

# THE DEBATABLE UNIVERSALITY OF THE PROPORTIONALITY TEST AND THE WIDE-SCOPE CONCEPTION OF FUNDAMENTAL RIGHTS

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## ABSTRACT

Whether human rights are universal or not has been the subject of much debate among legal experts, but major controversy has surrounded rights substance, not their structure. Authors discuss whether freedom of belief or gender equality, for example, are ubiquitous, without considering, however, that having a right may mean significantly different things in different legal systems, depending on how rights are structured. This essay addresses the arguable universality of a certain structure of rights; it does so by tackling the worldwide spread of proportionality and the conception of fundamental rights that underlies it in the principles-theory variant. Alexy has formulated a strong thesis on the universality of a certain conception of rights (and principles). He claims that proportionality is conceptually necessary in all minimally developed legal systems because it derives from the very structure of principles (or fundamental rights) and vice-versa.

This strong thesis contrasts with others that attempt to justify why proportionality is close to becoming a lingua franca in constitutional decision-making. The weak thesis holds that judges ought to have recourse to proportionality because it enhances the effectiveness of fundamental rights. The moderate thesis holds that proportionality may indeed be necessary in a legal system, but only if certain conditions are present there. These conditions are the wide-scope conception of fundamental rights and its equivalent in which respects constitutional principles: the optimization thesis. I assume that there are viable alternatives to them, for not all theorists relate principles to optimization, and in countries like the U.S., which is not an obvious example of an underdeveloped legal system, rights are conceived of narrowly.

This study posits, firstly, that there is no evidence that proportionality is empirically necessary; secondly, that the weak thesis raises difficult problems of prognosis; and thirdly, that a conceptual necessity, as the one Alexy implies between rights and proportionality, must presuppose a normative necessity, which is contingent on certain premises. As a result, the moderate thesis holds true, and the widespread model of rights endorsed by Alexy is not conceptually necessary everywhere. This essay will contribute for the debates on the universality of legal concepts by shedding light on the important choices members of a legal community and participants in legal discourse have to make when framing or interpreting their constitution.

**Keywords:** Proportionality. Universality. Principles theory. Optimization thesis. Wide-scope conception of fundamental rights.

## 1 INTRODUCTION

The proportionality test, in the version presented by Robert Alexy and his principles theory, has been fairly acclaimed as “an export triumph of German jurisprudence.”<sup>1</sup> From the case law of the Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG), proportionality and its sub-tests – suitability, necessity, and balancing – departed for a worldwide migration.<sup>2</sup> The test has been so enthusiastically welcomed in some countries, that a Canadian author qualified courts’ possible resistance to it as resulting from “scepticism” and “xenophobia.”<sup>3</sup> Due to this generally favourable reception, constitutional comparatists believe proportionality to be an essential element of a global constitutionalism that emerged after World War II.<sup>4</sup> Actually, among the world’s most influential adjudicative bodies, only the U.S. Supreme Court resists its influence. U.S. exceptionalism aside, proportionality is close to becoming lingua franca in comparative constitutional law. And yet, there is much to understand about its migration, for which this essay aims to contribute. In particular, judicial references to proportionality put forward implicit “demands of justification [that] must be met,”<sup>5</sup> whether the court that engaged in borrowing the test recognizes it or not.

Putting aside empirical approaches that I shall demonstrate are problematic, one can draw from the specialized literature three normative theses that recommend and justify recourse to proportionality and thus put arguments forward for its universality. The weak thesis holds that judges ought to have recourse to proportionality because it enhances the effectiveness of fundamental rights.<sup>6</sup> The strong thesis holds that

proportionality is conceptually necessary in any minimally developed legal system and, therefore, “unavoidable.”<sup>7</sup> These theses will be challenged below. I shall prove that the weak thesis is insufficient, and whereas Alexy’s principles theory implies the strong thesis, a more moderate thesis is correct. The moderate thesis, which this study supports, holds that proportionality is normatively necessary in a legal system if the proper conditions are met.

In order to reach this conclusion, important assumptions have to be made. This study does not aim at engaging in the ongoing discussion on whether proportionality is the most rational method for applying fundamental rights, or whether it is rational at all. Alexy claims that proportionality provides for greater rationality in constitutional adjudication, and courts are thus correct in having recourse to it. Particularly about balancing, he says, “there is no other rational way to decide controversial cases.”<sup>8</sup> Among the authors who disagree with Alexy is Habermas.<sup>9</sup> Quite apart of the controversy, courts have had recourse to the test when deciding sensitive causes. Were the proportionality test completely irrational or unable to produce rational outcomes, its use would be unjustifiable and no one could argue a case for its universality. Accordingly, this study assumes that the principles-theory variant of proportionality is rational enough, not completely irrational, or “as rational as possible.”<sup>10</sup>

Remarkably, the argument holds valid with regard to different adjudicative methods employed by other constitutional courts as well, for example the U.S. categorization.<sup>11</sup> So this study cannot endorse the proposition that proportionality is the only rational method available, either. Both assumptions that proportionality is rational, but not the only rational method, point to a conception of

1 JESTAEDT, Matthias, The Doctrine of Balancing: its strengths and weaknesses, in: KLATT, Matthias (Org.), *Institutionalized reason: the jurisprudence of Robert Alexy*, Oxford; New York: Oxford University Press, 2012, p. 152–153.

2 COHEN-ELIYA, Moshe; PORAT, Iddo, American balancing and German proportionality: The historical origins, *International Journal of Constitutional Law*, v. 8, n. 2, 2010, p. 267 ff.

3 BEATTY, David M., *The ultimate rule of law*, Oxford; New York: Oxford University Press, 2004, p. 177.

4 SWEET, Alec Stone; MATHEWS, Jud, Proportionality Balancing and Global Constitutionalism, *Columbia Journal of Transnational Law*, v. 47, 2008, p. 74 ff.

5 CHOUDHRY, Sujit, Migration as a new metaphor in comparative constitutional law. In: CHOUDHRY, Sujit (Org.). *The migration of constitutional ideas*. Cambridge: Cambridge University Press, 2010, p. 5.

6 PULIDO, Carlos Bernal, The Migration of Proportionality Across Europe, *New Zealand Journal of Public and International Law*, v. 11, n. 3, 2013, p. 511–512.

7 ALEXY, Robert, *A Theory of Constitutional Rights*, Oxford: Oxford University Press, 2010a, p. 73.

8 *Ibid.*, p. 74.

9 HABERMAS, Jürgen, *Between Facts and Norms: Contributions to a discourse theory of law and democracy*, Cambridge, Mass: MIT Press, 1996, p. 258–259.

10 ALEXY, Robert; PECZENIK, Aleksander, The concept of coherence and its significance for discursive rationality, *Ratio Juris*, v. 3, n. S1, 1990, p. 146.

11 On the U.S. categorization, see BARAK, Aharon, Proportionality, in: ROSENFELD, Michel; SAJÓ, András (Orgs.), *The Oxford handbook of comparative constitutional law*, 1. ed. Oxford: Oxford University Press, 2012, p. 752–754.

practical rationality.<sup>12</sup> This conception can be summarized as follows: every legal method is fraught with practical problems, and once the consideration of practical problems is concerned, there will necessarily be “a loss of exactness,” which is tolerable “as long as a minimum standard of rationality is guaranteed.”<sup>13</sup> Based on this assumption, the rationality challenge can be put aside for the purposes of the present inquiry. The study can thus focus on the more concrete arguments in favour of the universal use of proportionality.

