CDL-JU(2019)002
Engl. only

Strasbourg, 23 January 2019

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

In co-operation with
THE CONSTITUTIONAL COURT OF BOLIVIA

INTERNATIONAL CONFERENCE

Constitutional Justice
and the Principle of Proportionality

Sucre, Bolivia
7 December 2018

REPORT

THE PRINCIPLE OF PROPORTIONALITY: A GERMAN PERSPECTIVE

by

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Introduction

First, I would like to thank the organisers of this conference for inviting me to present a German perspective on the principle of proportionality, thus appreciating the contribution of German courts and jurisprudence to the development of this principle. It is a great pleasure and honour for me to participate in this event.

In German constitutional law,[1] but also in many other jurisdictions,[2] proportionality is the standard that guides the balancing of fundamental rights. According to this standard, interference with rights must be justified by reasons that keep a reasonable relation with the intensity of the interference.[3] One may well regard the principle of proportionality as a universal standard of rationality, which any legal system has to recognise.[4]

However, the interpretation and the scope of application of the principle of proportionality are a matter of dispute, in particular the element of balancing that it includes.[5] On the other hand, no alternative seems to be available, which could replace balancing.[6] Anyway, I will not enter into this discussion on alternatives to balancing. Instead, and more elementary, I would like to analyse what balancing is about, what is its structure, what are its criteria, and to what extent an objective justification of balancing judgments is possible. In order to answer these questions, I will present the standard model of the test of proportionality as developed on the background of the rulings of the German Federal Constitutional Court[7] and Robert Alexy's theory of fundamental rights.[8]

1. The Standard Test of Proportionality

The principle of proportionality applies in particular as a test for the constitutional justification of the infringement of fundamental rights.[9]

1.1. Presupposition: The Model of Principles

The application of the principle of proportionality implies that one interprets fundamental rights as principles, which can conflict with other principles and figure as

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[1] On the principle of proportionality in German constitutional law, Lerche 1961; Schlink 1976; Hirschberg 1981; Alexy 1985; 2002; 2007; Clérico 2001; 2009.
[2] See, for example, Borowski 2018, 98pp.; Vranes 2017, 101pp.; Lepsius 2015, 25; Saurer 2012, 4; Klatt/Meister 2012, 1pp.; Barak 2012, 181pp.
[3] See, in particular, Alexy 1985, 146; 2002, 102: 2007, 138; Clérico 2001, 144; 2009, 165.
[4] Beatty 2004, 159pp.; Sieckmann 2018, 3pp.
[5] For example, Bernstorff 2014, 63-83; id. 2011, 184; Bomhoff 2010, 108pp.; Poscher 2003, 12p.; Jestaedt 1999, 359pp.
[6] Wieckhorst 2017, 339pp.; von Arnauld 2015, 291.
[7] See BVerfGE 16, 194 (201); 21, 150 (156); 90, 145 (172, para. 163); 120, 378 (428); 121, 317 (346, para. 95); 124, 300 (para. 69); 125, 260 (316pp., para. 204pp.); BVerfG, 21.3.2018, 1 BvF 1/13; BVerfG, 23.5.2018, 1 BvR 97/14, para. 85. This is not to say that the jurisdiction of the BVerfG is uniform. Even beside human dignity, which in its core is regarded as not capable of being balanced (BVerfGE 93, 266 (293)), some decisions try to avoid balancing. See Kahl 2004, 167pp.; Hoffmann-Riem 2004, 203pp.
[8] In particular, Alexy 1985, 2002, 2007.
[9] See Alexy 1985; Borowski 2018.

reasons in a balancing of competing principles.[10] As principles, they demand a realization to a degree as high as possible, taking into account the factual and normative possibilities.[11] This allows one to balance fundamental rights with competing principles, which may protect rights or public interests.

The interpretation of fundamental rights as principles to be weighed and balanced against competing principles stands in particular contrast with the understanding of rights as "trumps" against political goals,[12] or as "firewalls",[13] which present strict or almost absolute borderlines for state action. This understanding of rights might be quite common,[14] but it is not defensible. For an absolute guarantee of rights cannot be justified without knowing what might be the reasons for interference. Consequently, the idea that rights are absolute borderlines of state action usually leads to a narrow definition of the scope of these rights, which assures that these rights do not conflict with important interests. Hence, strict protection excluding balancing implies a loss in substance of the protection of fundamental rights. By contrast, the interpretation of rights as principles softens the protection of rights but enlarges its scope. It tends to be a comprehensive protection of the interests underlying fundamental rights. In the end, this protection can be equally strong as that according to the absolute interpretation of rights, whenever there are good reasons for such a protection.[15] Thus, we need not have a loss in substance, but will have a gain in rationality of the protection of fundamental rights. Therefore, the interpretation of fundamental rights as principles seems clearly preferable.

