

THE PRINCIPLE OF PROPORTIONALITY: THE CHALLENGES OF HUMAN RIGHTS

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The purpose of the present paper can be synthesized in the following points: a) to expose the concept of the principle of proportionality in its broadest sense and its different components or dimensions; b) to draw the attention to an approach which is usually not studied by authors, that is, the fact that the application of the principle is not enough to guarantee the supremacy of the human rights, at least in some cases; c) lastly, to point out those requirements that could protect proportionality from the risk mentioned in b).

I. INTRODUCTION: THE PRINCIPLE OF PROPORTIONALITY AND ITS DIMENSIONS

For the last twenty years, constitutional courts have applied the principle of proportionality as a procedure that aims to guarantee the full respect of human rights (or fundamental rights) by the state. This principle is applied in both civil law and common law systems, in countries such as the United States, Argentina, Germany, Great Britain, Spain, Italy, France, Belgium, Denmark, Ireland, Greece, Luxemburg, Holland, Portugal, and Switzerland, just to mention a few; and also by the European Court of Human

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Rights, the Inter-American Court of Human Rights and the European Court of Justice.¹ It has been correctly said:

the parameter of rationality—a problematic restoration of the *rationabilitas* in the medieval juridical culture—can be recognized in the constitutional jurisprudence of the vast majority of the liberal-democratic systems of our days. No matter what its shades are, this is the question about the “reasonable basis” of the differentiation in the doctrine of the American Supreme Court, that of “reasonable justification” which is put forth by the Federal Supreme Court of Switzerland; the criteria of “non arbitrariness” which, following the thinking of Leibholz, is used by the Constitutional Court of Germany, or the rule of *ragionevolezza*, which became a general principle of law by the ruling of the Italian Constitutional Court (sentence 81, 1963). Among us, the criteria of “reasonableness” of normative differentiations introduced by the legislator was

1. See JÜRGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW 680-702 (1992); NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW (1996); Michael Akehurst, *The Application of General Principles of Law by the Court of Justice of the European Communities*, 1981 BRIT. Y.B. INT'L L. 29, 38-51 (U.K.); Sophie Boyron, *Proportionality in English Administrative Law: A Faulty Translation?*, 12 OXFORD J. LEGAL STUD. 237 (1992) (U.K.); Javier Barnes, *Introducción al principio de proporcionalidad en el derecho comparado y comunitario*, 135 REVISTA DE ADMINISTRACIÓN PÚBLICA 495, 495-99 (1994) (Spain); George A. Bermann, *The Principle of Proportionality*, 26 AM. J. COMP. L. (SUPP.) 415 (1978); Guy Braibant, *Le principe de la proportionnalité*, in MÉLANGES OFFERTS À MARCEL WALINE 297 (1974); Jean-Marie Auby, *Le contrôle juridictionnel du degré de gravité d'une sanction disciplinaire*, REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET À L'ÉTRANGER, janvier-fevrier 1979, at 227-238 (Fr.); JUAN FRANCISCO LINARES, RAZONABILIDAD DE LAS LEYES (2d ed. 1989); JUAN CARLOS GAVARA DE CARA, DERECHOS FUNDAMENTALES Y DESARROLLO LEGISLATIVO 293-326 (1994); ROBERT ALEXY, TEORÍA DE LOS DERECHOS FUNDAMENTALES 111-112 (2d ed. 2001); WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929); Anna N. Georgiadou, *Le principe de la proportionnalité dans le cadre de la Jurisprudence de la Cour de Justice de la Communauté Européenne*, 81 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 532 (1995) (Ger.); and Javier Jiménez Campo, *La igualdad jurídica como límite al legislador*, 1983 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL, no. 9, at 71, 72 (Spain).

invoked by the Constitutional Court, following, in part, those jurisprudential orientations.²

In the common law systems, the principle is usually called “principle of reasonableness.”³ In those places, it is possible to find court decisions in which the principle is applied not only in constitutional issues but also in civil law, administrative law, criminal law, etc.

The principle of proportionality prescribes that all statutes that affect human rights should be proportionate or reasonable. The analysis of proportionality is made up of three sub-principles: adequacy, necessity, and proportionality *stricto sensu*.

