampoco incluye, una teoría de la interpretación" (Guastini, 2008,155). But if this is so, that is, if legal positivism means only that, then the only comment that can be added is that such a poor conception of law simply lacks interest, regardless of whether its theses are true or not[15].

Going back to an earlier idea. The greater importance (and visibility) of the phenomena of defeasibility and balancing in recent times perhaps allows us to explain (and solve) a certain controversy that can be detected among researchers of defeasibility: while some, such as Rodríguez and Sucar (1998) or Poggi (2021), are in favour of abandoning the notion, as it would be nothing but a new label for designating things that are well known, others, such as Chiassoni, think that this would be a mistake, because the turn towards defeasibility in contemporary legal thought points towards central problems of law that could be clarified if this notion is carefully analysed (Chiassoni, 2019, 229).

This last author, precisely, has distinguished up to 11 different notions of defeasibility, that is, there would be—according to him—11 types of entities, of objects, to which philosophers of Law attribute this feature[16]; and it is possible that a similar analysis could be made with regard to balancing: many things can be balanced and the activity of balancing can also be seen from very different points of view. But Chiassoni himself concludes that many of those uses are parasitic and that the truly relevant and interesting notion is that of defeasible rule[17]. Well, although I personally consider

---

[15] A critique of Guastini's conception can be found in Atienza, 2018.

[16] They are the following: "(1) defeasible *facts*; (2) defeasible *beliefs*; (3) defeasible legal *concepts*; (4) defeasible legal *provisions* or legal *texts*; (5) defeasible legal *interpretations*, or defeasible *meaning*, of legal provisions; (6) defeasible legal *norms*, rules, principles, standards, etc. (norm defeasibility); (7) defeasible legal *reasoning*; (8) defeasible legal *positions*, jural relations, legal entitlements, etc. (status defeasibility); (9) defeasible legal *arrangements*, like contracts, wills, etc. (legal arrangements defeasibility); (10) defeasible legal *claims;* (11) defeasible legal *conclusions*)" (Chiassoni, 2019, 231).

[17] The definition he gives is this: "*Defeasible norm:* a norm is defeasible, if and only if, the normative consequence it states is liable (i.e., may be subject) to a set of negative conditions of application ('exceptions', 'defeaters', 'defeating conditions')" (249). And then he establishes more specific notions, depending on whether they are explicitly or implicitly defeasible norms, and whether the norms are closed-defeasible (of different types) or "open-defeasible". In total there would be seven more specific notions of "defeasible norm".

that Chiassoni's analysis of defeasibility (and of the indeterminacy of law) clarifies some things, it seems to me that the most fruitful (I would also say the most "natural") way of proceeding to analyse this notion (and also that of balancing) consists of starting from the two main instances that can be distinguished in legal practice: the activity of establishing general rules (I leave out contracts, wills and other legal transactions, although here too both balancing and defeasibility play a role) and that of interpreting and applying them in the solution of cases. In both instances it is about ensuring that the law can satisfy the characteristic aims and values of practice, and that is what explains, as I said, why those two notions—and others to which I have already referred in part—have acquired a singular importance in contemporary legal theory. Let us see.

3. Defeasibility and balancing in the process of legislation. Rules and principles.

Although when we speak of balancing we usually refer to the balancing carried out by judges, the bodies that apply the law, it should not be forgotten that the establishment of general rules, of laws (or of other types of measures that may not have a general scope) is fundamentally governed by the idea of balancing, of deliberation. This is why, for example, the rhetorical tradition called the type of (persuasive) discourse that took place in the assembly "deliberative genre", whose time horizon was the future (as opposed to the judicial genre, which looked at the past) and which included what we would call today legislative argumentation: to establish laws. Aristotle pointed out in his *Rhetoric* that we only deliberate about matters which are contingent (not about what must necessarily happen), and which are also under our control ("which we have it in our power to set going") (Aristotle, 1984b [1990], 1359b). The ultimate goal of deliberation, in general terms, would be, for him, happiness (*eudaimonia*), which consists of different parts, of different goods, although what is actually deliberated upon—let us say, the most immediate goal—would be constituted by the means, by the actions that are convenient to achieve those ends (Aristotle, 1984b [1990], 1362a 15).

Well, what could be called the "internal justification" of legislative argumentation could then be seen as a type of balancing, not of subsumption: each of the normative provisions of a legal text would be the fruit of a deliberation

in which the "balance of reason" would have given a certain statement as a result (the resultant of the parallelogram of forces in Heck's metaphor). But it is a balancing that is very different from the reasoning to which, sometimes, judges have to resort to and which is called by that name. The fundamental difference is that legislative argumentation is much more open than judicial argumentation, the reasons to which a legislator can (must) resort are not authoritatively determined or, to put it differently, those limits are much wider, so that, in short, it is about a more complex rationality which does not admit, for example, its reduction to a binary scheme: it is not a matter of choosing between the constitutionality or unconstitutionality of a law or between the conviction or acquittal of the accused, but of choosing a text from a plurality, almost an infinity, of possibilities.

In order to carry out this task[18], the legislator needs to mobilise scientific and technical knowledge of many different kinds; as well as starting on the basis of a moral and political philosophy. In other words, the ends to be achieved through legislative intervention must be morally justified or, at least, they must not contradict constitutional values and principles; the established statements—the rules—must be drafted with sufficient clarity; they must fit harmoniously into the previously existing legal system (so as not to generate gaps or contradictions); the appropriate subjective incentives (sanctions in the broad sense) and objective means (financial, institutional...) must be established so that the addressees comply with the requirements of the rules (to make the transition from law in texts to law in action); and it is also necessary to ensure that compliance with the provisions of the law leads to the achievement of the pursued goals (the transition from effectiveness to social effectiveness); but all of this must also be done in a reasonable (efficient) way. Well, within this extremely complex task, one aspect of considerable importance is the choice of the types of legal statements (I am referring, then, to the formal aspect, not to the contents) that are most suitable for achieving all those purposes.

Here it is worth starting by recalling that legislative statements do not only express norms[19]. There are also definitions—theoretical statements—, practical statements that express normative acts (for example, that of repealing a law)

[18] I present here a summary of different works on the theory and technique of legislation, now collected in Atienza, 2019.

[19] I take the classification of legal sentences that can be found in Atienza and Ruiz Manero, 1996.

or evaluative statements. And, within norms, we should make a distinction between those of a deontic or regulative nature (they establish that, given certain conditions, the performance of an action or the achievement of a state of affairs is deontically modulated as obligatory, prohibited or permitted) and constitutive norms (if certain conditions are met, then a certain normative result is produced—constituted—: a legal event or a legal action). All these statements differ in terms of their structure, but also with regard to the role they play within legal reasoning and in relation to the social system (inasmuch as they articulate in a certain way the social and individual powers and interests).

In order to deal with the problem of defeasibility, I will focus on regulative norms, because this is where the distinction between rules and principles is situated, which, as will be seen, is of particular significance. However, this does not mean that defeasibility only has a place here; for example, when it comes to establishing the conditions of validity of a contract (one of Hart's examples) we would be in the context of constitutive rules: those conditions of validity, at least on many occasions, cannot be established—as he told us—by pointing out a set of necessary and sufficient conditions, but instead, the list would have to be followed by the famous "unless" clause. The same could be said, of course, of legislative definitions. And, in any case, the classifications that can be made of legal statements must always be understood in an open, functional, and—so to speak—contextual sense: it is not only that there may be penumbral cases (statements that do not fully fit into any of these categories), but also that each one of those statements can only be properly understood if we take into consideration its relation to other statements of the other types: what functions as a unit is the set of statements, articulated in a certain way, that makes legislatively created law (or a fragment of it) capable of fulfilling its purpose.

Well, principles and rules (which—I insist—are characteristic types of legal statements, but are not the only pieces of law) differ from each other, as I said, from diverse perspectives. Thus, both rules and principles have a conditional structure, but the difference would be that the antecedent (the conditions of application) in the case of principles have an "open" character, while in rules it is "closed"; which could also be expressed, following von Wright's terminology[20], by saying that principles are categorical norms,

[20] *Vid.* on this Aguiló, 2000, 135 et seq.; Von Wright, 1979.

that is, their conditions of application do not contain other properties than those derived from the content of the norm itself, while in rules there are additional conditions of application. To illustrate this with an example: "it is forbidden to discriminate on the basis of sex (whenever there is an opportunity to perform such an act)" is a principle; "it is forbidden to pay a woman a lower wage than a man, if both do the same work", is a rule. From the point of view of how they operate in legal reasoning, rules work as peremptory or exclusionary reasons, so that, if the fixed conditions of application are met, then what is established in the rule must be done, without entering into any type of deliberation, whereas principles provide only non-peremptory reasons (thus, weaker reasons, with less force, but with a wider scope)[21], that must be weighed against other reasons (to return to the example, reverse discrimination or affirmative action may be justified in some cases). And, finally, principles limit the pursuit of individual and social interests (which is a way of saying that they establish rights) and promote the satisfaction of social interests; and rules also play this role, but by imposing positive and negative duties and thus generating reciprocal restrictions (without the need for balancing) or by granting a power of discretionality (rules of end[22]) that would affect only the means.

Those differences can also be seen in terms of defeasibility, in the following way. Principles are conditional statements (norms) that are presented as intrinsically defeasible: they are non-peremptory reasons; that is, *prima facie* reasons to carry out a certain conduct, but that, when balanced against others, can be defeated, all circumstances considered. This is what we saw in Ross's classic book (or in Alexy): they presuppose the existence of a distinction between two types of duties: ideal and real. Whereas the vocation of rules, we could say, is to not be defeated (to operate as peremptory reasons), although we cannot discard that exceptionally

[21] The way of drawing the distinction between rules and principles (Atienza & Ruiz Manero, 1996) is very similar to that found in Hage and Peczenik, 2000. They speak of decisive reasons and contributive reasons, but the meaning is the same as the one we outlined between peremptory or exclusionary reasons and non-peremptory reasons. One difference with our analysis, however, is that they assume Alexy's conception of principles: principles "only generate (as opposed to rules) reasons that plead for actions that contribute as much as possible to goal states" (306). And I do not see clearly the point of constructing two different kinds of logical functors—of conditionals—to symbolise a rule or a principle.

[22] In our scheme, the distinction between rules and principles is combined with the other distinction we made between action rules and end rules (vid. Atienza & Ruiz Manero, 1996).

they may be, that is, that they include implicit exceptions. And we have already seen why: human affairs cannot stand still[23] and it is impossible that the legislator, who necessarily has to express himself in general and future-referring terms, has taken into account all the elements that are relevant regarding the reasons underlying the rules, that is, the aims and values they seek to achieve[24].

In relation to the above, there are a few things to be clarified. To begin with—and I return to something I said earlier—this difference between rules and principles must be seen in relative terms; to put it differently, it is a distinction within a continuum, in the sense that the "open" or "closed" character of the conditions of application is an obviously gradable element: between very specific guidelines for conduct (indubitable rules) and very abstract principles there is a very wide intermediate zone; and the same

[23] So defeasibility is not simply due to certain features of natural language, but rather to certain features of law. On this, vid. Schauer, 2012, 77.

[24] There is a clarification to be made here. Authors such as Guastini (in general, the members of the Genoese school) start from a basic distinction between provision and norm, that is, one thing is the text, the statement, and another thing is what it means, the norm; so that norms only exist when statements are interpreted; Guastini insists, for example, that it is a mistake to confuse a statement with its literal interpretation. As a consequence of all this, he affirms that defeasibility can only be a feature of norms, not of provisions (see Chiassoni, 2019, who—following Guastini's thesis—thinks that legal provisions would only be defeasible in a metonymic sense, p. 249); or, in other words, defeasibility does not exist prior to the interpretation, but instead it depends on the interpretation. And hence the statement I referred to earlier, according to which defeasibility would not belong to the theory of normative systems (norms understood here as mere dispositions), but to that of interpretation. In my opinion, it is a way of speaking that does not contribute much to clarifying things, for the following reasons. I believe that, sometimes, the distinction in question is indeed relevant, but not always. Frequently, a jurist will refer to such and such an article of a law, and by this he may (usually) be alluding both to the text and to something like its basic meaning; no one (or almost no one), I believe, speaks of a legal system by referring exclusively to a set of statements, and excluding any idea of what the statements mean. But, in addition, there is a certain ambiguity in the use of the expression "interpretation" which, it seems to me, Guastini does not take into account in his work. Because "interpretative statement" can be understood as a statement of the form "T means S" (Guastini, 2008, 152), but such utterances are only relevant in case there is any doubt about T. So one thing is interpretation in the noetic sense (as a mere act of apprehension of a meaning) and another in the dianoetic sense (when it is a matter of solving a doubt and a discursive activity is carried out). On this, see Lifante, 1999. In short, I believe that there is no reason not to speak of defeasibility from the perspective of the system of norms, as long as norms are understood in the sense in which they are usually understood in the language of jurists. When a rule is established, the legislator may have formulated a general mandate or permission (or the conditions of validity of an act or of a rule) and added to it some explicit exceptions (which, indeed, has nothing to do with defeasibility) and he may also (having taken them into consideration or not) have left others unexplicit. When that rule has to be applied to solve a controversial case, interpretative activity will, of course, have to be carried out. But defeasibility is also a phenomenon that is present in the practice of the establishment of rules. The legislator can (must) count on the existence of this phenomenon.

could be said of the more or less peremptory character of a reason. This also translates into a greater or lesser tendency for rules to have exceptions, to be defeasible. It is sometimes said that, if all norms are defeasible, then the very distinction between rules and principles collapses or, at the very least, that it could not be seen as a qualitative, strong distinction. Well, I believe that this distinction is of great importance (indispensable to understand many aspects of our legal systems), but it certainly cannot be interpreted in essentialist terms, but in the functional and dynamic way I suggested before. I am not so sure that it can be said that *all* legal rules (like all conditionals) are defeasible[25], but, certainly, most of them are (they can be defeated in some occasion), even in very extraordinary circumstances[26]. And this difference between what happens usually or extraordinarily is what allows us to maintain the distinction in question: principles usually function (whether they are principles explicitly fixed by the legislator or by the constituent, or—implicit—principles "discovered" by the interpreter) as

[25] Recall what was said above (note 8) regarding Alchourrón's opinion. Also for MacCormick all or almost all legal rules (or instead, the formulations of rules) are refutable (I believe that the expression "rebatible" and "rebatibilidad" used in the Spanish translation is correct), in the sense that "[the rules] should be considered as stating 'ordinarily necessary and presumptively sufficient conditions' for the normative consequences they attach to the operative facts they stipulate". The reason why this is so is that "the principles and the implicit values of such a system interact with the more specific provisions to be found in the texts of statutes or in the more narrowly defined *rationes* of binding precedents" (MacCormick, 2005 [2016], 251 and 241).

[26] The prohibition of torture is often given as an example of an indefeasible norm. Perhaps it could be said that examples of indefeasibility refer to institutional actions. But, in any case, for what I am trying to defend here, the thesis that many of the norms (and, therefore, of the rules) can indeed have implicit exceptions is enough.

Juan Carlos Bayón is right when he says that the possibility of implicit exceptions to rules existing or not (for reasons of principle) is a contingent question. Indeed, a legal system (or the practice of rule application) could exclude that possibility, or limit it a lot (it could be Schauer's "entrenched model" of rule application). But it seems to me that this is not what happens in our constitutional law systems...

Schauer, by the way, has a very nuanced opinion in this respect: he thinks that sometimes rules are treated (by the applicators) as not defeasible and that defeasibility is not always desirable (which seems to presuppose that, in general, it is) *Vid.* Schauer, 2012, pp. 85 and 87. He distinguishes (a distinction that seems useful to me) regarding whether defeasibility is an essential feature of law, between a descriptive, a prescriptive and a conceptual level. His conclusion: "Defeasibility may well be a desirable component of some parts of some legal systems at some times, but it is far from being an essential property of law itself" (2008, 88).

In other words, I conclude myself, rules cannot be completely opaque regarding the underlying reasons, but neither can they be completely translucent. And another (I think equivalent) way of saying the same thing: in normal cases the applicator does not (should not) consider the possibility of whether implicit exceptions exist, but he also cannot completely exclude the possibility of extraordinary (or very extraordinary) circumstances happening. See Bayón, 2001, 54.

non-peremptory reasons, to serve as ingredients in a deliberation, and that is why they can be defeated; whereas, regarding rules, this (that they are defeated) can only occur very extraordinarily. Moreover, this distinction does not exactly correspond to the often drawn distinction between easy cases and hard cases. Easy cases are those that can be solved with rules, that is, when the interpretation of the text—including, of course, possible explicit exceptions to a general command or permission—does not raise doubts; principles play here no other role than that of certifying—it is not properly a question of deliberating—that the solution to the case can be obtained by simply applying a pre-existing rule. Hard cases, on the other hand, are those that require balancing and in which, therefore, principles play a relevant role: either because, in the absence of an applicable rule, one must resort to principles, or because the rule has to be corrected (to broaden or restrict its scope) and this can only be done by appealing to principles.

And all of the above leads us to the following. When trying to control people's behaviour by means of general rules, the legislator has to cope with the open, contingent character of the future, and has to do so by trying to harmonise (balance) two fundamental values: one is that of giving as much certainty as possible to the addressees of the rules, that is, they should be in a position to know in advance the (legal) consequences of their behaviour; and the other is to avoid that such application of pre-existing rules produces counterproductive effects, that is, effects that are contrary to the aims and values that inspired the legislation, to the reasons underlying the rules. Rules essentially fulfil the first function, that is, they are in a very special way mechanisms of certainty; and principles fulfil the second, they allow the openness of the system, they avoid what would otherwise be excessive rigidity. But they act together, that is, legal practice needs to have both rules that are established with relatively closed cases and which can only be defeated in very exceptional circumstances, and principles, with norms whose cases are open, so that their defeasibility, as I said before, is previously programmed. And if this is so, then it is pointless to conceive a legal system as consisting essentially of either rules or principles; both types of statements are necessary. However, depending on the subject matter and other circumstances, it is possible that sometimes regulation must be done fundamentally by means of rules (for example, when establishing criminal offences), while on other occasions it is necessary to leave more room for principles (for example, when regulating matters such as assisted

human reproduction, which is highly dependent on technological changes that happen in a practically incessant pace, that cannot be anticipated and, therefore, that prevent a regulation in very specific terms).

4. Defeasibility in the process of interpretation and application

Let us turn now to the other instance, that of the application of the rules, of the, so to say, raw legal materials (which in reality are not only rules), for the resolution of hard, controversial cases. The "easy cases/hard cases" distinction does not correspond exactly (but only approximately), as we saw before, with the pair "cases solved exclusively using rules/cases that also require principles"; and it would be more accurate to say that the correspondence is between cases that do not require deliberation/cases that do. Because principles, as I said before, also play a role in determining that a case is easy. But for that, one only needs to take a simple glance and realise that the case is covered by some rule (or, better, by a group of statements including rules) that does not contradict any principle of the system; whereas, in hard cases, that is not enough: an in-depth look is needed, concerning rules and principles; deliberation is needed. This distinction coincides, by the way, with the one that psychologists are used to making today (see Kahneman, 2011) between quick thinking and reflective thinking. Thus, recognising a case as normal or easy and whose resolution requires a "simple look" would be a way of referring to system 1 of thinking which, as we know, is intuitive thinking that includes both the use of heuristics and expert thinking; while there are problems (abnormal, hard cases) that cannot be solved in this way, but instead require an "in-depth look", which would be, in turn, the way of referring to *system 2* of thinking, to slow and reflective thinking, which Kahneman links precisely with deliberation. To put it more briefly: our *system 1* is the one that comes into operation when we have (when a judge has) to solve problems of rule application, while the solution of problems that involve principles (that involve deliberation) means activating *system 2*.

In legal theory, various typologies of hard cases have been constructed. A widely followed one is that of MacCormick, who, on the basis of the scheme of the judicial syllogism, differentiates between problems of proof

and qualification (referring to the factual premise), and problems of interpretation and relevance (referring to the normative premise) (MacCormick, 1978). It is, undoubtedly, of considerable interest, but it falls short, in my opinion (*vid.* Atienza, 2013), because, in his scheme, MacCormick starts, as a major premise, from a type of norm, a rule of action, and does not consider other possibilities. In particular, he does not take into account a situation in which there is (let us say, at first) no rule, but the applicator simply has principles to solve the case. Such a situation is a particular instance of a hard case, which is what, strictly speaking, can be called a balancing problem. This is distinguished from a (more) simple question of interpretation, which would be solved by simply opting for one of the different possible meanings of an expression. But when it comes to balancing, there is something more, that is, the applicator, in the beginning, has only principles and, therefore, he needs to make a step from the principles to the rule. Otherwise, there would be nothing to oppose to speaking of "interpretation" in these situations, but it would be a special type of interpretation. And the classifications of hard cases must, of course, be understood in a flexible and instrumental way: nothing prevents that for the resolution of problems of the other indicated types some balancing must also be done; at least, in the broad sense of the term: when a decision or action has to be taken, and there are several possibilities, opt for the one in favour of which there are the heaviest reasons[27].

The recourse to balancing is of particular importance (and visibility) when it is used to solve a conflict between rights, which in our legal systems happens with some frequency; precisely as a consequence of the phenomenon of the constitutionalisation of legal systems, and of the impossibility of fundamental rights being fixed in the Constitution only or almost exclusively by means of rules, without resorting to principles. In reality, it is about the problem, already raised by David Ross, of the transition from *prima facie*

[27] This would be the principle of practical rationality which Raz calls "principle P1" (Raz, 1991) and which Bayón explains as follows: "siempre se debe hacer lo que se tiene una razón concluyente para hacer, esto es, lo que resulte en cada ocasión del balance global de razones a favor y en contra sopesadas según su fuerza relativa". But given the existence of reasons not only of the first order, but also of the second order, there would be another principle "P2" which is stated as follows: "no se debe actuar según el balance de razones si las razones que lo deciden son excluidas por una razón excluyente no derrotada". And the principle that would gather the two situations (the true practical rationality) would be "P3": "siempre es el caso que uno debe, habida cuenta de todos los factores relevantes, actuar por una razón no derrotada" (Bayón, 1991).

duties to real duties, but in law it is more complicated (than in morality) because of the importance that institutional elements have gained: what is "correct" legally speaking has a moral component, but not only, in the sense that the judgement of correctness also has to take into account the characteristic aims and values of legal practice. The whole recent discussion on (judicial) balancing could be summarised, in my opinion (Atienza, 2017a, chap. 6), along these three questions: 1) what does balancing consist of?; 2) when should we resort to it?; and 3) is balancing a rational instrument or a simple excuse to act arbitrarily? And the answers, from my point of view, would be these.

Balancing is a type of reasoning structured in two phases. In the first one—balancing in the strict sense—we move from the level of principles to that of rules: therefore, creating a new rule that did not previously exist in the system in question. Then, in a second phase, the starting point is the created rule and the case to be solved is subsumed in it. What could be called the "internal justification" of this first step is a reasoning with two premises. The first premise simply states that, in relation to a given case, there are two applicable principles (or sets of principles), each of which would lead to solving the case in mutually incompatible ways: for example, the principle of freedom of expression, to consider this type of conduct permitted; and the principle of respect for privacy, to consider it forbidden. The second premise establishes that, given the particular circumstances of the case, one of the two principles (for example, the principle of freedom of expression) defeats the other, it has a greater weight. And the conclusion would be a general rule, expressed in terms of universality, linking the above circumstances with the legal consequence of the prevailing principle: for example, if circumstances X, Y and Z are present, then conduct C is permitted.

Naturally, the difficulty of that reasoning lies in the second premise, and this is precisely where we find Robert Alexy's famous "weight formula", which would be, therefore, the "external justification" of the second premise. This doctrine is well known, and I am not going to explain it here[28]. What I am interested in clarifying is that this approach, at least as it has been understood by many jurists (not so much by Alexy himself), constitutes a fairly clear example of what Vaz Ferreira called the fallacy

[28] Anyway, I have dealt with it on several occasions. *Vid.* Atienza, 2019.

of false precision (Vaz Ferreira, 1962; Atienza, 2013, 162 et seq.). For, as is well known, Alexy proposes to attribute a mathematical value to each of the variables in his formula and thus constructs an arithmetical rule that creates the false impression that the balancing problems can be solved by means of an algorithm, thereby concealing the fact that the key to the formula lies, as is quite obvious, in the attribution of those values: that is, in determining whether the effect on a principle is intense, moderate or slight, etc. However, if the Alexian construction were to be understood in a sensible way, we would have something like an argumentative scheme that includes diverse topics and which can be very useful when constructing the external justification of that second premise: what it would mean is that, when it comes to solving conflicts between goods or rights (or between the principles that express them: X and Y) and we have to decide whether measure M is justified or not, we need to construct a type of argument that contains premises such as (it could also be presented as a group of "critical questions" to be asked): "measure M is ideal to achieve X"; "there is no other measure M' that allows satisfying X without harming Y"; "in the circumstances of the case (or in the abstract) ‚X outweighs—is more important—than Y"; and so on (vid. Atienza, 2019).

In relation to the question of when does a judicial body have to balance, the answer is that it has to do so when the rules of the system do not provide an adequate answer to a case (there is a gap at the level of the rules); that is, when it is faced with a hard case and the judge needs to resort (explicitly) to the principles. Here, in turn, it is important to distinguish between two types of gaps (I insist: gaps at the level of rules): normative gaps, when there is no rule, no specific guideline of conduct that regulates the case; and axiological gaps, when the rule exists but establishes an axiologically inadequate solution, so that in this second case, so to speak, it is the applicator or the interpreter (not the legislator) who generates the gap.

Well, if we understand that the law, the legal system, is not necessarily complete at the level of rules, that is, that it can have normative gaps, then there is no other option but to accept that the judge (who cannot refuse to solve a case) has to do so by resorting in these cases to principles, that is, by balancing. Whereas, in relation to axiological gaps, the judge could resolve without balancing, but would then run the risk of incurring in formalism, that is, he would not be able to comply, in those cases of evaluative imbalances, with the claim to do justice through the law. In other words, there

are certain situations in which the recourse to balancing by judges is simply unavoidable (although not for all judges: there can be an established rule that, when a judge is faced with such a situation, he must defer the case to a higher body). Whereas in relation to the others (with the cases of axiological gaps) a distinction should, in my opinion, be made between three types of imbalances: a) between what is stated in (the wording of) the rule and the reasons underlying the rule itself: the purposes for which it was made; b) between the reasons underlying the rule and the reasons (values and principles) of the legal system as a whole or of a part of it; c) between the reasons underlying the rule (and eventually the legal system) and others coming from a moral system or some moral principle not incorporated in the legal system. Without going into detail, I think it could be said (that legal common sense tells us) that in the first case it is not difficult to justify balancing (without considering here whether any judge should do it or whether the operation should be reserved for judges of supreme or constitutional courts); that in the third it is never difficult, as it would mean to stop playing "the game of law"; and that in the second is where the most complex cases arise: sometimes balancing may be justified (sometimes not), but it will have to be done with special care and assuming that the burden of argumentation lies in the one who intends to establish an exception to the rule (the one who creates the gap).

The recourse to balancing presupposes, therefore, the phenomenon of the defeasibility of norms. And it is true, as Guastini (2008, 150) says, that both the identification of a normative gap and (if you like, the creation) of an axiological gap are operations that require interpretation. But in different ways. In relation to normative gaps, it must be determined that there is no rule of the system whose literal meaning refers to the case, and that naturally requires interpretation, but it could simply be a matter of what has been called (vid. supra, note 24) a noetic interpretation. And if it is so (if there is no applicable rule), then it will be necessary to resort to principles, that is, to intrinsically defeasible rules, to see which one is stronger, given the circumstances. Whereas in axiological gaps, the interpretation is much more complex (and controversial), since it deals with a deviation from the literal interpretation of the rule, on the grounds that there is some implicit exception[29]. And in order to justify the existence of

[29] It would mean moving from a literal interpretation to a restrictive one. But, in reality, it could also happen that the transition was to a broadening interpretation: the formulation of the rule did not

this exception (that is, the transition to—the creation of—a new rule), one must turn to principles. In the article by Guastini to which I have referred several times (Guastini, 2008), there are some examples which I think may serve to illustrate what I mean. One of them consists of a constitutional provision which establishes that "The President of the Republic may veto the promulgation of laws", and this provision is interpreted as referring only to ordinary laws, and not to laws of constitutional revision (which means creating the axiological gap and solving it in a certain way). For this, instead of "principles", Guastini prefers to speak of "legal theories" and "dogmatic theses", but this is obviously balancing: the reasons in favour of that restrictive interpretation are stronger than those in favour of sticking to the literal meaning.

Finally, arguing that balancing is a rational procedure, does not mean asserting that, in fact, it always is, that is, it seems obvious that it is possible to balance badly (to appeal to balancing to conceal arbitrary behaviour) or to balance when (or by whom) it should not be done. But on many occasions, when one examines the argumentation—the balancing argumentation—carried out, for example, by a court in a series of cases involving, let us suppose, a type of conflict between two certain principles, one can detect the existence of a type of rationality, which consists of the following[30]. On the one hand, in the construction of a taxonomy (based on the properties that are considered relevant) that makes it possible to establish increasingly specific categories of cases: for example, not only the conflict between principle P1 and P2, but also between principle P1 accompanied by circumstance X and principle P2 accompanied by circumstance Y, etc. On the other hand, in the elaboration of rules of priority: for example, when those two principles are confronted while these circumstances apply, the first principle prevails over the second. And finally in the respect, regarding the configuration of the taxonomy and the rules of priority, to the criteria of practical rationality: consistency, universality, coherence, adequacy of consequences, reasonableness... Properly understood, properly put into practice, balancing is not a purely casuistic, arbitrary mechanism.

include something that it should have included. In other words, the problem consists of an imbalance between the wording of the rule and its underlying reasons, its justification. On this see Atienza and Ruiz Manero, 2000.

30 *Vid.* Atienza & Ruiz Manero, 1996.

The person who ponders must have the pretension that the solutions that he is configuring will serve as a guideline for the future, as a mechanism of prediction, even though it is an imperfect mechanism, in the sense that new circumstances may always arise that had not been taken into account until then and which may force to introduce changes in the taxonomy and in the rules. In particular, the rules that are constructed by means of balancing inevitably have an open character, they are defeasible. But that, as we know, is a characteristic feature of practical rationality[31].

