Proportionality in Constitutional and Human Rights Interpretation*

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Abstract

In this article the author, in a context in which principles and the principle of proportionality are at the heart not only of jurisprudence but also of constitutional and human rights interpretation, claims that when there were those ready to raise the hand to declare a unanimous winner, some critics and skeptics appeared. In addition, to the traditional objections, they worry that proportionality invites to doing unnecessary balancing between existing rights, inventing new rights out of nothing at all (in detriment of those already well-established ones), and even worse in doing so balancing some rights away. In order to answer to such objections and to reject them, as well as to reinforce the importance of this development, the author: first, revisits the constitution of principles and of the principle of proportionality, which per definitio contradicts each one of this objections; and, then, restates the constitution of the principle of proportionality as a principle of principles not only in constitutional and human rights interpretation but also in legislation, including constitutional reformation, and adjudication.

Keywords: Interpretation, Principles, Proportionality, Rights.

Resumen

En este artículo el autor, en un contexto en el cual los principios y el principio de proporcionalidad están en el corazón no solamente de la filosofía y teoría del derecho sino además de la interpretación en materia constitucional y de derechos humanos, argumenta que cuando había quienes estaban listos para levantar la mano para declarar a un ganador unánime, algunos críticos y escépticos aparecieron. Aunado a las objeciones tradicionales están preocupados por que en su opinión el principio de proporcionalidad invita a hacer un balanceo innecesario entre derechos existentes, a inventar nuevos derechos de la nada (en detrimento de los ya bien establecidos), y que al hacer el balanceo se pierdan derechos. Para responder a tales objeciones y rechazar las mismas, así como reforzar la importancia del desarrollo, el autor: primero, revisita la constitución de los principios y del principio de proporcionalidad, la cual per definitio contradice cada una de las objeciones; y, luego, reestablece la constitución del principio de proporcionalidad como un principio de principios no sólo en la interpretación en material constitucional y de derechos humanos sino también en la legislación, incluida la reforma constitucional, y en la adjudicación.

Palabras Clave: Derechos, interpretación, principios, proporcionalidad.

[Ex]eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe. 
Exodus 21: 24-5.

Haste still pays haste, and leisure answers leisure; 
Like doth quit like, and measure still for measure. 
William SHAKESPEARE, Measure for Measure (1603).
I. Introduction

Constituting—and even reconstituting—legal principles, in general, and the principle of proportionality, in particular, to the core of legal standards and tests, of legal analysis and reasoning, of legal rationality for short, are major developments in contemporary not only jurisprudence but also constitutional and human rights interpretation for the past at least thirty-five years. These developments coincide with the appearance of several articles of Ronald Dworkin in a coherent and cohesive book, i.e. Taking Rights Seriously, which not only defines and defends a liberal theory of law based on rights but also debunks and displaces the prevailing conception of law as a model of rules and can be characterized as a model of principles.\(^1\)

And so, nowadays, principles, in general, and the principle of proportionality, in particular, not only appear to be quintessential for law but also seem to be ubiquitous: here, there and everywhere. Despite the differences in the national and regional legal systems, principles, especially the principle of proportionality, have transcended the borderlines of countries, at least within the Western Legal Tradition, in both Civil Law and Common Law families, and even have provided a means of reconciling the growing global concerns towards human rights protection with other important local considerations in the process not only of balancing competing rights but also of justifying their limitations.\(^2\)

Moreover, at a time, when principles and the so-called proportionality test—or balancing as it is also known—were at the heart not only of jurisprudence but also of constitutional and human rights interpretation, and there were those ready to raise the hand to declare an unanimous winner, some critics and skeptics appeared—or even reappeared.\(^3\) To the traditional objections regarding the inexistence of principles, its plurality, relativity and subjectivity, their incompatibility, incommensurability and indeterminacy, especially in cases of value conflict, and so on, some now worry additionally that proportionality constitutes “a dangerous and misguided invitation” to doing unnecessary balancing between existing rights, inventing new rights out of nothing at all (in detriment of the already well-established ones), and—even worse—in doing so balancing some rights away, such as human dignity.\(^4\)

Notwithstanding, to answer to such objections and to reject them, as well as to reinforce the importance of this development, I will like first to go back to the basics to revisit the constitution of principles and of the principle of proportionality, which per definitio contradicts each one of this objections by proving them wrong, and then to take the claim one step further to restate the constitution of the principle of proportionality as a principle of principles not only in constitutional and human rights interpretation but also in legislation, including constitutional reformation, and in adjudication.

Accordingly, in the coming section II, I intend following Dworkin to revisit the distinction between rules and principles to emphasize that the former are absolute and applied in an all-or-nothing fashion, whereas the latter are not and do have a dimension of weight. Hence, rules are connected—or link together—in chains of validity and are applied by subsuming the (particular) fact into the one and only applicable (general) rule, whereas principles are interconnected—or hang together—in a unity of value and are applied by balancing the different principles at stake and so proportionality as a principle provides a means to do such balance. Actually, as Robert Alexy has pointed out the nature of principles implies the principle of proportionality and vice versa. Anyway, despite theoretical and practical disagreement, proportionality has become an essential methodological criterion in the interpretation of constitutional and human rights.