> For example, Art. 12 sect. 1 of the German Basic Law, according to its wording, protects in sentence 1 the right to freely choose one's profession, without reservation of legislative restriction, whilst sentence 2 merely states that the exercise of the profession is subject to regulation by statutes, without mentioning any guarantee.[16] It seems that the core of professional freedom, the right to choose one's profession, is guaranteed absolutely, whilst the exercise of the profession does not enjoy any substantial protection against the legislature. For example, if a statute prohibits smoking in bars or restaurants, this is a regulation of the exercise of a profession, which, according to the wording of art. 12 of the German Basic Law, does not enjoy any substantial protection. This, however, would not amount to an adequate protection of the fundamental right to professional freedom.

Accordingly, in the case of professional freedom the German Federal Constitutional Court has interpreted the guarantee of professional freedom as a uniform fundamental right of choosing and exercising a profession.[17] This right is in principle protected against legislative interference in its whole scope of application. It is protected, however, with differing strength, according to the character and intensity of the

[10] See Dworkin 1978, 24pp.; Alexy 1985, 78pp.; Sieckmann 1990, 75.
[11] Alexy 1985, 75.
[12] Dworkin 1978, xv; 188.
[13] Habermas 1994, 315.
[14] See, for example, Menke/Pollmann 2007. 158; Bernstorff 2011, 168 .
[15] This is also recognised by Bernstorff 2011, 186; Schlink 2012, 734.
[16] Art. 12 sect 1 Basic Law: "All Germans have the right to choose their profession ... The exercise of a profession can be regulated by statute or on a statutory basis." (transl. J. Rivers in Alexy 2002, 428).
[17] BVerfGE 7, 377; 121, 317 (para. 92).

interference with this freedom, as the German Federal Constitutional Court developed in its "stage theory" (Stufentheorie). Consequently, professional freedom is comprehensively guaranteed according to the standard of proportionality.

1.2. The Structure of Constitutional Justification

Following this line of constitutional interpretation, in the case of interference with a liberty or defence right, the analysis of the justifiability of this interference includes,
- firstly, the statement that there is an interference with the right and,
- secondly, the justification of this interference according to standards of constitutional law.[18]

Among these standards of constitutional justification, the principle of proportionality is of crucial importance. It requires or presupposes that the interference pursues a legitimate objective and includes three sub-criteria
- firstly, the demand of adequacy or suitability, that is, the interference must be apt to promote the objective of the interference,
- secondly, the demand of necessity, that is, no alternative is available that is less detrimental to the affected right and at least equally effective regarding the objective of the interference, and
- thirdly, the demand of proportionality in a strict sense, that is, a demand of balancing, guided by the requirement that the intensity of an interference must keep a reasonable relation with the importance of the reasons for the interference in the concrete case.[19]

The German Federal Constitutional Court usually follows this structure when applying the principle of proportionality. Its elements can be found also in other jurisdictions, although the test of proportionality is not always as clear as that applied by the German Constitutional Federal Court.[20]

2. Proportionality and Balancing

In the test of proportionality, the demands of a legitimate reason for interference, of the suitability, and of the necessity of the applied measure are beyond doubt. It seems obvious that interference of a right cannot be justified if the objective of the interference itself must not be pursued, if the applied measure does not serve in any way to promote the objective, or if the interference can be avoided (at least in part) by an equally effective measure. These are elementary demands of rationality, which directly follow from the recognition of fundamental rights as principles.[21] The crucial and most

[18] See, for example, Borowski 2018, 305pp., 366pp.
[19] See BVerfGE 16, 194 (201); 21, 150 (156); 90, 145 (172); 104, 337 (347pp.); 120, 378 (428); 121, 317 (346); 124, 300 (para. 69); Saurer 2012, 7; Clérico 2017; 2018, 25p., 33.
[20] For example, the European Court of Human Rights applies the test of proportionality in the context that a restriction of a human right must be necessary in a democratic society. This is criticised as intransparent and mixing up diverse elements of judicial review (Gerards 2013, 467). In particular, necessity in the sense that no less restrictive and equally effective means is available, and necessity in the sense of sufficiently important reasons for the restriction, that is, the second and the third sub-principle, are not clearly separated. Also it is noted that the suitability of a restriction often is not treated explicitly. See Saurer 2012, 10 with further references. The European Court of Justice often clearly distinguishes suitability, necessity and proportionality in a narrow sense, but its examination of the third sub-principle is superficial. See Saurer 2012, 9.
[21] See Alexy 1985, 100.