5. Defeasibility, balancing and juridical common sense

Sometimes there are many different ways of saying the same thing, or almost the same thing. And this is what happens, in my opinion, with many discussions that take place in the field of legal theory in general or of more specific legal theories: what we usually call—in the world of continental law—legal dogmatics. This may be due to an excessive desire for originality, to the desire for imitating what happens in the "hard sciences", to the existence of different traditions or schools of thought which, in turn, may have their origin in different legal cultures (for example, those of continental law and those of common law, formalist or anti-formalist), to the growing climate of isolation in which theories of law are developed (and I believe that the tendency to "intellectual autism" is far from being exclusive to jurists), or to various other causes. It is possible, moreover, that "enlarging" a small difference is sometimes important: it allows a better understanding of some concept, some relevant aspect of the law and, as

[31] Guastini, criticising Hart, states that the idea that "una regla que concluye con la expresión 'a menos que…' sigue siendo una regla…me parece totalmente absurda" (Guastini, 2008, 154, note 34). And that would be because a "defeasible rule" "no puede ser utilizada como premisa en ningún razonamiento normativo". The latter is true, in the sense that in the premise of a justificative judicial reasoning, what will appear will be that norm interpreted in a certain way (the "defeated" norm). But I think Guastini is forgetting that norms also fulfil other functions such as, for example, serving as a guide (and as justification criteria) for conduct (and not only for that of judges). And a defeasible rule does fulfil this function, even if the addressee knows that, *exceptionally*, things could be otherwise. For the rest, it seems to me that Juan Carlos Bayón is right when he states that Hart's affirmation is sustainable "siempre que quepa reemplazar los puntos suspensivos por criterios o pautas que de alguna forma sean internos al propio derecho" (Bayón, 2001, 56).

A defense of Hart's theses (basically in the same terms as Bayón) can be found in MacCormick, 2016, 417-418.

a consequence, it can serve to develop the knowledge (and improve the practice) of law. But I believe that other (many) times this is not the case, and in particular it is not usually the case for—let us say—ordinary jurists (not the theorists or legal philosophers) who, in my opinion, should be the privileged recipients of these theoretical elaborations: those who have to solve legal problems, of whatever kind, and who could supposedly find some help in legal theory to do so. It should also be taken into account that in law (there is a reason why it is also part of practical reason) happens something similar to what David Ross pointed out about ethics: theories of law cannot deviate much from what we might call the good common sense of jurists; the legal method must also consist of some version of what has come to be called "reflective equilibrium". In order to avoid, therefore, as far as possible, that this work might contribute to increasing the risk I am warning about, I will point out the conclusions that follow, in my opinion, from what has been written in the previous sections and which, it seems to me, can be perfectly integrated into this legal common sense.

1. Defeasibility and balancing are more or less new names for realities that are not. And they are not, because they obey the intrinsic needs of any legal system: to regulate human conduct by facing, as far as possible, the unpredictability of the future, avoiding excessive rigidity and contributing, in short, to making the—unavoidable—breach that will always exist between law and justice as narrow as possible.

2. Defeasibility means that general rules may in some cases have implicit exceptions and, thus, that reasoning with rules may be affected by this: there may be extraordinary circumstances that force us to modify a conclusion that would justifiably have been reached under—let us say—normal conditions.

3. In a broad sense, to balance means to deliberate, that is, when a decision or an action has to be taken, and there are several possibilities, to opt for the one in favour of which there are the heaviest reasons. This is what defines the activity of the legislator, whose deliberations—from the legal point of view—are carried out within very broad limits. However, the law-applicator can only resort to balancing in relatively exceptional situations, and has to carry out this operation within much stricter limits.

4. The above means that the justificatory legal reasoning is not exclusively of a classificatory (subsumptive) type. It cannot be so in the case of the legislator, for obvious reasons: legislating does not consist simply of including a law—a norm—under some constitutional precept (or one of

a higher rank than that of the new norm). And, on occasions, it is not so in relation to the applicator of the law either: when there is no rule with sufficiently determined conditions of application to be able to say that the case is subsumed in the norm, or when the subsumption of the case in the conditions of application of some norm is not enough to justify the decision.

5. To clarify the above, it is necessary to resort to a distinction between rules and principles, even if legal sentences are not simply of these two types. But in legal systems there are both specific patterns of conduct that operate as peremptory or conclusive reasons—rules—and very open rules that operate only as non-peremptory or non-conclusive reasons—principles. The distinction need not be seen in rigid terms (the properties closed/open or peremptory/non-peremptory are given as a continuum), but it allows to explain that when there is a rule that is strictly applicable to the case, the case is solved (or its solution is justified) by subsumption; whereas the latter does not happen if only principles are available.

6. In establishing a general *rule* of conduct (and this is also true for constitutive rules or definitions), the legislator usually lays down explicit exceptions: in relation to what is ordered, to the conditions that must be met for a rule or a valid act to be produced, for a definition to be satisfied... But one cannot entirely exclude the possibility of implicit exceptions, which can be attributed to diverse factors (careless drafting of the text, impossibility of predicting future contingencies, acceleration of social change, growth of legal requirements as a consequence of the culture of rights...). Recognising the existence of implicit exceptions means recognising that the rule in question (and the reasoning that incorporates it) is defeasible. As well as the necessity of having to carry out a balancing exercise in the process of its application.

7. In the case of *principles*, and given their nature as open norms, it does not make sense to speak of exceptions, but it does make sense to speak of balancing. Principles are not defeasible like rules (because they provide non-exclusive, non-peremptory reasons, they do not present the typical resistance of rules). But the balancing of principles in a certain case does lead to a rule, whose case contains the open conditions of application of the applicable principles as well as the specific (closed) conditions that justified giving priority to one of the conflicting principles, and whose legal consequence will be precisely the one stated in the prevailing principle. Such a rule is not only general, but also universalizable: what it establishes

applies (or should apply) as long as the (generic) conditions laid down in its case are met.

8. The importance that is nowadays recognised, in the theory and practice of law, of the existence of rules with implicit exceptions (which can be defeated in extraordinary situations) and of principles whose application generally leads to a process of balancing, has to do with changes that affect the reality of our legal systems and is linked to what is usually called the phenomenon of constitutionalisation. In particular, if what justifies law—the supreme value of constitutionalism—is the guarantee of fundamental rights, this could not be achieved within the scope of a very formalist culture that denies—or tries to reduce to a minimum—these two phenomena, linked to each other: the acknowledgement of implicit exceptions (defeasibility) and the recourse to balancing.

9. But the fact that we must leave a considerable space for the use of these two instruments does not mean that we must not set limits to them, that anything goes and that the law is completely or fundamentally indeterminate. It is not, among other things because, if it were, we would in fact cease to have rights: if rules were easily defeated, and law-appliers could solve the cases they were presented with by resorting to a balancing exercise whenever they thought (even with good reasons) that they would thereby make fairer decisions, the idea of having a right would vanish.

10. Law must be seen as an authoritative enterprise with which certain ends and values are to be achieved. The jurist, in his practical and theoretical work, cannot forget either of these two components. The authoritative element (the materials established by the authorities recognised as having such power in a state under the rule of law) sets the limits within which this finalistic and axiological activity can be carried out. These materials are (have to be) interpreted (in the broadest sense of the latter expression), but interpreting is not the same as inventing, creating something *ex nihilo*. Interpreting law requires going back to some moral and political philosophy that accounts for the legal materials; or, rather, to the one that best accounts for those materials.

11. If we transfer the above premise to the problem of balancing, what follows is that this operation can only be carried out, in the application of the law, in extraordinary situations: a) when there is no rule—specific guideline—applicable to the situation, in other words, we would be faced with what is usually called a normative gap; b) when such a guideline does

exist, but what it establishes—according to the textual or literal meaning—entails a conflict of some importance with the principles (and values) of the legal system: or, said in other words, when there is an imbalance between what is established in the rule and the underlying reasons.

12. With regard to normative gaps, the use of balancing involves an easily recognisable logical scheme that is articulated in two phases: the first one concludes with the establishment of a (general and universalizable) rule; the second one consists of a simple subsumption. It is therefore a more complex procedure than simple subsumption (deduction), but it is nonetheless rational; the criteria of rationality that can be used for its control are, in addition to those of deductive logic, those characteristic of practical rationality, in which coherence must play a particularly important role.

13. Axiological gaps present a more complex situation. As the applicator always has at his disposal the possibility of solving the case by applying the rule "on his own terms", he will have to start by carrying out a balancing whose result is that the reasons for creating the gap are of greater weight than those existing for simply applying the rule. In short, he has to justify the existence of an exception in the norm—in the rule—which would be implicit. This cannot be done without resorting to principles and, therefore, to values; but those values cannot be other than those of the legal system of reference.

14. Defeasibility and balancing are mechanisms for the innovation of the law, but coherently, that is, in accordance with the authoritatively established purposes and values; and it should be remembered that, in constitutional states, this authority is of a democratic nature. Moreover, this process of innovation has an open character (as is generally the case with practical rationality), so that the new rules that are made (and the new interpretations of principles and values) will also continue to present the characteristic of defeasibility.

REFERENCES

Aarnio, A. (1990). Taking rules seriously, in *ARSP-Beiheft* (42, 180-192).

Aguiló, J. (2000). *Teoría general de las fuentes del Derecho (y el orden jurídico)*. Ariel.

Alchourrón, C. (2000). Sobre derecho y lógica, *Isonomía: Revista de Teoría y Filosofía del Derecho*, (13), 11-33.

Alexy, R. (1989). *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*. Clarendon Press.

Alexy, R. (2002). *A Theory of Constitutional Rights*. Oxford University Press.
Aristotle (1984a). *Nicomachean Ethics*, in BARNES J. (ed.), *The Complete Works of Aristotle*, Princeton University Press.
Aristotle. (1984b). *Rhethoric*. In J. Barnes (Ed.), *The Complete Works of Aristotle* (Vol. 2, 2152-2269), Princeton University Press.
Atienza, M. (2013). *Curso de argumentación jurídica*. Trotta.
Atienza, M. (2017a). *Filosofía del Derecho y transformación social*. Trotta.
Atienza, M. (2017b). Epílogo (abierto). In J. Aguiló & P. Grández (Eds.), *Sobre el razonamiento judicial. Una discusión con Manuel Atienza* (419-460). Palestra.
Atienza, M. (2018). Homenaje a Riccardo Guastini. In P. Chiassoni; P. Comanducci & G. B. Ratti (Coords.), *L'arte della distinzione: Scritti per Riccardo Guastini* (Vol. 1, 15-30). Marcial Pons.
Atienza, M. (2019). *Argumentación legislativa*. Astrea.
Atienza, M. & Ruiz Manero J. (1996). *Las piezas del Derecho. Teoría de los enunciados jurídicos*. Ariel.
Atienza, M. & Ruiz Manero, J. (2000). *Ilícitos atípicos*. Trotta.
Bayón, J. C. (1991). Razones y reglas: sobre el concepto de "razón excluyente" de Joseph Raz. *Doxa. Cuadernos de Filosofía del Derecho*. (10), 25-66. https://doi.org/10.14198/DOXA1991.10.01
Bayón, J. C. (2001). ¿Por qué es derrotable el razonamiento jurídico?. *Doxa. Cuadernos de Filosofía del Derecho*. (24), 35-62. https://doi.org/10.14198/DOXA2001.24.02
Campos, R. (2023). *Metamorphoses of Global Law. On the interaction of law, time and technology*. Bloomsbury Publishing.
Chiassoni, P. (2019). *Interpretation without Truth: A Realistic Enquiry*. Springer.
Dascal, M. (1996). La balanza de la razón. In O. Nudler (Ed.), *La racionalidad: Su poder y sus límites* (363-381). Paidós.
García Salgado, M. J. 2(010). *La jurisprudencia de intereses de Philipp Heck*. Comares.
García Salgado, M. J. (2019). La ponderación de intereses como método. *Eunomía: Revista en Cultura de la Legalidad*, (16), 283-311. https://doi.org/10.20318/eunomia.2019.4707
Guastini, R. 2008. Variaciones sobre temas de Carlos Alchourrón y Eugenio Bulygin. Derrotabilidad, lagunas axiológicas, e interpretación. *Doxa. Cuadernos de Filosofía del Derecho*, (31), 143–156. https://doi.org/10.14198/DOXA2008.31.07
Hage, J., & Peczenik A. (2000). *Law, morals and defeasibility. Ratio Juris*, 13 (3), 305-325.
Hart, H. L. A. (1948). The Adscription of Responsibility and Rights. *Proceedings of the Aristotelian Society*, 49(1), 171-194.
Hart, H. L. A. (1958). Positivism and the Separation of Law and Moral. *Harvard Law Review*, 71(4), 593-629.
Holmes, O. W. (1897). The Path of the Law. *Harvard Law Review*, (10), 457-478.
Ihering, R. (1913). *Law as a Means to an End*. Boston Book Company.
Kahneman, D. (2011). *Thinking, fast and slow*. Farrar, Straus and Giroux.
Lacey, N. (2006). *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*. Oxford University Press.
Lifante, I. (1999). *La interpretación jurídica en la teoría del Derecho contemporánea*. Centro de Estudios Políticos y Constitucionales.
Luhmann, N. (1977), *Sociologia del diritto* (A. Febbrajo, Trans. and Introd). Laterza.

Luhmann, N. (1990). *La differenziazione del diritto. Contributti alla Sociologia e alla Teoria del diritto* (R. De Giorgi, Trans. and Introd). Il mulino

MacCormick, N. (1978). *Legal Reasoning and Legal Theory*. Clarendon Press.

MacCormick, N. (1995). *Defeasibility in Law and Logic*. In Z. Bankowski, I. White, & U. Hahn (Eds.), *Informatics and the Foundation of Legal Reasoning* (99-117). Kluwer.

MacCormick, N. (2005). *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*. Oxford University Press.

MacCormick, N. (2016). *Retórica y Estado de Derecho: una teoría del razonamiento jurídico*. Palestra.

Pintore, A. (1990). *Teoría analítica dei concetti giuridici*. Casa editrice Jovene.

Plato. (1997a). Statesman. In J. M. Cooper (ed.), *Plato: Complete Works* (294-358). Hackett.

Plato. (1997b). Republic. In J. M. Cooper. (ed.), *Plato: Complete Works* (971-1223). Hackett.

Poggi, F. (2021). Defeasibility, Law, and Argumentation: A Critical View from an Interpretative Standpoint. *Argumentation*, (35), 409-434.

Poscher, R. (2022). Aciertos, errores y falso autoconcepto de la teoría de los principios. In J. A. García Amado & R. Giorgio Dalla-Barba (Eds.), *Principios jurídicos. El debate metodológico entre Robert Alexy y Ralf Poscher* (85-129). Palestra Editores.

Raz, J. (1991). *Razón práctica y normas*. Centro de Estudios Constitucionales.

Rodríguez, J.L., & Sucar, G. (1998). Las trampas de la derrotabilidad: niveles de análisis de la indeterminación del derecho. *Doxa. Cuadernos de Filosofía del Derecho*, 21 (2), 403-420. https://doi.org/10.14198/DOXA1998.21.2.28

Ross, D. (1930). *The Right and the Good*. Clarendon Press.

Ross, D. (1939). *The Foundations of Ethics*. Clarendon Press.

Schauer, F. (2012). Is Defeasibility an Essential Property of Law?. In J. Ferrer, & G. Ratti (Eds.), *The Logic of Legal Requirements: Essays on Defeasibility* (77-88). Oxford University Press.

Sieckmann, J-R. (1990). *Regelmodelle und Prinzipmodelle des Rechtssystems*. Nomos.

Toulmin, S. (1958). *The Uses of Argument*. Cambridge University Press.

Vaz Ferreira. (1962). *Lógica viva*. Losada.

Von Wright, G. H. (1979). *Norma y acción. Una investigación lógica*. Tecnos.

The Normative Foundation of Proportionality

Jorge Silva Sampaio

Lisbon Legal Theory; Lisbon Public Law Research Center; School of Law – University of Lisbon
Orcid: 0000-0002-8687-6622

DOI | 10.14195/2184-9781_4_2

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].

---

[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].

---

[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

---

[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].

---

[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

---

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

---

[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]

---

[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].

---

[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.

References

Alchourrón, C. E. (1991). Conflicts of norms and the revision of normative systems. *Law and Philosophy*, 10, 413-425.

Alchourrón, C. E., & Bulygin, E (2012). *Sistemas normativos* (2nd ed.). Astrea.

Alexandrino, J. M. (2011). *Direitos fundamentais: Introdução geral* (2nd ed.). Principia.

Alexandrino, J. M. (2017). *Lições de direito constitucional* (3rd ed., Vol II). AAFDL.

Alexy, R. (2010). The reasonableness of law. In G. Bongiovanni, G. Sartor, & C. Valentini (Eds.), *Reasonableness and law* (5-16). Springer.

Alexy, R (2019). Sobre la estructura de los princípios jurídicos. In R. Alexy. *Ensayos sobre la teoria de los princípios y el juicio de proporcionalidade* (55-75). Palestra.

Barak, A (2012). *Proportionality: Constitutional rights and their limitations*. CUP.

Beatty, D. M. (2004). *The ultimate rule of law*. OUP.

Bernal Pulido, C. (2007). *El principio de proporcionalidad y los derechos fundamentals* (3rd ed.). CEPC.

Bernal Pulido, C. (2018). La migración del principio de proporcionalidad a través de Europa. In C. Bernal Pulido, *Derechos, cambio constitucional y teoría juridica*. Universidad Externado de Colombia.

Bobbio, N. (2016). *Teoría general del derecho* (5th ed.). Temis.

Borowski, M. (2003). *La estrutura de los derechos fundamentals*. Universidad Externado de Colombia.

Brito, M. N. (2009). Direito administrativo de polícia. In P. Otero, & P. Gonçalves (Coords.), *Tratado de direito administrativo especial* (Vol. I). Almedina.

Bulygin, E., & Mendonca, D. (2005). *Normas y sistemas normativos*. Marcial Pons.

BVerfGE 19, 342 - Wencker. https://www.servat.unibe.ch/dfr/bv019342.html

Canas, V. (2017). *O princípio da proibição do excesso na conformação e no controlo de atos legislativos*. Almedina.

Canotilho, J. J. G. (2003). *Direito constitucional e teoria da constituição* (7th ed.). Almedina.

Celano, B. (2015). *Rule of law* y particularismo ético. In P. Luque (Ed.), *Particularismo – ensayos de filosofia del derecho y filosofia moral*. Marcial Pons.

Clérico, L. (2009). *El Examen de proporcionalidad en el derecho constitucional*. Eudeba.

Crisafulli, V. (1941). Per la determinazione del concetto dei principi generali del diritto. *RIFD*, XXI, 157-181.

Deschling, R. (1989). *Das verhältnismässigkeitsgebot: eine. Bestandsaufnahme der literatur zur verhältnismässigkeit staatlichen handels*. Franz Vahlen.

Duarte, D. (2021). From constitutional discretion to the positivistic weight formula. In J.-R. Sieckmann (Ed.), *Proportionality, balancing, and rights: Robert Alexy's theory of constitutional rights* (11-48). Springer.

Dürig, G. (1956). Der grundrechtssatz von der menschenwürde. *AöR*, 81(2), 117-157.

Fine, K. (2005). The varieties of necessity. In K. Fine, *Modality and tense - Philosophical papers* (235-260). Clarendon Press.

Gardner, J. (2012). Some types of law. In J. Gardner, *Law as a leap of faith: Essays on Law in General*. OUP.

Grabitz, E. (1973). Der grundsatz der verhältnismäßigkeit in der rechtsprechung des bundesverfassungsgerichts. *AöR*, 98, 568-616.

Grimm, D. (2007). Proportionality in canadian and german constitutional jurisprudence. *University of Toronto Law Journal*, 57(2), 383-397.

Guastini, R. (2016). *La sintaxis del derecho*. Marcial Pons.

Harbo, T.-I. (2015). *The function of proportionality analysis in european law*. Brill Nijhoff.

Hart, H. L. A. (2012). *The concept of law* (3rd ed.). OUP.

Hesse, K. (1999). *Grundzüge des verfassungsrechts der bundesrepublik deutschland*, (20th ed.). C.F. Müller.

Hirschberg, L. (1981). *Der grundsatz der verhältnismässigkeit*. Otto Schwartz.

Holländer, P. (2011). El principio de proporcionalidade: ¿variabilidade de su estrutura?. In J.-R. Sieckmann (Ed.), *La teoría principialista de los derechos fundamentales*. Madrid.

Huster, S. (1983). *Rechte und ziele: Zur dogmatik des allgemeinen gleichheitssatzes*. Duncker & Humblot.

Iturralde Sesma, V. (2003). *Aplicación del derecho y justificación de la decisión judicial*. Tirant lo Blanch.

Jackson, V. C. (2015). Constitutional law in an age of proportionality. *The Yale Law Journal*, 124(8), 3094-3196.

Jakobs, M. (1985). *Der Grundsatz der verhältnismässigkeit*. Heymann.

Jansen, N. (2011). Los Fundamentos normativos de la ponderación racional en el derecho. In J.-R. Sieckmann (Ed.), *La teoría principialista de los derechos fundamentales* (51-70). Marcial Pons.

Klatt, M., & Meister, M. (2012). *The constitutional structure of proportionality*. OUP.

Klatt, M., Meister, M., (2014, Jan-Jun). A Máxima da proporcionalidade: um elemento estrutural do constitucionalismo global. *Observatório da Jurisdição Constitucional*, 7(1), 23-41.

Klatt, M., & Meister, M. (2015). A proporcionalidade como principio constitucional universal. *Revista Publicum*, 1(1), 30-70. https://doi.org/10.12957/publicum.2015.20217

Kramer, M. H. (2018). *H.L.A. Hart*. Polity Press.

Lang, A. (2020). Proportionality analysis by the german federal constitutional court. In M. Kremnitzer, T. Steiner, & A. Lang (Eds.), *Proportionality in action* (22-133). CUP.

Lepsius, O. (2020). The standard-setting Power. In M. Jestaedt, O. Lepsius, C. Möllers, & C. Schönberger, *The german federal constitutional court* (70-130). OUP.

Lopes, P. M. (2017). The syntax of principles: Genericity as a logical distinction between rules and principles. *Ratio Juris*, 30(4), 471-490. https://doi.org/10.1111/raju.12183

Lübbe-Wolff, G. (2016). Constitutional courts and democracy. Facets of an ambivalent relationship. In K. Meßerschmidt, & A. D. Oliver-Lalana (Eds.), *Rational Lawmaking under Review* (19-32). Springer.

Merten, D. (2009). Verhältnismäßigkeitsgrundsatz. In D. Merten, & H.-J. Papier (Hrsg.), *Handbuch der grundrechte in Deutschland und Europa* (Vol. III, 517-558). C.F. Müller.

Miranda, J. (2012). *Manual de direito constitucional* (Tomo IV). Coimbra Editora.

Möller, K. (2007). Balancing and the structure of constitutional rights. *I•CON*, 5(3), 453-468.

Möller, K. (2012). *The global model of constitutional rights*. OUP.

Novais, J. R. (2019). P*rincípios estruturantes de estado de direito*. Almedina.

Ossenbühl, F. (1993). Maßhalten mit dem Übermaßverbot. In P. Badura & R. Scholz (eds.), *Wege und Verfahren des Verfassungslebens, Festschrift für Peter Lerche* (151-164). C.H. Beck.

Petersen, N. (2017). *Proportionality and judicial activism – Fundamental rights adjudication in Canada, Germany and South Africa*. CUP.

Perez Luño, A. E. (1997). Los princípios generales del derecho: ¿un mito jurídico?. *Revista de Estudios Políticos*, (98), 9-24.

R v. Big M Drug Mart Ltd, 1 SCR (1985). https://www.canlii.org/en/ca/scc/doc/1985/1985canlii69/1985canlii69.html

R v. Oakes, 1 SCR (1986). https://www.canlii.org/en/ca/scc/doc/1986/1986canlii46/1986canlii46.html

Raz, J. (2009a). Legal Validity. In J. Raz, *The Authority of Law* (146-162). OUP.

Raz, J. (2009b). The rule of law and its virtues. In J. Raz, *Authority of law*. (210-232). OUP.

Sampaio, J. S. (2015). The contextual nature of proportionality and its relation with the intensity of judicial review. In L. P. Coutinho, M. L. Torre, & S. D. Smith (Eds.), *Judicial Activism* (137-160). Springer.

Sampaio, J. S. (2023). P*onderação e proporcionalidade* (Vol. II). Almedina.

Schlink, B (2012). Proportionality. In M. Rosenfeld, & András Sajó (Eds.), *The Oxford handbook of comparative constitutional law* (718-737). OUP.

Sweet, A. S., & Mathews, J. (2019). *Proportionality balancing & constitucional governance – A comparative & global approach*. OUP.

Thorburn, M. (2016). Proportionality. In D. Dyzenhaus, & Malcolm Thorburn, *Philosophical foundations of constitutional law* (305-322). OUP.

Toh, K. (2021). Legal Positivism and Meta-Ethics. In T. Spaak, & P. Mindus (Eds.), *The Cambridge Companion to legal positivism* (561-584). CUP.

Tremblay, L. B. (2009). Normative foundation of the proportionality principle in constitutional theory. EUI Working Papers (4), 1-22.

Von Wright, G. H. (1993). Images of Science and Forms of Rationality. In G. H. Von Wright, *The Tree of Knowledge and Other Essays* (172-192). Brill.

Waldron, J. (2002). Is the Rule of Law an Essentially Contested Concept (in Florida)?. *Law and Philosophy*, 21(2), 137-164.

Wróblewski, J. (1992). *The judicial application of law*. Kluwer.

Ecoproportionality in a time of environmental and climate emergency

Alexandra Aragão

Faculty of Law, UCILeR, Univ Coimbra

Associate Professor (Faculty of Law) – Integrated Researcher (University of Coimbra Institute for Legal Research)

ORCID: 0000-0002-4084-6321

DOI | 10.14195/2184-9781_4_3

ABSTRACT

Ecoproportionality lies at the heart of sustainable development. This paper examines how ecoproportionality is operationalized in legal and decision-making frameworks aimed at sustainability. It concludes that the pressing context of climate and environmental emergency demands a new perspective on ecoproportionality in public decision making to achieve truly sustainable outcomes.

KEYWORDS

Ecoproportionality; Environmental law; Sustainability; Balancing; DNSH principle; Emergency declarations; Alternatives

1. Introduction: ecoproportionality in the Anthropocene

The principle of proportionality is inextricably linked to the very essence of justice, expressing the idea that fairness arises from balance and equilibrium[1]. Legal decisions guided by the proportionality principle must carefully weigh competing interests, ensuring that rights and obligations are aligned with the challenges they address and the objectives they seek to achieve.

In an ecological law (Bosselmann, 2017a) framework, ecoproportionality refers to the application of the principle of proportionality in environmental law. The intrinsic connection between proportionality and justice conveys the idea that equitable environmental outcomes depend on a certain symmetry or consistency between the environmental needs and the correlated legal action.

[1] The principle is usualy studied associated with human rights and constitutional justice (Lopes et al., 2021).

However, environmental protection requirements depend on the current state of the environment, whose evolution closely influenced by direct or indirect human activities. This is where Anthropocene law plays a role. In ancient times, human knowledge of the environment, and their ability to understand and control the Earth's forces, were extremely limited. In their struggle to survive the harsh elements that seemed hostile to humans, communities relied on strategies such as sacred rituals, magic, celebrations and sacrifices to placate enraged volcanoes, storms, floods, and droughts (Brockwell et al., 2013). In the Anthropocene, the status quo has changed radically. Over the last centuries, humans have developed great knowledge about the Earth's biogeochemical processes and great technical capacity to influence natural processes deliberately. Humans are now the main force shaping and transforming the Planet (Crutzen, 2002). Consequently, the objective of preserving the Earth System in a certain desired state depends on humans more than ever.

In this text, ecoproportionality is at the core of the critical decisions that must be taken to face and desirably *escape* (Stiegler, 2017), the Anthropocene:

- Decisions on climate adaptation policy requiring the construction of large-scale infrastructures, such as hydropower dams, massive water transfer between river basins, or large coastal protection works such as dikes, breakwaters, seawalls, and similar structures....
- Decisions on energy and climate policy, in order to phase out conventional fossil fuels, like nuclear fusion power plants, investing on the quest for nuclear fission energy[2], engaging in geological carbon sequestration (Directive 2009/31/EC)...
- Decisions regarding new promising products and prospective technologies, such as nanomaterials or smart materials, 5G internet or quantum computing, satellite launches or lunar colonization...

All of humanity's major advances through activities, products, processes, projects, plans, programs or investments, now require legal considerations that must be guided by the principle of ecoproportionality.

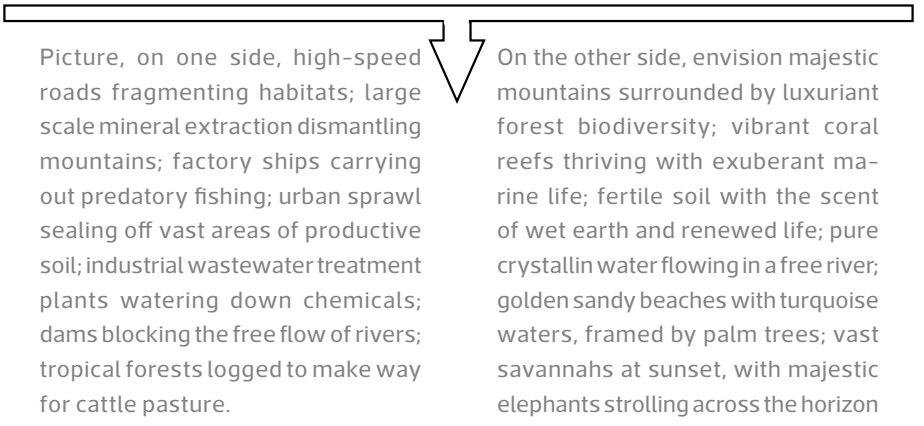
---

[2] In southern France, 33 countries are collaborating to build an International Thermonuclear Experimental Reactor – ITER, the world's largest magnetic fusion device that has been designed to prove the feasibility of fusion as a large-scale and carbon-free source of energy based on the same principle that powers the Sun and the stars (more information on the ITER project https://www.iter.org/few-lines).