The first sub-principle is that of adequacy, which establishes that the statute which affects a human right must be suitable to achieve the purpose that was sought by the lawmaker. That is to say, once the interpreter has defined the end that the legislator aimed for and the means that the legislator has designed to obtain such end, then the interpreter must verify if the means are capable of achieving such end.

Through the second sub-principle, the interpreter evaluates if the lawmaker has chosen, among the means capable of obtaining the desired end, the one which is the least restrictive of the human

2. Jiménez Campo, *supra* note 1, at 73. The importance of proportionality is so big that it has been said to be “the most important general principle of the communitarian law.” SCHWARZE, *supra*, at 677 (quoting Jürgen Gündisch, *Allgemeine Rechtsgrundsätze in der Rechtsprechung des Europäischen Gerichtshof, in DAS WIRTSCHAFTSRECHT DES GEMEINSAMEN MARKTES IN DER AKTUELLEN RECHTSENTWICKLUNG* 97, 108 (Institut für Integrationsforschung ed., 1983) (Ger.)).

3. However, in some cases it is called “proportionality.” See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2852 (U.S. 2008) (Breyer, J., dissenting). See also *Roper v. Simmons*, 543 U.S. 551 (2005); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Tennessee v. Lane*, 541 U.S. 509 (2004); *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Virginia v. Hicks*, 539 U.S. 113 (2003); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

The references to the idea of “reasonableness” are very common and frequent. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). See also *Smith v. City of Jackson*, 544 U.S. 228 (2005); *Muehler v. Mena*, 544 U.S. 93 (2005); *Illinois v. Caballes*, 542 U.S. 405 (2005); *United States v. Booker*, 543 U.S. 220 (2005); *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Florida v. Nixon*, 543 U.S. 175 (2004); *Devenpeck v. Alford*, 543 U.S. 146 (2004); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

rights. In other words, the norm will only pass the test of necessity if it is the one among those similar in efficacy which is the least restrictive of the rights.

Once it has been established that the norm has complied with the first and the second sub-principles, the interpreter should determine whether it is reasonable *stricto sensu*, or not. The doctrine and the jurisprudence have defined this sub-principle as an examination of the balance between the advantages and disadvantages brought about by the law. "The [sub]principle of proportionality *stricto sensu* means that the application of a given instrument or means to achieve a given end or objective should not be unreasonable in its reciprocal relationships."⁴ The interpreter must evaluate whether this balance is proportional (in other words, reasonable), or not. In spite of this initial coincidence between the doctrine and the jurisprudence, the dissidences in the specification of what a "reasonable" relationship is still to come up. The dominant position proposes that judges should weigh the advantages and the disadvantages of the measure under analysis. In French law, this alternative interpretation is called "balance between costs and benefits."⁵ Also, the Spanish Constitutional Court and doctrine have reached a similar characterization.⁶ For example, in STC 66/1995, the court stated that a restriction of a right is proportional *stricto sensu* if it is "pondered or balanced because more benefits or advantages for the general interest are

4. GAVARA DE CARA, *supra* note 1, at 308; BVerfGE 7, 377; 8, 71; 13, 97; 78, 77; y 79, 29].

5. Cf. Jeanne Lemasurier, *Expropriation: "Bilan-cout-avantages" et necessite publique*, LA REVUE ADMINISTRATIVE, septembre-octobre 1979, at 502 (Fr.). See EMILIOU, *supra* note 1, at 67-114, 92-95; Auby, *supra* note 1; and Braibant, *supra* note 1.

6. The proportionality *stricto sensu* prescribes that:

There should be a tendency to reach a balance between the advantages and disadvantages which will inevitably appear when a right is limited, in order to protect another right or good which is constitutionally protected. It is necessary to carry out an evaluation in which particular and collective interest will be confronted, which implies taking into consideration all the relevant circumstances in the case.

MANUEL MEDINA GUERRERO, LA VINCULACIÓN NEGATIVA DEL LEGISLADOR A LOS DERECHOS FUNDAMENTALES 132, 134 (1996) (Spain).