In the continuing section III, I pretend to explore not only the manner in which the principle of proportionality — lato sensu, comprising three sub-principles 1) suitability; 2) necessity; and, 3) proportionality—stricto sensu, has been constituted and further developed by the interpretation of some of the national constitutional courts and regional human rights tribunals, in general, but also the mode in which the Mexican Supreme Court, in particular, does apply—or sometimes fails to apply—the balancing criterion.\(^5\) Additionally, the proportionality approach has proven to be extremely useful not only in constitutional and human rights interpretation but also in adjudication and legislation, including constitutional reformation, as a criterion that must be met in order to stand a challenge on its constitutionality.

II. The constitution of principles and of proportionality

The appearance of Dworkin's "The Model of Rules"\(^6\) in 1967 did constitute not only a general attack on legal positivism with H. L. A. Hart's version as its main target by addressing the question on whether law is a system for rules but also an alternative based in
principles, in general, and rights, in particular. In short, he claimed that law was not "a model of and for a system of rules" and
grounded his claim around the fact that when lawyers, legal officials and legal operators "reason or dispute about legal rights and
obligations, particularly in those hard cases where our problems with these concepts seem most acute, they make use of standards
that do not function as rules, but operate differently as principles, policies, and other sorts of standards." 7

As it is widely acknowledged, he characterized legal positivism as "a model of and for a system of rules" and pointed out "its central
notion of a single fundamental test for law forces us to miss the important roles of the standards that are not rules.8 In my opinion,
he criticized explicitly (1) the reduction of legal standards to rules, despite the existence of other legal standards, such as principles,
rights and policies; and (2) the reduction of legal tests to a single fundamental test associated with rules, namely the validity test,
which Dworkin labeled as pedigree test,9 in spite of the existence of other legal tests, associated with other legal standards.

Similarly, I will like to suggest that he also criticized —at least implicitly— (3) the reduction of legal rationality to a single fundamental
level associated with both rules and its validity test, namely the analytical or formal logic, which can be characterized either as
deductive, i.e. from-the-general-to-the-particular, or inductive, from-the-particular-to-the-general, regardless of the existence of other
modes of legal rationality, associated with other legal standards and tests, namely the dialectical or informal/material logic,
which is neither deductive nor inductive but adductive and interpretive.10

Anyway, let me start by reproducing Dworkin's seven-fold strategy, in order to fulfill his immediate purpose of distinguishing
principles (generically) from rules.

(1) He establishes the use of the term "principle" — lato sensu— "to refer to the whole set of legal standards other than rules".11

Basically, following the principles of classical logical reasoning (identity, non-contradiction and excluded middle —principium tertium.
exclusum or tertium non datur) he claims: since a rule must be constant and remain identical to itself to be truly so; since a rule
cannot at a same time be or not-be; and, since the third middle option is excluded. Therefore, regarding legal standards, either they are
—and function as— legal rules or not. In the last case, they are —and function as— legal principles —lato sensu— instead.

(2) He distinguishes between principles —strictu sensu— and policies; and, in so doing, he further stipulates that "policy" is "a kind
of standard that sets out a goal to be reached, generally in an improvement in some economic, political, or social feature of the
community in some goal (though some people are negative, in that they stipulate, as the applicable legal principle: "No one shall be permitted to profit by his own fraud, or to take advantage of his own economic necessities of other... >>.

Let me advance that regardless the fact of being written —or not— into an applicable legal principle: "No one shall be permitted to profit by his own fraud, or to take advantage of his own economic necessities of other... >>.

(3) He exemplifies both cases: "Thus the standard that automobile accidents are to be decreased is a policy, and the standard that
no man may profit by his own wrong a principle".14 The former implies a contingent desirable goal, whereas the latter a necessary
requirement of justice, fairness or morality.

(4) He acknowledges that: "The distinction can be collapsed by construing a principle as stating a social goal (i.e., the goal of society
in which no man profits by his own wrong), or by construing a policy as stating a principle (i.e., the principle that the goal the policy
embraces is a worthy one) or by adopting the utilitarian thesis that principles of justice are disguised statements of goals (securing
the greatest happiness of the greatest number)"15 Although, prima facie there is no problem if the distinction between policies and
principles —strictu sensu— is collapsed falling both into the principles —lato sensu— category, he admits that "in some contexts the
distinction has uses which are lost if it is thus collapsed"16.