problematic issue of the test of proportionality is its third sub-principle, that is, the balancing of fundamental rights.[22]

I will describe the structure of balancing regarding the case of a statutory prohibition of smoking in bars or restaurants.[23] This case allows one to explain the basic structure of balancing, but also some important distinctions: first, that of balancing in a general, typical case and in special cases and, second, that of, what I would like to call, direct balancing, as distinct from the control of balancing. I will first present what seems to me a good or plausible exemplar of balancing, before I turn to the argumentation of the German Federal Constitutional Court.

2.1. The Structure of Balancing

Balancing includes at least two competing principles. In the case of the prohibition of smoking in bars or restaurants, these principles are:

> The principle of professional freedom: Everyone ought to have the right to professional freedom, and
> The principle of the protection of public health: Public health ought to be protected.

Accordingly, we have a conflict of the right to professional freedom of the owners of bars or restaurants with the protection of public health. In fact, the problem is more complex, but I will simplify the case. The principle of professional freedom implies a requirement of a particular normative consequent, namely that owners of bars or restaurant may allow smoking in their establishments. On the other side, with the further assumption that smoking in bars or restaurants might negatively affect the health of the people there, the principle of the protection of public health implies a requirement of the opposed consequent, that is, it should not be permitted to let people smoke in bars or restaurants.

This conflict requires a resolution by means of establishing a priority among the competing principles, regarding the facts of the case.[24] This priority usually holds under certain conditions. The priority among the competing principles determines the norm that definitively rules the case.[25] For example, one might assume that the prohibition of smoking in bars or restaurants is justified if there are no rooms available free from smoke. The question is how to justify such a priority and the corresponding definitive rule.

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[22] If balancing is included already in the second sub-principle, that of necessity, the problems of balancing affect this stage, too.
[23] See BVerfGE 121, 137.
[24] Reference to the facts of the case is sometimes misunderstood as making a decision in a single or particular case, without establishing a general rule. See, for example, Bernstorff 2011, 173. Any judicial balancing should include a description of a case, which refers to some general features and hence defines a certain type of individual cases. Consequently, judicial balancing aims at establishing general rules of priority.
[25] Alexy's "law of collision", Alexy 1985, 83.

2.2. The Criteria of Balancing

The balancing of the competing principles follows certain criteria. These criteria are, on the one hand, the abstract weight of the competing principles and, on the other hand, the degree to which they are affected or realised by the chosen solution.[26]

2.2.1. Abstract Weight and Degree of Interference

The abstract weight of a principle expresses the importance of a principle compared with other principles, but without regard to the degree of interference or fulfilment of the respective principle in a particular case. In general, we may assume that all fundamental rights are of great importance. Still we may state differences. For example, in the abstract, the right to life is more important than that to bodily integrity, and both are more important than the right to exercise one's professional freedom and, even more so, the right to do whatever one wants. In a first approach, we may order the abstract weight of principles as high, medium, or low. However, finer distinctions are possible and might be necessary.[27]

The degree of interference depends on what is lost regarding the fulfilment of a right by applying a certain restrictive measure. The degree of interference corresponds to the degree of fulfilment achieved by refraining from the respective measure. For example, the prohibition to exercise a certain profession is more restrictive than a requirement to pass an exam, and both of them are more restrictive than requirements that only affect minor aspects of the exercise of a profession, as, for example, the obligation to inform about risks of certain products. Again, one can compare and order degrees of interference as high, medium, or low.

In the end, whether the demand of proportionality in a strict sense is met depends on both factors, the degree of interference of the competing principles and their abstract weight. Both factors determine the weight or importance of a principle in the concrete or particular case. The principle with greater importance in the concrete case deserves priority against the competing principle.

2.2.2. Balancing in the General Case

In the case of a prohibition of smoking in bars and restaurants, a plausible balancing regarding a general, typical case seems to be as follows:

> Regarding the dimension of abstract weight, both the principles of professional freedom and of public health are of great importance.[28] One might argue, however, that the protection of public health has a greater abstract weight than professional freedom. For in general, without regard to particular circumstances of the respective case and the respective degrees of interference, one will always regard as justified a law that restricts professional freedom in order to protect public health. One will not accept a right to make money on the cost of the health of other people. So we might evaluate the abstract weight of public health as high, that of professional freedom as medium.