## 2 THE WORLDWIDE SPREAD OF PROPORTIONALITY

Comparative constitutional scholars traced the origins of proportionality to Germany, where the test has performed a central role in the adjudication of disputes concerning fundamental rights.<sup>14</sup> Its historical development can be divided into three phases.<sup>15</sup> The first phase starts in the eighteenth century and finishes at the beginning of the 1930s. During this lengthy period, the ideas that would pave the way for the proportionality test were generated in German political philosophy, legal theory, and private and public law – especially administrative law.<sup>16</sup> The second phase starts after World War II, in the 1950s, and lasts until the middle 1970s. It marks the constitutionalisation of proportionality, its reception in constitutional theory and case law and further development into an “expansive balancing framework.”<sup>17</sup> At the centre of these events was the BVerfG.

The third phase initiates in the late 1970s and continues until today. It represents the consolidation of proportionality as an essential element of German constitutional law and its worldwide expansion. The European Court of Justice (ECJ) and the European Court of Human Rights

(ECtHR) were the first to borrow the test from the BVerfG’s case law in the 1970s.<sup>18</sup> A few years later, proportionality started to sweep over Western Europe and subsequently moved to North and South America, Eastern Europe, Oceania, Africa, Middle East, and more recently South and Eastern Asia. Courts of countries like Canada, Israel, Portugal, Spain, South Africa, New Zealand, Mexico, Peru, Colombia, and Brazil, to name just a few, have decided constitutional cases by resort to proportionality.<sup>19</sup>

Despite being largely referred to worldwide, or maybe exactly because of its wide use by different courts, proportionality “has defied consistent definition.”<sup>20</sup> On the one hand, there are cases where the disagreement about the concept is a matter of pure phraseology. An example is the scholarly debate on the use of proportionality in the U.S. A significant part of the controversy centres on the fact that both terms ‘proportionality’ and ‘balancing’ have been documented in the Supreme Court’s case-law.<sup>21</sup> On the other hand, the disagreement over proportionality constitutes a genuine conceptual controversy in many cases.<sup>22</sup> Most scholars and courts are convinced to be referring to the same legal concept when they employ the term, although they may disagree about its nature, normative justification, constitutive elements, and so on.

The fact is that variants of proportionality exist, both in foreign case law and scholarship.<sup>23</sup> As an illustration, in the Canadian variant the three sub-tests that comprise proportionality in Germany are only performed once the measure passed an additional legality test.<sup>24</sup> And some

12 On practical rationality (or practical reason), see ALEXY; PECZENIK, 1990, p. 143–146.

13 ALEXY, Robert; DREIER, Ralf, *The Concept of Jurisprudence*, *Ratio Juris*, v. 3, n. 1, 1990, p. 3.

14 SWEET; MATHEWS, 2008, p. 98-102; BOMHOFF, Jacco, *Genealogies of Balancing as Discourse*, *Law & Ethics of Human Rights*, v. 4, n. 1, 2010, p. 123; BARAK, Aharon, *Proportionality: Constitutional rights and their limitations*, Cambridge, U.K.; New York: Cambridge University Press, 2012, p. 177-181.

15 BOMHOFF, 2010, p. 123.

16 COHEN-ELIYA, PORAT, 2010, p. 271; BOMHOFF, 2010, p. 124-126.

17 SWEET; MATHEWS, 2008, p. 98.

18 BARAK, 2012, p. 183-186.

19 *Ibid.*, p. 181-202.

20 LAW, David, *Generic Constitutional Law*, *Minnesota Law Review*, v. 89, 2005, p. 698.

21 See PORAT, Iddo, *Mapping the American Debate over Balancing*, in: HUSCROFT, Grant; MILLER, Bradley W.; WEBBER, Gregoire (Orgs.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, New York: Cambridge University Press, 2014, p. 401 ff.

22 See DWORKIN, Ronald, *Law’s Empire*, Cambridge: Belknap Press, 1986, p. 43-48, distinguishing “semantic disagreements” from “genuine disagreements” in law.

23 See MÖLLER, Kai, *Constructing the Proportionality Test: An Emerging Global Conversation*, in: LAZARUS, Liora; MCCRUDDEN, Christopher; BOWLES, Nigel (Orgs.), *Reasoning Rights: Comparative judicial engagement*, Oxford; Portland, Oregon: Hart Publishing, 2014, p. 31–40, for an overview on the competing versions of proportionality theorists and courts have suggested.

24 GRIMM, Dieter, *Proportionality in Canadian and*

theorists argue for a third variant in which balancing is either removed from the proportionality test or significantly constrained.<sup>25</sup> By contrast, Alexy conceives of proportionality as an adjudicative method encompassing three sub-tests – suitability, necessity, and balancing –, employed to solve collisions between principles, identify justifiable limits to the wide scope of fundamental rights, and point out what is in need of justification in legal reasoning.<sup>26</sup> Hereinafter I shall refer to Alexy’s account of proportionality as the principles-theory variant, which by no means should suggest that only his theses on constitutional principles are considered here. Important is that this study will only deal with the principles theory and its variant of proportionality.

Three conditions make proportionality conceptually necessary, Alexy postulates: the *optimization thesis*, the *wide-scope conception of rights*, and the idea of *argumentative representation*.<sup>27</sup> Were they universal, so would proportionality be. Admittedly, to think of the principles theory as a theory on the universality of proportionality is not obvious. Alexy has confessedly oriented his seminal work towards analysing the fundamental rights provisions in the Basic Law and justifying the case law of the BVerfG.<sup>28</sup> Notwithstanding his more parochial goals, proportionality has been exported to Europe and abroad, in each case more or less associated to his theory. Given this scenario, it is reasonable to assume that the normative conditions under which proportionality is necessary are widespread; but there is no evidence of their universality in the strong sense explained below.

### 3 WHAT DOES UNIVERSALITY MEAN?

In spite of what the word ‘universalism’ may suggest, not all universalists imply that a same principle or structure is universally shared. Many scholars argue for more modest commonalities and believe that it suffices if “a transcendent principle is found within more than one legal system.”<sup>29</sup> While the former type of universalism can be called ‘strong,’ the latter is a weak version of it. Accordingly, a court relies on universalist justification when judges regard themselves and other constitutional justices as engaged in a common enterprise that transcends national borders, regardless of whether they believe in legal features that are really universal in the strong sense. At any rate, as the enterprise in which courts engage may be common due to either certain content or structure, it is possible to separate between *content-based universalists* and *structure-based universalists*.

#### 3.1 CONTENT-BASED UNIVERSALISM

Content-based universalists try to discover through the comparison of legal systems the values, principles, and norms that lie behind formal arrangements and explicit rules.<sup>30</sup> They say that judges ought to borrow from another legal system so as to fulfil a norm that both systems share. Most commonly, comparatists of this type have in mind universal sets of principles that would justify constitutional migrations.<sup>31</sup> Judges who endorse this view are convinced that their own task consists chiefly in interpreting, applying, and fostering “substantive principles of political morality,” that is, legal norms that are morally appealing and lie behind authoritative law.<sup>32</sup> An example of content-based universalism can be found in Kommers’ article *The Value of Comparative Constitutional*

29 CHOUDHRY, Sujit, Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation, *Indiana Law Journal*, v. 74, n. 3, 1999, p. 844.