2. Understanding ecoproportionality

The best image to understand the role of proportionality in environmental law is the old metaphor of the balance scale. This ancient symbol that can be found in the classical representations of justice, both in the Greek and Roman mythology (Curtis & Resnik, 1986).

What can be found on the two pans of the ecoproportionality balance scale? In a context of sustainable development, the typical sustainability decision is made using a mental balance scale with two pans, one side standing for the economic activities contributing to human development and the other for pristine natural spaces and a clean environment. Visualizing the metaphor through concrete examples can vividly convey a stereotypical image of what is at stake in sustainability decisions based on the principle of ecoproportionality.



In any of the sketched scenarios, ecoproportionality involves balancing environmental protection with competing interests, in a way that ensures environmentally sustainable results. Using another visual metaphor, ecoproportionally can also be seen as the literal translation of the *sustainability wedding cake*[3].

In the next sections we will dive into ecoproportionality from the perspective of European Union, as an omnipresent principle in EU law that must be considered in every public decision-making processes. Subsequently, we will

[3] The Sustainability Wedding Cake is a diagram was elaborated in 2017 at the Stockholm Resilience Centre. It is based on the sustainable development goals, approved by the UN in 2015 (United Nation General Assembly Resolution A/RES/70/1, 2015) but replaces the rectangular layout and the coloured box by three concentric overlapped circles with a bottom layer representing the ecological limits, an intermediate social layer and an upper economic layer (Rockström & Sukhdev, 2016).

unveil the new context of ecological emergency and the changes it introduces in ecoproportionality judgments.

3. What is at stake? The ubiquity of ecoproportionality

If we want to have a deeper understanding of the environmental values which are to be protected through ecoproportionality, we must look for them in the legal regimes that were designed to support decision-makers in balancing environmental and non-environmental values. The paradigmatic example is the administrative procedure of environmental impact assessment (EIA). Established in EU law in the 80's, the European EIA directive (Council Directive 85/337/EEC) currently enumerates a list of all the environmental "factors" that must be considered before approving a project: population, human health, biodiversity, land, soil, water, air, climate, material assets, cultural heritage and landscape, including risks of major accidents or disasters[4].

These are the factors that suffer the effects of projects and economic activities that pollute and degrade the environment. The factors are ambient elements that shape living conditions and influence the health and wellbeing of humans[5], non-human species, and ecosystems, in line with the One Health approach[6].

Simultaneously, the factors influence each other mutually. In the words of the Directive, "the interaction between the factors" must as well be assessed and taken into account (Center for International Environmental Law, 2023). Air pollution contaminates the water, which contaminates the soil, and altogether constitute a threat to human health, fauna and flora. Soil and water contamination (e.g. microplastics) lead to air contamination which again jeopardizes health.

This is what makes the balancing required by ecoproportionality so hard.

Meanwhile, on the non-environmental side of the pan, we find projects[7], but we can also find public policies. The Directive on the assessment of the

[4] Article 3 of the EIA Directive 2011/92/EU.

[5] Using Mapping and Assessment of Ecosystems and their Services (MAES) methodologies (https://biodiversity.europa.eu/europes-biodiversity/ecosystems/maes) to evaluate, communicate and balance the gains and losses of ecosystem services would contribute to clarify the relative relevance of natural values, building consensus on sound decision criteria (Aragão, 2021).

[6] The One Health approach emphasizes the interconnection between human, animal, and environmental health. The One Health Joint Plan of Action (2022 – 2026) https://wedocs.unep.org/bitstream/handle/20.500.11822/40843/one_health.pdf?sequence=1&isAllowed=y is the first joint plan launched together by the UN Food and Agriculture Organization, the Environment Programme, the World Health Organization, and the World Organisation for Animal Health.

[7] A project is the execution of construction works or of other installations or schemes, or other

effects of certain plans and programmes on the environment (Directive 2001/42/EC) imposes the fulfilment of a strategic environmental assessment, for most public plans and programmes, such as plans adopted for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, plans likely to produce effects in Natura 2000 sites, or plans or programmes which set the framework for future development consent of projects. Strategic ecoproportionality contributes to the democratization of political choices, preventing precipitated, unfunded or biased decisions.

In any case, whether for projects, plans or programmes, how can decisions be ecoproportional?

A decision is ecoproportional when all reasonable less environmental-unfriendly alternatives (Winter, 2018) have been considered and the mitigation hierarchy has been respected. In the words of the Commission, "alternatives are essentially different ways in which the Developer can feasibly meet the Project's objectives, by carrying out a different type of action, choosing an alternative location or adopting a different technology or design for the Project for example. Alternatives may end up becoming part of the Project's final design, or its methods of construction or operation, in order to avoid, reduce or remedy environmental effects" (European Union, 2017, 45).

Returning to the scale metaphor, testing alternatives corresponds to having a scale that has more than two pans. In the project side of the scale, the decision-maker must consider more than one version of the project. The alternatives can be based on the diverse nature, size or location of the project[8] and must also include the so called "zero option" or do-nothing scenario (European Union, 2017, 46). Metaphorically, the abstention scenario is not represented by an empty pan, but rather by two pans. One, containing a depiction of the current status of the geographic area where it is intended to develop the project, and the other a projection of the same area in the future. How much

interventions in the natural surroundings and landscape including those involving the extraction of mineral resources. Some examples are projects for the development of agriculture, silviculture and aquaculture, industry, tourism and leisure, infrastructure (urban development, transport, dams, aqueducts and pipelines, coastal protection, water abstraction and transfer), waste management, etc., mentioned in annex I and II of the Directive.

[8] Article 2 n1. Of the EIA Directive: "Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment".

into the future must the natural evolution of the area be assessed depends on the expected life-span of the project[9] or on the level of prevision intended[10].

The mitigation hierarchy means that the choice should favour the option that best avoids the impacts, or, if that is not possible, on the one that most reduces the impacts. Alternatively, complementary measures should be considered to minimize those impacts, and only as a last resort, if none of these options are feasible, compensation measures for the impacts should be adopted (Aragão & van Rijswick, 2014). This is the mitigation hierarchy, or the avoid-reduce-compensate (ARC) approach[11].

The mitigation strategy relies strongly on fundamental environmental principles, the most important of which are enshrined in the Treaties, as will be seen in the following section.

4. Ecoproportional to what? Examining sustainability and its subprinciples

In the European Union, the range of European policies has expanded over time. To prevent contradictions that may arise during the implementation of measures, the Treaty on European Union explicitly emphasises the need for coherence across all EU policies[12].

Coherence means that policies should not conflict with one another and should, whenever possible, promote synergies. Regarding environmental protection, coherence requires integrating[13] environmental requirements "into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development"[14]. Agriculture, transport, energy, fisheries, industry, trade, employment, health, civil

[9] For instance, the useful life of a dam is around 100 years (Wieland, 2010).

[10] When the project is expected to be operational indefinitely, as in the case of roads or other infrastructure construction.

[11] This concept has been thoroughly developed in French law. See, for instance, Ministère de l'Écologie, du Development Durable, des transports et du logement (2012).

[12] Article 11 n.3. "The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent".

[13] The original version of what is called today the "integration principle" was less strong. In the wording of the article 130R n.2 of the European Economic Community: "environmental protection requirements shall be a component of the Community's other policies".

[14] Article 11 n.1 of the Treaty on the Functioning of the European Union.

protection, scientific research, tourism, are just some examples of European policies and actions that must integrate environmental requirements (Dhondt, 2003), in accordance with the integration principle (Montini, 2018).

But what if during the process of integration of the environment in other policies, there are serious clashes of values, severe contradictions of objectives, or insurmountable conflicts of interest? The answer is simple: in the European Union, a high level of environmental protection should prevail (Squintani, 2019). This position is sharply stated in European Union primary law: "the Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. The Union policy on the environment (...) shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay" [15].

Another equally clear statement is contained in the Charter of Fundamental Rights of the European Union, giving both the integration and the high level of protection principle an even stronger legal status: "a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development"[16]. In this context, the high level of protection is a surrogate of ecoproportionality, clearly indicating a preference for strong environmentaly sustainable outcomes.

Furthermore, proportionality is the heart of sustainable development (Bosselmann, 2017b), an *umbrella* principle that encompasses the other principles, and also at the core of each and every environmental sub-principle mentioned in the Treaty[17]: namely precaution, prevention (De Sadeleer, 1999), correction at the source (Krämer, 2018), and polluter pays (Aragão, 2022). In the operationalization of the various principles, the question arises: to what should the necessary environmental protection measures be proportional?

In a very schematic way, the necessary weighing, rooted in proportionality assessments, to be carried out during the application of the European Union's fundamental environmental principles, is as follows:

[15] Article 191 n.2 of the Treaty on the Functioning of the European Union.

[16] Article 37 on Environmental protection.

[17] Article 191 n.2 of the Treaty on the Functioning of the European Union.

Sustainability 	In sustainability-driven decision making, the weighing depends on the envisioned future and on the level of effort deemed necessary and acceptable to achieve it. Environmental protection measures should be proportional to the level of environmental, economic or social priorities of the desired future (How green is the envisioned future? How much effort to achieve it?)
Precaution 	Precaution applies in contexts of uncertainty, when the causal nexus between polluting activities and environmental deterioration is undetermined. Environmental protection measures should be proportional to the nature of the risks addressed (severity/plausibility of risks) and to the safety ambition (How safe is safe enough?).
Prevention 	Prevention applies when the causal nexus between the polluting activities and environmental deterioration is known and predictable. Environmental protection measures should be proportional to nature of the risks addressed (severity/probability of risks) and to the intended results (How "clean" is "clean" enough?)
Correction at the source 	Correction at the source aims at independent prevention measures, and proscribes ex post and third parties' solutions. Independent but end of pipe or outsourced prevention measures are only second best. Proportionality looks at the efficacity and efficiency of independent/preventive *versus* outsourcing/end of pipe solutions (What can effectively be done at the source?)
Polluter pays 	Making the polluter pay is a tool to achieve fairer results through effective preventive measures borne by the polluter. Proportionality of the payments should be assessed considering the current status of the environment and the intended environmental results. (How much should the polluter pay and when should the payments be done to be more effective?)

This is how the ecoproportionality contributes to the normative densification (Thibierge, 2014) of sustainability and other environmental sub-principles in order to achieve a high level of environmental protection through the integration of environmental considerations in other areas (Aragão, 2018).

However, although the law provides all the necessary legal tools to make sound and sustainable decisions, in practice this is not always the case.

5. Poor ecoproportionality assessment: two case studies

It is not rare that the Administration or the Courts decide against the environment and in favour of economic development, making the poor use – or no use at all – of ecoproportionality. What is even more concerning is that there are also cases of poor balancing in the laws. The next examples serve to illustrate the prevalence of non-environmental interests over ecological values, disregarding the fundamental environmental balance, at the expense of future generations, non-human species and ecosystems.

The first example comes from the European Union, in the context of the European energy policy. In response to the hardships and global energy market disruption caused by Russia's invasion of Ukraine, the European Commission implemented the so-called REPowerEU Plan, to phase out Russian fossil fuel imports[18]. The moto of the plan is "affordable, secure and sustainable energy for Europe". Cost-effectiveness comes first, sustainability comes last, indicating the hierarchy of values behind the new European approach to energy. In practice, this ambition, to rapidly increase renewable energy installation, is operationalized through a presumption that renewable energy projects that are developed in a "renewables acceleration area", do not have significant effects on the environment (Directive 2023/2413). If the renewable energy plant and its related infrastructure is declared "of overriding public interest, serving public health and safety", the presumption can only be rebutted in duly justified and specific circumstances, such as reasons related to… national defense.

This radical regime demonstrates how, in the grave context of war at Europe's doorstep, environmental values are subverted in a dangerous way.

[18] https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe_en

Such disproportional decisions may be understandable in the short term, but can be highly detrimental and potentially devastating in the long term.

The second example comes from Portugal. At the national level, the most outstanding case of poor balancing is the legal simplification created to attract and support large investment projects by streamlining and speeding up permit procedures (Decree Law 154/2013). These investment projects are called PIN+: projects of potential national interest. The conditions for the declaration of a project as a PIN+ are mostly the amount of financial investment, the number of jobs created, and the advancement of the technological solutions implemented. When a project is pronounced as PIN+, the obstacles raised by environmental and nature conservation laws become flexible and can be smoothly overcome. Declaring a project as having "potential national interest" in Portugal, is equivalent, in the European Union, to pronouncing its top priority based on "imperative reasons of overriding public interest" (IROPI). The IROPI requirement, set forth by the Natura 2000 directives, serves as a condition for authorizing projects likely to disturb protected wild species or natural habitats. In Portugal, the PIN+ regime has been used to accelerate huge touristic projects, large industrial sites, massive data centres, mega hydropower dams, vast agricultural developments based on intensive irrigation, high-volume aquaculture facilities, etc. (Ledo & Santos, 2017). These large projects are sometimes located in, or at least very close to, Natura 2000 sites, on which they usually produce extensive environmental impacts[19].

The two cases of insufficient consideration of ecoproportionality described, highlight the importance of having access to an additional legal tool to establish limits on the acceptable compromise of environmental values in favour of conflicting social or economic interests.

Such a tool is the "do no significant harm" principle, also known as DNSH principle (TSI, 2023).

6. The core of protection: the "do no significant harm" principle

The DNSH principle serves as the ultimate stronghold against sustainability policies that prioritize economic growth and social progress

[19] Since 2018, this system has been enlarged to support investments in the low populational density and less developed regions of the country (Decree law 111/2018, article 4).

at the expense of environmental protection. In this sense, it is also a legal instrument for the normative densification of ecoproportionality.

Its origin is in the 2020 European Regulation on the Taxonomy of Sustainable Investments (Regulation 2020/852). The Taxonomy Regulation introduced the idea that investments are only sustainable if they do not cause significant harm to the environment. The taxonomy Regulation indicates, in a high degree of detail, the general conditions that must be met, the environmental objectives that cannot be harmed, and the minimum safeguards that must be guaranteed, in order to allow the classification of an economic activity as sustainable.

These conditions, objectives and safeguards function as checklists to evaluate and rate the environmental sustainability of public or private investments. Consequently, both investments authorized by Member States (especially within the scope of the European Recovery and Resilience Mechanism (Regulation 2021/241)), and the investments on activities of economic business operators under the conditions established by European legislation on due diligence (Directive 2022/2464) are covered.

The operationalization of the "do no significant harm" principle was undertaken by a delegated regulation[20], a directive (Directive 2022/2464) and communications (Commission Notice 2021/C 58/01, 2023/C 211/01, C/2023/111) from the European Commission, which helped to operationalize, with practical examples, the obligations that are enumerated, but scarcely developed, in the Taxonomy Regulation.

Yet, the Taxonomy Regulation contains a catalogue of six environmental objectives (article 9): climate change mitigation; adaptation to climate change; protection and sustainable use of water and marine resources; transition to a circular economy; pollution prevention and control; protection and restoration of biodiversity and ecosystems.

According to the Delegated Regulation, for an activity to be qualified as environmentally sustainable, three main conditions must be met. It must make a substantial contribution to at least one environmental objective; do not cause significant damage to any of the other five environmental objectives; comply with minimum safeguards.

[20] Commission Delegated Regulation (EU) 2021/2178 of 6 July 2021 supplementing Regulation (EU) 2020/852 and Directive 2013/34/EU concerning environmentally sustainable economic activities https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A02021R2178-20230101 (amended by the Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R1214.

The environmental ambitions that must be pursued by sustainable economic activities are: contributing to the reduction of greenhouse gas emissions (the target being a 55% reduction in 1990 levels by 2030); carbon neutrality and adaptation to inevitable climate change by 2050; protecting, conserving and improving the European Union's natural capital; protecting human health and well-being from environmental risks; and leaving no one, and no place, behind.

In short, the DNSH principle means that even if on one pan of the ecoproportionality scale there are enormous benefits, the environmental objectives on the other pan cannot be ignored or set aside. The guidelines provided by the DNSH principle are particularly important for intra-environmental conflicts. In fact, it is not uncommon that projects aimed at achieving one environmental objective, to unintentionally undermine another.

The most frequent clash is between climate change (mitigation or adaptation) on one hand and biodiversity, water, or circular economy on the other. The examples abound: windmills require vast open areas which may lead to deforestation; large birds collide with the blades of wind turbines and small birds and bats die from lung collapse due to low pressures near the turbines (Baerwald et al., 2008); hydropower dams prevent the fish from migrating upstream to spawn, and aggravate water eutrophication due to overheating and lack of oxygenation in the stagnant water of the reservoir (Cabral et al., 2024); thermoelectric power plants operating on forest biomass prevent the use of woody products (resulting from forest cleaning) for the production of wood-based products such as particleboard or fibreboard; the permanent need for raw materials to burn due to the thermal inertia of the installation may induce clearcutting (Zero, 2021). The list could go on…

Being quite recent, the capacity of this principle to serve as a compass to guide decision-makers and to overcome the oxymoron inherent in the concept of sustainable development (Redclift, 2005) remains to be seen.

7. Ecoproportionality in a time of emergency

Since the mid-20th century, the climate and ecological crises have escalated and reached unprecedented levels, as a consequence of the intensification of water, energy and natural resource consumption, necessary to economic

development. This phenomenon of symmetric growth of economic indicators in parallel with environmental degradation and resource depletion indicators is known as the *great acceleration* (Stephen et al., 2015). The fatal mismatch between global development trends and the limited Earth's capacity[21] lead to the overshot of the planetary boundaries (IPBES, 2019).

The growing number of climate and environmental emergency declarations reflects increasing political concern over the severity and aggravation of the global ecological crisis. According to the Climate Emergency Initiative[22], the number of emergency declarations (by cities, regions, states and international organizations) is expanding rapidly. By 2024, in 40 countries and 2,364 jurisdictions, representing a combined population of 1 billion, had issued official climate emergency declarations.

In the European Union context, a climate and environmental emergency Resolution was adopted by the European Parliament in November 2019 (Resolution 2019/2930), benefiting nearly 450 million European inhabitants. The wording of the Resolution is quite strong, and the sense of urgency is impressive: "immediate and ambitious action is crucial to limiting global warming to 1,5° C and avoiding massive biodiversity loss. (…) Declares a climate and environment emergency; calls on the Commission, the Member States and all global actors, and declares its own commitment, to urgently take the concrete action needed in order to fight and contain this threat before it is too late".

The formal recognition of the climate and environmental emergency by the only institution of the European Union that is democratically elected by the European citizens[23], cannot fail to have legal implications.

One of the most obvious implications is giving prominence to ecoproportionality and shifting from a balanced scale to a scale tipping in favour of the environment. This interpretation was supported by the European Court of Human Rights in the Klimaseniorinnen Case decided by the Court in 2024: "Having regard, in particular, to the scientific evidence as regards the manner in which climate change affects Convention rights, and taking into account the scientific evidence regarding the urgency of combating the

[21] In the 60's Kenneth E. Boulding had developed the metaphor of a spaceship to describe the radical finitude of Earth's resources (Boulding, 1966).

[22] More information at https://climateemergencydeclaration.org/.

[23] In accordance with article 223 of the Treaty on the Functioning of the European Union.

adverse effects of climate change, the severity of its consequences, including the grave risk of their reaching the point of irreversibility, and the scientific, political and judicial recognition of a link between the adverse effects of climate change and the enjoyment of (various aspects of) human rights (see paragraph 436 above), the Court finds it justified to consider that climate protection should carry considerable weight in the weighing-up of any competing considerations. Other factors militating in the same direction include the global nature of the effects of GHG emissions, as opposed to environmental harm that occurs solely within a State's own borders, and the States' generally inadequate track record in taking action to address the risks of climate change that have become apparent in the past several decades, as evidenced by the IPCC's finding of "a rapidly closing window of opportunity to secure a liveable and sustainable future for all" (see paragraph 118 above), circumstances which highlight the gravity of the risks arising from non-compliance with the overall global objective" [24].

In other words, in a context of proclaimed emergency, the "do no significant harm" approach is not sufficient anymore. What should be categorically prohibited is environmental harm – either significant or not so significant. Only insignificant harm could be tolerated (and should nevertheless be compensated).

Besides, in a context of formally proclaimed emergency, environmental policy should be much more ambitious. Aiming at *no harm* is not enough. Neutrality is insufficient. Restoration (Regulation 2024/1991), rehabilitation, remediation, recovery, regeneration (Mendes et al., 2022) are, more than ever, necessary. Environmental-positivity is an imperative and the only proportional approach.

8. Conclusion: evolution of ecoproportionality

The examples of flawed ecoproportionality assessments emphasize the necessity of strong legal tools, such as a the DNSH principle, to support accurate legal interpretation. However, the alarming climate and biodiver-

[24] Paragraph 542 of the European Court of Human Rights judgement of the 9th April 2024 on the Application no. 53600/20 in the Case of Verein Klimaseniorinnen Schweiz and Others V. Switzerland (2024).

sity crises call for an evolution towards and even stricter interpretation of ecoproportionality[25], one that focuses on environmental-positivity. Human activities must contribute to enhancing the state of the environment and reversing climate change[26].

More than ever, ecoproportionality must gain doctrinal attention, legal importance, and practical relevance. Most of all, this principle must evolve to meet the escalating demands of a time marked by the environmental and climate emergencies.

References

Aragão, A. (2018) Environmental principles in the EU. In L. Krämer, & E. Orlando (Eds.), *Principles of environmental law* (449-462). Elgar Encyclopaedia of Environmental Law.

Aragão, A. (2021) Relational value as an argument to protect geological and hydrogeologic goods. In M. Abrunhosa, A. Chambek, S. Peppoloni, & H. I. Chaminé (Eds.), *Advances in Geoethics and Groundwater Management: theory and practice for a sustainable development* (3-7). Springer. https://doi.org/10.1007/978-3-030-59320-9_1

Aragão, A. (2022) Polluter-Pays principle. In J. Cremades, & C. Hermida (Eds), *Encyclopedia of Contemporary Constitutionalism* (1-24). Springer. https://doi.org/10.1007/978-3-319-31739-7_163-1

Aragão, A. (2024). La restauration écologique ou le «droit de l'eco-ingenierie». Du devoir d'abstention au devoir d'action, *Construire le Droit des ingenieries climatiques*. In A. Langlais, & M. Lemoigne-Schonne (Eds.), *Au croisement des enjeux climatiques et ecosystemiques* (297-330). UGA editions https://www.uga-editions.com/menu-principal/collections-et-revues/collections/ecotopiques/construire-le-droit-des-ingenieries-climatiques-1289187.kjsp?RH=1536914714291

Aragão, A., & van Rijswick, H. F. M. W. (2014) Compensation in the European Union: Natura 2000 and water law. *Utrecht Law Review*, 10 (2), 155-160. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2437517 .

Baerwald, E. F., D'Amours, G. H., Klug, B. J., & Barclay, R.M.R. (2008). Barotrauma is a significant cause of bat fatalities at wind turbines. *Current Biology*, 18 (6), 695-696. https://sciencedirect.com/science/article/pii/S0960982208007513

Bosselmann, K. (Ed.). (2017a) *Ecological approaches to environmental law*. Edward Elgar.

Bosselmann, K. (2017b) *The principle of sustainability. Transforming law and governance*. Routledge.

Boulding, K. E. (1966). The economics of the coming spaceship earth. In H. Jarrett (Ed.), *Environmental quality in a growing economy* (3-14). Resources for the Future,

[25] On the evolution of the propotionality principle, Silva (2012).

[26] This is not utopic, and numerous examples demonstrate the technical feasibility and the legally mandatory nature (Aragão¸ 2024).

Johns Hopkins University Press. https://arachnid.biosci.utexas.edu/courses/THOC/Readings/Boulding_SpaceshipEarth.pdf

Brockwell, S., O'Connor, S., & Byrne, D. (2013). *Transcending the culture–nnature divide in cultural heritage views from the asia-pacific region.* Australian National University https://press-files.anu.edu.au/downloads/press/p223681/pdf/book.pdf

Cabral, J.B.P., Barcelos, A.A. de, Ramalho, F.L., Gomes, P. da S., Nogueira, P.F., & Paulino, A.T. (2024). eutrophication levels of hydropower plant water reservoirs via trophic state index with evaluation of the fate of pollutants affected by the land use model. *Water, Air, & Soil Pollution*, 235, Article 625, pages 1-21. https://link.springer.com/article/10.1007/s11270-024-07428-3

Case of Verein Klimaseniorinnen Schweiz and Others V. Switzerland, Judgement of the European Court of Human Rights (Grand Chamber) of 9 April 2024 on the Application no. 53600/20 (2024). https://hudoc.echr.coe.int/eng#{%22appno%22:[%2253600/20%22],%22itemid%22:[%22001-233206%22]}

Center for International Environmental Law (2023). *Breathing Plastic: The Health Impacts of Invisible Plastics in the Air.* https://www.ciel.org/wp-content/uploads/2023/03/Breathing-Plastic-The-Health-Impacts-of-Invisible-Plastics-in-the-Air.pdf

Commission Delegated Regulation 2021/2178. *Commission Delegated Regulation (EU) 2021/2178 of 6 July 2021 supplementing Regulation (EU) 2020/852 and Directive 2013/34/EU concerning environmentally sustainable economic activities.* https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A02021R2178-20230101

Commission Delegated Regulation 2022/1214. *Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022.* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R1214

Commission Notice 2021/C 58/01. *Commission Notice (2021/C 58/01) on Technical guidance on the application of 'do no significant harm' under the Recovery and Resilience Facility Regulation.* https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:52021XC0218(01)

Commission Notice 2023/C 211/01. *Commission Notice (2023/C 211/01) on the interpretation and implementation of certain legal provisions of the EU Taxonomy Regulation and links to the Sustainable Finance Disclosure Regulation.* https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:52023XC0616(01)

Commission Notice C/2023/111. *Commission Notice (C/2023/111) on Technical guidance on the application of 'do no significant harm' under the Recovery and Resilience Facility Regulation.* https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=OJ:C_202300111

Council Directive 85/337/EEC. *Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.* https://eur-lex.europa.eu/eli/dir/1985/337/oj/eng

Crutzen, P. (2002) Geology of mankind. *Nature*, 415 (23) https://warwick.ac.uk/fac/arts/english/currentstudents/undergraduates/modules/literaturetheoryandtime/cruzen.pdf

Curtis, D. E., & Resnik, J. (1986). Images of Justice. *The Yale Law Journal*, 96, 1727 -1772 https://openyls.law.yale.edu/bitstream/handle/20.500.13051/5331/Images_of_Justice.pdf

De Sadeleer, N. (1999) *Les principes du pollueur-payeur, de prévention et de précaution.* Bruylant.

Decree law 111/2018. *Decree law N. 111/2018 of Portugal, of 11 December (article 4).* https://diariodarepublica.pt/dr/detalhe/decreto-lei/111-2018-117343896

Decree Law 154/2013. *Decree Law N. 154/2013 of Portugal, of 5 November.* https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=2008&tabela=leis&so_miolo=

Dhondt, N.M.L. (2003). *Integration of environmental protection into other EC policies - Legal theory and practice*. Europa Law Publishing. https://pure.uva.nl/ws/files/4062195/33951_Thesis.pdf

Directive 2001/42/EC. *Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment*. https://eur-lex.europa.eu/eli/dir/2001/42/oj/eng

Directive 2009/31/EC. *Directive (EU) 2009/31/EC of 23 April 2009 on the geological storage of carbon dioxide*. https://eur-lex.europa.eu/eli/dir/2009/31/oj/eng

Directive 2011/92/EU. *Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, amended by the Directive 2014/52/EU of 16 April 2014*. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02011L0092-20140515

Directive 2022/2464. *Directive (EU) 2022/2464 of 14 December 2022 as regards corporate sustainability reporting*. https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:32022L2464

Directive 2023/2413. *Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652*. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202302413

European Union. (2017). *Environmental* Impact Assessment of Projects Guidance on Scoping *(Directive 2011/92/EU as amended by 2014/52/EU)*. https://circabc.europa.eu/ui/group/3b48eff1-b955-423f-9086-0d85ad1c5879/library/38742302-d9d2-41e1-85de-aa88653ebe7c/details?download=true

IPBES. (2019). *Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (E. S. Brondizio, J. Settele, S. Díaz, & H. T. Ngo, Eds.). IPBES secretariat. https://doi.org/10.5281/zenodo.3831673

Krämer, L. (2018). The principle of fighting environmental harm at source (source principle). In L. Krämer, & E. Orlando (Eds.), *Principles of environmental law* (186-194). Elgar Encyclopedia of Environmental Law.

Ledo, W., & Santos, R. (2017, September 30). *Mapa: Quantos projectos PIN tem o seu concelho?* Jornal de Negócios. https://www.jornaldenegocios.pt/empresas/detalhe/mapa-quantos-projectos-pin-tem-o-seu-concelho

Lopes, D., Coutinho, F.P., & Botelho, C. S. (2021). *O Princípio da proporcionalidade. XIII Encontro de professores de direito público*. Instituto Jurídico. https://estudogeral.uc.pt/bitstream/10316/95784/3/Princi%cc%81pio_Proporcionalidade_ebook.pdf

Mendes, A., Hernández, L.M., Badoz, L., Slobodian, L., & Rabaça, J.E. (2022). Towards a legal definition of ecological restoration: Reviewing international, European and Member States' case law. *Review of European, Comparative & International Environmental Law*, 32 (1), 3-17 https://onlinelibrary.wiley.com/doi/10.1111/reel.12476

Ministère de l'Écologie, du Development Durable, des Transports et du Logement (2012). *Doctrine relative à la séquence éviter, réduire et compenser les impacts sur le milieu naturel*. https://www.ecologie.gouv.fr/sites/default/files/documents/Doctrine%20ERC.pdf

Montini, M. (2018). The principle of integration. In L. Krämer, & E. Orlando (Eds.), *Principles of environmental law* (139-149). Elgar Encyclopedia of Environmental Law.