[26] Sieckmann 1995, 50p., 58pp.
[27] See also Alexy 2002, 412p.
[28] One should note that this and the following assessments refer to the case at hand. In a conflict with the protection of life, for example, one might assign relatively low weight to professional freedom.

On the other hand, no one is forced to visit bars or restaurants where people are smoking. This affects the weight of the pursued objective, the protection of public health. It does not seem plausible to assume that the weight of this principle is high if the protected people prefer not to protect themselves.[29] An assessment as "medium" seems to be appropriate. Hence, the abstract weight on both sides is "medium".

As to the second dimension, the degree of interference, public health is affected to a rather low degree by smoking in bars and restaurant, compared with other interferences. There is a small risk of severe health damage, but not a concrete danger, and even less an actual damage. This justifies evaluating the degree of interference with public health by smoking in bars or restaurants as low.

The degree of interference of the prohibition with professional freedom seems in general to be low. The exercise of the profession is affected only at its margin. Bars and restaurants can well serve drinks and food without allowing smoking in their establishments. There is a loss in revenues, but this is entrepreneurial risk. In addition, the statute permitted to have separate rooms for smokers if a room without smoke was available.

Accordingly, in general, we have on both sides a rather low degree of interference and equal abstract weight of public health and professional freedom in this case. The result would then be a stalemate. That is, both sides are of equal importance regarding the circumstances of the concrete case. Consequently, the legislature may or may not prohibit smoking in bars or restaurants. The prohibition is proportionate and hence in conformity with constitutional law, but not required by constitutional law.

2.2.3. The Special Case of Small Bars

So far the general case. However, a special case concerns bars or restaurants that have only one room and cannot take advantage of the legal exception that permits to have a separate room for smokers. How does this feature affect the balancing?

One might argue that one-room bars or restaurants are affected to a high degree. In fact, there was evidence that the economic existence of some of them was in danger. Assuming equal abstract weight of the right to professional freedom and the reasons for its restriction, the conclusion would be that the high degree of interference regarding small bars or restaurants that depended on smokers must tip the balance in favour of their right to professional freedom, so that the prohibition of smoking would be disproportionate in their case. Assuming that the prohibition of smoking in bars or restaurants is admissible but not required by constitutional law, it seems clear that the Legislature cannot have such discretion where the economic existence of the owners of small bars or restaurants is at stake.[30]

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[29] To put it in another way: What is affected is, in first place, not public health but personal freedom in form of the right to visit bars or restaurants without being impaired by smoking. The principle of personal freedom, however, does not have greater weight than that of professional freedom.

[30] This does not necessarily exclude a strict prohibition of smoking in bars or restaurants. A prohibition without exceptions eliminates an advantage of bars or restaurants that can offer a separate room for smokers. This might reduce the impairment of small bars or restaurants to an

Accordingly, we get a clear result of the balancing in our case by comparing the special case with the general case and evaluating their differences regarding abstract weight or degree of interference of the competing principles.

2.2.4. Direct Balancing and Balancing Control

As I indicated before, the German Federal Constitutional Court did not follow the line of balancing presented before. It assumed that the restriction was a serious interference with the right to professional freedom because of the loss of revenues it caused,[31] but that, on the other hand, the legislative objective of protecting public health concerned a predominantly important public interest and that the Legislature could see a significant danger for this good.[32]

Thus, the Court avoided to some extent the problem of the objectivity of balancing judgments by limiting its control and leaving the assessment regarding the degree of interference with public health and, accordingly, of the concrete weight of the protection of public health, to the Legislature. It assumed that the Legislature might have given strict priority to this objective, justifying even a restriction that would lead to the termination of some small bars or restaurants.[33] In this perspective of control, the Court does not balance professional freedom and public health according to its own judgement. It does not look for the most plausible assessment of the factors of balancing, but for the utmost limits in which the pertinent assessments of the legislature remain defensible. In our scheme of balancing, the Legislature might have assessed the abstract weight of public health or the degree of its impairment, or both of them, as high. In any case, a justification of a strict priority in favour of public health would result. However, the Constitutional Court went on to argue that the Legislature did not establish a strict priority in favour of public health.[34] Instead, the statute prohibiting smoking in bars or restaurants left some loopholes. Bars or restaurants were permitted to have separate rooms for smokers beside the room for non-smokers. In addition, smoking in marquees (tents used at festivals) was permitted and some other exceptions were granted. By granting these exceptions, the Legislature showed that it did not attribute overriding weight to public health. Without attributing such a high weight to public health, however, the concrete weight of public health was not sufficient to justify a high degree of interference with professional freedom, which results from endangering even the economic existence of small bars or restaurants.[35]

Thus, the Court limited itself to the control of the balancing of the Legislature, criticized, however, lack of coherence in the balancing of the Legislature.