(5) He emphasizes that his immediate purpose is to "distinguish principles in the generic sense from rules" and starts by collecting
some concrete examples of the former, namely the already famous cases of Riggs v Palmer,17 also known as Elmer's case, in which
a New York court had to decide whether a heir named in the will of his grandfather could inherit under that will, even though he had
murdered his grandfather to claim the inheritance; and, Henningens v Bloomfield Motors, Inc., 18 in which a New Jersey court had to
decide whether (or how much) an automobile manufacturer may limit his liability in case the automobile is defective. Both cases
were aimed to suggest that the standards applied and quoted in them "are not of the sort we think of as legal rules".19 In Riggs the
court denied the murdered a right to inherit and quoted a variant of the Latin adagio alter non laedere (i.e. "do not hurt/wound
another")20 as the applicable legal principle: "No one shall be permitted to profit by his own fraud, or to take advantage of his own
wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime"21. In Henningens, the court denied the
manufacturer a right to limit his liability and, at various parts, quoted as applicable different legal principles, among them "<cf>there
any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the
courts will not permit themselves to be used as instruments of injustice and inequality?"22 And "<cf>More specifically the courts
generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the
economic necessities of other... >>.23

(6) He quotes as examples of legal rules, propositions like "The maximum legal speed on the turnpike is sixty miles an hour" or "A
will is invalid unless signed by three witnesses".24 Let me advance that regardless the fact of being written —or not— into an
authoritative legal source, an article in a legislative statute or a ruling in a judicial decision, and even of using the same or similar
concepts and words, propositions designating legal rules are different from those referring to legal principles and can be
distinguishable one from another, due not to their form but to their function.24

(7) He proceeds, finally, to suggest: "The difference between legal principles and legal rules is a logical distinction. Both sets of
standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the
direction they give".25 Let me clarify that the meaning of the "character of the direction they give" is simply the "nature of the dictate
or directive given" and so must be understood.

In what follows, I will try to explain succinctly, according to Dworkin, the ways in which legal principles and legal rules do differ
regarding the "nature of the dictate or directive given". As he states legal rules: "are applicable in an all-or-nothing fashion. If the
rule a fact stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or is not, in
which case it contributes nothing to the decision".26

First of all, in order to be applicable, rules must be valid. In other words, either a rule is valid or it is not truly a rule, i.e. not valid or
invalid. Secondly, only after we have gathered or get to know the relevant facts of case, a rule —which by definition is valid— is
either applicable or not to the case at hand. In that sense, it either contributes to the decision and hence the answer supplied must
be accepted and applied, or it does not and so must be rejected and not applied without necessarily ceasing to be valid.
Furthermore, a rule is by definition valid and must be applicable to the case at hand if the facts fall within the given dictate or directive, but it "may have exceptions". In this order of ideas, following the Latin maxim "Exceptio probo! regulam in casibus non exceptis", i.e. "exception confirms the rule in the cases not excepted", I will like to suggest that since the exception probes not only the existence of the (general) rule but also that it is valid and applicable to the cases expected. The fact that exceptions are applicable to unexpected cases or even to certain deviations of the expected cases, some of which might already have been expected, regardless of being made explicit or not, does not mean that the rule is neither valid nor applicable to expected cases that fall within its realm. Analogously, the fact that general rules are applicable to the expected cases does not mean that the exception is neither valid nor applicable to unexpected cases or even to certain deviations of the expected cases.

Take Dworkin's examples into account: "In baseball a rule provides that if the batter has had three strikes, he is out." Indeed, if a batter has had three strikes, according to the authoritative decision of the official, i.e. umpire, he is out. Unless he falls into an exception to the rule such as "the batter who has taken three strikes is not out if the catcher drops the third strike". Imagine that "the batter has had three strikes" and "the catcher drops the third strike": in the particular case at hand, if the batter has had three strikes as the general rule dictates, it must be concluded that he is out, but since the catcher dropped the third strike as the exception directs, it must be concluded that he is not out, but the rule is still in effect: valid and applicable to cases expected to fall within its reach (the batter has had three strikes and the catcher did not drop the third strike) and not applicable to unexpected cases or to deviations of the expected cases (such as the catcher dropping the third strike).

It is clear not only that both a rule and its exception are valid or they truly are neither a rule nor an exception but also that they are applicable or not in an all-or-nothing fashion: it is either applicable or not. However, let me explicit some of the implications: first, the rule is applicable or not; second, the exception is applicable or not; third, if the rule is applicable, then the exception is not applicable; fourth, if the exception is applicable, then the rule is not applicable; fifth, the rule and the exception cannot be applicable at the same case and time, either the one is applicable and the other not or both are not applicable.

What's more, according to Dworkin: "If two rules conflict, one of them cannot be a valid rule. The decision as to which is valid, and which must be abandoned or recast, must be made by appealing to considerations beyond the rules themselves. A legal system might regulate such conflicts by other rules, which prefer the rule enacted by the higher authority [lex superior], or the rule enacted later [lex posterior], or the more specific rule [lex specialis], or something of that sort [lex injuncta, locus regit actum]. A legal system may also prefer rules enacted by the more important principles [in dubio pro homine/personae/reo]. For this reason, in case of conflict between two —or more— rules, both rules cannot be or remain valid and applicable to the same case, to the extent that either one of them must be abandoned or reformulated. In that sense, it is clear that rules are valid or not in an absolute manner: it is either valid or not (if invalid it is not longer a rule); but also that rules are applicable or not in an all-or-nothing mode: it is either applicable or not (but still a valid rule).