30 JACKSON, Vicki C., Comparative Constitutional Law: Methodologies, in: ROSENFELD, Michel; SAJÓ, András (Orgs.), *The Oxford handbook of comparative constitutional law*, 1. ed. Oxford: Oxford University Press, 2012, p. 60–62.

31 PERJU, Vlad, Constitutional Transplants, Borrowing and Migrations, in: ROSENFELD, Michel; SAJÓ, András (Orgs.), *The Oxford handbook of comparative constitutional law*, 1. ed. Oxford: Oxford University Press, 2012, p. 1319.

32 CHOUDHRY, 1999, p. 870.

German Constitutional Jurisprudence, *University of Toronto Law Journal*, v. 57, n. 2, 2007, p. 383.

25 BERNSTORFF, Jochen von, Proportionality without balancing: why judicial ad hoc balancing is unnecessary and potentially detrimental to the realisation of individual and collective self-determination, in: HUSCROFT, Grant; MILLER, Bradley W.; WEBBER, Gregoire (Orgs.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, New York: Cambridge University Press, 2014, p. 66 ff.

26 ALEXY, Robert, The Construction of Constitutional Rights, *Law & Ethics of Human Rights*, v. 4, n. 1, 2010d, p. 24; Balancing, Constitutional Review, and Representation, *International Journal of Constitutional Law*, v. 3, n. 4, 2005, p. 578 ff.

27 ALEXY, 2010d, p. 24; 2005, p. 578 ff.

28 ALEXY, 2010a, p. 6.



tional Law.<sup>33</sup> As Kommers affirms, “the study of comparative constitutional law can be a search for principles of justice and political obligation that transcend the culture-bound opinions and conventions of a particular political community.”<sup>34</sup>

Another version of content-based universalism advocates something slightly different. Legal systems would not share the same basic substantive principles, but the same basic goal: “finding and applying the best and most just legal rules.”<sup>35</sup> Since “it is likely that some [legal systems] will have succeeded earlier or more convincingly than others” in the pursuit of justice, borrowing would provide parochial officers with a shortcut to approximate their own system to this goal.<sup>36</sup> In justifying the spread of proportionality, Stephen Gardbaum advances a universalist argument of this type.<sup>37</sup> He maintains that judges have recourse to the test because they work towards democracy, and its application actually enhances the democratic principle.<sup>38</sup> Remarkably, both forms of content-based universalism are openly normative in their premises, but whether the former version relies on *deontological arguments*, the latter relies on *teleological ones*.<sup>39</sup>

### 3.2 STRUCTURE-BASED UNIVERSALISM

By contrast, structure-based universalists claim that their variant of universalism relies on purely conceptual premises, such as “theoretical concepts of a universal legal language,”<sup>40</sup> or empirical premises, e.g. “a deep structure of constitutional grammar that forms the basis of all different constitutional languages and cultures.”<sup>41</sup> These

premises make some legal arrangements *conceptually* or *empirically necessary*, respectively.<sup>42</sup> Supposing that structure-based universalism is sound, the dialogue between courts does not create anything new, but merely discloses structures that were possibly hidden and will “come to the surface sooner or later – everywhere.”<sup>43</sup> In sum, structure-based universalists attribute some essential or necessary properties to legal systems, “without which law would not be law.”<sup>44</sup> These properties are universal not due to a normative command, but by definition: they “must be there, quite apart from space and time, wherever and whenever law exists.”<sup>45</sup> Or so structure-based universalists believe. The next sub-sections raise doubts about whether universalism can be exclusively grounded in empirical or conceptual premises.

## 4 WHY IS PROPORTIONALITY “INEVITABLE”?

As Neil Walker wrote, “the debate on the migration of constitutional ideas is complex and contentious both empirically and normatively.”<sup>46</sup> This statement is valid for constitutional migrations in general and judicial borrowings in particular. Especially the spread of proportionality can be grasped empirically, as a social fact that defies explanation, or normatively, as a legal decision that demands justification.<sup>47</sup> A scholar engaged in empirical research looks for explanatory reasons, or causal conditions that explain, “why a certain event has occurred or why a certain state of affairs exists.”<sup>48</sup> The range of explanations for a judicial borrowing, as for judicial decisions in general, is

33 KOMMERS, Donald P., The Value of Comparative Constitutional Law, *John Marshall Journal of Practice and Procedure*, v. 9, 1976, p. 692.

34 *Ibid.*

35 SMITS, Jan M., Comparative Law and its Influence on National Legal Systems, in: ZIMMERMANN, Reinhard; REIMANN, Mathias (Orgs.), *The Oxford Handbook of Comparative Law*, Oxford: Oxford University Press, 2006, p. 528–529.

36 *Ibid.*

37 GARDBAUM, Stephen, A Democratic Defense of Constitutional Balancing, *Law & Ethics of Human Rights*, v. 4, n. 1, p. 79–106, 2010.

38 *Ibid.*, p. 88–93.

39 On the difference between deontological and teleological arguments, see ALEXY, Robert, Legal Argumentation as Rational Discourse, *Rivista Internazionale di Filosofia del Diritto*, n. 70, 1993, p. 176, and section 5 below.

40 CHOUDHRY, 1999, p. 834.

41 SCHLINK, Bernhard, Proportionality in Constitutional Law: Why Everywhere but Here, *Duke J.*

*Comp. & Int'l L.*, v. 22, 2011, p. 302.

42 On “conceptual necessity” and “empirical necessity”, see section 4 below and ALEXY, Robert, On Necessary Relations Between Law and Morality, *Ratio Juris*, v. 2, n. 2, 1989, p. 169, footnote 4.

43 SCHLINK, 2011, p. 302.

44 ALEXY, Robert, On the concept and the nature of law, *Ratio Juris*, v. 21, n. 3, 2008, p. 290.

45 *Ibid.*

46 WALKER, Neil, The migration of constitutional ideas and the migration of the constitutional idea: the case of the EU, in: CHOUDHRY, Sujit (Org.), *The migration of constitutional ideas*, Cambridge: Cambridge University Press, 2010, p. 279.

47 Reference is made to the distinction between contexts of discovery and justification, on the one hand, and explanatory and justifying reasons, on the other, as propounded by GOLDING, Martin P., *Legal Reasoning*, Peterborough, Ontario: Broadview Press, 2001, p. 2–6.

48 *Ibid.*, p. 3.

considerably variegated and may draw on history, biology, psychology, and social sciences, for example. However relevant these explanations might be, they are not admitted in legal argumentation as reasons apt to justify a judicial ruling. In judicial decision-making, determinant is the context of justification, or whether “the reasons for asserting a given judgement” are true or acceptable and “relevant to the decision (conclusion).”<sup>49</sup>

In any event, someone who asks, ‘why is proportionality universal?’, might be searching for explanation or justification, and one must distinguish each type of question and the corresponding answer it requires, so as to avoid misconceptions. Authors who attempt to explain the universality of proportionality with recourse to some empirical feature that arguably inheres law or legal decision-making are asking for explanation. Remarkably, Alexy says something that can be taken as an argument of this type: “balancing is inevitable and unavoidable.”<sup>50</sup> One can interpret this assertion in two different ways. The first is as a normative statement about what is legally commanded. One who defends this reading infers that the words ‘inevitable’ and ‘unavoidable’ in Alexy’s sentence actually mean *conceptually necessary* or *normatively necessary*. In this sense, the term would not allude to how decision-makers actually act, but rather what they ought to do to act conform to the law. This interpretation shall be put aside for now. What is discussed below is the second, non-normative interpretation. That is the reading of Alexy’s statement as a statement of fact.

