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THE THEORY OF WEIGHTING IN ROBERT ALEXY, AN APPROACH TO EQUITY IN THE ELECTORAL CONTEST IN MEXICO

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Abstract
Aim. Based on the theory of legal reasoning by Robert Alexi, in which weighing serves as a tool for resolving conflicts between legal principles, to reveal the significance of the principle of proportionality in legal regulation.
Methodology. The study used general scientific methods: (analysis and synthesis) and private scientific (historical, formal legal and comparative legal).
Results. The application of the weighting method or proportionality principle in Mexican law is not unprecedented, although it is used indefinitely in Mexico. The reference to weighting and principles is brief and has lost its primary meaning in the course of evolutionary development. It has only been applied in electoral matters on two occasions by different Mexican courts. It is concluded that it is necessary to apply the principle of proportionality in electoral disputes, including in the event of deregistration of a local political party.
Research implications. The conclusions made in the course of the study are aimed at improving legislation and law enforcement practice.

Keywords: weighting, principle of proportionality, electoral rights

ТЕОРИЯ ВЗВЕШИВАНИЯ РОБЕРТА АЛЕКСИ, ПОДХОД К РАВЕНСТВУ В ИЗБИРАТЕЛЬНОЙ БОРЬБЕ В МЕКСИКЕ

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Аннотация
Цель. На основе теории правовых рассуждений Роберта Алекси, в которой взвешивание служит инструментом разрешения коллизий между правовыми принципами, выявить значимость принципа соразмерности в правовом регулировании.
Процедура и методы. В исследовании использовались общенаучные методы: (анализ и синтез) и частно научные (исторические, формальные правовые и сравнительно-правовые).
Результаты. Применение метода взвешивания или принципа пропорциональности в мексиканском законодательстве не является беспрецедентным, хотя его применение в Мексике является не вполне ясным. Ссылка на взвешивание и принципы является краткой и утратила своё основное значение в ходе эволюционного развития. Он применялся в отношении выборов лишь дважды различными мексиканскими судами. Делается вывод о необходимости применения принципа соразмерности в избирательных спорах, в том числе в случае снятия с учёта местной политической партии.
Теоретическая и/или практическая значимость. Выводы, сделанные в ходе исследования, направлены на совершенствование законодательства и правоприменительной практики.

Ключевые слова: взвешивание, принцип пропорциональности, избирательные права

Introduction

In the exercise of the judicial function, legal argumentation is used to achieve legal certainty and certainty in the law and, normally, the application of the right is associated with the transaction known as subsumption (subsume an individual case in a general rule). However, although the act of subsumption is present in the legal transaction, such an act is not the only variable to ensure legal certainty and certainty in the law. It is true that subsumption is the traditional way to solve complex cases, however, many of the current commitments of the law are focused on articulating other forms of argumentation around the interpretative task, linked to criteria of controllable legal rationality, the reference points to the weighting.

In contemporary legal theory, the most articulate conception of weighting is that of the technique of resolving conflicts between principles that establish rights, by Robert Alexy. Alexy's claim is to develop weighting as a rational procedure for the application of the law. The German philosopher of law, professor, and jurist Robert Alexy, has contributed to the development of legal argumentation in the field of human rights and fundamental rights and has thus contributed a theory that goes beyond the positivist view of law, based on the ethics of speech (*Diskursethik*)[1]. Nowadays, such discursive ethics constitute a theoretical model aimed at basing the validity of moral statements and judgments through the examination of the assumptions of legal discourse. Contemporary discursive ethics has been elaborated by German philosophers, who are regarded as the basic and inescapable references in democratic constitutional states [3, p. 532–576].

According to Alexy and in relation to the criteria of rationality and weighting applicable to the field of fundamental rights, he clarifies to us that the modern democratic constitutions contain two types or categories of norms: First, the norms that constitute and organize the legislative, executive, and judicial branches belong to the State. Here the central thing is the attribution of power (*Ermächtigung)*[2]. Second, this includes those that limit and direct state power. In the exercise of State power, reference should first be made to the area of fundamental rights.

Alexy affirms that this dichotomy has extensive validity in the universe of democratic constitutional states and in this universal validity is included any constitutional and democratic state, in our case is Mexico, this is due to the principle of abstraction, and the highest abstraction encroaches on state powers, as well as individual rights.

Now, as to the rules that limit and direct state power, and that refer to state power and its relationship to fundamental rights, and understanding that in a constitutional and democratic State two or more norms that affect the fulfillment and exercise of these fundamental rights could come into conflict, Alexy relates two different forms of solution:

There are two basic theories (*Konstruktion)* of fundamental rights: a narrow and rigorous one (*eng und strikt*), and a broad and comprehensive one *(weit und umfassend*); the first is called "rule theory"; the second, "theory of principles". Nowhere are these two theories purely realized. However, they represent different basic trends and the question of which is best is central to the interpretation of any Constitution that knows fundamental rights and constitutional jurisdiction[3].