Redclift, M. (2005). Sustainable Development (1987-2005) - An Oxymoron Comes of Age. *Horizontes Antropológicos*, 13(4), 212-227. https://www.researchgate.net/publication/227650615_Sustainable_Development_1987-2005_-_An_Oxymoron_Comes_of_Age

Resolution 2019/2930. *Resolution 2019/2930(RSP) of the European Parliament on Climate and environmental emergency*. https://www.europarl.europa.eu/doceo/document/TA-9-2019-0078_EN.html

Regulation 2020/852. *Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment*. https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:32020R0852

Regulation 2021/241. *Regulation (EU) 2021/241 of 12 February 2021 establishing the Recovery and Resilience Facility*. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R0241

Regulation 2024/1991. *Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration, imposing the Member States to restore 30% of all degraded land and sea until 2030, 60% until 2040 and 90% until 2050*. https://eur-lex.europa.eu/eli/reg/2024/1991/oj/eng

Rockström, J., & Sukhdev, P. (2016). *A new way of viewing the sustainable development goals and how they are all linked to food.* Stockholm Resilience Centre. https://www.stockholmresilience.org/research/research-news/2016-06-14-the-sdgs-wedding-cake.html

Silva, S. T. da. (2012). O tetralemma do controlo judicial da proporcionalidade no contexto da universalização do princípio. *Boletim da Faculdade de Direito: Universidade de Coimbra*, 88 (2), 639-678 https://estudogeral.sib.uc.pt/bitstream/10316/23213/1/tetralema%20da%20proporcionalidade.pdf

Squintani, L. (2019). *Beyond minimum harmonisation. Gold-plating and green-plating of european environmental law*. Cambridge University Press.

Stephen, W., Broadgate, W. Deutsch, L. Gaffney, O., & Ludwig, C. (2015). The trajectory of the Anthropocene: The great acceleration. *The Anthropocene Review*, 2(1), 81-98. https://www.scinapse.io/papers/2139274755#fullText

Stiegler, B. (2017). Escaping the Anthropocene. In M. Magatti (Eds.), *The crisis conundrum* (149-163). Palgrave Macmillan. https://link.springer.com/chapter/10.1007/978-3-319-47864-7_7

Thibierge, C. (2014). *La densification normative. Découverte d'un processus*. Mare et Martin. https://densinormative.sciencesconf.org/resource/page/id/9.html

TSI (2023). *Do No Significant Harm. Towards environmentally-sensitive management of public finances – implementing the 'DNSH' principle*. https://reform-support.ec.europa.eu/system/files/2022-05/2023%20Flagships%20Techical%20Support%20projects%20-%20dnsh.pdf

United Nation General Assembly Resolution A/RES/70/1, October 21, 2015, https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf

Wieland, M. (2010, February). Life-span of storage dams. International Water Power & Dam Construction. https://www.researchgate.net/profile/Martin-Wieland-2/publication/294385718_Life-span_of_storage_dams/links/5757edcb08aef6cbe362583e/Life-span-of-storage-dams.pdf

Winter, G. (2018). Substitution: From alternatives to ecological proportionality. In L. Krämer, & E. Orlando (Eds.), *Principles of environmental law* (234-250). Elgar Encyclopedia of Environmental Law.

Zero (2021). *Big biomass in Portugal*. https://zero.ong/wp-content/uploads/2021/10/Big_Biomass_in_Portugal.pdf

Proportionality vs. legalism

Milena Korycka-Zirk

University of Nicolaus Copernicus in Toruń, Poland
milenakorycka@gmail.com
ORCID:0000-0001-6441-1747

DOI | 10.14195/2184-9781_4_4

ABSTRACT

The rule of law is fundamentally anchored in the legality of state actions, ensures that state bodies operate within the legal frames. The interplay between legality and proportionality is crucial, as the legality test assesses whether actions are lawful, while the proportionality test evaluates the balance of interests involved. Together, these principles create an actual scope of individual autonomy against the potential overreach of state power, emphasizing the importance of justice based on individual rights rather than majority interests. The principles of legalism and proportionality are coherent in the task to limit state power and protect individual rights. While legalism provides a formal structure for governance, proportionality ensures that any limitations on rights are justified and balanced against the need to protect individual autonomy. The relationship between these principles is essential for maintaining a just legal order, where the protection of individual rights is prioritized, and the potential for political influence in judicial decisions is minimized. This coherence is vital for fostering a legal culture that respects individual freedoms while ensuring that state actions remain within lawful bounds.

KEYWORDS

Principle of proportionality; Legalism, Theory of principles; Liberalism; Individual rights

1. Philosophy of state action in the light of legalism and proportionality

The rule of law anchors its existence in the assumed legality of the actions of state bodies. This is understood as acting on the basis and within the limits of the law, which meets the Weberian standard of legal action. In other words, state organs are subject to the law in the same way as the individual. Thus, the main emphasis of legal action is on being bound by the law, and more specifically, on fidelity to the legal text in terms of acting on the basis of the norm of competence, as well as the existence of a legal basis for individual decisions. In the field of application of the law,

i.e., the very making of individual decisions on the basis of general norms included in the legal text, the possible confluence of two fundamental tests of the correctness of the action of state bodies - the test of legality and the test of proportionality - is revealed. The first determines the assessment of the legality of the action of an organ or court, the second assesses the proportionality of the means of action. The first in assessing the formal aspect of the rule of law is intersubjectively verifiable, the second inevitably accentuates the material element-weighing interests, hence it becomes the basis for building a certain vision of justice (i.e., based on the primacy of the interest of the individual rather than the majority).

The premise of legalism in the action of state bodies is the belief that the law (primarily the legal text) is able to determine the decision of the body. This determination must concern the formal aspect - the competence basis for the decision and the material aspect - that is, the basis for the decision is so clearly drafted that the basis for the decision is the legal text and not the authority. From a practical point of view, the substantive basis of the decision can raise problems of interpretation, the linguistic indeterminacy of legal texts excludes the subsumptive nature of the application of the law. However, judicial or clerical practice shapes the canons of interpretation that standardize the process of interpreting linguistically vague provisions, and thus the vagueness does not raise controversy from the point of view of the potential arbitrariness of the decision.

The principle of proportionality, on the other hand, determines the procedure for resolving conflicting interests-individual and public. Its application thus builds the core narrative of legal culture, answers the question of fairness and the necessity of encroaching on the autonomous sphere of the individual determined by constitutional guarantees.

Essentially, therefore, the two principles and the resulting tests that form the basis of the culture of democratic states are possibly complementary in several spheres. Both create a common standard limiting the actions of public authority, both touch the sphere of individual autonomy and protect it, the behavior of both principles is subject to control especially by the Constitution. All these factors together draw a picture of the justice of a legal order based on the balance of the public and the private.

The analysis of the two tests leads one to reflect on the necessary relationship of the two for the preservation of individual autonomy and the dangers of merely basing the assessment of the actions of a state body on the requirements of legality.

2. Principle of proportionality

Liberal constitutionalism is based on the assumption of the constitutional norm as a defense shield for the individual against values gaining majority support in legislative discourse. It means the relevance in constitutional discourse (i.e., the procedure for reviewing the constitutionality of an act of the legislature) of any value protecting individual autonomy as long as this is not precluded by the principle of harm (Mill, 1998, 4)[1].

Such a role in liberal constitutionalism is played by the principle of proportionality, in supranational law terminology is used the term limitation clauses (with the fact that the conflict of substantive norms primarily concerns declaratively defined human rights and freedoms), in American constitutionalism, on the other hand, the concepts of tests are operated (strict scrutiny, intermediate scrutiny, rational basis scrutiny). The case law establish the value of right and in consequence the type of test witch should be applied (Spece & Yokum, 2015, 285). Regardless of the nomenclature, the essence of resolving conflicts of values captured in the form of substantive norms is shifted to procedural assumptions. The principle of proportionality, by its very nature being a peculiar procedure inherent in the assumptions of legal discourse, consistently for these theories is constructed in such a way as to ensure the ethically peculiar correctness of discourse, within the framework of which the constitutionally relevant values coming into conflict in concreto - that is, within the framework of the juxtaposition of a specific regulation of a legislative act with the constitution - will be juxtaposed and subjected to a weighing procedure in a manner appropriate to the requirements of discourse. In other words, the test of preserving the proportion of restriction of one value in favor of another, must meet the ethical requirements of discourse - based on the requirement of coherence with the essence of liberal constitutionalism. Such requirements are the interpretive presumption of preference for the right and freedom of the individual when confronted with the value protecting the public interest, relevance for the discourse of values protecting the individual not gaining support in the statutory discourse as the one that exemplifies in principle

[1] Mill puts it, the basis for limiting individual autonomy can only be "is to prevent harm to others" (Mill, 1998, 14).

the will of the majority (this is a consequence of parliamentarism as a representation of the will of the majority of voters), the public interest should be a representation not of the abstractly assumed will understood aggregatively, and should represent that individual interest that receives the support of public authority. Thus, the principle of proportionality is a consequence of recognizing the relevance of each individual interest by including it in the constitutional discourse, and in its requirements it creates assumptions for balancing values coherent with the assumptions of liberal constitutionalism.

The principle of proportionality, a formula in the nature of a limiting clause, the literal wording of which manifests the assumed constitutional order of preferences, under which the principle is the protection of rights and freedoms and the exception is their limitation, is a consequence of the philosophical and legal assumptions of liberal constitutionalism. Thus, it means exposing the constitutional principle materially declaring the protection of the right or freedom of the individual, as a model for sub-constitutional legislation. It is a declaration of liberal democracy that is, setting the majority manifesting its will in subconstitutional acts the limits of this will. At the same time, the relevance of protecting the constitutional autonomy of each individual potentially opens up the problem of conflict - the collision of these principles. Constitutional principles or the principle of proportionality in its constitutional formulation (reinforced by their genesis, i.e., the political philosophy of individualism inherent in liberalism) create an order of preference - the priority of protection of rights and freedoms in conflict with the interest exhibited in the subconstitutional regulation, and at the same time sets the procedure for its limitation (the correctness of the constitutional discourse). Pro libertate preference for constitutional protection and the formulation of the conditions for the correctness of the limitation procedure must be mutually coherent and not negate the essence of liberal constitutionalism - that is, the constitutional norm treated as a barrier to the unlimited will of the majority of society or those in power. Determining the weight of the constitutional principle in the procedure of balancing values (application of the principle of proportionality) is an in concreto assessment of constitutional jurisprudence and the application of limitation clauses by international judicial bodies established to protect rights and freedoms. This means tahat the essence of the right or freedom is naturally possibly influenced by this jurisdiction. Moreover, coherent

interpretation of the right's or freedom's essence, should be extra protection against state's antiliberal usurpations based on concept of national identity. Nevertheless application of individual right or freedom necessively concerns the open concept of the legal principle. Not only the essence might be in question specially in political discourse-that one can be restricted by the concept of coherent interpretation, more problematic is the nonconclusive manner of application of these norms which means weighting of conflicting principle. The problem of continuity or discontinuity with respect to the earlier jurisprudence of the so-called core or essence of the right and freedom - that is, the interpretive determination of such right in the light of supranational background of assistance of such rights, must be faced also with manner of weighting and the vague of principle in broader culture (not national). These factors constitute a political metaground for proportional discourse. The legal discourse captured by reference of politicization in constitutional discourse, mask the actual rejection of the interpretive presumption pro libertate in constitutional jurisprudence. This is very dangerous process so the theory of principles and the clarity of application of the principle of proportionality guarantee the lack of politicization.

The essence of the application in jurisprudence of the principle of proportionality is underpinned by the theory of principles of law. These concepts are based, firstly, on the assumption that constitutional rights and freedoms are norms that take the form of legal principles, and this is generally a type of norm differently applied then legal rules. Within legal theory, the only controversy is whether the difference between a legal principle as a norm and another type of norm -legal rules is a logical difference. Legal rules in these concepts are usually based on Herbert Hart concept of rules (Hart, 1961). The theory of principles is richly developed on the ground of legal theory (Alexy, 2002; Dworkin, 1967-68; Toubez-Muniz, 1997). The principle of proportionality in consequence boils down to the material-legal aspect (of course, the formal aspect examined in the application of the principle of proportionality is also important, that is, the requirement to preserve the appropriate type of subconstitutional act, but nonliberal interpretation, more restrictive limitation take place in nonproportional material aspects of the principle of proportionality). The most important question is how to justify the constitutional correctness of the application of the proportionality test, that is, the collision of principles-norms defined in a very general way even while specifying jurisprudentially and theoretically what the test is

actually supposed to mean. Within the civil law culture, the prevailing concept in this regard is that of Robert Alexy, developed on the basis of the jurisprudence of the German Federal Constitutional Court, which firstly does not differentiate the application of the principle of proportionality due to the type of constitutional right subject to restriction and secondly, the effect of a positive proportionality test, i.e. of recognizing a restriction as constitutional contains an assumed element of recognition resulting from the application of a sub-assembly of the proportionality test referred to as the proportionality test sensu stricto being solely an assessment of the so-called legal possibilities of restricting a right resulting from assessments that escape causal reasoning (instrumental rationality) (Alexy, 2000, 300). In American constitutional jurisprudence tree different types of scrutiny, differently applied are the consequence of the kind of right which is limited. This mean that judiciary creates the vague of principle due to the previous institutional background, that the principle got. The discretion is more restricted and the process of the assessment of proportionality is more clear.

However, returning to the analysis of the sub-principles that make up the principle of proportionality, which is crucial for the civil law system, and moving on to their characteristics, it should also be noted a very important cultural feature affecting the application of the principle of proportionality, that is, the commitment to interpretive textualism even when the interpreted text is the constitution and its effect but the cause and therefore a kind of reduction of constitutional interpretation involving the elimination in the process of applying the law of philosophical and legal considerations inherent as a pre-understanding of the text of the constitution. In other words, the tendency to interpret only the linguistic text of the Constitution is a result of, but also entails in the application of the principle of proportionality the elimination (evident in the justifications of the rulings of constitutional courts) of extra-textual considerations that are relevant to the understanding and interpretation of individual subsets of the principle of proportionality (especially in the assessment of the so-called. legal requirements for the limitation of a constitutional right) and underlying this principle that is, first of all, the conditions that liberal constitutionalism brings (that is, in particular, the requirement of pro libertate interpretation, and the unconstitutionality of aggregative reasoning - ie. assuming that it is possible to evaluate the necessity of limiting a constitutional right through utilitarian reasoning, in other words,

that in the evaluation of proportionality the majority reasoning typical of parliamentary discourse can be used as an argument - i.e., the situation of protecting the right of a larger number of people even if this right were to be less drastically affected by protecting an individual constitutional right, can be used as the prevailing argument for constitutional adjudication in the application of the principle of proportionality).

The principle of proportionality in its constitutional application consists of three tests (sub-principles) that the constitutional court evaluates when assessing whether a sub-constitutional regulation is constitutional: the principle of effectiveness (a requirement that is so-called. factual, which means that its evaluation implies the need to apply the causal arguments typical of empirical evaluations; that is, in the evaluation of this test are evaluates whether the subconstitutional regulation is able to achieve the goal it assumes), the principle of necessity (factual-legal requirement, which means that the court examines whether the subconstitutional regulation limiting the constitutional right is necessary, in the sense of whether it is possible to achieve the same effect otherwise less encroaching on the constitutional right; here the reduction of the constitution only to the text without the background of liberal constitutionalism allows the use of utilitarian arguments, i.e., the concession to the group by virtue of its greater representation may prevail the more important constitutional interest but not gaining greater social representation), and the principle of proportion sensu stricto (the so-called. legal requirement which in essence is supposed to mean evaluating and weighing only constitutionally relevant values that have the support of the law).

The principle of proportionality understood in this way can create a trap for itself, i.e. for its individualistic assumptions. First of all, jurisprudence does not create sharpened criteria for the possible limitation of a constitutional right due to the type of right. In other words, a right that is particularly sensitive to the preservation of individual autonomy, e.g. freedom of speech, by working out special strictures in the application of the sub-rules of the principle of proportionality could result in the practical impossibility of their restriction by a sub-constitutional act. Constitutional jurisprudence limiting such a fundamental right would not only in concreto have to justify the correctness of the application of the principle of proportionality, which is not difficult in the situation of reducing the interpretation of the Constitution to the text and leaving discretion in the

application of the principle of proportionality sensu stricto, but such a ruling would have to undermine the jurisprudentially developed procedural requirements of strict proportion evaluation in a situation where a right recognized in jurisprudence as essential is involved. Strengthening the effect of protection should also be achieved by redefining the concept of presumption of constitutionality of subconstitutional acts. In accordance, moreover, with the textual wording of the restrictive clauses - principle the protection of a right should be treated as a principle rather than its limitation, and to conclude that, at least in relation to rights and freedoms that are sensitive to individual autonomy, the argumentation should be reversed and the procedure for applying the ratio assessment should be based on the presumption of unconstitutionality of a restriction of a right or freedom that is essential to individual autonomy. In addition, assessing the legal weight of conflicting principles in a strongly textual legal culture allows to justify as constitutional the effects of applying the principle of proportionality inconsistent with legal constitutionalism. These are the fundamental pitfalls that allow the introduction of the argumentation of the antithesis of liberal constitutionalism into institutions formed as an achievement of individualist thought, i.e. the essential protection of individual autonomy and the need to create a counterweight to parliamentary discourse within the framework of constitutional jurisprudence.

3. Legalism

The concept of legalism was introduced into the scientific discourse in Western culture by John Locke (Locke, 1988, 323-331)[2], proposing the subordination of the state to law, while in conceptualized form it was proposed by Max Weber. He distinguished so-called legal rule from the other two forms of government: traditional rule and charismatic rule. What is characteristic of the legal form of rule is its reliance on formally introduced rules and principles and their legitimacy by virtue of the authority attributed to such law. The system of legal authority is complemented by a

[2] Locke assumed in the second treatise that government should be based on a law that binds everyone including the governed. The rulers are bound by the social contract and the ruled can use the law of resistance in case of violation of the rules of government (Locke, 1988, 400-419).

bureaucratic apparatus operating in a hierarchical structure and what Adolf Merkl and Hans Kelsen (Kelsen, 1967, 221-229; Paulson, 1998, 154) later called the hierarchy within the sources of law and the relation of authority within the dynamic structure of norms. Weberian bureaucratism is an apolitical official, impartial, issuing decisions in the manner prescribed by procedural norms.

The authority of power is based on the so-called rational basis, i.e. on the belief that the legitimacy of normative rules and the right to exercise power of those who have assumed and exercise power on the basis of these rules is justified by the authority of legality (Weber, 1999a, 116-119)[3]. This means that the authority of power is a reflection of the authority of legal rules. Compliance with the law is the result of - as Weber puts it - impersonal order (impersonal order), there is no authority of man, and there is the authority of office (that is, not the authority of the person internalizing the traditional exercise of power or the person whose authority derives from special trust or devotion) (Weber, 1999a, 69). A legal norm derives its legitimacy either from acceptance or the fact of introduction by an authority. The desirability or rational value of the norm, in turn, is the primary factor in its legal adaptation. The authority of the norm is also associated with the bureaucratic apparatus, which means that, according to Weber, the rational authority of law consists of: an organized bureaucracy bound by legal norms, the norm of competence as the basis for the action of the official as an administrative body, a hierarchical structure of organ dependence, the substantive preparation of the official, the objectivity of official decisions (Weber, 1999a, 116-119). Bureaucratic authority led by the first official is technical, apolitical in nature hence constitutes the continuity of the state structure regardless of political changes (Weber, 2005, 152-164). An entity with authority based on legal domination (legal domination) is also subject to rules shaping legal regulations. The ruling entity, as a rule, is the highest (superior) of those entitled to the indicated function (Weber, 1999b, 99-101).

Conceived in this way, legalism sets the basis for a formally understood rule of law, i.e. basing the functioning of government on the norm of

[3] In addition to the authority of legality, Max Weber distinguishes between two more forms of authority that legitimize power: authority based on traditional grounds and authority based on charismatic grounds. The former stems from devotion to immortal traditions, while the latter stems from devotion to the peculiar charismatic qualities of those in authority (Weber, 1999b, 99-108).

competence. Characteristically, legalism has no reference to the axiological requirements of the content of the law. Complementing the principle of legalism is a model of the application of law that excludes judicial discretion, except for the concepts intended by the legislator, which are open to interpretation. However, the assumed mechanistic nature of the application of the law suffers from a fundamental conceptual difficulty when the basis of the decision is a norm that takes the form of a legal principle.

The theoretical-legal peculiarity of a legal principle - especially in the area of normative regulation of the protection of individual rights - results from the necessity of the applying entity to carry out a process of weighing, that is, to assess the degree of possible application of the principle (and thus the degree of restriction of its application motivated by the protection of other values of the legal order conflicting in concreto with the principle). The application of this type of norms is not determined only by their disposition, but is the result of the requirements of proportionality in the application of conflicting norms. The otherness of their application concerns both the methods used to interpret the principle and the assessment of its permissible limitation. The peculiarity of the application of the principles is so apparent that, from a legal perspective, it can raise a dilemma as to the possible reconciliation of the classically understood principle of legalism with the textually elusive requirements of the principle of proportionality, which are the basis for assessing the legality of a violation of a principle, for example, a constitutional one. In practice, this means the visibility of the discretion of the body applying the law, identifiable as the assumed margin of discretion both in interpreting the norm and in determining its scope of application. The confrontation of the application of the principle of proportionality determining the scope of application of a legal principle with the classically understood principle of legalism, therefore, requires a redefinition or at least an indication of the dissimilarity in the degree to which the body applying the legal principle is bound by the legal text. The classically understood principle of legalism and, consequently, the basis for the pillar of the doctrine of the rule of law ideally leaves the entity applying the norm to state law in the position of being the mouth of the legal text with a minimum of decision-making slack. Interpretation with an element of normative novelty or the authority's determination of the degree (scope) of application of a norm is certainly not the realization of an abstractly idealized construction of the relationship between the lawmaker

and the law applied. The rule of law as the basis for the functioning of state bodies especially implications in connection with its reinterpretation in the situation of the application of legal principles can be seen against the background of the application of constitutional principles. The application of constitutional principles with a strong paradigm of legalism of the action of the constitutional court means the adoption of doctrines of interpretation of subconstitutional acts for the purposes of the constitutional norm, and, moreover, the application of the principle of proportionality in a way that masks the discretionary nature of constitutional jurisprudence.

The relationship of minimizing recognition as the best realization of the principle of legalism is particularly evident in civil law countries, and especially in this cultural area, the unification of doctrines of interpretation of the subconstitutional and constitutional norm is evident in the legal discourse in order to possibly eliminate the charge of discretion and thus shake the foundations of legalism of judicial action. The most common is the attempt to adapt the doctrines formed in connection with the application of subconstitutional norms to the text of the Constitution, i.e. the dominance of literal interpretation, doctrinaire textualism, i.e. to base interpretation as much as possible on the understanding of the text and - in the best version - on the assumed as possible objective understanding of the text. This, in turn, gives rise to a clear incompatibility of textual doctrines of interpretation with constitutional principles, both because of the way they are linguistically framed, forcing the "filling of the text" with extra-textual understandings of clauses such as privacy, dignity, equality, for example, and the incompatibility with the specifics of the process of assessing the degree of application (limitation) of the principle occurring in the application of the principle of proportionality. The classical model of subsumption, dominant in legal thinking about the application of law, in the context of constitutional principles is impossible to sustain. Thus, legalism on the grounds of the application of the constitution requires taking into account the necessary element of fulfillment of the content of the law (even not always the legal text) by the one applying the law. In other words, the application of the constitutional principle within the limits consistent with the principle of legalism implies the activity of the applicator of the norm both as to its interpretation and the degree of its application. Against this background, legalism is not determined by the relationship of subordination of the body to the text, but by the relationship of equivalence

between the text and the subject applying the principle, which implies, at the very least, the determination of the body applying the constitutional principle of the result of applying the principle. This redefinition of the principle of legalism in the situation of the application of the principle of proportionality (resolving the collision of principles) can also be justified in another way, namely by the very assumption that the authority to apply the norm as such implies the authority to interpret it and determine the degree of its application. This is a Kelsenian justification of interpretive activism in relation to the norm giving rise to recognition Paulson, 1990, 143-151). Kelsen operates with the concept of authority derived from the legal norm creating a basis of competence for the application of the norm, so the exercise of discretion manifested by interpretive freedom is still an authoritative determination of the legal situation of the addressee of the act of applying the law, nevertheless, this justification post factum, is rather an adaptation of the inevitable practice of applying principles to rigid assumptions about the competence of the authority subject to the law. Thus, legal practice is confronted with the situation of justifying the manner of application of constitutional principles with justifications based on the doctrines of interpretation and application of the law adapted to subconstitutional acts captured - in principle - by norms that have the form of rules (that is, norms applied weightlessly and in principle without recognition). The theoretically and legally conditioned practice of resolving conflicts of rules activates the applying subject and confronts him with a strong narrative based on the preference for textualism. The linguistic doctrines of interpretation minimizing the role of the interpreting subject juxtaposed with the intuitive (detached from the theory of legal principles) practice of resolving the collision of constitutional principles, give rise to political-legal doctrines better or worse justifying the coherence of the result of resolving this collision with the essence of the constitution or legal order. The inevitably apparent otherness of the application of a constitutional principle, together with legal preconceptions about the subordination of the applying authority to the text, result in a lack of conceptualized criteria for evaluating the result of the application of a constitutional principle as either acceptable or pathological. In other words, the lack of understanding of the theoretical-legal considerations of what a norm that is a legal principle is (Dworkin's concept) (Dworkin, 1967-68, 23), how it should be applied, to what extent its application is proportional and thus legal gives

rise to political-legal narratives justifying the results of the application of the principle of proportionality that are disproportionate. Newly sensitive for the legal order are those cases of principle application, which are the application of constitutional clauses that limit individual rights. These situations of assessing the degree of application of the principle, carried out through the procedure of assessing proportionality, shape the degree of protection of individual autonomy, and are therefore crucial for protecting the essence of legalism. These doctrines: legalism and the requirement of proportionality of restrictions on individual rights are aimed at the same goal - the elimination of usurpation of power. Thus, only the application of the principle of proportionality in a way that minimizes the limitation of the individual right is coherent with the idea of legalism or limited power. Judicial discretion in itself is not a threat to legalism, the threat becomes the application of tests of proportionality in a disproportionate manner, i.e., favoring public power pursuing majority interests in democratic procedures. Thus, the coherence of legalism and proportionality means the transparency of the test of suitability, necessity and most important proportionality sensu stricto, which is the juxtaposition of individual and majority interests. This means that the role fundamental to justifying the outcome of the application of a constitutional norm - its interpretation and the degree of its limitation in favor of other constitutional values - is played by the applied principle of proportionality, which is evident to the addressees of the law. Political doctrines "masking" specialized legal (and, in fact, strictly theoretical-legal) reasoning by virtue of their incomprehensibility, begin to play a leading role in the discourse of constitutional courts. Coherent with the idea of constitutionalism and legalism, the preference for the individual interest is often masked in the superficial reasoning of politically oriented constitutional jurisprudence. Such a way of adjudicating constitutionality poses a threat to the foundations of legal culture, individual autonomy and distorts the essence of the principle of proportionality, which in principle contains a maximizing paradigm for the protection of the individual.

The principle of proportionality sensu stricto and the principle of necessity are both paradigmatic principle to maximilizing process of human rights protection, these ratio tests are used in constitutional jurisprudence and constituting the matrial-legal aspect of the control of the constitutionality of a subconstitutional act in the application of the principle of

proportionality. R. Alexy refers to three sub-principles that make up the principle of proportionality, besides necessity and proportionality sensu stricto, Alexy describes principle of appropriateness as based on actual (not legal) possibilities (Alexy, 2000, 297).

Both of these sub-principles in the analysis of the degree of limitation of the constitutional principle, in assessing the degree of protection of, for example, individual privacy, force the evaluation of the so-called legal possibilities of applying the constitutional principle. The legal possibility of applying the principle is non-factual reasoning, that is, not based on the objective relationship between the means and the purpose of implementing the principle (characteristic, in turn, in assessing the standard of the suitability sub-assumption), so it is largely based on the prima facie subjectivization of reasoning. The necessity of a restriction of a constitutional principle means assessing the necessity of the restriction, i.e. the unavailability of another measure to achieve the statutorily preferred goal. Proportionality sensu stricto is an assessment of the weight of conflicting principles (theoretical-legal term), i.e., the interests of the individual and the majority[4] (political-legal term). The most elusive for the addressee of judgments based on the evaluation of the collision of constitutional principles is the criterion of the weight (validity) of the principle. Prima facie subjectivity of these reasonings, i.e. the assessment of the necessity and strictly proportionality of the limitation of a constitutional principle can be greatly reduced by building a unifying guarantee standard of understanding a right or freedom by creating the criteria necessary to be taken into account in assessing the importance of constitutional principles. The concept of the weight of a constitutional principle is key to understanding whether a restriction on an individual's right is justified by a pre-understanding of constitutional principles. That is, whether we are able to assess whether the jurisprudential technique of standardizing the concept of weight with universalist reasoning, i.e., based on the analogy of the constitutional standard and the standard of international protection of individual rights, or the ad hoc unspecified jurisprudential assessment of weight whose legitimacy is,

[4] By majority interest I mean both a collective interest and an individual interest, but one that gains support in statutory discourse (i.e., a majority preference for a certain individual interest over another, e.g., a preference for the protection of religious feelings over freedom of expression due to the dominance of a certain type of worldview in society).

in fact, only the authority of the court, is more coherent with the thought of constitutionalism. The choice seems obvious, individual autonomy is a common cultural achievement, not limited to a single constitution, and the universalist standard is the only possible choice. Legality is precisely indeterminacy, including in determining the degree of individual autonomy. Undetermining the interpretation of a legal principle in connection with the application of the principle of proportionality makes it possible to expose political tendencies that are dangerous to the standard of individual protection. How, then, to optimally understand the concept of the weight of the principle, so that it does not give rise to the dangers of a revolution in the understanding and degree of restriction of individual rights, and does not depart from the essence of the idea of constitutionalism, that is, the maximization of the protection of individual autonomy in confrontation with the social majority determining its interests through the statutory norm? The fundamental problem with the formation of the concept of the weight of a constitutional principle is linked to the legally strong narrative that it is a strictly subjective criterion and results from the ad hoc judgments of the constitutional court that have a more or less political-legal basis. In other words, it is legally accepted that the result of the application of constitutional principles is undetermined, and gives rise to little or no counterargument based on exposing the departure of the result of the interpretation of a principle beyond the framework of legalism. The remedy for this process may be to externalize in constitutional jurisprudence with maximum detail the process of application of the sub-principles that make up the principle of proportionality and standardize the understanding of the principles that express the individual right. The most important thing, however, is to understand the basic narrative of our legal culture, that is, that the principle is the protection of the individual right, and that its limitation is suspect not only because of the possible overstepping of the limits of proportionality, but also because it undermines the principle of legalism.