#### 4.1 EMPIRICAL NECESSITY

Alexy’s sentence, “balancing is inevitable and unavoidable”<sup>51</sup>, is a statement of fact if ‘inevitable’ and ‘unavoidable’ are intended to mean ‘empirically necessary.’ Under this reading, the universality of the proportionality test, or at least its last step, balancing, is deeply grounded. Its ultimate explanatory cause would be physically compelling. That is, either the way our thinking is built, perhaps due to structural patterns absorbed in education, or even maybe the biology of our brains concerned with legal decision-making and argumentation would impel judges to see constitutional rights as principles which collide among one another and inevitably require balancing. Or

49 *Ibid.*, p. 8-9.

50 ALEXY, 2010d, p. 20.

51 *Ibid.*.

maybe the proportionality test is really a necessary element of any legal system, “without which law would not be law.”<sup>52</sup> But any of these conclusions is counterintuitive, to say the least.

Strong counterarguments to the *empirical necessity thesis* are the facts that, firstly, only after the second half of the 20<sup>th</sup> century constitutional courts started to employ the proportionality test, and secondly, even today no empirical evidence supports the claim that all courts (or a majority) do so.<sup>53</sup> Furthermore, as in any attempt to describe how judges actually make their decisions, one who says that proportionality is empirically necessary enters the context of explanation. And Alexy expressly affirmed that his principles theory is concerned with another context: justification.<sup>54</sup> Finally, were the assertion that balancing is empirically necessary true, it would be useless for legal scholars and judges to discuss or even criticise the method. The debates, were it the case, would be transferred to the fields of psychology, neuroscience, or legal education. Particularly the main argument made in the present study, about the conditional universality of the proportionality test, would be senseless.

As to demonstrate the weaknesses of the *empirical necessity thesis* and the type of problems it raises, let us analyse the work of a constitutional comparatist that resorted to it: David Beatty.<sup>55</sup> Beatty is an advocate of the migration of proportionality across the globe. In his famous book *The Ultimate Rule of Law*, he pointed out that some type of proportionality analyses has been present in the constitutional case law of different countries. After exposing judgements of many constitutional courts on themes of interest for constitutionalists and comparatists, Beatty concluded, “proportionality is a universal criterion of constitutionality,” and offered what I assume is the reason supporting his conclusion, “[proportionality] is an essential, unavoidable part of every constitutional text.”<sup>56</sup> Let us suppose that this assertion was not intended to be normative.<sup>57</sup>

52 ALEXY, 2008, p. 290.

53 POSNER, Richard A, Constitutional Law from a Pragmatic Perspective, *University of Toronto Law Journal*, v. 55, n. 2, 2005, p. 301.

54 ALEXY, Robert, 2010a, p. 14; *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, Oxford; New York: Oxford University Press, 2010b, p. 228.

55 BEATTY, 2004.

56 *Ibid.*, p. 162.

57 This is how Webber, e.g., interpreted Beatty’s conclusion. See: *The negotiable constitution: On the*

This assumption necessarily leads to the conclusion that Beatty is wrong because his premises are false. Not all constitutions textually provide for the proportionality test as an adjudicative method – only a minority of constitutions actually do –, nor do data support the belief that all courts across the world engage in some kind of proportionality analysis. Beatty himself has only devoted close attention to examples from Germany, Canada, Israel, South Africa, Japan, Hungary, Australia, and the European Court of Human Rights.<sup>58</sup> As Posner correctly pointed out, “Beatty cites decisions from only 15 of 193 nations [...], and 11 of the 15 are former British possessions. His sample of world judicial opinion, therefore, is hardly representative. He has not demonstrated that ‘proportionality’ is a universal legal norm.”<sup>59</sup>

#### 4.2 CONCEPTUAL NECESSITY

Whereas the *empirical necessity thesis* resorts to factual events and causal conditions in attempt to explain why some legal features are universal, the *conceptual necessity* and the *normative necessity theses* offer justifying reasons for the spread of proportionality. In fact, an influential part of the scholarship has argued for a conceptually necessary connection between proportionality and fundamental rights, in conformity with Alexy’s *necessity thesis*. According to Alexy, proportionality is logically derived from the structure of constitutional principles (or fundamental rights), and vice-versa.<sup>60</sup> In his words, “proportionality with its three sub-principles of suitability, necessity, and [balancing] follows logically from the definition of principle, just as the definition of principle follows from the principle of proportionality with its three sub-principles.”<sup>61</sup> Importantly, the principles theory differentiates between *normative necessity* and *conceptual necessity* and claims that the connection between proportionality and principles is rather conceptual than normative.

Alexy affirms: “there has to be a strict distinction between normative and conceptual necessity.”<sup>62</sup> As he explains, “something being normatively necessary means no more than its being obligatory,” and the distinction between norma-

limitation of rights, Cambridge, UK; New York: Cambridge University Press, 2009, p. 58.

58 BEATTY, 2004, p. 162.

59 POSNER, 2014, p. 301.

60 ALEXY, 2010a, p. 66; 2010d, p. 24.

61 ALEXY, 2010d, p. 24.

62 ALEXY, 1989, p. 169, footnote 4.

tive and conceptual necessity consists in that “the validity of [a] [normative] obligation can be denied without committing a contradiction, but the existence of a conceptual necessity cannot.”<sup>63</sup> If the principles theory is correct and proportionality is conceptually necessary, any further effort of normative justification is superfluous.<sup>64</sup> The question is, thus, whether the necessity thesis conveys a conceptual necessity exclusively, so as to prevent a normative necessity. The answer must be negative, as the next sub-section demonstrates.

#### 4.3 NORMATIVE NECESSITY

Anyone engaged in justifying the spread of proportionality must demonstrate that it is normatively commanded or permitted, and thus not prohibited, that judges have recourse to the test. This is also true the other way around. One who demonstrates that convincing normative grounds are for judges to appeal to proportionality justifies the borrowings. The strongest normative argument that could be put forward for proportionality is a normative necessity. “Something being normatively necessary means no more than its being obligatory,” or legally commanded, Alexy correctly says.<sup>65</sup> So if an assertion such as, “balancing is inevitable and unavoidable,”<sup>66</sup> is intended to mean that judges are legally obliged to resort to proportionality, there must be underlying normative reasons that make the test necessary, if not always, at least under appropriate conditions.

In other words, contrary to what Alexy claims, it is doubtful whether there can exist in law such a thing as a strict separation between conceptual necessity and normative necessity. The validity of a legal proposition does not depend solely on the logical structure of its premises and conclusion; besides logical correctness, legal concepts necessarily mobilise arguments concerning authoritative issuance and social efficacy, and the validity of a legal proposition depends on how these three elements articulate.<sup>67</sup> In practice, this means that a legal solution that would be conceptually correct under ideal conditions can be invalid due to real

63 *Ibid.*

64 SILVA, Virgílio Afonso da, O proporcional e o razoável, *Revista dos Tribunais*, v. 798, 2001, p. 43-44.

65 ALEXY, 1989, p. 169, footnote 4.

66 ALEXY, 2010d, p. 20.

67 ALEXY, Robert, *The Argument from Injustice: A Reply to Legal Positivism*, New York: Oxford University Press, 2010c, p. 3-4.

authoritative and social factors.<sup>68</sup> What follows is that legal concepts carry not only logical implications, but normative and social ones as well.