3. Conclusion

What can we learn from this case? The priority among principles will depend on the facts of the case, in particular the degree of interference with the competing principles,

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extent that can be regarded as proportional. However, there are other reasons why a strict prohibition appears to be disproportionate compared with a licensing system that allows a small number of bars or restaurants to permit smoking. See Sieckmann 2018 (in process of publication).

[31] BVerfGE 121, 317 (para. 118).
[32] BVerfGE 121, 317 (para. 119).
[33] BVerfGE 121, 317 (para. 121).
[34] BVerfGE 121, 317 (para. 128).
[35] BVerfGE 121, 317 (para. 135pp.).

and on the abstract weight of these principles. Thus, the balancing requires not only the conflicting principles but also arguments concerning the weight and the degree of fulfilment or non-fulfilment of the requirements included in the conflicting arguments. This makes rational argument possible. Balancing does not simply consist in a judgment regarding the priority of competing values, but includes complex arguments, which can be analysed and criticised step by step.

In addition, one can distinguish between the general, typical case and special cases, which differ as to the abstract weight of the respective principles and the degrees of interference. This gives structure to the balancing by comparing different cases and may enhance objective judgment.

Regarding restrictions of professional freedom, the Constitutional Court attributes to the Legislature the power to assess the weight even of constitutional principles, thus limiting itself to the control of legislative balancing. Of course, the Legislature must respect limits of defensible assessments. However, at least regarding the weighting of professional freedom, the German Federal Constitutional Court respects a large margin of appreciation of the Legislature. Accordingly, the intensity of constitutional review in these cases is rather low. To what extent this applies also to other fundamental rights is, however, a topic on its own and beyond the scope of this presentation.[36]

A further important point is that the Legislature must be coherent in the evaluations underlying its regulation.[37] If the Legislature claims high importance for its objectives regarding certain cases, this evaluation must also determine the regulation of other cases. A restriction that cannot be justified according to the legislature's own weightings is disproportionate.

As to the structure of balancing, as displayed in our example, balancing requires an evaluation, which has to some extent subjective or personal character. It is true that much of the discussion on constitutional balancing tries to show or presupposes the objectivity of balancing judgments.[38] It seems to me that this line of analysis is not an adequate point of departure for the analysis of balancing.[39] It is an essential feature of the balancing of principles that the rule established as the result of a balancing does not follow from pre-determined criteria,[40] but is a matter of judgment.

Resulting in a subjective normative judgment, balancing includes a decision, which, in first place, the legislature must take.[41] However, there may be arguments for courts forming a balancing judgment on their own. Despite of the subjective character of balancing judgments, we might get objectively valid results, for example, by means of a rational discourse, in which individual judgments are the object of rational critique, and intersubjective reflection of diverse judgments might come to a certain conclusion.[42] Or objectively valid rules might be established by a constitutional practice based on the balancing of principles. The systematic elaboration of balancing seems to be crucial in order to enhance objectivity in balancing. Finally, even where an objective justification

[36] By contrast, the intensity of control is greater in cases of the right to personality or of communicative freedom in political context.
[37] BVerfGE 121, 317 (para. 135). See also BVerfGE 104, 337 (351p.).
[38] See Alexy 2009, 15pp.; 2010, 26pp.
[39] See also Schlink 2012, 734p.
[40] Sieckmann 2004, 66pp.; 2012, 75, 85pp.
[41] See also BVerfGE 120, 378 (para. 168).
[42] See Sieckmann 2012, 113pp.

of balancing judgments is not achieved, the institutional role of courts might justify substantive constitutional review.[43] Because of the capacitation of the judges, their independence, and their orientation towards correctness of their judgements according to constitutional law, they may be better equipped to balance constitutional rights than the legislature. This, however, addresses an issue beyond the scope of this presentation.

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[43] See the suggestions of Alexy 2005, 99pp.; Rawls 1993, 231pp.

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