4. Summary

In an attempt to point out the mutual coherence of legalism and the requirement of proportionality, it should be noted that both of these principles aim to limit power. The limitation of an individual right to be

legal formally forces the issuance of a limitation act in compliance with the principles of decent legislation, while in the material sense it means the issuance of a legal act that meets the three tests that make up the principle of proportionality. Both of these principles are coherent, and only together do they determine the proper relationship between public authority and the individual. The mere preservation of legalism does not yet guarantee the individual a proper standard of protection, proportionality determines the order of preference based on the priority of protection of the individual right, and the analogy in the construction of the standard of understanding of the constitutional principle between the national order and the international standard allows to maintain depoliticization in the application of subsets of the principle of proportionality in constitutional jurisprudence.

References

Alexy, R. (2002). *A Theory of constitutional rights* (J. Rivers, Trans.). Oxford University Press.

Alexy, R. (2000). On the structure of legal principles. *Ratio Juris*, 13 (3), 294-304.

Dworkin, R. (1967-68). The Model of rules. *The University of Chicago Law Review*, 35(14), 14-46.

Hart, H. (1961). *The concept of law* (1st ed.). Oxford Clarendon Press.

Kelsen, H. (1967). *Pure theory of law*. University of California Press.

Locke, J. (1988). *Two treaties of government* (P. Leslett, Ed). Cambridge University Press.

Mill, J. S. (1998), *On libery and Other Essays*, Oxford University Press.

Paulson, S. L. (1990). Hans Kelsen on legal interpretation. *Legal Studies*, 10, 136-152.

Paulson, S. L. (1998). Four phases in Hans Kelsen's legal theory? Reflections on a periodization. *Oxford Journal of Legal Studies*,18, 153-166.

Spece, R. G., & Yokum, D. (2015). Scrutinizing strict scrutiny. *Vermont Law Review*, 40, 285-351.

Toubes-Munis, J. R. (1997). Legal principles and legal theory. *Ratio Juris*, 10 (3), 267-287.

Weber, M. (2005). *Bureaucracy*. In J. Joseph (Ed.), *Social Theory:A Reader* (152-164). Edinburgh University Press.

Weber, M. (1999a). The Rational State and Its Legal System. In R. Swedberg (Ed.), *Essays in Economic Sociology* (116-119). Princeton University Press.

Weber, M. (1999b). The Three Types of Legitimate Domination. In R. Swedberg (Ed.) *Essays in Economic Sociology* (99-108). Princeton University Press.

Juridicity and Legality: Rule of law *versus Rechtsstaat* or Rule of law *et Rechtsstaat*?

Ana Raquel Gonçalves Moniz

Faculty of Law, UCILeR, Univ Coimbra
Associate Professor (Faculty of Law) – Integrated Researcher (University of Coimbra Institute for Legal Research)
ORCID: 0000-0003-3770-8566

DOI | 10.14195/2184-9781_4_5

ABSTRACT
This text aims to explore the moments of divergence and convergence between the constructions that led to the emergence of the rule of law and the *Rechtsstaat*. The conceptual evolution of the two terms leads to a reinforcement of their material dimensions, notably through the affirmation of the subordination of public powers (not only) to legality (but also) to juridicity (*Rechtsstaatlichkeit*). This evolution finds one of its fundamental precipitations in the principle of proportionality – whether as a result of its jurisprudential origin, or due to its dissemination within a global judicial review.

KEYWORDS
Rule of law; Rechtsstaat; Rechtsstaatlichkeit; juridicity; legality; normative principles; proportionality

1. Introduction

Historically there is no consensus on the meaning of *Rechtsstaat*, the rule of law or even *Etat de droit* (Böckenförde, 2000, 18; Heuschling, 2002, 5-17). One of the reasons for this consists in a plurality of meanings (which plurality is at the same time both synchronic and diachronic) and, therefore, with a tendency towards the vagueness associated with these concepts (Sunnquist, 2022, 81). Regardless of its spatial or temporal location, the concept is based upon the limitation of power (thus rejecting any sense of absolute power), its fragmentation (*hoc sensu*) and legal bounds, a guarantee of freedoms and the need to protect citizens against the arbitrary will (*potestas*) of the State, or at any rate the recognition of the political representation of individual citizens in Parliament. These various perspectives, therefore, have in common the fact that the principle as considered here is assumed to be an "essential form" (Stolleis, 2014b, 7) and, in particular, a "formula with a

political program" (*Formel mit politischen Programm*) (Stolleis 1990, 368). As such, it presupposes the existence of a political collectivity organized into a Sovereign state, the subordination (*hoc sensu*, limitation) of sovereign political power to (by) law/legislation[1], a certain kind of organization of the legal system (Chevallier, 2017, 13) and the consequences that such a relationship between State and law implies for the status of its citizens, especially with regard to the protection of their rights and, inherently, the strengthening of its position vis-à-vis public authorities (Costa, 2007, 74).

Taking as a reference point the recognition of a material dimension to the rule of law and the *Rechtsstat*, the distance between the two models begins by ... not existing! In different dimensions and with different purposes, both aim to give substantial meaning to the organization of the State around public values – which was not necessarily true in the French reading of the German model, which arose in the wake of legal thinking that was shaped by positivism. As we will see, the formal evolution of the German system would end up separating the meaning of the rule of law from the *Rechtstaat*. But it was also within German constitutionalism that, from the mid-20th century onwards, the idea of subordination of public powers to law (juridicity and not only legality) was born – forming the *Rechtsstaatlichekeit*, within which the principle of proportionality would emerge, in the context of a praetorian construction, as a remarkable example of the (re)birth of the importance of law over legality.

2. The rule of law: from England to the United States

The English rule of law is closely linked to the Common Law system itself. As such, English law highlighted the importance not of the notion of the law imposed by political power, but rather of a system that had been formed by the sedimentation of experience (even jurisdictional experimentation) over the centuries and shaped by the activity of generations of jurists and, above all, judges, who have always been autonomous from the will of the sovereign (or a prince or any other entity). Underlying the Common law was also the protection of liberties; put simply, instead of this protection

[1] Which the codifying movement, initiated in the second half of the 18th century by the Prussian Civil Code of 1751 or the Austrian Penal Code of 1787, would solidify, thanks to its generalizing nature and its vocation of certainty and security (Hayek, 2011, 297-298).

being granted exclusively to an assembly which, through a legislative act (an expression of *voluntas*), assumed the task of protecting these liberties (and even conforming to them), the guarantee of freedoms resulted from a constitution that emerged through various contributions (and not always necessarily through the intervention of an Act of Parliament).

Being a case law system, it is based on the prudential concretizing and normative-constitutive mediation of the judge, within the horizon of (judicial) decision of juridically relevant controversies. In the English version, the rule of law put the emphasis on the guarantees (in defence mechanisms, especially jurisdictional ones – the available remedies) that individuals had at their disposal to protect their liberties. Constitutionalism informed by the rule of law is not satisfied by a mere declaration of rights (which, per se, can guarantee nothing); it also demands (and above all so) the existence of remedies designed to protect them.

Since 1885, the theory of the rule of law has found its fundamental expression in Dicey (1927, 179), and it was established as one of the pillars of the English Constitution (along with the sovereignty of Parliament). It is the dichotomy between these two pillars (rule of law and parliamentary supremacy[2]) that will allow us to understand the specific role of the rule of law, endowed with a material or substantial content, which constitutes the result of an acquis built over centuries. On the one hand here, we have the principle *nullum crimen sine lege*, which embodies the epitome of reaction against an arbitrary and oppressive power of coercion (Dicey, 1927, 183-184); and on the other hand, there is the principle of equality before the law, implying the subordination of all citizens to the law of the kingdom and the jurisdiction of its courts of law. Added to this is the recognition that the fundamental principles of the English constitution (including rights and freedoms) derive from judicial decisions, which, over time, have been "discovering" (Dicey, 1927, 189-190) individual rights in actual cases before the courts, whose *rationes decidendi* became generalized, allowing us to state that the English Constitution itself is based on decisions (possibly, but not necessarily, confirmed, a posteriori, by Acts of Parliament – as occurred, *e.g.*, with the Habeas Corpus Act)[3].

---

[2] Dicey (1927, 402-404, 406-408) stresses that the supremacy of Parliament not only favours the rule of law but is also its presupposition.

[3] One of the aphorisms of English constitutionalism determines that "*the constitution has not been made but has grown*" (Dicey, 1927, 191) – a dictum not to be taken literally, but as a form of expression that stresses that the English constitution "[has] not been created at a stroke" (Dicey, 1927, 192).

However, English constitutionalism coexists with the centrality of parliamentary activity – which will not be surprising when, also referring to Dicey (1927, 68), we note that the doctrine of the supremacy of Parliament (*hoc sensu*, the body consisting of the King, the House of Lords and the House of Commons) represents a keystone of the English Constitution. In this sense, as Parliament is the body responsible not only for creating but also repealing laws, it cannot be limited by any law, and it is in the light of any Acts of Parliament that judges will resolve specific cases (Dicey, 1927, 69-71). Nevertheless, the idea of parliamentary supremacy did *not* imply the concept that Parliament would have unlimited power (being, from the outset, prevented from adopting tyrannical measures) (Allison, 2024, 423-425); on the contrary, Acts of Parliament were subject to prudential judicial mediation. And that last substantial dimension of the rule of law assumes major relevance as far as English constitutionalism is concerned. If Dicey (1927, 193-194) himself admitted that freedoms could be protected either through their declarations of rights, or through their discovery in jurisprudence, he emphasized that the English solution was not so dependent on circumstances (which would dictate the existence of this or that right) and stressed the importance of (judicial) remedies under which such freedoms were effectively protected.

The subordination of public power to law has a different perspective in the North American system, under the motto inaugurated by the Massachusetts Constitution of 1780, in the sense of building a government of laws, not of men (cf. article XXX – Part I). This point is clearly revealed in Paine's (almost pamphleteering) statement, according to which "in America, the law is King", "for as in absolute governments, the King is the law, so in free countries, the law ought to be King, and there ought to be no other" (Paine, 2000, 28), or, most particularly, in Wilson's[4] interrogation about the danger of the existence of a "legislative despotism" – which, after all, it would end up leading to an attitude of reverent "worship of the Constitution" or of "canonizing the Constitution" (Holst, 1889, 64-79), which in turn would not have been unrelated to the period of prosperity (including economic prosperity) that followed its adoption (Corwin, 1928, 150-151).

[4] Reflecting on the need to limit the legislative branch, James Wilson (Farrand, 1911, 254) states that only the imposition of limits on the executive branch can assure the stability and the freedoms, as despotism can arise in different forms, among which, as "legislative despotism". Therefore, he advocated the creation of a bicameral Parliament.

The decisive contribution of the United States to the understanding of the rule of law lies in the affirmation of the parametricity of constitutional norms (in line with the reaction against parliamentary supremacy) and, in particular, the creation of a judicial environment designed to ensure this hierarchical superiority and, through it, the submission of public powers (especially the legislature) to the law. This was a mechanism that, in line with the Anglo-Saxon roots that predicate it, would represent a construction of jurisprudence and assume the value of binding precedent. We refer, of course, to the judicial review of legislation, established by the decision in *Marbury v. Madison* (1803).

The meaning and value given to the Constitution are in line with the historical-legal experience that determined the independence of the United States itself, directed at the reaction against the "insolent despotism" (Iredell, 1858, 146) of the English Parliament, whose tyranny was associated with abusive actions.

In legal-philosophical-political terms, the specific US notion of constitutional supremacy resulted both from the understanding that the Constitution incorporated, if not theoretical truths (Holst, 1889, 69), at least the fundamental axiological dimensions of the State (which were, as such, immutable), which (human) laws should obey, and, later, from the circumstance of their emanation being rooted in the popular will (as its initial words would evoke: *We, the People*) (Corwin, 1928, 152), their adoption of representative constituent procedures.

In association with this dimension, the specificity of the US rule of law is in its recognition of the power of the judiciary (indeed its duty) to ascertain the constitutionality of the acts of the constituted powers (in particular, the legislature). Underlying that institution is the ineliminable connection between the rule of law and the system of checks and balances presupposed by the US Constitution. In perfect coherence with the concern that it is a reaction against parliamentary omnipotence, the legislative branch was conceived as a creation of the Constitution, meaning that an act that contradicts the latter is void. In turn, as the courts were bound to act in accordance with the laws of the State, which included constitutional norms (norms that only differed from the rest due to their nature as fundamental law), they could not obey laws that were null, because this would imply disobeying the superior law that bound them and which, ultimately, would result in an action that would go beyond the scope of their power.

3. The origins of the *Rechtsstaat*: from a (Kantian) material point of view to a formal perspective

The German perspective has in its genesis Kant's vision of the State and the constitution. Contrary to the idea, widespread during the *Polizeistaat*, that the sovereign (*hoc sensu*) should be guided towards satisfying the *salus publica*, Kantian philosophy argues that the function of the State consists of guaranteeing freedom and autonomy, values that must also evidently limit sovereign action. According to Kant, the global civil constitution, or the constitution as an expression of cosmopolitan law (*Weltbürgerrecht*, *ius cosmopoliticum)* is one of the elements of approximation of perpetual peace (and, as such, a project of a legal-philosophical nature), guided as it is by the value of hospitality and considering men as citizens of a universal State of humanity (Kant, 2003). However, the principles emerging from this civil constitution were not limited to the expression of the will of the people or the general will, but rather constituted principles of reason. In this context (and despite the accentuation of the clearly formal character that this perspective would assume throughout the 19th century), Kant inaugurates the dogmatic tendency that, later, Placidus (1798, 73) would qualify as characteristic of the "authors of the theory of the rule of law" (*Rechts-Staats-Lehrer*). At issue was the need to highlight the contrast between a perspective tending towards the submission (typical of *Polizeistaat*) of rights to the interests of the sovereign (whose supporters Placidus (1798, 70) called "Staatsglückseeligkeitslehrer" or "politischen Eudämonisten") and a theorization in which the State would find itself subordinate to the law, being responsible, in a Kantian way, to ensure its performance in harmony with principles (or principles of reason).

During the 19th century, we saw a re-thematization of the problem. Initially, such a re-thematization was developed under the impulse of the Historical School and the conception tending to the legal personalization of the State, which was itself the personification of the specific national consciousness (*Volksgeist*), the *ethos* shared by an actual national historical community. At this moment, the concept was primarily connected with the abstraction in which the State is embodied – the solution followed by German doctrine immediately after the Congress of Vienna to, simultaneously, sustain the conciliation between the monarchical principle and popular sovereignty, allowing the concept of both the monarch and the

Parliament (as a polarizer of the representation of the people) as organs of the legal entity that the State constituted (Stolleis 2014a, 59-60).

The *Rechtsstaat* theory from the first half of the 1800s already bore an essential idea: a rational conception of the State, accompanied by the need to establish limits to its action (in particular, the actions of the State-Administration), ensuring the protection of freedoms. Von Mohl was responsible for disseminating[5], in German law, the significant *Rechtsstaat* – a concept already presented in an essay dated 1829 (Mohl, 1829), but, three years later, elevated to the title of one of his most emblematic works: *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*, whose first edition dates back to 1832.

If the *Rechtsstaat* began by being outlined as a *type* of State, rationally shaped and a guarantor of the conditions for the realization of individual freedoms, its subsequent dogmatic evolution (driven by positivism and, above all, by the Pandectists and the *Begriffsjurisprudenz*) removed this material dimension from it, to give it an essentially formal meaning. Through theoretical-constructivist thinking *Rechtsstaat* was transformed into an abstract category (a concept). This is what happened, *par excellence*, in the model proposed by Stahl (clearly an expression of a conservative liberalism (Stolleis, 2014b, 8)), already influenced by the abstraction that the nascent (and reigning) conceptualism would impose. Therefore, Stahl emphasized that, regardless of the purposes borne by the State (satisfaction of administrative purposes or protection of individual rights, or even both – a point that, for the construction of this specific concept, is not relevant), the *Rechtsstaat* (which is opposed to the patriarchal, patrimonial State and the *Polizeistaat*, or even to Rousseau's or Robespierre's *Volksstaat*) only intends to translate the State's *form* of action, the way or character (*Art und Charakter*) in which the purposes and content of the State are realized (Stahl, 1856, 137-138). Now, in the author's very words, such ends were achieved "in the manner of law" (*in der Weise des Rechtes*) (Stahl, 1856, 136). The law would constitute a *form*, now *un*concerned with a *material* content (such as the guarantee of freedoms). In Stahl's own synthesis, the nature of the *Rechtsstaat* simply expresses the impossibility of violating the legal order but does not attempt to define the content of that order (which comes from higher moral or political principles) (Stahl, 1847, 62).

[5] The paternity of the expression remains controversial: *v.* Hayek, 2011, 299-300.

4. The French reading of the *Rechtsstaat*: the *Etat de droit* and the *Etat légal*

The emergence, in France, of the concept of *Etat de droit* would correspond, *mutatis mutandis* (making use of the specific contributions and roots of French law), to the translation of the German *Rechtsstaat*, a concept that, when associated with an idea of voluntary self-limitation of a powerful State, raised reluctance in French doctrine, which saw it as a form of legitimization of the German State (Redor, 1992, 11). Hence, only the autonomy of the word from its meaning (Heuschling, 2002, 324) (and the perception that the former has a much later establishment compared to the latter) allows us to understand the meaning of the *Etat de droit* from the French perspective.

The introduction of the expression *Etat de droit* into the French doctrinal panorama appeared during the 19th century (in the context of a certain general fascination with Germanic thought that followed defeat in the Franco-Prussian war), but it truly flourished only at the beginning of the 20th century, with Duguit and Hauriou. In the first edition of his *Manuel de Droit Constitutionnel*, Duguit alluded, even using the German word *Rechtsstaat* (Duguit, 1907, 48-51, 472-477; Duguit, 1901), to the State bound by law (*Etat lié par le droit*); stemming from the concept of the State as a legal entity, it not only enjoyed rights, but was also subject to duties (which included the pursuit of legal purposes, and in particular, the realization of social solidarity). As Duguit admitted that the legislature was founded by a previous and superior written law (a reference to the revolutionary experience), the emphasis would be on subordination to a "regime of legality" (Duguit, 1907, 358-359). Hauriou also, expressly adhering to the German doctrine, identified the *état de droit* (*sic*) with the State subject to the regime of law (*regime du droit*, in a formulation very close, although not admittedly so, to the French version of the *rule of law*), leading him, immediately afterwards, to the "summary idea that the *état de droit* or the regime of law are the same thing as the regime of legality", the latter defined as "a balance of all forms of right established in favour of the law" (*loi*, not *droit*) or "under the hegemony of the law" (*loi* again) (Hauriou, 1916, 19, 27). Thus, political power is a legally limited power, insofar as it is subordinate to the rules of positive law that it itself emanates.

Although we may find some diversity of concepts in this matter, it would be up to Carré de Malberg (1962, 488-494) to design a very impressive distinction between the *Etat légal* and the *Etat de droit*, identifying the latter with *Rechtsstaat* and conceiving it (in opposition to the *Polizeistaat*) as subject (and limited), in its relations with citizens (now defended against the discretion of public powers), to a regime of law, insofar as its action is disciplined by a set of rules that establish the rights of citizens and that define the means of public action. For this reason, one of the fundamental characteristics of this *Etat de droit* leads not only to the limitation of the Public Administration, by preventing it from acting *contra legem*, but also to the subordination of administrative entities to the law (*loi*), binding them to act *secundum legem* (when they are given by the legislature a power to act).

The *Etat légal* expressed a specific political understanding of the relationship between the State branches, in particular, between the legislative and executive branches, with the purpose of subordinating the second to the first, giving supremacy power to the legislature (Malberg, 1962, 492, 496) and returning its administrative functions exclusively to the execution of the law (*loi*), understood as its source of legitimation. To this extent, the *Etat légal* aimed to establish a hierarchy between functions (a singularity that separated it from the German monarchies (Malberg, 1962, 491), without requiring, on the other hand, supervision of all acts of public power (including legislative acts) (Malberg, 1962, 493). The *Etat légal*, more than representing a mechanism designed to offer a set of guarantees to citizens, compatible with different forms of government, would – itself – constitute a *form* of government (Malberg, 1962, 491).

In short, in the French construction too, the evolution of the idea of subordination of the State to the law would end up leading to the defence of the supremacy of the acts of the legislature in the face of the administration, whose activity was led to the strict execution of the latter, under the principle of administrative legality on a material-substantive level, with the law defining the framework and limits of Public Administration action (Chevallier, 2017, 14) and the principle of parliamentary supremacy (on an organizational level) (Berthélemy, 1904, 213-214). If the judge and the executive were "dominated" by subordination to the legislation (as the only legal referent), the legislature would remain unchecked, with no mechanism for constitutional oversight yet to be envisaged.

5. *Intermezzo:* constitutionality and legality – the corollary of a certain view on *Rechtsstaat* and rule of law

A formal conception of *Rechtsstaat*, the worship of the Constitution in the US rule of law, a particular perspective on the Parliament's supremacy and the positivist conception of law underlying the binomial *Etat de droit/Etat légal* led to the emergence of two core principles: constitutionality and legality.

The binomial Constitution and legislation would thenceforth represent the axis around which the relationship between powers and sources evolved. The combination between constitutionality and legality pointed towards the recognition of popular sovereignty – and, as such, the supremacy of the general will, expressed in representative assemblies, whether at the foundational moment (as in a constituent assembly) or in the day-to-day functioning of institutions (the Parliament). In fact, the perception of the constitution as a superior norm of the legal system did not obliterate (but ended up paving the way for) the consequences of a legalism that would greatly mark nineteenth-century and early twentieth-century legal systems, in line with the evolutionary meaning given to the principle of separation of powers and the importance (actually, the essentiality) recognized, within it, by the legislature. Legislation now assumed a position as the essential element to provide movement and will to the political body organized as the State. And while, from the French or English perspective, this understanding did not result in the recognition of a specific substantive content for legislative provisions, the German construction established a material concept of legislative act and the principle of parliamentary reservation. However, the dogmatic elaboration underlying parliamentary reservation, instead of putting an end to the political understandings of the *Polizeistaat*, ended up merely replacing the seat of recognition of divine attributes, previously polarized in the King and now embodied by the Nation and legislation, as an expression of its will (the general will) (Soares, 1955, 63-64).

Taken to its ultimate consequences, the simultaneous affirmation, in this period, of constitutionality and legality reveals, at different times, a tension. On the one hand, the recognition of the (formal) constitution as a superior norm of the legal system involves, *volente, nolente*, the possibility of a confrontation between the former and the law, leading to the conclusion that there is a conflict between both of them. On the other hand, and considering that legislative acts effectively corresponded to an expression of the general will or the emanation of a body endowed with sovereign authority

or supremacy (over others), legality accentuated its rational superiority, consolidated by formality (*scilicet*, due to the independence of the content contained in them and the respective axiological basis of validity), and, to that extent, it detracted from their possible compatibility with the material requirements arising from the constitutional text.

6. From legality to juridicity as *the* referent for the action of public authorities... both in rule of law and *Rechtsstaat*

The last half of the 20th century[6] saw, in a consummate way, a review of the liberal centrality given to legality and the solidification of juridicity as a material or substantive principle that represents the core connection between public powers and the law. Despite previous advances[7] (abruptly interrupted by the interregnum resulting from the crisis of the Weimar Republic and the emergence of National Socialism), the *Rechtsstaatlichkeit* – or the subordination to juridicity – gives us a new scope to the understanding of this connection, to the point where it can be said that we now face a structure of own rationality, primarily oriented around the guaranteeing function of the law and the protection of fundamental rights, without losing sight of the ineliminable dimension of the separation of powers, as a rationalized form of organizing public powers.

Above all, the reference to juridicity allows for the recognition of parameters of binding public powers that are different from the legislation and the Constitution. Given the pluridimensionality of the legal system – true "networked juridicity" (Loureiro, 2006, 667) – the very attempt to clarify the normative standards to which public authorities are bound constitutes a task that is understandably more difficult than it would be if we let ourselves still be guided by a model like the normative pyramid.

We are interested, at this moment, in alluding to the less dense layer of the juridical system – that of normative principles – which, despite being

[6] As far as the *Rechsstaat* is concerned, this statement is true of the developments that took place in West Germany following the *Grundgesetz*, but it was no longer the case in the DDR (Stolleis, 2014b, 19).

[7] In the early 1930s, Jellinek had already introduced the juridical (and not strictly legal) binding of Public Administration as a dimension of the constitutional State and expressly emphasized that the State could not act against the law (*der Staat soll nicht Unrecht tun*) (Jellinek, 1931, 96, 88, respectively).

(mostly) treasured in constitutions, are possible expressions or concretizations of a meta-constitutional axiology and, therefore, of a metapositive axiology. And this is not a surprising statement considering the path we have taken: in fact, neither the affirmation of the *Rechtsstaatlichkeit* nor the consolidation of the rule of law (or even the transposition of its meaning to supranational orders – such as EU Law) intertwine in the defence of principles as foundations of the legal system.

Even when enshrined in positive texts or discovered by case law, the moment of validity of a legal system is identified by its normative principles, by its axiological-normative and constitutive foundations of law, foundations which, due to the openness that predicates them, intone a regulative intention but do not offer an immediate criterion for solving a problem (Neves, 1995, 175; Bronze, 2019, 627-632). The accentuation of the idea of subordination of public authorities to principles, whatever the form taken by the action in question, allows us to emphasize that the constitutional, legal and/or European normative positivation of principles does not preclude or replace the imperative of subordination of public powers to *all* law.

The relevance of principles in public action goes further, assuming special relevance in the context of interpreting norms. In fact, the determination of the normativity of the norm always calls for consideration of the entire legal (juridical) system and, consequently, also of its foundations. Therefore, the normative principles with which it is praised embody the last factor in determining the practical-normative intentionality of the norm, allowing such principles to perform a "calibrating function" (Bronze, 2020, 346). We may refer, in this regard, to the canon of "interpretation of norms in accordance with principles" (Neves, 1993, 188-189; Bronze, 2020, 348-351). Noting the founding dimension of normative principles, this canon postulates the determination of the normativity of the norm (any norm, even a constitutional one) considering its axiological foundations, implying the preference of the meaning of the norm that best harmonizes with the principle(s) underlying it and eliminating potential conflicts between *ius* and *lex* (*lato sensu*).

7. Proportionality as an example

Among normative principles, the subordination of public powers to the imperative of proportionality assumes fundamental importance today.

Regardless of the densification given to the principle of proportionality, the latter corresponds to an axiological requirement of the idea of rule of law and *Rechtsstaat*, binding, as such, all legal-public action (without distinction of the branch in question). Its refractions are not limited, moreover, to national Constitutional Law and Administrative Law, but extend to Comparative Public Law, as far as International Law (Vranes, 2009) or EU Law, as well as more recent legal-dogmatic branches, such as Investment Law (Vadi, 2018).

Understanding the judgments inherent in the principle of proportionality demonstrates a clear overcoming of a model that has moved from legality to juridicity, based on the redensifying role of jurisprudence – allowing us, therefore, to combine the original meaning of the rule of law with the acquisition of a material sense on the part of the *Rechtsstaat*. As is well-known, in its current configuration the principle of proportionality dates back to the jurisprudence of the *Bundesverfassungsgericht*, which culminated in the famous *Apothekenurteil* of 1958[8]. Analogous relevance (especially from the perspective of balancing) has the *Lüth* Judgment (also from 1958)[9], which, stemming from the conceptualization of the *Grundgesetz* as an expression of a *Wertordnung*, came to consider that the civil system must be interpreted in light of the Constitution (and constitutionally enshrined rights) to impose on judges of civil/common courts a methodical balancing of rights and interests (Schlink, 1976, 49-79).

The content of the principle of proportionality continues to reveal disagreements and reinvent itself, as a result of the various theoretical-dogmatic incursions and the emerging influences of jurisprudential practice (*rectius*, of jurisprudential practices) which, in the context of a global judicial dialogue, reciprocally interpenetrate. Furthermore, its understanding depends on its intersection with a set of other normative dimensions, such as occurs, *par excellence*, with the principle of the separation of powers or with the scope of fundamental rights (Barak, 2012a, 739).

In general, the principle of proportionality relates means and ends, aiming to answer the problem of knowing whether, after assessing the legitimacy of the latter, their achievement can be reached through the measures selected, which must be suitable and enforceable, and provide more benefits than they cause

[8] BVerfG, 11. 6. 1958 – 1 BvR 596/56: Niederlassungsfreiheit für Apotheker, *Neue Juristische Wochenschrift* (1958), 28, 1035.

[9] *BVerGE* (1958), 7, 198.

harm. In other words, the adequacy or aptitude (*Geeigneheit*) test supposes an *ex ante* judgment of causal prognosis (essentially – but not only – of an empirical nature), in order to evaluate whether the measure proves to be a suitable mechanism for the satisfaction of the given purpose. The reference to the aspect of necessity (or indispensability) emphasizes that, when compared with other equally appropriate means, the measure must constitute the least harmful or least intrusive instrument. Proportionality in the strict sense constitutes the proper moment for a cost-benefit analysis (the *Abwägung* of German law (Hirschberg, 1981, 77-87), the *bilan coût-avantages* discovered by French jurisprudence (Philippe, 1990, 179-181) or the cost-benefit analysis presupposed by US case law (Stone & et. al, 2023, 251-258)) and points towards the rationality and the reasonableness (*ragionevolezza*, *Zumutbarkeit*) of the proposed measure, taking into account the consequences it produces. From a positive perspective, cost-benefit balance aims to weigh up the advantages (to achieve the end) against the disadvantages implied by a measure, with the consequence that the greater the sacrifices caused by it, the greater importance the benefits must assume for the satisfaction of its purpose (Alexy, 2010, 102). From a negative perspective, the principle calls for a rule according to which, in situations of uncertainty, the decision-maker must choose the alternative whose worst consequence is greater than the worst consequences of the others (Rawls, 1999, 133). Or, ultimately, considering an alternative perspective, the principle supposes a balance between the importance of the social benefit achieved by reaching the purpose underlying the measure (satisfaction of the public interest or guarantee of another fundamental right) and the social importance that would exist if it were not to restrict the fundamental right; which is a judgment that seeks to evaluate the status of these benefits before and after such a restriction, by comparing their marginal effects (Barak, 2012a, 745; Barak, 2012b, 350-362).