Alexy himself expresses the question between these two theories: Which is better for the interpretation of any Constitution that knows fundamental rights and constitutional jurisdiction? and following Alexy, he himself presents us with the answer[4]. First, the narrow and rigorous theory (which follows the theory of rules), rules that guarantee fundamental

[1] Alexy R. Constitutional Rights, Balancing, and Rationality. In: *Ratio Iuris*, 2003, vol. 16, pp. 131–140.

[2] Alexy R. Derechos fundamentales, ponderación y racionalidad. In: *Revista Iberoamericana de Derecho Procesal Constitucional,* 2009, vol. 11, pp. 3–14; Alexy R. Epílogo a la Teoría de los derechos fundamentales, trad. de C. Bernal. In: *Revista española de Derecho Constitucional,* 2002, vol. 22, no. 66, pp. 13–64.

[3] Alexy R. Derechos fundamentales, ponderación y racionalidad. In: *Revista Iberoamericana de Derecho Procesal Constitucional,* 2009, vol. 11, pp. 3–4

[4] Alexy R. On Balancing and Subsumption. A Structural Comparison. In: *Ratio Iuris*, 2003, vol. 16, pp. 433–449; Alexy R. Teoría de los Derechos Fundamentales. Madrid, Centro de Estudios Constitucionales. 1993. 607 p.

rights are not essentially distinguished from others in the legal system. Of course, as norms of constitutional law, they have their place at the highest level of the same system and their object is rights of extreme abstraction and greater importance; but all this is, according to the theory of rules, no basis for any fundamental structural difference: they are legal rules and, as such, are applicable in exactly the same way as all the others; its peculiarity consists only in protecting certain positions of the citizen described in the abstract from the State. On the other hand, according to the comprehensive or holistic theory (which follows the theory of principles), legal and fundamental norms are not limited to protecting certain positions of the citizen described in the abstract from the State; this perpetual function of fundamental rights is placed in a wider context, in which a number of fundamental principles can be resolved which collide, and it is here that Alexy expresses that the weighting must be made present by the Federal Constitutional Court:

"A collision of principles can only be resolved by weighting; ...For all these reasons, from a methodological point of view, the concept of capital is that of weighting; Instead of opposing a broad and comprehensive theory to a strict one, a weighting model and a subsumption model could be confronted. This allows us to ask the following questions: which of the two theories leads to more rationality (*Rationalität)* in the constitutional judgment? The one that requires a subsumption or the one that demands a weighting?"[1].

And this is where, in the face of a clash of fundamental principles, from a methodological point of view, Alexy highlights the "capital concept of weighting", in which, by the way, he refers to the German Federal Constitutional Court[2].

From the foregoing, it is interpreted that, in the theory of law embodied in modern democratic constitutions, there are legal systems that are composed not only of rules, understood as rules, but also of principles. Collision with other rules is understood to be resolved by the premise of the subsequent rule and the special rule, and from that point on they require specific and determined behavior. But, in contrast- and unlike the rules-the principles contain optimization mandates, for example: "everyone has the right to be politically represented by the political institute he decides". In the event of a conflict with other principles and legal assets protected by the Constitution, a weighting is required, in which the court weighs the principles that correspond to the specific case to resolve the dispute. It is not a question of applying positive law outright, but of introducing an ethical aspect for optimization. The legal principles that are translated into standards that have the structure of optimization mandates refer to (norms) that do not determine what should be done but require that something be done to the greatest extent possible within the existing legal and real possibilities.

Now, the rationally structured weighting procedure is provided by the theory of principles, understood as optimization mandates that as such imply what in German legal terminology is called the principle of proportionality, which comprises three subprinciples: the rule of adequacy, the rule of necessity and the rule of proportionality in the strict sense [6, p. 230]. The application of the weighting method or proportionality principle guarantees the rationality of judicial decisions to resolve conflicts between principles.

The Applicability of Robert Alexy's Theory in Mexico

The principle of proportionality has been applied in a wide range of contexts[3] around the world [1; 2; 4; 5; 8; 10; 11; 12; 13]. In

[1] Alexy R. Derechos fundamentales, ponderación y racionalidad. In: *Revista Iberoamericana de Derecho Procesal Constitucional,* 2009, vol. 11, pp. 6.

[2] In Germany, in the 1958 Lüth decision, the Federal Constitutional Court for the first time fully developed this broader framework (broad-comprehensive or holistic theory). The Federal Constitutional Court has always advanced the path it took with the Lüth decision. All in all, from a methodological point of view, the key concept is that of weighting; instead of opposing a broad, comprehensive theory to a strict one, a weighting model and a subsumption model could be pitted against each other.