On the contrary, it can be claimed in a simple straightforward form that legal principles —lato sensu—are simply not legal rules, but let me try to explicit why it is the case and why they do not function alike. First of all, legal principles' validity is absolute, in the sense that they are always valid and hence cannot cease to be valid, as rules do. By the same token, legal principles' applicability is relative in the sense that they are not applicable in an all-or-nothing fashion, as rules do. In sum, although the validity of legal principles is absolute, it is their applicability that is relative, i.e. more or less applicable, as Dworkin pointed out they "have a dimension that rules do not —the dimension of weight or importance".

As a consequence, of their dimension, of weight which grants them value and their validity, principles cannot cease to be valid and do not have exceptions as rules do, but have instances and counter-instances, which sometimes appear as counter-principles, all of which are valuable and so already valid. In Dworkin's own voice: "We say that our law respects the principle that no man may profit from his own wrong, but we do not mean that the law never permits a man to profit from wrongs he commits. In fact, people often profit, perfectly legally, from their own wrongs.

After citing several counter-instances to the principle that "A man may not profit from his own wrong", such as adverse possession, he adds: "We do not threaten these —and countless other counter-instances that can easily be imagined— as showing that the principle about profiting from one's wrongs is not a principle of our legal system, or that it is incomplete and needs qualifying exceptions. We do not treat counter-instances as exceptions (at least not exceptions in the way in which a catcher's dropping the third strike is an exception) because we could not hope to capture these counter-instances simply by a more extended statement of the principle. It is not as in the case of legal rules that the more complete the statement of the rule is the better.

Another consequence of their weight dimension is that principles do not conflict as rules do and more precisely the conflict of principles is not solved as that of rules by either abandoning or recasting it, since principles are valuable and so already valid. Let me recall, Dworkin assertion: "When principles intersect (the policy of protecting automobile consumers intersecting with principles of freedom of contract, for example), one who must resolve the conflict has to take into account the relative weight of each. This cannot be, of course, an exact measurement, and the judgment that a particular principle or policy is more important than another will often be a controversial one. Nevertheless, it is an integral part of the concept of a principle that it has this dimension that it makes sense to ask how important or how weighty it is". Since rules do not have this weight dimension, we cannot speak of rules being more or less important within the system of rules, because they are all of equal importance: substantial or procedural, public or private, constitutional or criminal rules all alike are not only of equal importance but also equally valid. Although as Dworkin admits "We cannot speak of rules as being outranked (the baseball rule that three strikes are out is outranked by the rule that runners may advance on a balk, because the game would be much more changed with the first rule altered than the second). In this sense, one legal rule may be more important than another because it has a greater or more important role in regulating behavior. But we cannot say that one rule is more important than another within the system of rules, so that when two rules conflict one supersedes the other by virtue of its greater weight".

Let me try to explicit, a couple more of consequences associated with the fact that principles do have weight and rules do not.

First, whereas principles are weighty and more or less important, rules are not weighty but equally important since they are valid and are connected or link together in chains of validity. For a rule to be applied it is necessary to be valid and for that purpose it is sufficient to pass a single fundamental test associated with rules, i.e. a validity test or pedrigree test as Dworkin labeled it, which basically requires an uninterrupted chain of validity linking the applicable rule to the more basic or fundamental ones. However, principles are interconnected or hang together in a unity of value (and so of validity) and for a principle to be applicable, since by definition associated to its weight it does have value and so it is already valid, it is necessary to be called upon and whenever that it is the case, its applicability is decided not on a mere applicative-deductive mode but in an argumentative-interpretive one.
There may be other principles or policies arguing in the other direction... If so, our principle may not prevail, but that does not mean that it is not a principle of our legal system, because in the next case, when these contravening considerations are absent or less weighty, the principle may be decisive. All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another.

In that sense, rules are conclusive in an all-or-nothing fashion. They are applicable or not; and, in the event of a conflict, they are abandoned or reformed, in order to become a new general rule or an exception to one. But—as Dworkin suggests—"Principles do not work that way; they incline a decision one way, though not conclusively, and they survive intact when they do not prevail." Since principles are relative or non-conclusive and do have (more or less) weight and counter-weight it is clear that legal analysis or reasoning—in the case of legal principles—cannot be reduced to a mere applicative-deductive mode, but to an argumentative-interpretable mode characterized by balancing the different principles and counter-principles at stake—or their weight and counter-weight.

In sum, regarding applicability, rules are absolute or conclusive and applied in an all-or-nothing fashion, whereas principles are relative or non-conclusive and more or less applicable or relevant due to its dimension of weight—and counter-weight. Hence, principles do not admit or have exceptions but instances—and counter-instances—pointing in one direction or another and whenever they appear to be in conflict—or in competition, collision or crashing—since they cannot be abandoned or reformed and much less overruled, a form of “balancing” comes and must come into play to work it out.

In that sense, Robert Alexy argues: "The nature of principles implies the principle of proportionality and vice versa". In addition, he clarified: "That the nature of principles implies the principle of proportionality means that the principle of proportionality with its three sub-principles of suitability, necessity (use of the least intrusive means), and proportionality in its narrow sense (that is, the balancing requirement) logically follows from the nature of principles; it can be deduced from them". And, finally, cited the German Federal Constitutional Court as stating that "the principle of proportionality emerges 'basically from the nature of constitutional rights themselves'".