The reference to these judgments supposes a further step and requires a reflection on the functions pursued by the principle of proportionality, conceived (yet again) as a predicative dimension of the rule of law *and* of the *Rechtsstaat*. Within this context, it becomes possible to attribute a double (methodological) role (or "methological aspect" (Barak, 2012b, 3-4, 7-8, 72-75) to the principle under analysis: on the one hand, we have its perspective as a *canon of interpretation*, contributing to the implementation of both constitutional norms (especially those relating to fundamental rights) and infra-constitutional norms; and on the other hand, there is its

configuration as a *limit* to public action, characterizing it as a *parameter of validity* and *standard of control* of the latter (to be called upon, above all, when it comes to the restriction of fundamental rights).

As an interpretative canon, the idea of proportionality determines that the meaning given to a constitutional norm is adequate and reasonable in view of the foundations that underlie it, and that its mobilization for the resolution of cases contributes to the realization of these same foundations. This means, therefore, that the principle of proportionality ends up tracing the (external) limits of the scope of the protection of constitutional norms (Kumm, 2007, 132). In this sense, the principle approaches (and complements) interpretation in accordance with principles and comes close to the scope that, in general, should be given to consequential thinking (*Sinepëik*) with regard to the problem of the relevance of the result of a decision (Fikenstcher, 1980, 57; Fikenstcher, 2004, 130-145). Proportionality aims to ensure practical-normative consonance between the meaning of the (constitutional) norm and its predicative axiology – an aspect that assumes greater importance in norms endowed with normative openness and the constitutional density of norms relating to fundamental rights.

But the principle of proportionality is also the basis for the canon of interpretation in accordance with the Constitution, thus having an impact on the development of the interpretative task of infra-constitutional norms. This canon is based not only on the principle of the unity of the legal system, but also on specifically hermeneutical principles, such as the principle of the unity of *interpretation* of the legal system – supposing the search for and choice of a meaning that does not prove to be incompatible with the Constitution. These are also associated with principles that are relevant, in particular, to the theory of unconstitutionality, such as the principle the preservation of norms (or, more generally, of all public acts) – which, when combined with proportionality, requires that unconstitutionality is an *ultima ratio* consequence (of normative conflicts), affecting only those acts whose failed constitutionality proves impossible to save.

Although it cannot be completely separated from the previous dimension[10], the privileged field of actions in proportionality concerns,

[10] The Charter of Fundamental Rights of the European Union demonstrates this interconnection between both dimensions of the principle of proportionality, insofar as it frames the restrictions (subject to the principle of proportionality in a precept (article 52) dedicated to the scope, but also to the meaning of the rights.

nonetheless, the assessment of the validity of acts of public authorities, and in particular, of measures that restrict rights with the purpose of safeguarding other fundamental (constitutional) goods or interests. And it is within this dimension that questions arise related to the identification of the judgment(s) of proportionality. On one hand, we must be aware of the fact that the invocation of the principle is not independent of the function (whether negative or positive, defensive or protective (Grimm, 2005, 137-155)) of the norms that enshrine those rights (Barak, 2012a, 742; Barak, 2012b, 27-32). On the other hand, we must not lose sight of the fact that such judgments in question assume a legal/juridical (and not political) nature, that they are based on a practical-normative rationality (and not on a strategic rationality), that they are praised in *ratio* (and not in *voluntas*), and that they are imposed by force of argument and not by the force of power, and so by *auctoritas* and not by *potestas*.

8. Concluding remarks

Despite having distinct roots, the rule of law and the *Rechtsstaat (Rechtsstaatlichkeit*) today converge in a material perspective[11]. Such a perspective requires, at the very least, the subordination of public powers to juridicity, and includes the recognition of principles as a layer of the legal system as one of its fundamental elements. And the importance assumed by the principle of proportionality – especially as a parameter of validity and standard of control of the activity of public authorities – represents an important expression of this phenomenon.

The difficulties inherent in the invocation of the principle of proportionality (by judges) led to its densification through a set of sub-principles (as already stated above). Such densification aimed to specify the meaning

[11] See, *e.g.*, article 2(a) of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council, of 16 December 2020, on a general regime of conditionality for the protection of the Union budget. The expression rule of law (from the English version) appears translated, respectively, in the German and French versions, as *Rechtsstaatlichkeit* and *Etat de droit*. In either case, its material content is reduced to a value (more precisely, a European value), that "includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law".

of the means-end relationship demanded by compliance with the axiology underlying the principle under analysis here. While, in this context, proportionality is traditionally associated with the so-called "triple test" (which presupposes the logically successive assessment of suitability, necessity and cost-benefit balance), the normative qualification attributed to each of them remains controversial. Furthermore, jurisprudential experience in this matter has demonstrated not only the intentional differences inherent in the multidimensionality of the principle of proportionality, but also a certain evolutionary tendency, which tends to connect it, at certain times (even if not always in the most practical-normatively successful way), with other principles, such as is the case with reasonableness, but also with the protection of trust and equality – presupposing a confrontation between judgments of a different nature and content.

Difficulties increase due to the fact that the "tests" of proportionality not only presuppose the carrying out of very complex normative reasoning and considerations (which slip easily from the area of the law into the domain of political opportunity), but also prove to be changeable within the scope of resolving the various problems that the actual practice of the law has recently been facing. In particular, if we consider that the construction of proportionality involving several judgments presents an essentially praetorian matrix, it will not be surprising that we face today the need to re-thematize this principle, in an increasingly broader scenario of global judicial review. In fact, the specific dynamic nature of the principle has allowed it to receive new influences through the sharing of jurisprudential experiences and as a result of the assumption, by international (or supranational) courts, of functions parallel to those of the constitutional judges.

However, one of the main assumptions of the principle of proportionality – inclusion within the rule of law *and* the *Rechtsstaat* – is now being challenged. The construction and subsequent expansion of the principle of proportionality represented one of the expressions of the comparative constitutional law movement and the so-called "constitutional borrowing", which ended up obtaining very wide dissemination due to the public value it carries. The problems arise because, currently, the models that are attracting new (and not-so-new) States are those that have more authoritarian characteristics (although under the guise of democratic-constitutional semantics), calling into question the essential dimensions of constitutionalism (Dixon & Landau, 2019, 489-496). This rapprochement therefore occurs despite

the mobilization of the democratic European constitutional design and its related conceptual map – determining that, in practice, these new autocracies use this *instrumentarium* (and also the principle of proportionality) to legitimize and justify the appropriate nature of their actions, precisely inverting the axiological dimensions inherent to those principles. Once again, the rule of law and the (material) *Rechtsstaat* are in danger.

References

Alexy, R. (2010). *A Theory of constitutional rights*. Oxford University Press.

Allison, J. W. F. (2024). Current fictions in public law. *Current Legal Problems*, 77(1), 413–444.

Barak, A. (2012a). Proportionality (2). In M. Rosenfeld & A. Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law* (738–755). Oxford University Press.

Barak, A. (2012b). *Proportionality: Constitutional rights and their limitations*. Cambridge University Press.

Berthelemy, H. (1904), De l'Exercice de la Souveraineté par l'Autorité Administrative, *Revue du Droit Public et de la Science Politique*, 11, 209–227.

Böckenförde, E. W. (2000). Origen y cambio del concepto de estado de derecho. In E. W. Böckenförde. *Estudios sobre el Estado de Derecho y la Democracia* (17–47). Trotta.

Bronze, F. J. (2019). *Lições de introdução ao direito* (3rd ed.). Gestlegal.

Bronze, F. J. (2020). *Metodologia do direito*. Imprensa da Universidade de Coimbra.

Chevallier, J. (2017). *L'Etat de Droit*. LGDJ.

Corwin, E. (1928). The "Higher Law" background of american constitutional law. *Harvard Law Review*, 62, 149–185, 365–409.

Costa, P. (2007). The rule of law: A historical introduction. In P. Costa, & D. Zolo (Eds.), *The rule of law: History, theory and criticism* (73–149). Springer.

Dicey, A. V. (1927). *An introduction to the study of the law of the constitution*. MacMillan.

Dixon, R., & Landau, D. (2019), 1989–2019: From democratic to abusive constitutional borrowing, *International Journal of Constitutional Law*, 17(2), 489–496.

Duguit, L. (1901). *L'Etat, de droit objectif et la loi positive*. Albert Fontemoing Editeur.

Duguit, L. (1907). *Manuel de droit constitutionnel*. Albert Fontemoing Editeur.

Farrand, M. (Ed.) (1911). *The records of the Federal Convention of 1787* (Vol. I). Yale University Press/Oxford University Press.

Fikentscher, W. (1980). Synepëik und eine synepëische definition des rechts. In W. Fikentscher, H. Franke, & O. Köhler. (Eds.), *Entstehung und Wandel Rechtlicher Traditionen* (53–120). Karl Albert.

Fikentscher, W. (2004). *Modes of thought*. Mohr Siebeck.

Grimm, D. (2005), The protective function of the state. In G. Nolte (Ed.), *European and US constitutionalism* (137–155). Cambridge University Press.

Hauriou, M. (1916). *Principes de droit public* (2nd ed.) Sirey.

Hayek, F. (2011). *The constitution of liberty* (R. Hamowy, Ed.). The University of Chicago Press.

Heuschling, L. (2002). *Etat de droit, rechtsstaat, rule of law*. Dalloz.
Holst, H. v. (1889). *The constitutional and political history of the United States* (J. J. Lalor, & A. B. Mason, trans; Vol. I). Callaghan and Company.
Hirschberg, L. (1991). *Der Grundsatz der Verhältnismäßigkeit*. Verlag Otto Schwartz & Co..
Iredell, J. (1858). To the public. In G. J. McRee (Ed.), *Life and Correspondence of James Iredell, One of the Associate Judges of the Supreme Court of the United States – II*. D. Appleton and Company.
Jellinek, W. (1931). *Verwaltungsrecht* (3rd ed.). Verlag von Julius Springer.
Kant, I. (2003). *To perpetual peace: A philosophical sketch* (T. Humphrey, trans). Hackett Publishing.
Kumm, M. (2007). Political liberalism and the structure of rights: On the place and limits of the proportionality requirement. In G. Pavlakos (Ed.), *Law, rights and discourse* (131-166). Hart Publishing.
Loureiro, J. C. (2006). Direito à (protecção da) saúde. In J. Miranda (Ed.), *Estudos em homenagem ao Professor Doutor Marcello Caetano: No Centenário do Seu Nascimento – I* (657-692). Faculdade de Direito da Universidade de Lisboa/Coimbra Editora.
Malberg, R. C. de (1962). *Contribution à la théorie générale de l'Etat*. Editions du CNRS.
Mohl, R. v. (1829). *Das Staatsrecht des Könnigreiches Württemberg. Vol. I – Das Verfassungsrecht*. Heinrich Laupp.
Neves, A. C. (1993). *Metodologia jurídica – Problemas fundamentais*. Coimbra Editora.
Neves, A. C. (1995). A unidade do sistema jurídico: O Seu problema e o seu sentido. In Neves, A. C., *Digesta. Escritos acerca do Direito, do Pensamento Jurídico, da sua Metodologia e Outros – II*. (95-180). Coimbra Editora.
Paine, T. (2000). *Political writings*. Cambridge University Press.
Placidus, J. W. (1798). *Litteratur der staatslehre: Ein versuch*.
Philippe, X. (1990). *Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administratives françaises*. Economica.
Rawls, J. (1999), *A theory of justice – Revised Edition*. Belknap Press.
Redor, M.-J. (1992). *De l'Etat légal à l'etat de droit: l'evolution des conceptions de la doctrine publiciste française 1879-1914*. Economica/Presses Universitaires d'Aix-Marseille.
Schlink, B. (1976). *Abwägung im verfassungsrecht*. Duncker & Humblot.
Soares, R. E. (1955). *Interesse* público, Legalidade e Mérito. Atlântida.
Stahl, F. J. (1847). *Der christliche staat und sein verhältniß zu deismus und judenthum*. Verlag von Ludwig Dehmigke.
Stahl, F. J. (1856). *Die staatslehre und die prinzipien des staatsrechts* (3rd ed.). Mohr.
Stolleis, M. (1990). Rechtsstaat. In *Handwörterbuch zur deutschen rechtsgeschichte* (Vol. IV). Erich Schmidt Verlag.
Stolleis, M. (2014a). Öffentliches *rechts in deutschland: Eine eiführung in seine geschichte (16.-21. Jahrhundert)*. Beck.
Stolleis, M. (2014b). *Nahes unrecht, fernes recht: Zur juristischen zeitgeschichte im 20. Jahrhundert*. Wallstein Verlag.
Stone, G. R., Seidman, L. M., Sunstein, C. R., Tushnet, M. V., Karlan, P. S., Huq, A., & Litman, L. M. (2023). *Constitutional law* (9th ed.). Aspen.

Sunnquist, M. (2022). The *rechtsstaat* in a substantive and a formal sense: Revisiting the theory development of the 1830s and 1840s. *Giornale di Storia Costituzionale/ Journal of Constitutional History*, 44(2), 81-92.

Vadi, V. (2018). *Proportionality, reasonableness and standards of review in international investment law and arbitration*, Elgar.

Vranes, E. (2009). Der verhältnismäßigkeitgrundsatz: herleitungsalternativen, rechtsstatus und funktionen, *Archiv des Völkerrechts*, 47, 1-35.

Are There Really "Tragic Cases"? A Critical Analysis of Manuel Atienza's Proposal[1]

Cláudia Toledo

Federal University of Juiz de Fora
Orcid: 0000-0002-8687-1717,

DOI | 10.14195/2184-9781_4_6

ABSTRACT
The aim of this article is to critically analyze the concept of the tragic case proposed by Manuel Atienza, starting from the same basis – the work of Robert Alexy –, but reaching very different conclusions. In the light of the parameters presented by Alexy (correctness, rationality, legal argumentation, human rights), the inadmissibility of some of Atienza's central assertions about tragic cases is exposed (such as the absence of a correct answer, the limitation of legal rationality, the option for the lesser evil), as well as the unsustainability of the very notion of tragic cases itself.

KEYWORDS
Easy, Hard and Tragic cases; Theory of legal argumentation; Positive law; Claim to correctness; Rationality; Democratic Rule of Law

1. Easy and Hard Cases, Theory of Legal Argumentation

Most *factual situations* socially understood as relevant in today's Democratic Rule of Law are based on statutes (especially in civil law) and precedents (especially in common law). One consequence of such broad social reality regulation lies in the usually immediate identification of the *answer* to concrete cases in positive law (statutes and precedents). According to the classic common law terminology, these are the so-called *easy cases*.

However, due to the plurality of social reality and its dynamicity, it is not rare that answers to some situations are not immediately found in positive law, regardless of its broadness. These are the so-called *hard cases*.

[1] This article is a further development of the article *Tragic Cases: No correct answer? An approach according to the Legal Philosophy of Robert Alexy*, published in *Archiv für Rechts- und Sozialphilosophie* 105, 2019/3, 392-403.

According to Ronald Dworkin (1975, 1057), hard cases are those "in which the result is not clearly dictated by statute or precedent".

The more democratic the State, the more active and independent its Judiciary; once the case is brought before a court, the judge is obliged to judge it, due to the principle of non-obviation of jurisdiction and to the principle of *non liquet* prohibition. However, the judge's decision must be based on *reasons* rather than on his/her subjective concepts, under penalty of arbitrariness or decisionism.

Thus, the vital role played by *rationality* in the legal discourse becomes clear. Theories of legal argumentation are essential to this field, since law is discursively formulated through statutes and precedents, as well as argumentatively applied to judicial decisions. Despite the contribution from several authors to the issue of *legal argumentation*, such as Chaïm Perelman and Lucie Olbrechts-Tyteca (1969), Stephen E. Toulmin (1958), Aulis Aarnio (1987) and Aleksander Peczenik (1989), Robert Alexy and Neil MacCormick stand out among authors who presented legal argumentation theories of great expression and international repercussion – the Spanish jurist Manuel Atienza (2006) states that Alexy's and MacCormick's theories together form the so-called *standard theory of legal argumentation*.

The current article focuses on the theory by Robert Alexy (2010a), who presents *legal discourse* as a *special case* of general practical discourse. Both discourses (i) deal with *practical* issues concerning what is *commanded*, *prohibited,* and *permitted*, and (ii) raise the *claim to correctness*, i.e., participants assert their *propositions* as *correct* and ground their discourse accordingly. Nevertheless, unlike general practical discourse, legal discourse is composed of *institutional arguments*, i.e., orders/commands, prohibitions, and permissions set by the State. Such arguments are also called *authoritative reasons*, since they come from the state body in charge of their creation – Legislative Power in civil law, and Judiciary in common law.

However, *institutional arguments* may sometimes (i) not be *clear* enough, (ii) *conflict* with each other, or (iii) be *incomplete* or *not expressed* in positive law. The solution to each of these problems is presented respectively as follows.

If (i) the law is unclear, *hermeneutical methods* should be used to clarify positive law and make it more intelligible. In case of (ii) normative antinomy, if the conflict is between *rules*, the *logical criteria* (chronological, specialty and hierarchical) should be used to solve the antinomy, whereas if there is a collision between *principles*, the *principle of proportionality* should be used to

solve the collision. Finally, in case of (iii) *legal gaps*, when there is no positive law to be applied, the gap must be filled with *authoritative reasons* (in the case of analogy, where statutes and/or precedents are applied to non-regulated cases) and/or *non-authoritative reasons* (moral, ethics and pragmatic reasons), according to Alexy (2021), based on Jürgen Habermas work (1996)

Neither of these situations depicts an easy case; nevertheless, the typical hard case is evidenced especially in the third option, when there is an openness in positive law, and the judge is faced with a lack of institutional arguments for decision-making. Legal decisions must be argumentatively justified, and arguments are based on reasons (otherwise, they are not arguments, but mere statements). Thus, the more grounded the legal discourse, the more rational it is. In other words, the *rationality* of discourse is intrinsically related to its *justifiability*.

2. Tragic Cases

If hard cases demand a high argumentative burden – in order to solve ambiguities, antinomies, or mainly legal gaps –, such burden is also required by the so-called *tragic cases*. According to Manuel Atienza (2003; 1997), tragic cases are those whose *solution sacrifices some essential element of a value considered fundamental from a legal and/or moral point of view*. Therefore, one would not be faced with different alternatives (as usual), but with a *dilemma*.

Mostly based on Alexy's thought, Atienza (1997) draws three conclusions in his approach to tragic cases. According to the Spanish author, when it comes to tragic cases:

1. *there is no correct answer*;
2. there is a *limitation of legal rationality*;
3. one makes the *option for the lesser evil*.

Atienza (1997, 19) justifies the statement (1) by saying that the legal system does not offer a correct answer to tragic cases because there is no way to find a solution that does not sacrifice a fundamental value. This would lead to an "internal contradiction" in the legal system, thus making it impossible for the judge to make decisions without violating the system.

Atienza adds the assertion (2) and states that the existence of tragic cases themselves would be a limitation of legal rationality, since there is no reason in the legal system able to solve these cases. The judge would then have to resort to *reasonable* criteria, i.e., to criteria located between *strict rationality* and pure and simple *arbitrariness* (Atienza 1997).

Atienza (1997, 25–26) ends up coming to a conclusion (?) (3) and emphasizes that the limitation of legal rationality in tragic cases does not mean, however, the "total loss" of rational control in the decision-making process. The lack of answers that can be qualified as correct or good does not mean that all possible alternatives are compatible and comparable, since the lack of a "good answer" does not imply the impossibility of identifying *worse* and *better* answers. Therefore, the author concludes that what should be done in such situations "is sincerely opting for the lesser evil".

However, precisely on the basis of Alexy's thought (2010a), we consider that none of the three statements above may be inferred from the work of the German jurist, and even the existence of *tragic cases* themselves is questionable, as explained below.

3. No correct answer

With respect to statement (1), it is known that, unlike Dworkin, Alexy (2010a) does not support the thesis of one single correct answer in the legal discourse. If legal argumentation is developed within the broad scope of what is *discursively possible* – i.e., between what is discursively necessary and what is discursively impossible –, the possibility of having more than one correct answer in the legal discourse is not only plausible but also permanent. However, the pivotal point is that the *given answer* must be *correct*, no matter whether the case is *easy*, *hard,* or even *tragic* (if the latter really exists).

From the *formal* point of view, legal reasoning is correct if it accomplishes the legal and discursive *proceedings*, expressed in the rules of *positive law* and rules of *legal argumentation*.

From the *material* point of view, the correctness of the answer is measured by the *justification* of the decision. In other words, the correctness criterion lies in the *reasons* justifying the decision. If the decision is reasoned, i.e., argumentatively grounded, and its arguments are demonstrated or proven,

the decision is correct. Evidently, every judicial decision must be reasoned, under penalty of arbitrariness.

Yet, there is no doubt that both the *quality* and *extent* of legal reasoning may vary; after all, reasoning may be better or worse (quality), as well as greater or lesser (extent). Two of the legal argumentation rules developed by Alexy (2010a) may influence the quality and extent of justification in legal discourse, although they are directly related to the *formal* structure of the logical inference of premises in the so-called *internal justification* (legal syllogism):

> (J.2.4) the number of decompositional steps required, is that number which makes possible the use of expressions whose application to a given case admits of no further dispute;
> (J.2.5) As many decompositional steps as possible should be articulated.

Rule J.2.4 influences the quality of legal argumentation insofar as the greater the *logical relevance* of the expressions used to ground its premises, the better (clearer and more organized) the legal argumentation. This logical relevance should be present throughout legal argumentation; the more logical the justification, the more intelligible the argumentation. Moreover, according to rule J.2.5, as many steps as necessary (or possible) must be taken throughout legal reasoning. In other words, reasoning must be as extensive as possible.

As it was pointed out, these two rules concern the form or/and (?) the structure of legal argumentation. The correctness of the *content* of legal discourse premises is verified in what Alexy (2010a) calls *external justification*. As the scope of what is discursively possible is very broad, legal argumentation premises may be of quite different types. Alexy distinguishes them into (1) positive law rules; (2) empirical statements; and (3) premises that are neither empirical statements nor positive law rules. The methods to justify each type of premise are different. Concerning positive law rules, there must be a demonstration of their compliance with the validity criteria of the legal system. In relation to the empirical premises, there are several ways of justifying, e.g. the methods of empirical sciences, as well as the legal maxims of rational presumption and the rules of burden-of-proof with regard to law. As for the premises that are neither empirical statements nor positive law rules, the rules of legal argumentation are applicable. Alexy

(2010a) develops six sets of external justification rules and forms, taking into account the diversity of the possible premises in legal discourse: rules and forms of (1) *interpretation*; (2) *dogmatic* argumentation; (3) use of *precedents*; (4) *general practical* reasoning; (5) *empirical* reasoning; (6) the so-called *special legal argument* forms, such as analogy, *argumentum a contrario, argumentum a fortiori, argumentum ad absurdum*.

The thematic approach of the current article does not allow for analyzing, in detail, the development of the forms and rules of judicial decisions' internal and external justification. What is herein relevant to be known is that decision correctness lies on its justification, and that there are many criteria for the assessment of the rational quality of the justification in legal discourse.

Nonetheless, if the legal reasoning that justifies the decision taken is really based on reasons, i.e. on substantiated arguments, it is not only formally correct but also tends to be materially correct, no matter how good or how great it is. Substantiated arguments are those supported by institutional arguments (statutes, precedents, legal doctrine), and/or non-institutional arguments (moral, ethical, pragmatic arguments) rationally grounded.

Institutional arguments are typical of legal discourse, which is a *special case* of *practical discourse* (Alexy, 2010a). Practical discourse is a normative discourse in which the claim to correctness is raised. *Legal discourse* is a special case of practical discourse because it is also a *normative* discourse which raises the *claim to correctness*, but is bound to statutes, precedents, and legal doctrine, i.e. *institutional arguments* or authoritative reasons.

General practical discourse is composed of *non-authoritative reasons*, which are classified by Habermas (1996; 1989) as *pragmatic*, *ethical*, or *moral*. *Pragmatic* reasons are those related to the option for techniques and strategies mainly based on the *utility* or *efficiency* criterion according to a *means-end* relation.[2] *Ethical* reasons arise when discourse participants seek clarity about their *way of life* and about the *ideals* guiding their *common life projects*; therefore, ethical arguments result from the *cultural and political self-understanding of a community.*[3] *Moral* reasons are raised when discourse

[2] *Pragmatic* reasons are related to the search of appropriate means to meet interests, preferences and certain ends.

[3] *Ethical* reasons relate to traditions, reflect the identity of a specific society, and go beyond subjective ends based on a "good for us" behavior.

participants seek to identify what is *universally good*, what could be accepted by *everyone* as corresponding to the interests of all (*universality*)[4] – e.g. a rule is only accepted for moral reasons when it gives equal attention to the interests of anyone affected by it (Cooke, 2007).

On the one hand, one may often argue that the decision is not correct, stating that it should be based on other institutional arguments or one may even say that it is not correct, because it is against positive law. The point is that positive law is composed of multiple institutional arguments and so the decision may be based on reasons with which one may disagree, but this does not render the decision incorrect, since it is justified with institutional arguments.

On the other hand, in those hard cases characterized by a legal gap, that is, an openness in positive law due to the lack of institutional arguments, the openness must be filled and it will be not by the judge's subjective conceptions, but by reasons drawn from positive law (e.g. by *analogy*), and/or by rationally grounded non-institutional arguments, i.e. moral, ethical and pragmatic arguments. Obviously, for an argument to be considered a valid moral or ethical argument, it must be *justifiable*, and it will be so if it has the possibility to face a process of rational argumentation about what is morally or ethically *correct*. Therefore, the reference here is not to any Moral or Ethics, but to a justifiable Moral or Ethics (Alexy, 2000).

Accordingly, no matter if it is an easy or a hard case, the answer given by Judiciary must be correct, and it will be if it is based on positive law (institutional arguments) or on justified/justifiable non-institutional arguments.

However, one point that should be noted is that in today's Democratic Rule of Law *moral* values taken as *fundamental* by the society tend to become the content of *legal* norms. In this type of State, the *most relevant values* for society are provided (and protected) by *positive law*, whose norms are endowed not only with *binding force*, but also with *coerciveness*. Coerciveness, in terms of the possibility of the *State* using physical force to enforce the norm, is currently only possessed by *legal* norms. Therefore, the more relevant the moral value, the more it tends to be regulated by law, mainly by constitutional or legal *principles*.

[4] *Moral* reasons concern not only what is "good for us" (criterion of *good*), but what is equally good "for all" (criterion of *correctness* or *due*).

It is worth emphasizing that the answer, although correct, is not necessarily *definitive* – like every scientific answer, due to science *fallibility* or *falsifiability* (Popper, 1978; Popper, 1997; Kuhn, 1970). However, a correct answer can only be disproved if better reasons justify another decision as the best argument. Consequently, not only consensus is justified, but dissention as well. In other words, both affirmation and refutation of arguments are linked to the notions of correctness and rationality.

It is also important to highlight that Atienza (1997, 15, 19) equates the lack of a correct answer in tragic cases (i) with an "internal contradiction" in the legal system, (ii) which would lead the judge to violate such system.

However, both statements should be contested. Actually (i) neither the *collision of principles* is an *internal contradiction*, (ii) nor, much less, does the *solution* of this collision happen through the *violation* of legal system. Collisions are absolutely recurrent in terms of principles, mainly in the case of fundamental rights principles. If the *open texture* is characteristic of some legal norms, *constitutional* norms are those whose text is especially indeterminate and vague. Among constitutional norms, principles that declare *fundamental rights* are markedly the vaguest ones, due to both the amplitude of their factual support and the serious weight (according to the Alexyan triadic scale) of the protected value. Solving these collisions of principles without violating the legal system is not only possible, but it is *obligatory*, since judicial decisions are based on *balancing* principles of a specific legal system, and balancing is a *rational* process made up of arguments which comply with positive law.

The solution of collisions of principles is made possible by the application of the *principle of proportionality*, by which the *suitability* and the *necessity* of the *means* used in the concrete case are assessed, and the colliding *principles* are *balanced* so that one of them prevails in that specific situation. However, as it is well known, according to the *theory of principles* by Alexy (2002), the fact that legal principles collide does not mean that there is a violation of the legal system. On the contrary, as stated above, collisions of principles are quite frequent in legal systems, since their factual support is very broad, without precise determination or exact delimitation. In other words, due to the normative structure of principles, their collision is not a violation of the legal order at all. On the contrary, it is even an expected or foreseen situation.

4. Limitation of Legal Rationality

With respect to the statement (2), according to which there is a limitation of legal rationality in tragic cases, because there would be no correct answer, and the judge would then have to resort to *reasonable* criteria (Atienza 1997), it is necessary to clarify that "*reasonable* criteria" are applied not only to the cases classified by Atienza as tragic, but *reasonableness* is the expression of *rationality* in *all practical* discourses, of which *legal* discourse is a special case. Thus, any legal discourse – whether it concerns an easy, hard or what would be a tragic case – is based on reasonableness or practical rationality. Therefore, (practical) rationality is neither greater nor lesser in tragic cases.

In the light of Kant (1964), Alexy (2006) explains that the difference between the *reasonable* and the *rational* lies on the *moral* dimension of the former. The *reasonable*, in the sphere of practical rationality regarding human actions, is related to the *categorical* imperative; whereas the *rational*, in the sphere of theoretical rationality referring to empirical reality, is related to the *hypothetical* imperative.

Rationality is based on three criteria, namely: *logical correctness*, which is guided by the concept of *coherence*; *means-ends* ordering, which is guided by the concept of *efficiency*; and *empirical truth* or reliability, which is guided by the concept of *generalizability*. *Reasonableness*, in turn, comprises *rationality* criteria, as well as the *valuation* criterion of what is *correct* and *good* (i.e., the values *Correctness* and *Good*) (Alexy 2009).

Thus, the *reasonable* holds *moral* elements, whereas the *rational* does not. Or, as Georg Henrik von Wright (1993, 173) taught, "the reasonable is, of course, also rational – but the 'merely rational' is not always reasonable".

Practical rationality, which relates to the *content* of legal discourse, is added to *discursive* rationality, which refers to a formal structure: the way the discourse should be conducted, i.e. how speakers should act so that their discourse is rational. Therefore, the answer of a rational discourse is formally correct. For legal discourse to be rational, the legal argumentation rules must be complied with. Examples of legal argumentation rules are the *rationality rules*, which determine *discursive equality*[5] and *freedom*[6];

[5] (2.1) Everyone who can speak may take part in the discourse.