Alexy opted for focussing on the logical aspects of the necessity thesis by formulating it as a conceptually necessary connection between proportionality and principles. That does not prevent us from unveiling the normative arguments that his formulation necessarily implies. For “a ‘normatively necessary connection’ [...] is nothing other than a normative argument on behalf of a certain conceptually necessary connection,” as Borowski noticed.<sup>69</sup> It is not to say that Alexy contradicted himself, but that, by claiming the existence of a conceptually necessary connection between principles and proportionality, he expressed certain normative convictions, whether admittedly or not.

## 5 THREE NORMATIVE THESES ON THE UNIVERSALITY OF PROPORTIONALITY

Judges who engage with proportionality must necessarily claim, even implicitly, that borrowing the test is definitively commanded or permitted – that is, not prohibited. That something is not definitively prohibited means that it is legally justifiable. Proportionality has been documented in several democratic countries in the last decades, which means that courts must have reasons to believe that having recourse to the test is justifiable. Many authors have attempted to disclose the normative arguments that make a case for borrowing and must be presupposed in judicial opinions. With regard to the proportionality test, these arguments can be grouped in three theses. The weak thesis claims that proportionality offers the best means to reach some normative goals or promote certain principles. The strong thesis says that proportionality is necessary because it is implied by the very structure of principles. Finally, the moderate thesis reads that proportionality is necessary depending on certain normative conditions.

The three theses have something in common. They set out practical reasons for borrow-

<sup>68</sup> ALEXY, 2010b, p. 289; 2010c, p. 3-4.

<sup>69</sup> BOROWSKI, Martin, Discourse, Principles, and the Problem of Law and Morality: Robert Alexy’s Three Main Works: Robert Alexy’s Three Main Works by Martin Borowski, *Jurisprudence*, v. 2, n. 2, 2011, p. 588.

ing the proportionality test and argue that these reasons ought to overcome possible objections, if not always, at least under certain circumstances. Practical reasons are arguments that rely on legal or general practical discourse.<sup>70</sup> The type of practical reasons each thesis mobilises differentiates it from the others and determines its normative strength. Both the strong and the moderate theses deploy typically *deontological arguments*, which “express what is legally right or wrong without looking at the consequences”<sup>71</sup> and “derive their strength solely from being of correct content.”<sup>72</sup> By way of contrast, the weak thesis is grounded in *teleological arguments*, which “look at the consequences of an interpretation and are based on an idea of what is good.”<sup>73</sup> Each of these theses is expounded below.

### 5.1 WEAK THESIS

According to the weak thesis, judges ought to have recourse to proportionality because the test is the best means to reach social goals that are made desirable by some legal norm in the country of destination. The weak thesis is thus normative, for it says that something ought to be done so as to fulfil a norm.<sup>74</sup> Yet, in contrast with the strong and moderate theses, it does not postulate the existence of any norm that directly commands the use of proportionality and can be immediately fulfilled when the commanded action is performed. Instead, comparatists and courts that endorse this thesis make the weaker claim that some norm is indirectly fulfilled by borrowing proportionality because performing the test contributes to achieving a goal that was commanded by that norm.

In fact, the weak thesis is only able to offer second-order justification for proportionality,<sup>75</sup> as the arguments it relies on are teleological. As advanced above, teleological arguments “look at the consequences of an interpretation and are based on an idea of what is good.”<sup>76</sup> So an advocate of the weak thesis must anticipate the consequences of borrowing and applying the proportionality test and suppose that they are desirable altogether. That is to say, the proportionality test

<sup>70</sup> ALEXY, 1993, p. 176.

<sup>71</sup> *Ibid.*, p. 176.

<sup>72</sup> *Ibid.*, p. 177.

<sup>73</sup> *Ibid.*, p. 176.

<sup>74</sup> On normative arguments, see ALEXY, 1989, p. 169.

<sup>75</sup> On first- or second-order normative justification, see GARDBAUM, 2010, p. 88-89.

<sup>76</sup> ALEXY, 1993, p. 176.



is needed as a means to promote a state of affairs the realization of which is commanded owing to another legal principle. The validity of the weak thesis depends, thus, on demonstrating: first, that proportionality is a suitable means to promote a certain principle; and second, that the test is also necessary. An inescapable conclusion is that, if another suitable means is available that could promote the same state of affairs more effectively or at less cost, proportionality ought not to be applied.

## 5.2 STRONG THESIS

By contrast with the weak thesis, the strong thesis relies on deontological arguments to claim that proportionality ought to be universally adopted. It affirms that the test is necessarily implied by the very structure of any minimally developed legal system. The principles theory endorses the strong thesis, albeit implicitly. To recapitulate, Alexy says that proportionality is “inevitable”<sup>77</sup> and interprets ‘inevitable’ as meaning ‘conceptually necessary.’<sup>78</sup> He postulates that a necessary connection exists between proportionality and fundamental rights. That is the so-called *necessity thesis*.<sup>79</sup> Two other theses extend the postulate to all minimally developed legal systems. They are the *identity thesis*, which assumes that fundamental rights are principles,<sup>80</sup> and the *incorporation thesis*, which argues, “every legal system that is at least minimally developed necessarily comprises principles.”<sup>81</sup>

With respect to the necessity thesis, three sub-theses make it intelligible: the *optimization thesis*, the *wide-scope conception of fundamental rights*, and the idea of *argumentative representation*. Let us put the idea of argumentative representation aside and focus on the other two sub-theses. Principles are *optimization thesis*, i.e., “norms requiring that something be realized to the greatest extent possible, given the factual and legal possibilities at hand,” reads the optimization thesis.<sup>82</sup> “As such,” Alexy continues, principles “can be satisfied to varying degrees,” and proportionality is the specific form of determin-

ing “the appropriate degree of satisfaction of one principle relative to the requirements of another principle.”<sup>83</sup> The wide-scope conception of fundamental rights points to a similar conclusion. For “the wider the scope is conceived, the greater the number of cases in which constitutional rights norms are relevant, and the greater the number of competing principles.”<sup>84</sup> And there is no other rational way to decide collisions between principles than by having recourse to balancing and proportionality, Alexy postulates.<sup>85</sup>

Combined, these three theses and sub-theses make proportionality “unavoidable.”<sup>86</sup> Either proportionality is part of a legal system or the legal system in question is not minimally developed. Furthermore, in a country that is above the minimum threshold of legal development, courts ought to resort to the test. If proportionality is not applied in a system alike, constitutional framers might have failed in not dedicating a constitutional provision to it; yet, constitutional courts certainly fall short of their duty by not resorting to the test despite the inexistence of such a provision. On the whole, the principles theory advances reasons for the universality of the proportionality test that makes Alexy a representative of the strong thesis, although he confessedly oriented his seminal work towards more parochial goals.<sup>87</sup>

## 5.3 MODERATE THESIS

The moderate thesis says that the proportionality test is conceptually and normatively necessary provided that certain premises be given. On the one hand, it is more modest than the strong thesis because it pays due respect to system-dependent reasons, which judges ought to draw from their own legal system to justify that a foreign idea, say proportionality, fits within that particular normative arrangement. On the other hand, however, the moderate thesis mobilises normative arguments that are deontological, thus stronger than those advanced by the weak thesis, which relies on purely teleological arguments. According to the moderate thesis, the proportionality test ought to be applied given certain conditions that are not present everywhere – and the absence of which is not necessarily a sign of le-

77 ALEXY, 2010d, p. 20.

78 *Ibid.*, p. 24. Cf. ALEXY, 2010a, p. 66.