Let me emphasize that the balancing test is identified with a principle itself, i.e. the principle of proportionality—lato sensu. It is a principle that can be implied by the very same nature of principles and as such constitutes a principle of principles for at least two reasons. First, it provides a means to control the (strong) discretion of lawyers, legal officials, and operators associated with the cases in which apparently the rules have run out and the only option at which their application is either to create a new rule or to recast the existing one to fit the case at hand, with the corresponding violation of legal principles such as legal certainty and security, legality and normativity, so on and so forth. Second, it also provides a means to direct the activity of a legislative authority, regardless of its name and nature, especially in complex modern societies characterized by the creation—or recognition—of legal standards other than rules such as principles and policies into the legal system, which most probably will conflict. Please consider the possibility of legal authorities not only having to realize certain principles in the form of both rights and policies but also having to recognize certain limits to such rights and policies. Those limitations and restrictions must be legitimate and as such justifiable and reasonable to stand a challenge on their constitutionality, and a hint on whether they will be upheld or not can be found in the principle of proportionality itself. In short, let me advance the thesis of proportionality as a principle of principles for both legislation and adjudication, especially on constitutional and human rights interpretation, as we will see in the following part.

III. The principle of proportionality in constitutional and human rights interpretation

As we have already seen, in Germany, the German Federal Constitutional Court has recognized not only the existence of the principle of proportionality but also the fact that it emerges from the nature of constitutional (and human) rights themselves, despite lacking an express formulation. Analogously, in Canada, the principle of proportionality emerged from the decision of the Canadian Supreme Court in R. v Oakes and has been developed further in following decisions, to the extent that its influence can be traced not only in New Zealand, South Africa, Israel, Zimbabwe and the United Kingdom but also in the European Court of Human Rights and in the Inter-American Court of Human Rights. Actually, it can be said that the Oakes test has been influenced by them as well to the extent that it has to be measured against three sub-criteria: the means used to limit the right must be rationally connected to the objective sought; the right must be impaired as little as possible to achieve the objective; and finally there must be proportionality between the effect of the limitation upon the right and the objective achieved by that limitation.

Similarly, to Canada and Germany, the principle of proportionality appeared in Mexico explicitly for the first time in the dissenting opinion of a minority of four out of nine justices of the Mexican Supreme Court that decided in April 20, 2004 the Amparo en Revision 543/2002 on whether the distinction introduced by the legislative in the article 68 of the Ley General de Población (i.e. a general bill regulating not only migration but also nationality and foreign status) was constitutional or not by requiring an "authorization" from the migration authority whenever a national intended to marry a foreigner in the Mexican soil on the ground of being discriminatory and as such an unequal treatment against the third paragraph of article 1 of the federal Constitution, which prohibits discrimination. The argument at the core of the dissenting opinion runs as follows:

"Thus it is necessary to determine, first of all, whether the distinction introduced by the legislative follows an objective and constitutionally valid purpose. It is clear that the legislator cannot introduce unequal treatments in an arbitrary fashion, but must do it with the purpose of advancing the consecution of constitutionally valid objectives, that is admissible within the boundary limits of the constitutional provisions, or expressly included in such provisions.

In second place, it is necessary to examine the rationality or adequacy of the distinction introduced by the legislator. It is necessary that the introduction of the distinction constitutes an apt means to conduce to the end or objective that the legislator wants to achieve. If the relation of instrumentality between the class fictary measure introduced by the legislator and the end pretended to be achieved is not clear, or the conclusion reached is that the measure is simply inefficacious to conduct to the pretended end, it will be obligatory to conclude that the measure is not constitutionally reasonable.

Thirdly, the requisite of proportionally of the legislative measure must be met: the legislator cannot try to achieve constitutionally legitimate objectives in an openly disproportionate way, but must guarantee an adequate balance between the unequal treatment granted and the purpose followed. It is of course beyond the competence of the Supreme Court the duty to examine in the exercise of its functions, the appreciation on whether the distinction realized..."
by the legislator is the more optimal and opportune measure to reach the desired end; that will require applying criterion of political opportunity that is totally out of the jurisdictional competence of the court. Such competence is limited to determine whether the distinction realized by the legislator is within the spectrum of treatments that may be consider proportional to the fact situation at stake, the purpose of the law, the rights affected by it, with independence that, form certain points of view, one may be consider to be preferable to others. What the constitutional guarantee of equality requires is that, in definitive, the achievement of a constitutionally valid objective is not made to the cost of an unnecessary or unlimited affection of other constitutionally protected rights.

According to the minority the triple criterion of objectivity, rationality and proportionality was not met and therefore the legislative act must have been ruled unconstitutional instead. It is also worth to mention that previously to this decision, in September 17, 2003 the Inter-American Court of Human Rights in its Consulting Opinion 18/03 on the legal condition and rights of undocumented immigrants argued that distinctions granting a differentiated treatment are not prohibited per se, and that such distinctions must be justified or legitimated, whenever admissible and relevant, in virtue of meeting the criteria of being objective, rational and proportional.