[6] (2.2) (a) Everyone may problematize any assertion.

(b) Everyone may introduce any assertion into the discourse.

the *basic rules* such as non-contradiction[7], sincerity[8], consistency[9]; the *justification rules* such as role exchange[10], realizability[11], openness[12]; and the *internal justification rules* such as saturation of arguments and other regulative parameters of legal reasoning (Alexy, 2010a)[13].

Thus, there is no doubt that rationality criteria in the *legal* discourse – whether it concerns an easy, hard, or even what would be a tragic case – are different from rationality criteria in the *empirical* discourse of natural sciences. However, *difference of* rationality criteria does not mean *decrease* or (even less) *lack* of rationality. On the contrary, the practical rationality of legal discourse not only does not exclude but rather encompasses the rationality criteria of empirical discourse and adds valuation criteria to them. Added to the criteria of both rationality dimensions, there are the rules that direct discourse rationality.

Therefore, there are several rationality criteria. The *argumentative burden* necessary to make a decision may vary and will certainly be lighter in *easy* cases (whose answer is immediately found in positive law), as well as heavier in *hard* cases (in which it is necessary to solve ambiguities, antinomies, or legal gaps), and would also be in *tragic cases* (in which, despite the given answer, there is serious detriment to or sacrifice of a fundamental principle). However, the point is that answers are argumentatively obtained – i.e. by reasoning developed in the number of steps necessary to allow the used expressions to be indisputable – and these answers are correct, because they are not arbitrarily released, but validly demonstrated.

(c) Everyone may express his or her attitudes, wishes, and needs.

7 (1.1) No speaker may contradict him or herself.

8 (1.2) Every speaker may only assert what he or she actually believes.

9 (1.3) Every speaker who applies a predicate F to an object *a* must be prepared to apply F to every other object which is like *a* in all relevant respects.

(1.4) Different speakers may not use the same expression with different meanings.

10 (5.1.1) Everyone who makes a normative statement that presupposes a rule with certain consequences for the satisfaction of the interests of other persons must be able to accept these consequences even in the hypothetical situation where he or she is in the position of those persons.

11 (5.3) The actually given limits of realizability are to be taken into account.

12 (5.1.3) Every rule must be openly and universally teachable.

13 Alexy clarifies that, for the discourse to be rational, it is not necessary complying with *all* legal argumentation rules (quantity), nor *fully* complying with them (quality), since there are rules that only allow an approximate compliance. Therefore, the concept of discourse rule violation must be set in a different way according to the diverse nature of different rules. In principle, it is always possible determining whether there is (or not) violation in the case of non-ideal rules such as non-contradiction. On the other hand, ideal rules such as universality of participation and universality of agreement are only complied with in an approximate way. Cf. Alexy (2010a).

5. Option for the Lesser Evil

Finally, prominent issues are involved in Atienza's conclusion (3), according to which what would be done in tragic cases is making the option "for the lesser evil" rather than for the correct answer.

The first issue is that Atienza states that this "option for the lesser evil" results from the limitation of legal rationality, although such limitation would not mean "total loss" of legal rationality, since there are worse and better answers even if there is no correct answer. The question that immediately arises is: what is the limit allowed to rationality limitation? In other words: what is the "minimum rationality degree" required to avoid arbitrariness? Atienza does not answer these questions in his explanation about this "option for the lesser evil".

Allowing a little "loss" of rationality without missing "everything", means admitting a legal uncertainty degree incompatible with law. For this purpose, Constitutional States created positive law in the eighteenth century. Acknowledging the difficulty in deciding due to ambiguity, antinomy or legal gap (or even acknowledging the tragic aspect of a legal decision due to the sacrifice of a fundamental value), *does not mean* admitting that this decision may be irrational or "a little" irrational. It does mean the demand for a heavier *argumentative burden*, a fact that increases the difficulty in rational reasoning. However, *difficulty* is not synonymous with *impossibility* of rational treatment of the case and rationality is *always* due.

The second issue to be highlighted refers to Atienza's conclusion that the legal decision in tragic cases is not good, but the best of the possible ones. The point is that *good* decisions do not mean *correct* decisions. Saying that an answer is "good", "better" or "worse" than another one has no relation with identifying an answer as "correct" or not. *Good* is not synonymous with *correctness*. Qualifying a decision as good or bad means applying a *value judgment* (according to the *good* criterion) to a proposition. Value judgments are moral ones, and *judicial decisions* are not *moral* decisions, but *legal* ones, which enunciate a *duty judgment* according to *positive law* (i.e. regarding the *correctness* criterion).

Judicial decisions must be *correct*, but may not be *good*. They are correct, if based on *objective* criteria (first of all, *positive law* – judicial decisions must be in accordance with positive law, which is the elementary institutional argument of legal discourse). However, judging an answer as good or bad

depends on society's *moral values*. These values are in the sphere of *general practical* discourse. The point is that in general practical discourse, many normative questions are discussed, but often no agreement or consensus is reached, and social life frequently demands decision-making, under penalty of anarchy or civil war (Alexy, 2008; 2015). Therefore, practical discourse *is not sufficient* to solve coordination and cooperation problems typical of social life, because it does not necessarily lead to decisions. Thus, there is the necessity of positivation and of legal discourse in order to solve conflicts and decide impasses. In legal discourse, decisions are necessarily reached, since the Judiciary cannot fail to judge (by virtue of the principles of non-obviation of jurisdiction and of *non liquet* prohibition).

Thereby, there is greater openness to *dissent* in understanding a decision as good or bad. If, in the legal discourse, which has institutional arguments as content, there is not a single correct answer, far less there is a single correct answer in the general practical discourse, which is formed by non-institutional arguments.

There is an *integration* between non-institutional and institutional arguments in legal discourse. Actually, general practical arguments and legal arguments complete one another. It is precisely this that Alexy (2010a, 20) explains with the adoption of the *thesis of integration* between legal argumentation and general practical argumentation, according to which "specifically legal arguments and general practical arguments should be combined at all levels and applied jointly". As a matter of fact, "general practical reasoning forms the basis of legal reasoning" (Alexy, 2010a, 286).

Thus, it is possible to use distinct reasons to justify concrete cases. *Easy cases* are mostly solved based on authoritative reasons (positive law). In *hard cases*, positive law has its legal gap filled with authoritative (analogy) and non-authoritative (general practical discourse) reasons, which may also be used to clarify ambiguities in institutional arguments or to solve antinomies between them. Similarly, if we consider the existence of *tragic cases*, authoritative and non-authoritative reasons would be used to justify which of the correct answers should prevail.

Finally, in compliance with the formal principle of *legal certainty* and according to rule J.7 of the theory of legal argumentation by Alexy (2010a), institutional arguments are binding and must prevail, unless *moral*, *ethical,* and *pragmatic* reasons attribute stronger importance to non-institutional arguments:

(J.7) Arguments which express a link to the literal content of the law or to the will of the historical legislator prevail over other arguments, unless rational grounds can be presented which give priority to other arguments. (Alexy, 2010a, 248)

6. Are There Really Tragic Cases?

As mentioned above, Atienza (2003; 1997) defines tragic cases as those whose solutions sacrifice some essential element of a value considered fundamental from a legal and/or moral point of view. Thus, in these cases, one would not be faced with different alternatives (as usual), but with a *dilemma*.

If one frames tragic cases in the structure of Robert Alexy's work, especially the theory of principles (Alexy, 2002), these cases always depict a collision of principles, since the core values of a legal system are the content of principles, mainly constitutional principles such as the fundamental rights principles.

According to the *law of balancing* (Alexy. 2002, 112), "the greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other". Tragic cases are the classic example of a *stalemate* in the Alexyan *weight formula* (2007), since both colliding principles have *serious abstract weight* (both are constitutional principles) and so the same *utmost satisfaction importance*. These conditions lead, under the law of balancing, to the proportional relationship by which the more important *the compliance with* a principle, the stronger *the detriment to* the opposite principle.

Thus, it is not rare that the degree of detriment to one principle is so serious, due to the serious degree of the importance of satisfying the colliding principle, that the outweighed principle is completely excluded. When it comes to fundamental rights principles, we are talking about values considered the highest and most important by society. Therefore it is not uncommon that the solution of the collision of fundamental rights principles sacrifices some essential element of a value considered fundamental from a moral and/or legal point of view.

Hence, what Atienza calls a "tragic case" is actually no more than one of the many cases in which a fundamental right principle is outweighed

by another fundamental right principle and the interference with the former is so serious that it is sacrificed. As a matter of fact, this is just one of the possible results of the solution of the principles collisions that daily happen in a society. One typical example (of several) is the case of abortion. If priority is given to women's rights (right to freedom, right to self-determination and autonomy, right over their own body, among others), the right to life of the fetus is completely outweighed, i.e. it is sacrificed. If the opposite happens, that is, if priority is given to the right to life of the fetus, it is not possible to fulfill women's rights to any degree, that is, women's rights are sacrificed.

It is important to highlight that when there is a collision between fundamental principles, wherein there is a serious detriment to or sacrifice of one principle due to the serious importance of satisfying the preceding principle, both principles establish fundamental values (since both are fundamental rights principles). The "tragic" point is that one of these values is sacrificed, despite its fundamental relevance for society. Since both values are socially taken as fundamental, sometimes principle P_1 takes precedence over principle P_2, sometimes the opposite may happen, according to the factual and legal possibilities. Thus, the decision is made either based on principle P_1 or on principle P_2. Since both principles are fundamental and comprise the positive law, both decisions are grounded on arguments. Therefore, the decisions made in these cases not only do not violate the system but are justified by institutional arguments.

Lastly, some of Atienza's statements throughout the presentation of his notion of tragic cases and some of his criticisms of Alexy's theory of legal argumentation are worth clarifying.

On the one hand, the Alexyan assertion that the answer given to the concrete case – whether it is easy or hard – must be correct is not an overvaluation of the law of Democratic States as "the best of the legally imaginable worlds" (Atienza, 2003, 226). The assertion that the judicial decision must be correct (although there is not a single correct answer in legal discourse) does not result from an anachronistic exegetical belief in the perfection of positive law or in its completeness. It is simply a matter of primacy to *legal certainty* and protection of *democratic legitimacy* rather than voluntarist subjectivism or authoritarian decisionism.

Asserting that the answer must be correct means only requiring what is elementary for its *controllability*: the decision must be *justified by argu-*

ments based on *objective* criteria. In legal discourse, the objectification of parameters begins with the *institutionalization* of arguments into statutes and precedents. Positive law is the first objective parameter on which legal decisions must be based.

However, the *objectivity* of positive law does not mean its *exclusivity* as the content of legal discourse. Legal discourse is not a "different" case of general practical discourse, but a *special* case of such discourse. A necessary corollary of this assertion lies in the fact that, although institutional arguments have *prima facie* heavier weight in legal argumentation than general practical arguments, the latter arguments are not excluded from it. Actually, general practical arguments and legal arguments complete one another. It is precisely this that Alexy (2010a) explains with the adoption of the *thesis of integration* mentioned above.

On the other hand, Alexy's assertion that the answer given in legal discourse must be correct does not mean that "positive law always provides at least one correct answer", nor it depicts an overly positive and uncritical view about the modern law in Democratic Rule of Law by Alexy (Atienza, 2003, 225).

The German jurist not only conceives the hypothesis that there might be no correct answer in positive law, but literally expresses this thought in rule J.7 of the theory of legal argumentation rules presented above. By this rule, arguments that express a link to the literal content of positive law prevail over other arguments, "unless rational grounds can be presented which give priority to other arguments" (Alexy, 2010a, 248).

According to this rule, legal argumentation is immediately linked to positive law, which is effectively the primary source of law (statutes in *civil law* and precedents in *common law*). Therefore, arguments immediately based on positive law are preponderant; however, once again, *preponderance* does not mean *exclusivity*. The link between legal argumentation and the law in force does not result in the *identification* of legal argumentation with positive law, neither in its *reduction* to such law nor in the *sufficiency* of it.

Yet, the cited rule does not say when there are *rational grounds* to attribute *less weight* to the arguments related to the literal content of positive law. This is left free for the participants in legal discourse to decide and, as said, all discursively possible arguments (institutional or not) are admissible in this discourse.

Nevertheless, Atienza (2003) is perfectly right when he says that on the basis of a certain concept of argumentation, there is inevitably a legal ideology, which has moral and political dimensions. However, the critical dimension of a theory or thought is not solely presented through a sociological analysis of reality or an explicit discourse about justice and politics. A *normative* theory on any subject determines *how* it *should be* treated and developed. Since Alexy's thought is based on the concept of rational discourse, the simple affirmation of such discourse is already a critical step taken, because law cannot be rational without incorporating human rights (Alexy, 2010a). Thus, asserting the rationality of law implies asserting human rights. Insofar as these rights are only feasible under the democratic regime, their assertion refers to the assertion of the Democratic Rule of Law. One single sentence of Alexy (2010a, 13) summarizes this relation among law, rationality, human rights, and democracy, i.e. it sums up the critical dimension of his thought: "reason requires law in order to become real and law requires reason in order to become legitimate".

In addition, the critical dimension of Alexy's thought becomes clear when he literally refers to it in the assertion of the *dual nature* of law, according to which law has an ideal or *critical* dimension (claim to correctness), besides the real dimension (authoritative issue and social efficacy) (Alexy, 2010b). The claim to material correctness in law requires its content to be correct, and according to Alexy (2015, 441) "the correctness of content concerns, above all, *justice*" (italics added).

7. Concluding Remarks

Tragic cases are conceptualized by Atienza as cases where there is the sacrifice of legally and/or morally fundamental values. According to him, in tragic cases, there is no correct answer, but rather the best possible answer, since the judge is before a dilemma and what is left to do is to sincerely choose the lesser evil. This situation would depict the limitation of legal rationality.

Nevertheless, such conclusions are demonstrated as infeasible in the Democratic Rule of Law, which is the only State model compatible with human rights. On the basis of Alexy's work, tragic cases are framed as those where fundamental principles (usually fundamental rights principles)

collide and one of them is sacrificed. Thus, tragic cases are nothing else but cases in which there are fundamental rights collisions, whose result is the sacrifice of one of the competing principles. Actually, this situation may happen in both easy and hard cases, since the fact that one of the colliding principles is completely excluded from the case has nothing to do with the immediate identification or not of the answer to the concrete cases in positive law.

The essential point is that legal decisions must be argumentatively grounded, i.e. they must be rational, and their correctness derives from such rationality. Thus, although there is not a single correct answer in legal discourse, the answer given in the concrete case must be correct, and it will be correct if it is rationally grounded.

Discursive rationality necessarily involves discursive liberty and equality, which are materially related to human rights to liberty and equality. As human rights are only possible in the Democratic Rule of Law (as fundamental rights), issues such as correctness, rationality, human rights, and democracy are inseparable. If one refers to the Democratic Rule of Law, one necessarily refers to correct answers in any case (whether it is easy or hard, whether one colliding principle is sacrificed or not).

References

Aarnio, A. (1987). *The rational as reasonable: a treatise on legal justification*. Springer.

Alexy, R. (2000). On the thesis of a necessary connection between law and morality: Bulygin's critique. *Ratio Juris*, *13*(2), 138–147.

Alexy, R. (2002). *A theory of constitutional rights*. (J. Rivers, Trans.). Oxford Press.

Alexy, R. (2007). The weight formula. In B. Brozek, J. Stelmach, & W. Z. Zaluski. (Ed.), *Studies in the Philosophy of Law: frontiers of the economic analysis of law* (09–27). Jagiellonian University Press.

Alexy, R. (2008). On the concept and the nature of law. *Ratio Juris*, *21*(3), 281–299.

Alexy, R. (2009). The reasonableness of law. In G. Bongiovanni, G. Sartor, & C. Valentini, *Reasonableness and Law* (05–15). Springer.

Alexy, R. (2010a). *A theory of legal argumentation – The theory of rational discourse as theory of legal justification* (R.Adler & N.MacCormick, Trans.). Oxford University Press.

Alexy, R. (2010b). The dual nature of law .*Ratio Juris*, *23*(2), 167–182.

Alexy, R. (2015). Legal certainty and correctness. *Ratio Juris*, *28*(4), 441–451.

Alexy, R. (2021). Jürgen Habermas's theory of the indeterminacy of law and the rationality of adjudication. In R. Alexy, *Law's Ideal Dimension* (299–311). Oxford University Press.

Atienza, M. (1997). Los limites de la interpretación constitucional – de nuevo sobre los casos trágicos [The limits of constitutional intepretation – once again about tragic cases]. *Isonomía*, 6, 07–30.

Atienza, M. (2003). *As razões do Direito – Teorias da argumentação jurídica* [*The reasons of Law – Theories of legal argumentation*]. Landy.

Atienza, M. (2006). *El derecho como argumentación* [*Law as Argumentation*]. Ariel.

Cooke, M. (2007). Law's claim to correctness. In G. Pavlakos (Ed.), *Law, Rights and Discourse – The legal philosophy of Robert Alexy* (225–247). Hart Publishing.

Dworkin, R. (1975). Hard cases. *Harvard Law Review, 88*(6), 1057–1109.

Habermas, J. (1996). *Between facts and norms – Contributions to a discourse theory of law and democracy*. (W. Rehg, Trans.). MIT Press.

Habermas, J. (1989). Para o uso pragmático, ético e moral da razão prática [For the pragmatic, ethical and moral use of practical reason]. *Estudos Avançados*, *3*(7), 04–19.

Kant, I. (1964). *Groundwork of the metaphysic of morals* (H. J. Paton, Trans.). Harper & Row.

Kuhn, T. (1970). *The structure of scientific revolutions* (2nd ed.). University of Chicago Press.

Peczenik, A. (1989). *On law and reason*. Kluwer Academic Publishers.

Perelman, C., & Olbrechts-Tyteca, L. (1969). *The new rhetoric – A treatise on argumentation*. Notre Dame Press.

Popper, K. (1978). *Lógica das ciências sociais* [*social sciences logic*]. Tempo Brasileiro.

Popper, K. (1997). *O Realismo e o objetivo da ciência* [*Realism and the objective of science*]. Publ. D. Quixote.

Toulmin, S. E. (1958). *The uses of argument*. Cambridge.

Wright, G. H. v. (1993). Images of science and forms of rationality. In G. H. von Wright (Ed.), *The tree of knowledge and other essays* (172–192). Brill.

Is a new constitutive rule born or rather brought to life? *Interpreting admissibility of evidence based on the judgment of the CJEU in the EncroChat case*

Barbara Janusz-Pohl

Professor at Department of Criminal Procedure
Faculty of Law and Administration, Adam Mickiewicz University in Poznan/Poland
barbara.janusz@amu.edu.pl
ORCID: 0000-0002-7135-4960

DOI | 10.14195/2184-9781_4_7

ABSTRACT
The article analyzes the admissibility of evidence under Directive 2014/41/EU, focusing on a new constitutive rule for evidentiary action recognized by the Court of Justice of the European Union in the EncroChat case (C-670/22) on April 30, 2024. It begins by introducing the concept of constitutive rules, particularly from the Polish Poznan School of General Theory of Law. The article then summarizes the ruling in the EncroChat case and examines its implications as a source for the new evidentiary rule within the European Investigation Order (EIO). Finally, it discusses the benefits of incorporating constitutive rules into the practical discourse on evidence admissibility, contributing to broader reflections on legitimate sources of such rules in legal systems.

KEYWORDS
Constitutive rule; EncroChat; European Investigation Order; Admissibility; Electronic evidence; Digital justice

1. General Remarks

The issues addressed in this article can be analyzed from several perspectives. The broadest context pertains to the admissibility of evidence under Directive 2014/41/EU from the European Parliament and the Council, dated April 3, 2014, concerning the European Investigation Order (EIO) in criminal matters. However, the primary focus of this analysis is the identification and validation of a new constitutive rule for evidentiary action. This rule has been established or recognized by the Court of Justice of the European Union (Grand Chamber) in its judgment

of April 30, 2024 (C-670/22), commonly referred to as the EncroChat case or MN case[1].

To enhance the clarity of our argumentation, we have adopted the following structure for the study. First, we will introduce the concept of constitutive rules, focusing on the applicative variant that arises from the Polish school of jurisprudence, specifically the Poznan School of General Theory of Law (Kwiatkowski & Smolak, 2021). Next, we will provide a summary of the ruling in the EncroChat case, which will serve as the main reference point for our theoretical discussion.

In the following section, we will examine whether the judgment in EncroChat can be regarded as a direct source for the new constitutive rule regarding evidentiary actions in criminal proceedings within the framework of the European Investigation Order (EIO). Finally, we will discuss the benefits of integrating the concept of constitutive rules into practical discussions about the admissibility of evidence. Overall, this examination will be part of broader theoretical reflections on the legitimate sources of constitutive rules within legal systems.

*

Before we focus on the theoretical assumption for this work, it shall be mentioned that the first attempt in legal sciences to use the concept of constitutive rules for interpreting action in criminal procedural law was made based on the judgment of the ECtHR in case Gäfgen v. Germany (no. 22978/05/ 1 June 2010). This interpretation was delivered by M. Mittag, who operated on the initial version of the constitutive rules by J. Searle (Mittag, 2006, 637-645; Janusz-Pohl, 2024a, 101–118; Janusz-Pohl, 2024b, 754-765).

Mittag's conclusions have shown the potential of the indicated theoretical framework but also its certain shortcomings. Meanwhile, in the last 30. years, especially from 1996 onwards, the idea of constitutive rules has been interpreted by Polish scholars. Hence, the purpose of this interpretation was to adapt the idea of constitutive rules to the demands of legal thinking. Thus, S. Czepita- a Polish legal philosopher, formulated additional assumptions that enabled its application to private law considerations

[1] ECLI:EU:C:2024:372.

(Czepita, 2016, 138-139; Czepita, 1996, 146 et seq.). In turn, B. Janusz-Pohl has used this transformed concept with some additional assumptions for the interpretation of legal actions in criminal proceedings (Janusz-Pohl, 2017a; Janusz-Pohl 2017b, 24-28). The proposed versions of the concept of constitutive rules focus on the legal consequences of violating these rules and, thus, on issues relevant to lawyers, for whom the legal status of the rule for performing actions takes on significance from the perspective of its possible legal consequences.

2. Foundations of the Constitutive Rules Concept

For further consideration, it is necessary to bring the foundations of the constitutive rules concept, briefly reporting on its evolution. What must be emphasised at this point is a core assumption, which states that legal action is a pure example of conventional legal acts (actions). At the same time, criminal procedure shall be perceived as a sequence of legal actions. Consequently, the constitutive rules shall be attributed to each legal action in this sequence (Janusz-Pohl, 2017b).

It is said that the most significant contribution to conceptualising the idea of constitutive rules was made by the language philosopher J. Searle. However, it should not be forgotten that the idea of constitutive rules originally referred to the interpretations of speech acts, but the thought that the 'legal universe' is based on certain artificial and formalised rules, 'conventions' - and that it is a realm of conventional concepts that is materialised within the framework of concrete social relations - cannot be attributed to a single author. Thus, supposedly, the inquiries on the concept of constitutive rules have started with the works that characterise in more detail the actions of participants in conventional discourse, including the processes of social communication and the application of law. From this perspective, the works of Austin and especially Searle are worth noting. So let us remember that in formulating the concept of constitutive rules, Searle refers to the conception of performative utterances developed initially by Austin, specifically to locutionary, illocutionary and perlocutionary acts (Austin, 1962, 311-320). As well known, these categories were referred to as 'speech acts', which are much simpler conventional creations compared to legal acts. At the same time, the regularities observed in the framework

of their study have implications for the study of law. Just drafting these assumptions let us emphasise that an illocutionary act is an intentional act performed by an individual uttering a performative sentence (locutionary act), the purpose of which is to create a new state of affairs unattainable in any other way (Janusz-Pohl, 2017b, 25-30; Searle, 1967, 1987).

In this definition, several elements such as "intentionality of action", "purpose of", and "create a new state of affairs" attract attention. All these elements are essential, as legal actions are an example of illocutionary acts. Thus, the essence of Searle's achievements was to display the rules for the performance of illocutionary acts and to clarify the nature of these rules. The assumption was taken into account that these actions have a rational character, the subject of the action pursues certain goals, and one such goal (primary goal) is the valid and effective performance of such an action. From the beginning, the assumption was included that the rules for the performance of illocutionary acts - later viewed rather as formalised conventional acts are connected with a set of specific rules attached to the given type of action (Janusz-Pohl, 2017a, 31-37).

In Searle's conception, the distinction is made between speech acts as uttering (muscle movements), propositional, and illocutionary acts. Its crux is an elaboration of the so-called elementary illocutionary act (Searle, 1967, 1987). Consequently, Searle stressed that: 'In our analysis of illocutionary acts, we must capture both the intentional and the conventional aspects, especially the relationship between them. In the performance of an illocutionary act in the literal utterance of a sentence, the speaker intends to produce a certain effect by means of getting the hearer to recognise his intention to produce that effect' (Searle, 1967, 45). Furthermore, component acts can be distinguished in any act, not only intentional. A component of a given act is held to mean an act, the performance of which is a necessary albeit insufficient condition of performing a given act.

Anticipating further discussion, let us observe that a component of a given act is renowned based on another theoretical conception by Czepita and the Poznan School of General Theory of Law (Kwiatkowski & Smolak 2021) as the material substrate of a conventional act. In Searle's conception, it is pivotal to observe that illocutionary acts are interpreted by opposing constitutive rules for given speech acts to regulative rules. As the latter, Searle considered such rules regulate antecedently or independently existing forms of behaviour. In turn, constitutive rules not merely regulate but,

above all, create or define new forms of actions (we could say conventional forms); they thus create new beings. Searle introduced a pattern of the constitutive rule. The pattern ran as follows: X counts as Y in context C. He emphasised that constitutive rules were thus rules of conventionalisation. It is worth mentioning that Searle analysed regulative rules, such as the rules of etiquette, finding that their observation did not undermine the existence of specific acts but determined their form (Searle, 1967, 36; Janusz-Pohl 2017b)[2].

It could be observed that Searle's concept was quite intuitive and transparent, but at the same time – one shall say "not ready" for application into dogmatics, as based on this conception, the consequences of the breach of two types of rules were not discussed. As it was mentioned before, the concept of constitutive rules was addressed by many scholars, and displayed in many scientific disciplines. However, there are only a few approaches that developed the initial idea further when it comes to a practical application of the idea of the constitutive rule, specifically to discuss problems of particular legal sciences.

A complex and insightful proposition on constitutive rules with a focus on the consequences of their infringement was delivered by Polish legal philosopher Stanisław Czepita. This Author has developed Searle's concept of constitutive and regulative rules by denominating them as constitutive rules (rules of conventionalisation) and formalisation rules (Czepita, 2016, 138-139; Czepita, 1996). The essential was that both types of rules have been divided into two others: constructive rules and consequential rules. The constructive rules (rules of construction) indicate how to perform a conventional act validly (constitutive rules) and effectively (formalisation rules). On the contrary, consequential rules indicated legal consequences of infringements of construction rules.

Through this approach, B. Janusz-Pohl has analysed the defectiveness of legal actions, starting with the sanction of 'non-existent legal action' and nullity *ex tunc* (in case of breach of constitutive rules) through inadmissibility (in case of breach of some constitutive rules) to nullity *ex nunc*

[2] It appears that disavowing the approach to regulative rules as second types of rules helped Searle discern a new approach to illocutionary acts. It inspired scholars to search for such conventional act rules whose breaking would not undermine the validity (existence) of a given act. In this sense, it appears that regulative rules inspired Czepita to distinguish the formalisation rules of conventional acts and devise a related mechanism of formalisation.

and the non-futility -in case of breach of formalisation rules (Janusz-Pohl 2017a, 2017b). Besides, it is to be observed that many formalisation rules remain only the rules of construction and are not linked with consequential rules, the so-called *lex imperfecta*. It means that any legal consequence is not connected with the breach of formalisation rules of this type. The indicated forms of defects apply to all types of procedural actions, but they are most fully exemplified by defects in evidentiary actions. Specifically, if the product of evidentiary action emerges the factual foundations of the court's decisions.

Therefore, abruptly, one could ask, what is the main contribution of this concept to legal sciences? The separation of constitutive rules (rules of conventionalisation) and rules of formalisation indicates that the rules for the performance of legal acts are diversified. Only a few of them have the status of constitutive rules, and most are rules of formalisation, the violation of which – sometimes – does not cause any negative legal consequences. The concept also has two other important features relevant to the interpretation of legal actions; namely, it allows for imposing the sanction of nullity and non-existence (in the legal sense) /*negotia nulla, nogotia non existens*/ in systems that do not provide statutory sanction of nullity. It is critical, as the recognition that a rule has a constitutive status and a primary meaning enables the declaration of nullity (*nullity ex tunc*) of an act performed in violation of a given constitutive rule, even when at the level of statutory regulation, such a sanction does not exist. An example of the lack of nullity sanction in reference to the mechanism of the European Investigation Order (EIO) is also present in the case of the CJEU analyzed in this article.

Naturally, the discussion on how to determine that a rule has the status of a constitutive rule for a legal (procedural) act of a given type is beyond the scope of this discussion (Janusz-Pohl, 2024b, 754-765). At this point, we can point out that constitutive rules, as rules of validity, refer to what, on the background of the concept at hand, is called the material substrate for a given conventional action (legal action), so-called primary constitutive rules. In addition, constitutive rules concern the existence of competence in the legal system to perform an action of a given type; in some cases, these rules may have the status of temporal rules or rules of other modalities of the given action – so-called secondary constitutive rules (Janusz-Pohl, 2024c, 97-128; Janusz-Pohl, 2023, 9-50).

The question of the sources of constitutive rules is particularly intriguing. Currently, it seems that the understanding is that, depending on the type of legal system, these sources must be legitimized within that system. However, due to the unique nature of constitutive rules, their existence often requires a detailed interpretative process. For legal systems based on statutory law, a constitutive rule must be grounded in statutory law, although its existence can be inferred from the broader set of norms. An example of the establishment of a constitutive rule can, therefore, be the interpretation of a court, especially a court that is the guardian of rights and values. The institutional position of the CJEU as a court of a higher order, whose task is to ensure the axiological coherence of the legal systems of the EU Member States with the treaties, allows it to be considered competent to create constitutive rules. The current discussion will not focus on determining the competence of the Court of Justice of the European Union (CJEU) regarding such creations. It will also not address whether referring to a rule derived from the legal system as a "constitutive rule" implies its establishment—akin to exercising law-making authority—or if it simply represents a form of functional interpretation that suggests bringing the rule to life. Determining the latter issue is indeed very complex, as it is a question of the admissible limits of legal interpretation in the judicial application of the law, an issue that obviously goes beyond the scope of this study.