The author insists on this when he says that the balancing test is: "the well adjusted relationship between the means and the ends in terms of costs and benefits." *Id.*

derived from it than damages against other goods or values in conflict.”⁷

The expression “balance between costs and benefits” seems to indicate that any norm with a cost proportionate to its benefits will be reasonable. Therefore, if the hypothetical benefits are high, the way in which human rights may be affected is expected to be high too, and this will be acceptable.⁸ This may be expressed with the following formulas, using a scale from 1 to 3 to measure the degree of restriction (3 being the most restrictive measure) and a scale from “a” to “c” to measure the importance of the end (“a” being the most important end):

- (1) If measure 1 (M1) restricts (r) in a second degree, and it leads to an end (E) of importance b, then it is proportional;
- (2) If M2 r 3, and E c, then the measure is disproportional;
- (3) If M3 r 1, then it is sufficient for E to be constitutional for the measure to be considered proportional.

II. PROPORTIONALITY AND RESPECT OF HUMAN RIGHTS

A. The Problem

A proportional norm will be: a) adequate to the end; b) the least restrictive of the human rights among all the adequate options that could be applied; and, finally, c) proportional *stricto sensu*, that is, it must keep the balance between the costs and the its benefits.

7. S.T.C., May 8, 1995 (S.T.C., No. 66/1995) (Spain). In Spanish: “Ponderada o equilibrada por derivarse de ella más beneficios o ventajas para el interés general que perjuicios sobre otros bienes o valores en conflicto.” *Id.*

8. Cf. GERMÁN JOSÉ BIDART CAMPOS, LA CORTE SUPREMA: EL TRIBUNAL DE LAS GARANTÍAS CONSTITUCIONALES 107 (1984) (Arg.).

The Argentine Supreme Court has said: “the higher the hierarchy of the protected interest, the stronger the regulation could be.” Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/6/1962, “Partido Obrero (Cap. Fed.) / personería” Fallos (1962-253-154) (Arg.).

However, the principle which says that “the regulation cannot alter the human right involved in the case, but it should go untouched and in its integrity, without corrupting nor extinguishing it, in whole or in part.” Is still in force. See CSJN, 5/9/1903, “Hileret y Rodríguez c. Provincia de Tucumán / inconstitucionalidad de ley provincial del 14 de junio de 1902 y devolución de dinero” Fallos (1903-98-20), at 24 (Arg.).

In my opinion, and this is the thesis of the present article, this conception of proportionality does not necessarily prevent the legislator from violating the human rights, at least in some cases.

In other words, if the principle of proportionality were just a balance between the “weight” of the right and that of the reasons that have led the legislator to decide to restrict such right, then, ultimately, that human right could lose its characteristic of impassable barrier for the state. Indeed, the invocation of a more or less convincing *raison d’état* could justify the sacrifice of some human rights. We can find an example of this in the excesses of the de facto governments in some Latin American countries during the 1970s and 1980s. The consequences of this viewpoint cannot be more disastrous for the general theory of human rights: at best, the rights will depend on consensus; in all cases, they will never be called victories in front of the majorities.⁹

The risk mentioned above can be clearly seen in the following formula:

If $M4 \rightarrow 3$ and if $F \rightarrow a$, then the norm would seem to be proportional. However, $M4$ restricts the norm ($N4$) so much, that it causes the violation of the essential content of the human right involved.

Therefore, it would be sufficient to find an end which is important enough and a means that can be justified by that end to transform the principle of proportionality in a mere formal criterion, that is, without the capacity to guarantee the supremacy of human rights.¹⁰

B. Possible Solutions

There are two alternatives to make the principle of proportionality more meaningful.

9. According to a well known expression, human rights are “are political trumps held by individuals.” Thus, they cannot be altered, not even by consensus. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

10. That has been pointed out by A. B. Bianchi, in his critique of the Argentine case “Peralta, Luis A. y otro c. Estado Nacional.” CSJN, 27/12/1990, “Peralta, Luis A. y otro c. Estado Nacional (Ministerio de Economía - Banco Central de la República Argentina) / amparo” *El Derecho* [E.D.] (1990-141-519) (Arg.). Cf. Alberto B. Bianchi, *La Corte Suprema ha establecido su tesis oficial sobre la emergencia económica*, 1991 L.L 5, 5-6 (Arg.).