Regardless of the differences between the Canadian, German and Mexican —via Inter-American Court of Human Rights— approaches, the principle of proportionality —lato sensu— and its sub-criterion of proportionality —strict sensu, i.e. there must be a necessary balance or proportion between the limitation of a right and the objective achieved by such limitation, is nowadays generally present all over the board. What's more in the United States of America, where the different levels of scrutiny approach — rational basis scrutiny, intermediate scrutiny and strict scrutiny— is employed depending on the interest at stake and how "fundamental" the right in question is considered to be. It has been argued by justice Stephen Breyer, in his dissent in the Supreme Court's decision in District of Columbia v. Heller, that proportionality was the preferable approach to scrutinizing legislation limiting the Second Amendment right to bear arms and he even noted that the proportionality approach has been "applied... in various constitutional contexts, including election law cases, speech cases, and due process cases". In that sense, justice Breyer is not only advocating for extending the balancing of the intermediate scrutiny —which has a striking resemblance with the proportionality approach— to strict scrutiny cases but also arguing for making it the central method for the protection of rights and the justification of its limitations, in the United States.

Finally, let me turn back to the Mexican cases. Firstly, to a case that reinforces the adequacy of proportionality approach —or intermediate scrutiny— over the strict scrutiny in constitutional rights adjudication and interpretation; and, secondly, to a series of controversial legislative reforms, which have already stand the challenge of its constitutionality, due to the fact that they were drafted and enacted considering the principle of proportionality by means of comparative legal interpretation of local or national courts and regional or international tribunals all over the globe.

On the one hand, in October 5, 2005, the First Chamber of the Mexican Supreme Court decided —by a majority of three out of five justices—the controversial Amparo en Revisión 2676/2003, well known as Caso Bandera (i.e. Flag Case) or Caso del Poeta Maldito (i.e. Wicked Poet Case). To make a long story short: A poet, i.e. Sergio Heinrich Witz Rodriguez, who was charged with the federal crime of "ultraje a los símbolos patrios" (i.e. insulting the national symbols), by writing a poem in which he used the word "bandera" (i.e. flag), and said disgusting and offensive things —not necessarily disrespectful but critical from my point of view— petitioned the federal authority for an Amparo, by challenging the constitutionality of the article 191 of the Código Penal Federal (i.e. Federal Criminal Code), on the basis of the federal Constitution guarantee on article 6 to protect freedom of speech as long as it does not constitute an "attack to morals, [or] third-party rights, incite a crime, or disturb the public order".

Since the Constitution contemplated explicitly certain limits to the freedom of speech, the majority merely subsumed the disgusting and offensive —for them even disrespectful— reference in a poem to a national symbol as an attack to the morals of the community, and denied the Amparo considering it a legitimate constitutional limitation. On the contrary, with the proportionality approach, the Court must have to carefully analyze whether it was proportional to criminalizing the disgusting and offensive reference in a poem —or any other form of speech— to a national symbol such as the flag when it is done in an arguably disrespectful way, or it was required that such reference indeed attacked the morals or third-party rights, incite a crime, or disturbed the public order.

In the dissenting opinion, the minority starts by quoting the Consulting Opinion 5/85 of the Inter-American Court of Human Rights, dated November 13, 1985, to establish a direct link between the freedom of speech and a democratic society, and continues by stressing that the right to a freedom of expression is not merely a right to speak but a right to a free speech: "The freedom of expression, in other words, protects the individual not only in the manifestation of the ideas shared with the great majority of the fellow citizens, but also of unpopular, [and] provocative ideas or, even, those that certain sectors of the citizenry consider offensive." Furthermore, continues "Any legislative act containing a limitation to the rights of free speech and press, with the intention of concretizing the constitutional limits foreseen must, therefore, thoroughly respect the requisite that such concretion is necessary, proportional and of course compatible with the constitutional principles, values and rights." In addition, considers that the legislative action criminalizing speech-making reference to the national flag "goes well beyond any reasonable understanding of what can be estimated to be covered by the necessity of preserving the public morality. A crime so conceived affects directly the nucleus protected by the freedom of speech, which contains, as has been pointed out before, the freedom to express freely convictions in any matter, and in a special way in political matter". What's more concludes not only that it includes a dis proportional effect:

The effect of the article under exam is to compel the individuals not to dispute, in any event, certain political convictions, and not simply to secure the protection of the nucleus of moral convictions about right and wrong, basic and fundamental, of a society, making nugatory the fundamental right to a free expression and the basis of political pluralism that our Constitution guarantees at the most higher level.

But also that there are other less intrusive means to pursue the legitimate concern of promoting nationalism and respect for the national symbols such as the flag:

What the State can do via education, cannot be done through a more virulent and delicate instrument —criminal law— when is directed, besides, not to groups that have with the State a special relation of subordination (such as military or public civil functionaries) but to the common citizen, and what is at stake is preserving some kind of meaning to the constitutional fundamental rights to express and publish writings in a free way.