79 ALEXY, Robert, Comments and Responses, in: KLATT, Matthias (Org.), *Institutionalized reason: The jurisprudence of Robert Alexy*, Oxford; New York: Oxford University Press, 2012, p. 333.

80 ALEXY, 2010d, p. 24.

81 ALEXY, 2010c, p. 71.

82 ALEXY, 2010d, p. 21.

83 *Ibid.*

84 ALEXY, 2010a, p. 213.

85 *Ibid.*, p. 74.

86 ALEXY, 2010d, p. 20.

87 ALEXY, 2010a, p. 6.

gal underdevelopment. And yet, once these conditions are met, judges are commanded to resort to proportionality. They ought to do so because a legal duty is directly addressed to them. The normative conditions are the same implied by the principles theory: that principles are deemed as optimization requirements, fundamental rights as possessing wide scope, and courts as argumentative representatives of the people.<sup>88</sup>

The moderate thesis claims that these conditions required by proportionality are contingent on the constitutional text, interpretive practice (which includes legal scholarship and courts' self-understanding), and institutional framework (which determines the actual authority of a constitutional court, for example). But in the end, the validity of the moderate thesis depends on the existence of alternative accounts that conceive of fundamental rights as possessing narrow scope. Actually, constitutional comparatists have observed that most constitutional courts adopt either the American model, in which individual rights have narrow scope, or the German model, in which fundamental rights are rights with a wide scope.<sup>89</sup> The debate about which model is the best, whether German or American, or even a combination of both, is far from coming to a conclusion despite the extensive literature it has ensued. In any case, this long-lasting debate indicates the existence of a basic choice that every community makes when framing and interpreting its constitution.

## 6 THE WEAK THESIS: IS IT SUFFICIENT?

The weak thesis postulates that proportionality must be applied in virtue of another norm, which albeit not directly requiring the test, makes it indirectly necessary. Comparatists and courts that endorse the weak thesis suppose the existence of a means-end relationship between the proportionality test and a certain substantive principle. This means that, by choosing to employ the proportionality test as an adjudicative method, a court is making two assumptions. On the one

hand, a judge that has recourse to proportionality must assume that "certain positive consequences result from the fact that courts engage in this balancing."<sup>90</sup> This assumption is empirical. On the other, our decision-maker must accept the validity of a normative proposition according to which those empirical consequences are commanded.<sup>91</sup> This is a normative assumption. But while the empirical assumption is highly contestable, the normative assumption is too weak. A conclusion is that the weak thesis per se cannot offer sufficient justification for proportionality.

If the weak thesis is correct, a judge that adopts proportionality accepts the validity of a norm commanding the consequences that result from engaging in balancing. Pulido, for example, claims that judges resort to the proportionality test because they believe that doing so enhances the effectiveness of fundamental rights.<sup>92</sup> And I submit that this is true at least in Brazil. In 2010, the Supreme Federal Court (*Supremo Tribunal Federal* – STF) ruled that cases where the constitutional right to healthcare conflicts with other constitutional principles ought to be decided with recourse to the proportionality test.<sup>93</sup> The *Healthcare Cases I and II* (2010)<sup>94</sup> illustrated a major shift in the STF's attitude towards fundamental rights and judicial review, which had initiated years before but reached a peak then. This process was triggered by the need to enhance the effectiveness of constitutional provisions, particularly those dependent on positive state action, the enforcement of which had been hindered by executive and legislative inertia.<sup>95</sup>

88 ALEXY, 2010d, p. 24; ALEXY, 2005, p. 578 ff.

89 GARDBAUM, Stephen, The structure and scope of constitutional rights, in: GINSBURG, T.; DIXON, R. (Orgs.), *Comparative constitutional law*, Cheltenham; Northampton: Edward Elgar, 2011, p. 388–391.

90 ANNUS, Taavi, Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments, *Duke Journal of Comparative & International Law*, v. 14, n. 2, 2004, p. 313.

91 *Ibid.*

92 PULIDO, 2013, p. 511–512.

93 BRASIL. Supremo Tribunal Federal. SL 47 AgR/PE, 17 mar. 2010. Relator: Min. Gilmar Mendes, DJe-76, 29 abr. 2010; Supremo Tribunal Federal. STA 175 CE, 16 jun. 2009. DJe-117, 24 jun. 2009.

94 BRASIL. Supremo... 2010; Supremo... 2009.

95 SILVA, Virgílio Afonso da, Discovering the Court: or, How Rights Awareness Puts the Brazilian Supreme Court in the Spotlight, *This Century's Review: Journal for rational legal debate*, n. 1, p. 2012, p. 17. The words of Justice Gilmar Mendes, an influential justice and a leading figure in the migration of proportionality to Brazil, are revealing about what motivated the shift in STF's jurisprudence. He affirmed that the reasons compelling the STF to abandon its previous deferential attitude towards other state branches was the "administrative and legislative omissions concerning the extensive social agenda in the Constitution."

Let us assume that courts are right in making the normative assumption that proportionality enhances the effectiveness of fundamental rights. The rationale underlying the decisions can be construed as follows. Borrowing the principles-theory variant of proportionality, grounded in the optimization thesis and a wide-scope conception of fundamental rights, is justified in as much as the test helps to enhance the effectiveness of the rights the constitution provides for. As with the weak thesis in general, two premises are at play here. The first, normative, holds that rights ought to be given effectiveness. The second premise, empirical, holds that resorting to proportionality is the best way to do so.

One must nevertheless acknowledge that this rationale poses a “problem of effectivity,” which “is largely concerned with the effect of current measures in the future, that is, with problems of prognosis.”<sup>96</sup> Empirical consequences are very difficult to assess in reality. From where judges stand, they can only hope that the decisions they take will have the beneficial effects to society they were expected to produce in the long run. In the *Healthcare Cases I and II* (2010), for example, it is not impossible that Brazilian justices had foreseen effects that their decisions never actually brought about and ignored others that were in fact produced. In reality, authors who study the constitutional right to health in Brazil have disagreed about how beneficial the judicial approach to this matter has actually been.<sup>97</sup> The existence of such a sharp disagreement suffices to demonstrate that the positive outcomes the STF expected to achieve are neither evident nor irrefutable. But then, the empirical premise on which their rationale was based – that proportionality would in fact enhance the effectiveness of fundamental rights – is highly contestable. As a result, borrowing would still lack justification if judges could only find support for it in the weak thesis.

Even if the empirical premise was true and

(MENDES, Gilmar, New challenges of constitutional adjudication in Brazil, *in*: Brazil Institute (Org.), *Special Reports*, Washington, DC: Wilson Center, 2008).