The first one is to evaluate whether the norm respects the principle of proportionality *stricto sensu* or not,¹¹ and subsequently, whether the essential content¹² is also respected in a given case. Those who defend this opinion should accept that it is possible for a proportionate norm—in spite of its being so—to be unconstitutional if it affects the essential content of a human right.¹³

The second alternative completely rules this possibility out. On the one hand, it does not seem appropriate to accept the proportionality of a norm that violates a human right, both from a theoretical point of view (because it would be contradictory) and from a pragmatic point of view (as it would give place to bad interpretations). On the other hand, the evaluation of the proportion between costs and benefits cannot be satisfactorily done without considering the content of the human rights involved in the case.

Consequently, from this second perspective, a norm can only be proportionate if it does not affect the essential content of the involved rights. For example, this is the position held by the Argentinean Supreme Court. For this court, the principle of proportionality (*principio de razonabilidad*) is the technical instrument it uses to apply article 28 of the Argentinean Constitution, which prescribes that human rights cannot be affected.¹⁴

The position of the Argentinean Supreme Court does not transform the two steps explained in the first alternative into one. In fact, the court admits the existence of the two steps, as the evaluation of the proportionality of the norm is different from the evaluation of the essential content. However, the court changes the

11. See MEDINA GUERRERO, *supra* note 5, at 145-165.

12. See GAVARA DE CARA, *supra* note 1; ANTONIO LUIS MARTÍNEZ-PUJALTE, *LA GARANTÍA DEL CONTENIDO ESENCIAL DE LOS DERECHOS FUNDAMENTALES* (1997).

13. “No matter how difficult the task may be and, consequently, how strong the temptation to reduce the content of the limits to the proportionality test, the guarantee recognized by article 53.1 of the Spanish Constitution undoubtedly demands its autonomous application as a technique aimed to control the *proportional* limits.” MEDINA GUERRERO, *supra* note 5, at 165.

14. “The principles, guarantees, and rights recognized in the preceding sections shall not be modified by the laws that regulate their enforcement.” Art. 28, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

order in which it performs the evaluations. First, the tribunal must check if the content of the right has been affected. Then, it must examine if the norm preserves a proportional relationship between the advantages and the cost that it produces.

Such analysis may give the following results:

- (1) If measure 1 (M1) alters (a) the content of human right 1 (D1), it is disproportional;
- (2) If $M2 \neg (a) D2$, but $r 3$, and $F c$, it is disproportional;
- (3) If $M3 \neg (a) D3$, and $r 2$, and $F to$, it is proportional.

As a preliminary conclusion, we may say that the proportionality of a measure (3) presupposes: a) that the measure does not alter the content of the involved human rights; and b) that the measure which does not alter the human rights restricts the norms about human rights in an acceptable degree, taking into account the importance of the pursued end. Then, there are two possible types of violation of the principle of proportionality: disproportionality due to the alteration of the human rights involved (hypothesis 1), and disproportionality due to the lack of justification of the restriction (hypothesis 2).

The evaluation concerning the alteration should come before the evaluation concerning the justification because the latter requires determining the degree in which the involved right is being restricted. Thus, it is necessary to learn which the limits and the characteristics of the rights are, the relationship between the specific human rights involved and other human rights, and the relationship between such human rights and the common good. Such knowledge may only be acquired if the contents of the human rights are analyzed. Moreover, it is necessary to inquire about the degree of public interest inherent to the norm under consideration.¹⁵

In fact, the temporal sequence above described is not lineal. There is a circle of comprehension that involves both the

15. The Argentine Supreme Court has said: "the degree of the public interests affected and the principles to be protected will determine the degree of the regulations in each case." CSJN, 1/9/1944, "Pedro Inchauspe c. Junta Nacional de Carnes" Fallos (1944-199-483) (Arg.). Such statement seems to be extremist. In my opinion, the relationship between public interest and human rights should not be a one-way road, but there should be a reciprocal influence. Just as the degree of public interest affected cannot be indifferent, the human right involved cannot be indifferent either.