In sum, the minority concludes:

Hence, we are against the decision supported by the majority. What did correspond to determine as First Chamber of the Supreme Court, we cannot forget, is not whether mister Witz wrote a good or bad poem, or whether we will say about the national flag, did he petition us to determine is whether life of a person has a right to say in Mexico without suffering a criminal prosecution that marks his/she for life and that may take him/her into jail. What did correspond to us, in definitive, was to guarantee the scope for the protection of a fundamental right and to issue a
most common and popular instantiations of the principle of proportionality, in which a limitation or restriction on any right, say liberty as a principle of principles for both legislation and adjudication, especially on constitutional and human rights interpretation, by Finally, to conclude, let me reinforce the adequacy of the balancing or proportionality test, as well as of the thesis of proportionality

IV. Conclusion

Finally, to conclude, let me reinforce the adequacy of the balancing or proportionality test, as well as of the thesis of proportionality as a principle of principles for both legislation and adjudication, especially on constitutional and human rights interpretation, by pointing out its close relationship with John Rawls’ difference principle. As it is well-known, the difference principle is one of the most common and popular instantiations of the principle of proportionality, in which a limitation or restriction on any right, say liberty

Despite the majority ruling, there is a clear parallel between this case and the United States of America Supreme Court’s flag-burning cases of Texas v Johnson striking down a conviction under Texas flag-burning local statute; and United States v Eichman striking down a federal statute that imposed criminal sanctions on someone who “knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States”. In the former, Justice Anthony Kennedy in a concurring opinion noted: 60

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision.

In the latter, the Supreme Court noted that protection for “expression of dissatisfaction with the policies of this country [is] situated at the core of our First Amendment values”. 61

On the other hand, the Legislative Assembly of Mexico City has enacted in the recent past some controversial legislative reforms: (1) allowing the interruption of a pregnancy in the first twelve weeks, i.e. a first trimester abortion, following the well-know Roe v Wade three-trimester criteria; and (2) allowing gay-marriages and recognizing their right to adoption, after allowing civil unions, under the label of sociedades de convivencia (i.e. cohabitating societies), and resistance by administrative legal officials to grant them the right to adoption. Besides, it is actually discussing the necessity of (3) regulating the possibility of uterus’ surrogating at the local level, but is also analyzing the possibility of presenting an initiative at the federal level.

Both (1) and (2) have already being constitutionally challenged and did stand such challenge. On one side, a propos of (1) the Mexican Supreme Court decided the Acciones de Inconstitucionalidad 146/2007 and 147/2007 with a majority of eight out of eleven justices in August 28, 2008. As the Chief Justice—who by the by was in the minority—clarified in a speech communicating the decision to the society:

The resolution of the Supreme Court of Justice of the Nation neither criminalizes nor decriminalizes abortion.

It is neither an attribution of this Constitutional Tribunal to establish crimes nor sanctions.

We did determine the constitutionality of a norm approved by the representative body, and in this particular case, did participated in a definition of national transcendence.

Among the reasons to uphold the legislative reforms was mainly the consideration that the human life protected implicitly by the Mexican Constitution and explicitly by the American Convention on Human Rights, stated that the protection of life starts with the conception, in general, and hence that as an exception it could be stipulated differently by state parties. In this case, until after the first twelve weeks period of a pregnancy and by giving proportional priority to several other competing rights at stake, such as the human life of the women seeking an abortion and her right to health which will be impaired if she has to practice a dangerous and unsafe clandestine (illegal) abortion procedure; her freedom to choose whether to carry a pregnancy to term or not; and —in my opinion— to some extent a right to (her) privacy. In addition, the transcendence of the decision and its legal and social effects is out of question. What’s more sparked also in the local-state level the enactment of at least 17 anti-abortion state constitutional reforms and/or statutes, some of them with a dubious constitutionality.

On the other, as regards of (2) the Mexican Supreme Court started to discuss the Acción de Inconstitucionalidad 2/2010 in August 3, 2010. In the following sessions of August 5, 10 and 16 resolved: first, with a majority of eight out of ten justices, the constitutionality of the same-sex marriage; second, with a majority of nine out of eleven justices, the recognition of its effects in all the country; and, third, also with a majority of nine out of eleven justices, the constitutionality of their right to an adoption.

In short, the Legislative Assembly of Mexico City, first, decided to recognize the so-called civil unions, under the label of sociiedades de convivencia, as not doing it will have a disproportionate effect on de facto unions of gays and lesbians by denying either legal rights or legal obligations to their homosexual partners, which heteroexuals do enjoy or have. And, later, faced with the fact that administrative legal officials refused to grant same-sex couples the right to adopt, resolved not only to modify the label to the full-bodied same-sex marriage but also to explicitly recognize their right to adopt, because not doing so will also have a disproportionate effect on homosexuals by denying a right that heterosexuals do enjoy. In that sense, Mexico City legislators recognized twice the principle of proportionality as a guideline for the use of its legislative power. Actually, if the action of administrative legal officials refusing to grant same-sex couples the right to adopt were to be constitutionally challenged, the Supreme Court of Mexico most probably would find it to have a disproportionate effect and so to be unconstitutional by violating the principle of proportionality.
or equality, must be proportional, in order to be justified or legitimated, such as in the case of permitting differences as long as they are in benefit of the less-advantaged or worse-off members of society, such as those contemplated in some affirmative action programs. Nonetheless, it must be provided that they do not deny the existence and exercise of a legal principle or right because the limitations and restrictions are and must remain proportional, granting to the principle of proportionality its principle of principles constitution.