96 ALEXY, 2010a, p. 310.

97 See, e.g., MACHADO, Felipe Rangel de Souza; DAIN, Sulamis, Health Public Hearing: Issues for the judicialization and to health management in Brazil, *Revista de Administração Pública*, v. 46, n. 4, 2012, p. 1017-1036; Cf. PEPE, Vera Lúcia Edais; SCHRAMM, Fermin Roland, Judicialização da saúde, acesso à justiça e a efetividade do direito à saúde, *Physis Revista de Saúde Coletiva*, v. 20, n. 1, 2010, p. 77-100.

demonstrable, the kind of justification the weak thesis offers would not be fully satisfactory. And the reason for this is normative. As anticipated above, the weak thesis relies on teleological arguments, which are about what is good, not about what is possible.<sup>98</sup> This type of reasons is weaker than the deontological type that supports the moderate and strong theses. Deontological arguments are essentially concerned with correctness, thus, with what is normatively possible, whether everywhere or in a given legal system.<sup>99</sup> In the extreme, the weak thesis would allow one to resort to the proportionality test even if there were no legal conditions for doing so, provided that the desired empirical consequences followed in the end. Nevertheless, to accept that a solution that is legally wrong but socially desired can be declared as lawful by a judge, even a constitutional court, is to deny what Alexy called the *claim to correctness* – that agents acting on behalf of the state must assume that the decisions they make are legally correct.<sup>100</sup> And this assumption has not been disproved yet. Therefore, the weak thesis does not suffice per se. Of course, nothing prevents us from combining it to either the strong or the moderate theses, if they are correct.

## 7 THE STRONG THESIS: IS IT CORRECT?

Alexy postulates that a necessary connection exists between constitutional principles and proportionality. “The nature of principles implies the principle of proportionality and vice versa,” he says.<sup>101</sup> This is the so-called necessity thesis. As explained above, he conceived of such a connection between principles and proportionality as conceptually necessary. I posit instead that the necessity thesis expresses certain normative convictions and can be read as a proposition about a normative necessity. On this account, it is possible to identify three assumptions without which the necessity thesis would not be intelligible as a normative proposition. These normative assumptions are attached to the *optimization thesis*, the *wide-scope conception of fundamental rights*, and the idea of *argumentative representation*.

Alexy admits that, from his conception of

98 ALEXY, 1993, p. 176.

99 *Ibid.*, p. 177.

100 ALEXY, 2010c, p. 38.

101 ALEXY, 2010a, p. 66.

principles as “optimization requirements” arises an obligation to optimize that judges ought to comply with.<sup>102</sup> By the same token, it is plausible to expect that normative obligations will follow from the other two conceptual elements that are distinctive of the principles theory: the *wide-scope conception of fundamental rights* and the *argumentative conception of representation*. The wide-scope conception implies that fundamental rights are externally limitable, but any interference with their scope ought to be justified with recourse to proportionality.<sup>103</sup> The idea of argumentative representation implicates that judicial decisions ought to be legally correct and rationally justifiable,<sup>104</sup> and proportionality “tells us what it is that has to be rationally justified.”<sup>105</sup>

Altogether, these assumptions conduce to a normative conclusion that makes proportionality unavoidable: “to accept principles in a legal system means to conceive of courts as both empowered and obligated to decide, in hard cases, on the basis of balancing.”<sup>106</sup> To put it briefly, the *necessity thesis*, the *identity thesis*, and the *incorporation thesis* make proportionality necessary everywhere, not merely as a concept but normatively. They voice a deontological argument and convey a definitive command addressed to judges. As a result, if a court does not make use of the test when applying constitutional principles and adjudicating on fundamental rights, it fails in its duty to deliver legally correct and rationally justified decisions.

There is, however, an objection to this conclusion that is levelled at the necessity thesis. As I posited above, the connection between principles and proportionality is normative and grounded in (thus, contingent on) basic decisions that every legal system makes about the structure of principles and rights. Principles are not regarded as optimization requirements everywhere, and rights do not necessarily possess wide scope.<sup>107</sup> And only where these conditions are met, proportionality is conceptually necessary. In reality, constitutional framers and interpreters have important choices to make in these matters. Convincing alternative theories exist, which agree with the principles theory on that constitutional

principles are norms, and nevertheless deny that they are optimization requirements. Dworkin is the author of a theory of this type.<sup>108</sup> Additionally, the U.S. constitution provides for fundamental rights, but courts do not treat them as wide-scope rights that can be externally limited to the extent that their core is not violated.<sup>109</sup> Despite some myth surrounding American exceptionalism, the principles-theory variant of proportionality has not found fertile soil to grow in the U.S.<sup>110</sup> The proportionality test does not fit within the local normative arrangement – which means it will not fit other legal systems where framers and interpreters opted for following the American model. And importantly, no one could reasonably classify American legal system as underdeveloped.

## 8 THE MODERATE THESIS: WHY IS IT RIGHT?

The moderate thesis, as I called it, claims that the proportionality test ought to be applied given certain conditions that are system-dependent. The conditions are the same implied by Alexy: the *optimization thesis*, the *wide-scope conception of rights*, and the idea of *argumentative representation*.<sup>111</sup> However, neither are they present everywhere, nor is their absence necessarily a sign of legal underdevelopment. On the whole, the moderate thesis is not necessarily pre-emptive of the principles theory. It does not reject the incorporation thesis, the identity thesis, and the necessity thesis categorically; it can actually incorporate these with certain qualifications.

Particularly concerning the necessity thesis, the moderate thesis can concur with the existence of a necessary connection between fundamental rights and proportionality,<sup>112</sup> provided that,

108 See for instance DWORKIN, Ronald, *Is democracy possible here? principles for a new political debate*, Princeton, N.J.; Woodstock: Princeton University Press, 2008, p. 27.

109 GARDBAUM, Stephen, The myth and the reality of American constitutional exceptionalism, *Michigan Law Review*, v. 107, 2008, p. 419.

110 *Ibid.*

111 ALEXY, 2010d, p. 24; 2005, p. 578 ff.

112 Which means the moderate thesis is not an example of what Alexy calls a “contingency thesis,” according to which “there exists no necessary connection of whatever kind between constitutional rights and proportionality.” See ALEXY, Robert, Constitutional Rights and Proportionality, *Revus*, n. 22, 2014, p. 51.