In our reasoning, however, we will focus on the constitutive rule interpreted by the CJEU and the related sanction of nullity, also referred to in legal literature as the exclusionary rule. In the case we are analyzing, the interpreted constitutive rule will concern the modality, i.e. the manner of performing the procedural action consisting of the transmission of evidence in a special procedure related to the execution of an EIO. In the ruling, which we will analyze further, after careful consideration, the CJEU not only clarified the modalities of the issuance and execution of an EIO, underscoring its commitment to ensuring the efficacy of judicial cooperation tools but also focused on guaranteeing fair trial, particularly rights of the defendant. It ruled that evidence acquired in violation of these rights must be excluded from criminal proceedings. With this judgment, the CJEU has established a new approach to evidence admissibility but also recognized its power to create a new state of affairs.

3. Interpretation of Evidentiary Actions – Jurisprudential Example

The entire theoretical framework will be compared with the example of evidentiary actions, specifically the modalities of these actions and their outcomes as elaborated by the Grand Chamber of the CJEU in the EncroChat case, also known as the MN case (C-670/22). It is essential to consider the context surrounding this ruling, as it stems from a previous legal conflict among German courts regarding the admissibility of using EncroChat data as evidence in criminal cases.

To summarize the factual background of this case, it is important to mention that it involved EncroChat, a French service provider that facilitated end-to-end encrypted communication through specially modified smartphones. During an investigation conducted by French authorities, it was discovered that the individuals were utilizing encrypted mobile phones operating under an 'EncroChat' license to engage in activities primarily associated with drug trafficking. These mobile devices were equipped with unique software and modified hardware that allowed for end-to-end encrypted communication through a server located in Roubaix (France), which could not be accessed through traditional investigative methods.

With the authorization of a judge, the French police were able to secure data from that server in 2018 and 2019. Those data enabled a joint investigation team, which included experts from the Netherlands, to develop a piece of Trojan software. With the authorization of the tribunal correctionnel de Lille that software was uploaded to the server in the spring of 2020 and, from there, was installed on those mobile phones via a simulated update. It was said that, of a total of 66 134 subscribed users, 32 477 users in 122 countries have been affected by that software, including approximately 4 600 users in Germany. In March 2020, police officers from various European countries were informed about EncoChat discoveries during a videoconference organized by the European Union Agency for Criminal Justice Cooperation (Eurojust). As a consequence many investigations have been opened across all of Europe, importantly for the case under discussion, on 2 June 2020 the Frankfurt Public Prosecutor's Office (having the status of issuing authority) requested authorization from the French authorities (here executing authority), by way of an initial European Investigation Order EIO, to use the data from the EncroChat

service without restriction in criminal proceedings. The tribunal correctionnel de Lille executed the EIO and authorized the transmission and use of the requested data. Further data were transmitted subsequently on the basis of two supplementary EIOs dated 9 September 2020 and 2 July 2021. This evidence was then used in proceedings against *MN*. During these proceedings, the lawfulness of the procedure of the EIOs was contested by German courts. As a consequence the Landgericht Berlin (Regional Court, Berlin) decided to stay the proceedings and to refer the questions to the Court of Justice for a preliminary ruling.

The request concerned 5 areas including the interpretation of the provisions of the Directive 2014/41 (see Bernardini, 2024; Merkevičius, 2024, 20-36):

1) The interpretation of the concept of "issuing authority" under Article 6(1) in conjunction with Article 2(c);
2) The interpretation of Article 6(1)(a) in respect to precluding an EIO for the transmission of data already available in the executing State: a) when the EIO seeks the transmission of the data of all terminal devices used on the territory of the issuing State, and there was no concrete evidence of the commission of serious criminal offences by those individual users either when the interception measure was ordered and carried out or when the EIO was issued; b) when the integrity of the data gathered by the interception measure cannot be verified by the authorities in the executing State by reason of blanket secrecy;
3) The interpretation of Article 6(1)(b) regarding the inadmissibility of an EIO for the transmission of telecommunications data already available in the executing State (here France) where the executing State's interception measure underlying the gathering of data would have been inadmissible under the law of the issuing State (here Germany) in a similar domestic case (equivalence principle);
4) The interpretation of the meaning of "interception of telecommunications" based on Article 31(1) and (3), specifically whether this notion includes a measure entailing the infiltration of terminal devices for the purpose of gathering traffic, location and communication data of an internet-based communication service. Additionally, this question covers the issue of whether Article 31 also assumes

compliance with the administrative national rules for individual telecommunications users concerned.

5) In our discussion on the emergence of a new constitutive rule, the most critical aspect was the final question concerning the legal ramifications of acquiring evidence in contravention of EU law. This encompasses not only the regulations outlined in the Directive but also insights from Trites and, particularly, the Charter of Fundamental Rights.

That is strictly connected with the principle of effectiveness of EU Law before national courts, according to which any national regulation or any legal interpretation shall not make impossible in practice or excessively difficult the exercise of rights conferred by EU law, As Elvira Mendez-Pinedo observes, this concept is grounded on the "effet utile" of international treaties and the unique supranational nature of EU law. The Luxembourg court developed this concept through judicial interpretation -or even functional and creative law-making (Mendez-Pinedo, 2021). Based on this principle, the Court established a framework that combines it with other key principles. These include the primacy of EU law over national law, the direct effect of EU law for private individuals and economic operators—subject to certain conditions (especially limited in the case of Directives and horizontal situations)—the indirect effect requiring consistent interpretation, and, most importantly, the liability of Member States for breaches of the EU law (Rott, 2013). The principle of the effectiveness of the EU Law is based on Article 47 (1) CFR and art. 19 TUE. What is more, the principle of effectiveness now written into Article 47(1) of the Charter, which reads: Article 19(1) TEU puts the responsibility for "providing remedies sufficient to ensure effective legal protection in the fields covered by Union law" on Member States through the status of their courts of law as "Union courts". As it is scholarly argued, a similar provision was contained in Article I-29(1) of the Draft EU Constitution, but later formed the basis of the TEU (Reich, 2013, 89-130). As a side note, one shall emphasize that the principle of effectiveness shall be discussed in the triple formula proposed by Norbert Reich, including a) its traditional reading as an "*elimination rule*" or as 2) a "*hermeneutical*", *"the interpretative"* principle, 3) with an emphasis on its "*remedial*" *function* (Reich ,2013).

Regarding the admissibility of using evidence the following sub-questions were formulated in a request for a preliminary ruling:

(a) In the case where evidence is obtained by means of an EIO which is contrary to EU law, can a prohibition on the use of evidence arise directly from the principle of effectiveness under EU law?
(b) In the case where evidence is obtained by means of an EIO which is contrary to EU law, does the principle of equivalence under EU law lead to a prohibition on the use of evidence where the measure underlying the gathering of evidence in the executing State should not have been ordered in a similar domestic case in the issuing State and the evidence obtained by means of such an unlawful domestic measure could not be used under the law of the issuing State?
(c) Is it contrary to EU law, in particular the principle of effectiveness, if the use in criminal proceedings of evidence, the obtaining of which was contrary to EU law precisely because there was no suspicion of an offence, is justified in a balancing of interests by the seriousness of the offences which first became known through the analysis of the evidence?
(d) In the alternative: does it follow from EU law, in particular the principle of effectiveness, that infringements of EU law in the obtaining of evidence in national criminal proceedings cannot remain completely without consequence, even in the case of serious criminal offences, and must therefore be taken into account in favour of the accused person at least when assessing evidence or determining the sentence?

In examining the questions posed by the German court, it becomes evident that the court aimed to ascertain whether the rule prohibiting the use of evidence collected in violation of EU law can be directly connected to the principle of effectiveness, rather than being derived from national regulations. What role does the principle of equivalence play in this context? Does it allow for the exclusion of evidence obtained under the European Investigation Order (EIO)? Furthermore, should the application of evidence gathered in accordance with EU law depend on the severity of the crime, or can potentially invalid evidence be utilized to the advantage of the accused?

In our analysis, we will specifically examine the CJEU's position, focusing on the elements that will help us ascertain whether this ruling establishes a foundation for a new constitutive rule. As previously outlined in our preliminary assumptions regarding constitutive rules, acknowledging certain rules as constitutive implies that if an activity is

conducted in violation of such a rule, the sanction of nullity *ex tunc* will apply, irrespective of whether this sanction is explicitly articulated in the pertinent legal framework.

4. Legal Grounds for the Conceptualization: the EIO

Nonetheless, before the statement of the CJEU will be closely examined, it's important to refer to a regulatory background. Specifically having regard to an interdisciplinary prism of this study. As we pointed out, the legal foundations for this instrument are established in the Directive under the section titled 'The European Investigation Order and the duty to enforce it,' Article 1 of that directive specifies:

> 1. A European Investigation Order (EIO) is a judicial decision which has been issued or validated by a judicial authority of a Member State ("the issuing State") to have one or several specific investigative measure(s) carried out in another Member State ("the executing State") to obtain evidence in accordance with this Directive.
> The EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing State.
> 2. Member States shall execute an EIO on the basis of the principle of mutual recognition and in accordance with this Directive.

Interpreting this provision, one shall observe that EIO concerns investigative measures to obtain evidence, that is, evidentiary action with the aim of obtaining evidence, but it can also take the form of requesting evidence that is already gathered. In the case of EncroChat, the second option is discussed (Biasiotti & Turchi, 2023). Due to the necessity of selecting materials for analysis, we will only indicate here the normative aspects concerning EIO that were crucial to the CJEU's reference ruling of April 30, 2024. The directive contains extensive regulations on various procedural aspects of issuing and executing an EIO. It also clarifies legal definitions. In addition to the aforementioned *in extenso* definition of the EIO itself, Article 2c also specifies the terms "issuing" and "executing authority." To keep the following discussion organized, let us therefore point out that:

Article 2 of that directive, headed, 'Definitions', provides:

'For the purposes of this Directive the following definitions apply:

…

(c) "issuing authority" means:

(i) a judge, a court, an investigating judge or a public prosecutor competent in the case concerned; or

(ii) any other competent authority as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law. In addition, before it is transmitted to the executing authority the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO under this Directive, in particular the conditions set out in Article 6.1, by a judge, court, investigating judge or a public prosecutor in the issuing State. Where the EIO has been validated by a judicial authority, that authority may also be regarded as an issuing authority for the purposes of transmission of the EIO;

(d) "executing authority" means an authority having competence to recognize an EIO and ensure its execution in accordance with this Directive and the procedures applicable in a similar domestic case. Such procedures may require a court authorization in the executing State where provided by its national law.'

In addition, for further analysis, the regulations contained in Article 6 of the Directive should be indicated headed 'Conditions for issuing and transmitting an EIO', which provides:

1. The issuing authority may only issue an EIO where the following conditions have been met:

(a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4 taking into account the rights of the suspected or accused person; and

(b) the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case.

2. The conditions referred to in paragraph 1 shall be assessed by ***the issuing authority in each case.***

> *3. Where the executing authority has reason to believe that the conditions referred to in paragraph 1 have not been met, it may consult the issuing authority on the importance of executing the EIO. After that consultation the issuing authority may decide to withdraw the EIO.*

It must be mentioned that Article 31 of the Directive concerns the issue of notification of the Member State where the subject of the interception is located from which no technical assistance is needed. Additionally, we must refer to Article 14 of the Directive, headed „Legal remedies", which expresses the principle of equivalence. Based on this regulation:

> '1. Member States shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO.
> 2. The substantive reasons for issuing the EIO may be challenged only in an action brought in the issuing State, without prejudice to the guarantees of fundamental rights in the executing State.
> (…)
> 7. The issuing State shall take into account a successful challenge against the recognition or execution of an EIO in accordance with its own national law. Without prejudice to national procedural rules, Member States shall ensure that in criminal proceedings in the issuing State, the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO'.

Upon examining this regulation briefly, it becomes evident that Article 6 does not offer a clear interpretation regarding the consequences of breaching the conditions for issuing a European Investigation Order (EIO). The EIO mechanism involves two collaborating authorities from different member states: the "issuing State" and the "executing State," both of which are defined in the legal definitions provided in Article 2. The collaboration between these two authorities relies on the rebuttable presumption of mutual trust. While Directive 2014/41 outlines the rules for this collaboration, the principle of mutual recognition serves as the foundational rule for this specific form of legal assistance. This principle ensures that each state applies its national law to actions carried out within its territory (Mitsilegas, 2019, 566-578; Belfiore, 2014, 91-105; Illuminati,

2013; Allegrezza, 2014; Volger, 2014). Consequently, there is a marge of discretional power for the executing authority to apply national law for investigative measures realized with the purpose of obtaining pieces of evidence. On the other hand, Article 6 sets the premises for the decision of issuing authority to serve an EIO. So, it is the "issuing authority" who has the power to assess if in the given case the EIO is proportionate and effective regarding the protection of the defendant's rights and at the same time the principle of equivalence is realized so, the EIO concerns the investigative measure(s) that could have been ordered under the same conditions in a similar domestic case, so conditions appropriate in issuing authority (Tudorica & Bonnici, 2023).

5. Between Exclusionary Rule and Constitutive Rule: Examination of the EnchroChat Case by CJEU

In the EncroChat ruling, responding to 5 main questions, the CJEU stated that Article 6(1) of Directive 2014/41 does not determine the nature of the authority that may issue the EIO. Additionally, an EIO for the transmission of evidence already in the possession of the competent authorities of the executing State need not necessarily be issued by a judge where, under the law of the issuing State, in a purely domestic case in that State, the initial gathering of that evidence would have had to be ordered by a judge, but a public prosecutor is competent to order the transmission of that evidence. Additionally, Article 6(1) of Directive 2014/41 must be interpreted as not precluding a public prosecutor from issuing an EIO for the transmission of evidence already in the possession of the competent authorities of the executing State where that evidence has been acquired following the interception, by those authorities, on the territory of the issuing State, of telecommunications of all the users of mobile phones which, through special software and modified hardware, enable end-to-end encrypted communication, provided that the EIO satisfies all the conditions that may be laid down by the national law of the issuing State for the transmission of such evidence in a purely domestic situation in that State. As a side note, it shall be added that the CJEU stated that Article 31 of Directive must be interpreted as being intended also to protect the rights of those users affected by a measure for the 'interception of

telecommunications' within the meaning of that article (Bernardini, 2024; Merkevičius, 2024).

In the last point refers to the question of whether the principle of effectiveness requires national criminal courts to disregard information and evidence obtained in breach of the requirements of EU law. When "translating" this question into the language of the constitutive rules concept, one shall ask if the principle of effectiveness itself could be observed by the national criminal court as a source for the constitutive rule for excluding products of evidentiary actions. What is noticeable is that the Luxembourg Court remarked first that there is no need for this question to be answered unless the referring court comes to a conclusion, on the basis of the replies to previous points (1 to 4), that the EIOs were made unlawfully.

Additionally, the CJEU remained that EU law currently stands on the principle of procedural autonomy of states, that it is for national law alone to determine the rules relating to the admissibility and assessment in criminal proceedings of information and evidence obtained in a manner contrary to EU law[3]. Consequently, the Court has consistently with the previous line of adjudication, held that, in the absence of EU rules on the matter, the rule that would have operated with the sanction of nullity, is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights that individuals derive from EU law, provided, however, that those rules are no less favorable than the rules governing similar domestic actions (the principle of equivalence) and do not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (the principle of effectiveness)[4]**.** However, Article 14(7) of Directive 2014/41 expressly requires Member States to ensure, without prejudice to the application of national procedural rules, that in criminal proceedings in the issuing State, the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO. It means that evidence on which a defendant is not in a position

[3] See judgment of 6 October 2020, *La Quadrature du Net and Others*, C511/18, C512/18 and C520/18, EU:C:2020:791.

[4] In light of the principle of procedural autonomy, Member States are entrusted with the competence to establish procedural rules for actions aiming at safeguarding rights deriving from EU law, on condition that they conform with the principles of equivalence and effectiveness. see judgments of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral*, 33/76, EU:C:1976:188 and of 6 October 2020, *La Quadrature du Net and Others*, C511/18, C512/18 and C520/18, EU:C:2020:791.

to comment effectively must be excluded from the criminal proceedings. Consequently, addressing question no 5 the CJEU stated that Article 14(7) of Directive 2014/41 must be interpreted as meaning that, in criminal proceedings, national criminal courts are required to disregard information and evidence if that person is not in a position to comment effectively on that information and on that evidence and the said information and evidence are likely to have a preponderant influence on the findings of fact.

Regarding the substantive requirements for issuing a European Investigation Order (EIO), the Court emphasized that any assessment of proportionality and necessity must derive from national law and should be conducted specifically by the competent national authorities. According to the principle of mutual recognition, issuing authorities cannot apply their domestic standards of proportionality and necessity to investigative measures that have already been conducted, nor can they reevaluate their legality. In this case, the German authorities could only assess the proportionality and necessity of the transmission itself, rather than the methods used by the French authorities to gather the evidence. Additionally, the right to seek reassessment is ensured both during the issuance and execution of the European Investigation Order (EIO), as outlined in Article 14 of the Directive. Challenges regarding the legality, proportionality, and necessity of an EIO's issuance can be raised in the courts of the issuing State. Conversely, any legal remedies related to its recognition and execution should be addressed by the judicial authorities in the executing State (as referenced in Article 14). Therefore, the principle of mutual recognition, founded on mutual trust, facilitates the sequential application of national laws and the available systems of remedies. The MN ruling highlights a significant shift toward concrete minimum standards for evidence admissibility, while the essence of mutual recognition remains intact (Bernardini, 2024; Merkevičius, 2024).Yet, the MN case serves as definitive evidence of the Court's commitment to establishing a heightened level of protection for the defendant, which is in accordance with the overarching objectives of the Union's legislation **(Kanakakis, 2024).**

As we have indicated earlier, the issue of constitutive rules was previously referred to by researchers to ECtHR rulings (Mittag, 2006, 637-645; Janusz-Pohl, 2024a, 101-118; Janusz-Pohl, 2024b, 754-765). It is noticeable, though, that the CJEU, in the case at hand, consciously differentiates itself from the reserved approach adopted by the European Court of Human Rights (ECtHR) with regard to fair trial and defence rights. In exploring the origin

of the constitutive rule, it is worth considering whether this rule emerged as a result of the EncroChat ruling or if the court merely revived it by adding a layer of axiology. It is important to note that in the NM case, the Court of Justice of the European Union (CJEU) explicitly authorized national courts to impose sanctions of nullity. Moreover, the Court does not confine itself to formulating interpretative guidelines or identifying infringements, but instead has autonomously ruled the inadmissibility of evidence as a direct consequence of the infringements of the UE law. In doing so, the Court did not hesitate to take a step further, differentiating itself from the opinion of the Advocate General and boldly shaping a novel exclusionary rule[5]. Based on the principle of effectiveness, the Court has brought to life the constitutive rule for the legal action of the transmission of evidence (products of evidentiary actions) that was "hidden" in Article 14 (7) of the Directive. Shortly, the Court, in the judgment at hand, recognized the status of the given rule as constitutive. Consequently, this allows for the implication of nullity by national courts in domestic proceedings if the defendant is not in a position to comment effectively on the way it was collected. Once again, this rule imposed on national courts to 'disregard' evidence obtained in breach of EU law, and stems directly from the duty to safeguard the rights of the defence and the fairness of the proceedings as enshrined in Article 47 of the EU Charter of Fundamental Rights. One shall say that such interpretation counterbalances the flexibility of the issuance and execution of an EIO under national laws. The duty to apply the effectiveness principle affects all the authorities intervening in these proceedings, either in the issuing or in the executing state[6].

6. Is There Something More Practical Than a Well-Founded Theory?

To sum up, it should be noted that the argumentation concerning the concept of constitutive rules has not yet appeared in the discourse concerning

[5] See opinion of the AG Ćapeta, points 116-131.

[6] Let us add that the perspective related to the application of the effectiveness principle also concerns the initial issues, thus Grounds for non-recognition or non-execution regulated in Article 11 of the Directive, as one of the premises for refusal refers to substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter.

a sort of legal interpretation whereby the application of a rule concerning the manner of performing a given act is used to deduce sanctions for its violation. As we have already mentioned, the performance of a procedural act is governed by a whole set of directives. As researchers have previously noted, these rules have different statuses, and for the violation of some of them, there is no explicit sanction (*leges impertecta*). Simultaneously, for each procedural action, we can designate a set of constitutive rules, even if they are minimal. Their existence automatically legitimizes the hypothetical existence of a sanction of invalidity, which is activated in the event of a violation of a constitutive rule. Until now, doubts in scholarly literature have concerned the criteria that are to decide whether a given rule can be considered constitutive.

This is controversial, especially when we have no systemic hint, i.e. the system does not operate a sanction for its violation. Analyzing the rulings of the European courts, the ECtHR, and especially the ruling in the EncroChat case by the CJEU, having exemplary status for our analysis, we can conclude that these entities have the legitimacy to authoritatively recognize a rule as constitutive. Naturally, the question arises as to what conditions such a ruling must meet, whether it is necessary to uphold a relevant line of interpretation, etc.

Overall, the Grand Chamber ruling in the case at hand certainly confirms this hypothesis. Finally, one may ask what would be the benefits of an explicit reference by the European Court to the concept of constitutive rules. It seems that, apart from methodological consistency, a full legitimization of nullity sanctions is an apparent gain, not to mention that it is difficult to achieve this kind of legitimization in statutory law systems, but fortunately, the concept of constitutive rules is recognized.

References

Allegrezza, S. (2014). Collecting Criminal Evidence Across the European Union: The European investigation order between flexibility and proportionality. In S. Ruggeri (Ed.), *Transnational evidence and multicultural inquiries in Europe* (51–67) Springer Cham. https://doi.org/10.1007/978-3-319-02570-4_4

Austin, J.L. (1962). *How to Do Things with Words*. Clarendon Press.

Belfiore, R. (2014). Critical remarks on the proposal for a European investigation order and some considerations on the issue of mutual admissibility of evidence. In S. Ruggeri (Ed.), *Transnational evidence and multicultural inquiries in Europe:*

Developments in EU legislation and new challenges for human rights-oriented criminal investigations in cross-border cases (91-105). Springer, Cham. https://doi.org/10.1007/978-3-319-02570-4_7

Bernardini, L. (2024, May 5). *On encrypted messages and clear verdicts – the EncroChat case before the Court of Justice (Case C-670/22, MN).* EU Law Live. Retrieved March 3, 2025, from https://eulawlive.com/op-ed-on-encrypted-messages-and-clear-verdicts-the-encrochat-case-before-the-court-of-justice-case-c-670-22-mn-by-lorenzo-bernardini/

Biasiotti, M.A., & Turchi, F. (Eds.). (2023). *European investigation order. Where the Law Meets the Technology. Law, Governance and Technology Series* (Vol. 55). Springer. https://doi.org/10.1007/978-3-031-31686-9

Czepita, S. (1996). *Reguły konstytutywne a zagadnienia prawoznawstwa.* Uniwersytet Szczeciński.

Czepita, S. (2016). O koncepcji czynności konwencjonalnych w prawie. In M. Smolak (Ed.), *Wykładnia konstytucji. Aktualne problemy i tendencje* (109-146). Wollters Kluwer.

Illuminati, G. (2013). Transnational Inquiries in criminal matters and respect for fair trial guarantees. In S. Ruggeri (Ed.). *Transnational inquiries and the protection of fundamental rights in criminal proceedings* (15-24). Springer.

Janusz-Pohl, B. (2017a). *Formalizacja i konwencjonalizacja jako instrumenty analizy czynności karnoprocesowych w prawie polskim.* Poznan.

Janusz-Pohl, B. (2017b). *Definitions and typologies of lega acts: Perspective of conventionalisation and formalisation.* Poznan.

Janusz-Pohl, B. (2024a). The influence of the ECtHR's jurisprudence on models of evidence admissibility in national criminal proceedings – remarks on the art. 3 of the ECHR. In *М. Шкулић, Р. Етински, И. Миљуш, & А. Шкундрић (Eds.), ЗБОРНИК РАДОВА СА МЕЂУНАРОДНЕ НАУЧНЕ КОНФЕРЕНЦИЈЕ „ОДНОС МЕЂУНАРОДНОГ КРИВИЧНОГ И НАЦИОНАЛНОГ КРИВИЧНОГ ПРАВА“* (vol 1, 101-118). International Criminal Law Association and University of Belgrade – Faculty of Law.

Janusz-Pohl, B. (2023). Theoretical and methodological foundations for consensual models based on Polish example. In S. Pawelec (Ed.), *Consensual mechanisms in criminal proceedings – Integrative and comparative perspective* (9-50). Peter Lang Publishing Group.

Janusz-Pohl, B. (2024b). Rozważania o źródłach reguł konstytutywnych w prawie karnym. Uwagi na tle art. 3 EKPC (przykłady spraw Gäfgen v. Niemcy oraz Ćwik v. Polska) In P. Czarnecki, S. Głogowska, A. Górski, A. Sakowicz, & A. Światłowski (Eds), *Hominum causa omne ius constitutum sit. Księga jubileuszowa Profesora Piotra Hofmańskiego* (754-765). Wolters Kluwer.

Janusz-Pohl, B. (2024c). Theoretical approaches to VOM through the prism of polish regulations. In W. Marcin, & B. Oręziak (Eds.). *Hominum Causa Omne Ius Constitutum Sit. collection of scientific papers of the Polish-Hungarian research platform* (Vol. 1, 97-128). Wydawnictwo Instytutu Wymiaru Sprawiedliwości.

Kanakakis, A. (2024). *The EncroChat judgment (Case C 670/22, MN): CJEU steering a bold course through the symplegades of evidence admissibility.* UKAEL. Retrieved April 1, 2025 from https://ukael.org/2024/07/01/the-encrochat-judgment-case-c-670-22-mn-cjeu-steering-a-bold-course-through-the-symplegades-of-evidence-admissibility/#:~:text=On%2030%20April%202024%2C%20the%20Grand%20Chamber%20of,transfer%20of%20evidence%20related%20to%20the%20EncroChat%20network.

Kwiatkowski, P., & Smolak, M. (Eds.). (2021). *Poznań School of Legal Theory*. Brill.
Mendez-Pinedo, M.E. (2021), The principle of effectiveness of EU law: a difficult concept in legal scholarship. *Juridical Tribune*, 11 (1), 5-29.
Merkevičius, R. (2024). Judgment of the Court of Justice of the European Union of 30 April 2024 in the "EncroChat case" (case No. C-670/22): Does this judgment really legitimise forum shopping in criminal proceedings, and how will it impact Lithuanian criminal proceedings?. *Teise*, 132, 20-36.
Mitsilegas, V. (2019), The european model of judicial cooperation in criminal matters: Towards effectiveness based on earned trust. *Revista Brasileira de Direito Processual Penal*, 5(2), 565-595.
Mittag, M. (2006), A legal theoretical approach to criminal procedure law: The structure of rules in the German Code of Criminal Procedure. *German Law Journal*, 7(8), 637-645.
Reich, N. (2013). The Principle of Effectiveness and EU Contract Law in 'Osservatorio del diritto civile e commerciale. Revista semestrale' no 2 (337-360). doi: 10.4478/75624
Rott, P. (2013). The Court of Justice's principle of effectiveness and its unforeseeable impact on private law relationships. In D. Leczykiewicz, & S. Weatherill (Eds). *The involvement of EU law in private law relationships (Studies of the Oxford Institute of European and Comparative Law)*. Hart Publishing. https://ssrn.com/abstract=2247260
Searle, J.R. (1967). *Speech acts: An essay in the philosophy of language*. Cambridge University Press.
Searle, J.R. (1987). *Czynności mowy. Rozważania z filozofii języka*. Instytut Wydawniczy Pax.
Tudorica, M., & Bonnici, J.M. (2023). Legal framework for digital evidence following the implementation of the EIO Directive: Status quo, challenges and experiences in member states. In M.A. Biasiotti, & F. Turchi (Eds.), *European investigation order. law, governance and technology series* (Vol. 55, 127-151). Springer. https://doi.org/10.1007/978-3-031-31686-9_9.
Vogler, R. (2014). The European Investigation Order: Fundamental Rights at Risk? In S. Ruggeri (Ed.), *Transnational Evidence and Multicultural Inquiries in Europe* (45-49). Springer Cham. https://doi.org/10.1007/978-3-319-02570-4_4

Author Guidelines

1
Articles must be submitted in English.

2
Articles must contain up to 50.000 characters, including spaces and footnotes (excluding the bibliography), and must be preceded by up to 10 keywords and an abstract ("summary") with a maximum of 300 characters, including spaces, in which it should be easily recognizable the purpose, originality and relevance of the article and the research it presupposes. Footnotes should not exceed 300 characters.

3
Articles are submitted to a double-blind peer review procedure. Therefore, the texts must not contain any mention allowing the personal or professional identification of the author.

4
Articles must be submitted in Word format (.doc/.docx), inTimes New Roman, 12, with footnotes in Times New Roman, 10.

5
The texts should be single spaced; italics should be used instead of underlining (except for URL addresses); citations, figures and tables shall be inserted into the text, not at the end of the document as attachments; authors must consider and are responsible by all copyright law concerning the article, including figures and tables; the bibliographic citations and references must conform to the styles provided by APA Standards (American Psychological Association);

6
The articles shall be original and unpublished and shall not be simultaneously under review or waiting for publication by another publication.

7
Whilst submitting the articles, the authors shall introduce their identification (full name, affiliations, e-mail), the year when the article was written and the title of the article. ORCID identification is also highly recommended.

For further information, please contact e-mail
ULCJ@ij.uc.pt

UNIVERSITY OF COIMBRA
INSTITUTE FOR LEGAL RESEARCH (UCILER)

COIMBRA UNIVERSITY PRESS

CONTACTS
ULCJ
University of Coimbra,
Faculty of Law of University of Coimbra
ulcj@ij.uc.pt

URL
impactum-journals.uc.pt/
undecidabilitiesandlaw

ISSN
2184-7649

E-ISSN
2184-9781

DOI
10.14195/2184-9781