examination of the alteration and of the justification in a process of mutual feedback (called by Engisch “*hin-und herwandern des blicks*”). For this reason, the degree of importance given to the norm in relation to the common good can influence on the determination of the precise content of the human right involved in the case. However, we can conclude, too, that examining the alteration is the starting point and the key to proportionality *stricto sensu*.¹⁶ The light shed by examining the alteration transmits its clarity to the darkness of the exam of justification and thus, the temptation of utilitarianism may be avoided.

Now a question arises: how should the examination of the alteration be carried out? To determine if a measure alters a human right or not, the inquiry about the essential content of such right should be performed. Once the essential content has been established, it is necessary to determine if the measure interferes with it or not. Thus, the most important point is to identify which is the inalterable content. This is a task to be performed by the constitutional interpreter, especially by the judges with constitutional competence. It will be done “in the light of the constitutional norms, through a systematic and specific interpretation of the Constitution, and through an understanding of each human right in relation to its underlying moral values and concepts, and to the objectives to be achieved through its protection.”¹⁷

16. So much so, that without this test the principle of proportionality becomes meaningless. If this step is omitted, it may lead to not applying the principle at all, as Jiménez Campo did. According to him:

The evaluation of the law would not lose much, and it would even achieve some certainty, if the principle of proportionality, as an autonomous and direct canon, were less demanded and applied and, maybe, even excluded. To assess the proportionality of a norm, maybe legal or not, is, in short, just to compare, to balance or to weight “losses” and “profits” which, from a juridical point of view, are not rationally measurable and they leave narrow margin to the argumentation and counter argumentation according to objective criteria.

Javier Jiménez Campo, *Artículo 53. Protección de los derechos fundamentales*, in *COMENTARIOS A LA CONSTITUCIÓN ESPAÑOLA DE 1978*, t. IV, at 438, 488 (Oscar Alzaga Villaamil ed., 1996).

17. MARTÍNEZ PUJALTE, *supra* note 1, at 73.

In my opinion, the decisive point will be to make a teleological inquiry of the human rights involved,¹⁸ especially taking into account the goods whose protection is looked for through their constitutional recognition,¹⁹ and without forgetting about the significant role played by the facts of the case,²⁰ in the manner in which it has been stated by the Spanish Constitutional Court.²¹

18. See 1 RAFAEL BIELSA, *La locución justo y razonable en el derecho y en la jurisprudencia*, in ESTUDIOS DE DERECHO PÚBLICO: DERECHO ADMINISTRATIVO (1950).

19. Pedro Serna Bermúdez, *Derechos fundamentales: el mito de los conflictos*, 4 HUMANA IURA 197, 225 (1994); MARTÍNEZ PUJALTE, *supra* note 1, at 72.

From another viewpoint, "the principle of proportionality *stricto sensu* must be understood as a formal principle from which no material content for judicial review is derived." GAVARA DE CARA, *supra* note 1, at 319-320. According to A. Boggiano, "to judge about the reasonableness of the positive law is to judge about the fundamentals of the positive law in the natural law." ANTONIO BOGGIANO, *POR QUÉ UNA TEORÍA DEL DERECHO: INTRODUCCIÓN A UN DERECHO CONSTITUCIONAL* 42 (1992).

20. See Guy Braibant, *Le principe de la proportionnalité*, in MÉLANGES OFFERTS À MARCEL WALINE 297, 306 (1974).

21. See S.T.S., Jan. 18, 1991 (R.T.C. 1991-I-195, FJ 2) (Spain), in which the Constitutional Court stated: "the Constitution includes a value system which respects the demand of a teleological interpretation of the Constitution." See also S.T.S., Apr. 8, 1981 (R.T.C.1981-173, FJ 10) (Spain); S.T.S., Feb. 17, 1984 (R.T.C. 1984-I-227, FFJJ 2, 5) (Spain). See MARTÍNEZ PUJALTE, *supra* note 1, at 72.