102 ALEXY, Robert, On the Structure of Legal Principles, *Ratio Juris*, v. 13, n. 3, 2000, p. 300–301.

103 ALEXY, 2010a, p. 210–217.

104 ALEXY, 2005, p. 572.

105 ALEXY, 2010a, p. 107.

106 ALEXY, 2012, p. 329.

107 SCHLINK, 2011, p. 297.



in the legal system under analysis, fundamental rights be regarded as possessing wide scope, wide-scope rights as principles, and principles as optimization requirements. Instead of objecting the necessary connection between optimization and proportionality, the moderate thesis claims that this connection is dependent of specific conditions that may not be present everywhere. Furthermore, the moderate thesis recognizes the *prima facie* priority of institutional reasons over substantial reasons, which coincides with what Alexy says.<sup>113</sup> Finally, the moderate thesis also accords with the principles theory in that legal decisions raise a more limited claim than to be rationally justifiable: that of being “rationally justifiable within the framework of [a] valid legal order.”<sup>114</sup>

Importantly, the moderate thesis endorses neither an extreme cultural relativism nor a rigorous positivism.<sup>115</sup> It does not claim, “the question whether constitutional rights are connected with proportionality depends exclusively [...] on the decisions of [the constitution] framers.”<sup>116</sup> It maintains instead that the conditions for borrowing proportionality, whether established by the constitutional framers or not, are to be seen as cogent by the participants in legal “disputation about what is commanded, forbidden, and permitted” in the system of destination.<sup>117</sup> In this sense, I agree with Beatty: “for the judges, proportionality is grounded in the word and structure and purposes of constitutional texts, not in the jurisprudence they write.”<sup>118</sup> So profound is the impact of system-dependent reasons on the participants in legal discourse, that courts may see the foreign influence as no more than an inspiration for a solution that they could eventually come up with by their own means and with recourse to parochial sources only. It is strikingly illustrative that in a country like Canada, the Supreme Court applies a formula altogether similar to German proportionality without however referring “to foreign antecedents.”<sup>119</sup> This attitude suggests that “the court wishes to present propor-

tionality as a reasoned and sensible approach to the particular problem posed by [the Canadian] Charter rights.”<sup>120</sup>

Alternatively, if proper conditions are not present in the system of destination, the authority engaged in borrowing must imply the existence of normative reasons to change the institutional background in order to accommodate the test. Such occurrences are not unknown to the literature on comparative law. South Africa is an exemplar case in which the constitutional text was partially modelled on the Basic Law of Germany, particularly upon the clause protecting the core of fundamental rights, which contributed to the migration of the German conception of wide-scope rights to that legal system.<sup>121</sup> But while constitutional framers drafting a new constitution enjoy great freedom to decide whether to borrow and from where, the discretion that constitutional courts have is considerably more restricted. Without a doubt, judges can interfere with the development of their legal system, but only with the corresponding legal permission or in compliance with a legal obligation, and up to certain limits.<sup>122</sup> There are constraints courts must operate within without compromising the legal system as a whole and the very source of their own authority.

## 9 CONCLUDING REMARKS

The worldwide spread of proportionality is the result of choices made by local constitutional framers and interpreters. This is essentially what the moderate thesis on the universality of proportionality proposes. The two competing theses were demonstrated either inadequate or insufficient. Differently from what advocates of the strong thesis argue, there is nothing conceptually necessary about the appropriation of proportionality that is not contingent on the three normative conditions implied by the principles theory: the optimization thesis, the wide-scope conception of fundamental rights, and the idea of argumentative representation. The proposition that proportionality logically derives from the structure of principles only holds true where those premises are valid. Hence, one can speak of a ‘normatively conditional universality’ at best, but not of something being ‘conceptually neces-

113 ALEXY, 1993, p. 177. See also ALEXY, 2014, p. 62.

114 ALEXY, 2010b, p. 289.

115 See GONÇALVES, Guilherme Leite, Are we Aware of the Current Recolonisation of the South?, *This Century’s Review: Journal for rational legal debate*, n. 1, 2012, p. 25, on cultural relativism; and ALEXY, 2014, p. 61, on the “positivity thesis” that leads to what I call a “rigorous positivism.”

116 ALEXY, 2014, p. 60–61.

117 See ALEXY, 2010c, p. 25, 35 ff., for more on participants and the participant’s perspective.

118 BEATTY, 2004, p. 176.

119 SWEET; MATHEWS, 2008, p. 118.

120 *Ibid.*

121 GARDBAUM, 2011, p. 390.

122 ALEXY, 2010c, p. 69.

sary everywhere.’

On its turn, the weak thesis was proven to be insufficient. Among its proponents are STF’s justices that have relied on proportionality in the belief that it would enhance the effectiveness of the fundamental rights in the Federal Constitution. But this type of argument raises difficult issues relating to prognosis. In cases involving the right to healthcare in Brazil, for example, whether or not the outcomes were really positive has remained under dispute years after the judicial rulings were pronounced. Furthermore, even in the event that positive results are easily predicable, the weak thesis can only offer a second-order justification for judicial recourse to the proportionality test. For it says nothing about what is legally possible in a given legal system. Only arguments like those deployed by the moderate thesis do. Only they offer adequate and sufficient justification for proportionality.

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## *A controversa universalidade do teste de proporcionalidade e da concepção ampliada do suporte fático dos direitos fundamentais*

### RESUMO

A suposta universalidade dos direitos humanos tem sido objeto de considerável debate entre juristas, mas grande parte da controvérsia gira em torno do conteúdo, e não da estrutura desses direitos. Autores discutem se a liberdade de consciência ou a igualdade entre os gêneros, por exemplo, são ubíquos, sem, no entanto, considerar que ter um direito pode implicar algo significativamente diferente em diferentes sistemas jurídicos, dependendo de como se estruturam esses direitos. Este ensaio questiona a alegada universalidade de um certo modelo de direitos fundamentais. Foca-se aqui na propagação mundial do teste de proporcionalidade e na concepção de direitos fundamentais que subjaz a ele na versão oferecida pela Teoria dos Princípios. Alexy propõe uma tese forte sobre a universalidade de uma certa concepção de direitos (ou princípios) constitucionais. Ele afirma que a proporcionalidade é conceitualmente necessária em todos os sistemas jurídicos minimamente desenvolvidos porque ela decorre da própria estrutura dos direitos fundamentais concebidos como princípios constitucionais e vice-versa. Essa tese forte contrasta com outras teses que tentam justificar por que a proporcionalidade está perto de se tornar língua franca entre cortes e tribunais constitucionais. A tese fraca defende que juízes devem recorrer à proporcionalidade porque, ao fazerem-no, eles garantem maior efetividade aos direitos fundamentais. A tese moderada sustenta que a proporcionalidade pode ser realmente necessária em um sistema jurídico, mas desde que certas condições estejam presentes ali. Essas condições são a concepção ampliada do suporte fático dos direitos fundamentais e seu equivalente no que se refere aos princípios constitucionais: a tese da otimização. Supõe-se aqui que haja alternativas viáveis a essas condições, pois nem todos os teóricos do Direito afirmam que princípios são comandos de otimização, e, em países como os EUA, o suporte fático dos direitos constitucionais é concebido de modo consideravelmente reduzido.

Este ensaio propõe: primeiramente, que não existe evidência de que a proporcionalidade é empiricamente necessária; em segundo lugar, que a tese fraca suscita difíceis problemas de prognóstico; e, finalmente, que uma necessidade conceitual, como a que Alexy supõe existir entre a proporcionalidade e os direitos fundamentais, tem que pressupor uma necessidade normativa, cuja validade depende de certas premissas que são contingentes. Isso demonstra que a tese moderada é a correta, e o modelo de direitos endossado por Alexy não é conceitualmente necessário em todos os sistemas jurídicos, apesar do que sugere sua propagação. Assim, este estudo deve contribuir para os debates acerca da universalidade dos conceitos jurídicos ao iluminar as importantes escolhas que os membros de cada comunidade jurídica e participantes do debate jurídico têm diante de si quando encarregados de formular ou interpretar a própria constituição.

**Palavras-chave:** Proporcionalidade. Universalidade. Teoria dos Princípios. Tese da otimização. Concepção ampliada do suporte fático dos direitos fundamentais.

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