Notas

* Revised version of the paper prepared for the Symposia Proportionality in Law, University of Western Ontario, London, Ontario (Canada), October 22-23, 2010. [Links]

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5 By the by, in my opinion, it is precisely when courts fail to apply the proportionality test that rights fade away and not the other way around when they do apply it.


7 Ibidem, p. 22.

8 Idem.

9 Ibidem, p. 17.

10 Vid. infra note 41 and its accompanying text.

11 Dworkin, Taking Rights Seriously, cit., p. 22.

12 Idem.

13 Idem.

14 Idem.

15 Ibidem, pp. 22-23.

16 Ibidem, p. 23.

17 115 N.Y. 506, 22 N.E. 188 (1889).


20 The Roman emperor Iustinian emphasized the existence of three main legal principles considered as “preecepta iuris” (i.e. “legal precepts”): “honeste vivere” (i.e. “to live respectfully/truthfully”); “alter/um non laedere” (i.e. “to not hurt/wound another”; and, “ius suum quique tribuere” (i.e. “to give everyone his/her due”).

21 115 N.Y. at 511, 22 N.E. at 190.

22 32 N.J. 358, 161 A.2d at 86 (quoting Frankfurter, J., in United States v Bethlehem Steel, 315 U.S. 289, 326 [1942]).


26 Idem.

27 Idem.
In the event that both a rule and its exception(s) are not applicable to a case at hand, lawyers, legal officials and legal operators will have to look for another legal standard applicable, which can be either a rule or not, i.e. a principle — lato sensu. The answer to the question whether they have to create a new legal rule or to apply an existing legal principle, as well as the distinction between strong discretion and weak discretion, will remain largely unexplored at this time. Vid. Hart, H. L. A., The Concept of Law, Oxford, Oxford University Press, 1961, p. 124 (there is 2nd ed. with "Postscript", 1994, p. 127); [Links] Dworkin, Taking Rights Seriously, cit., pp. 31-9 and 68-71; and Waluchow, Wilfrid J., Inclusive Legal Positivism, Oxford, Oxford Oxford University Press, 1994. [Links]

Dworkin, Taking Rights Seriously, cit., p. 27.


Although some authors, like Robert Alexy, consider that principles cannot conflict, but collide with, compete with or crash into one another. The merits or demerits of the distinction between conflict and collision, competition or crash will remain unexplored at this point, and will be use interchangeably. Vid. Alexy, A Theory of Constitutional Rights, cit., pp. 50-4.


Dworkin, Taking Rights Seriously, cit., p. 27.

"rules can be identified and distinguished by specific criteria, by tests having to do not with their content but with their pedigree or the manner in which they were adopted or developed".


Idem. [Footnote is omitted].

Idem. [Footnote is omitted].

Alexy, A Theory of Constitutional Rights, cit., p. 66.

Idem (footnote is omitted).

Idem. Vid. BVerfGE 19, 342 (348 f.); 65, 1 (44).


The contrast between the Canadian and German approaches will remain largely unexplored at this time, vid. for example, Dieter Grimm, "Proportionality in Canadian and German Jurisprudence", University of Toronto Law Journal, Vol. 57, No. 2, 2007, pp. 383-97. [Links]


In my opinion, the criteria were met. However, the importance of the case does not rely on the ruling itself but in the recognition of the principle of proportionality.
Since the minority is careful in justifying its decision as within its judicial competence and not as an invasion or usurpation of the legislative one, I will like to seize the opportunity to introduce a distinction between two types of judicial activism: (1) interpretative, and (2) inventive—or legislative. The first is admissible and thus must be encouraged as a form of a proper judicial function; and, the second is not admissible and so must be discourage as a form of an improper judicial invasion or usurpation of the legislative function. Vid. Flores, Imer B., "Legiprudencia: The Forms and Limits of Legislation", Problema. Anuario de Filosofía y Teoría del Derecho, No. 1, 2007, pp. 247, 257-260; [Links] and Flores, Imer B., "Legiprudencia: The Role and Rationality of Legislators—vis-à-vis Judges—towards the Realization of Justice", Mexican Law Review, Vol. 1, No. 2, 2009, pp. 91, 100-106. [Links] Vid. also Dworkin, Law's Empire, cit., p. 66: "The justification need not fit every aspect or feature of the standing practice, but it must fit enough for the interpreter to be able to see himself as interpreting that practice, not inventing a new one." Dworkin, Justice in Robes, cit., p. 15: "Any lawyer has built up, through education, training, and experience, his own sense of when an interpretation fits well enough to count as an interpretation rather than as an invention”.

54 CO-18/03 (2003), paragraph 84.
56 Idem, at 2851.