[3] Clérico L. Derechos y proporcionalidad: violaciones por acción, por insuficiencia y por regresión. Miradas locales, interamericanas y comparadas, 2018. Available at: https://www.corteidh.or.cr/tablas/r38165.pdf (accessed: 06.02.2022); Constitución Política de los Estados Unidos Mexicanos (2021). Cámara de Diputados.

accordance with modern constitutionalism, fundamental rights are accorded the status of principles. To apply the principle of proportionality in Mexico, Sánchez Gil identifies these fundamental rights with Mexican individual guarantees [9]. It follows that they are accorded the greatest possible effectiveness and that they must be safeguarded to the same extent as they are, "by rationalizing their restriction under another rule of constitutional law; precisely this possible relativization – in specific and objective circumstances" [9, p. 231].

However, there are no provisions in the Mexican Constitution that state that individual guarantees should be as effective as possible (Sánchez Gil 2008), and it is not possible to derive it from the discussions in the Constituent Congresses of 1857 and 1917 [9]. Thus, the mandate to optimize the effects of Mexican individual guarantees derives from its national and international jurisprudential interpretation.

The case law of the courts has for more than three decades stated that individual guarantees "must not be taken as a rigid, invariant and limiting catalogue ..., which must be interpreted ... in a rigorous manner" but consist of a strictly "Living principles or guidelines", not subject to "literal rigorism" [9, p. 232, 289–290]. The author considers that this criterion can be considered as fundamental to the evolutionary doctrine of fundamental rights in **Mexico and refers to some examples of its application.**

Sánchez Gil warns that it is important to determine the binding nature of the criterion. That, although it could be an isolated thesis, the person who issued it has sufficient authority to be followed by the other Mexican courts. Emphasizes that only the mandate of optimization of individual guarantees discovered by the Court's interpretation explains that the impact on fundamental rights must be rational and proportionate; and in this sense this criterion should be the parameter of constitutionality of the contested acts.

Sánchez Gil states that the maximum realization of fundamental rights corresponds to an international obligation of the Mexican State, included in articles 5.2 of the International Covenant on Civil and Political Rights and 29, b), of the American Convention on Human Rights. Based on the meaning given by the Inter-American Court of Human Rights to the stipulation, it is that human rights provisions should be interpreted in such a way as to benefit their holders. Thus, in Mexico, the internal projection of the *pro homine* principle and the external projection relative to the apparent contradiction between different textual provisions were recognized [9, p. 235–236]. The ownership of individual guarantees "constitutes the "natural and general state of every person in Mexico"... This assertion is fundamental in the jurisdictional examination of proportionality, by virtue, since it would contravene a constitutional *status quo*, when challenging a legislative measure for intervening disproportionately in a fundamental right, it would be up to the authority that issued it to argue and prove its conformity with the Constitution, that is, to prove that its act is appropriate, necessary and provided *strictu sensu*" [9, p. 293].

The idea of proportionality in Mexican law is not unprecedented, although it has been used vaguely, despite this "there has been a clear use of the principle of proportionality according to the canons of the German dogmatic, applicable in particular to resolve constitutional normative conflicts and, above all, characterize the lawfulness of the degree to which a legislative measure intervenes in fundamental rights" [9, p. 247]. The difference between Mexican jurisprudence and the formulation of the principle of proportionality in Germany is that it examines the subprinciples of adequacy, necessity, and proportionality in isolation, and not as a whole [9, p. 318].

Sánchez Gil mentions that the Supreme Court of Justice of the Nation has laid the foundations for the application of the principle of proportionality in Mexico but notes that the reference to the principle of proportionality "seems to be short and somewhat rudimentary". It has been used as a tool to qualify constitutionality as restrictions on the right of access to justification, and as

a criterion for examining the constitutionality of penalties. The work of the First Chamber has been fundamental to the principle of proportionality in our country, but it has not been constant [9, p. 256–257]. The Second Chamber has also expressly considered the principles of appropriateness, necessity, and proportionality for qualifying the constitutionality of tax laws in relation to the purposes for which they are intended but has made the mistake of only doing the adequacy test and setting aside the judgments of necessity and proportionality in the strict sense [9, p. 259–260].

In Mexican law, the principle of fiscal proportionality has been applied in the establishment of the amount of maintenance, in contractual injury caused by the irreciprocity between the benefits mutually granted by the parties to a legal act, and criminal self-defence as precluding responsibility, in which there must be "rationality" and "necessity" between the aggression and the means used to repel it [9, p. 246, 301–302].

The principle of proportionality in the electoral context

The Superior Chamber of the Electoral Tribunal of the Judicial Branch of the Federation is the first Mexican court that "not only expressly alludes to the subprinciples of suitability, necessity and proportionality -also considering them different-, explaining them in detail and very punctually, but also the first to have based it on article 16 of the Constitution, in addition to article 14 of the Constitution, and to have interpreted the guarantee of material motivation in the sense of enshrining a "principle of prohibition of excesses or abuses in the exercise of discretionary powers" [9, p. 260–261; 10, p. 77–78].

In the 2006 presidential election, the Coalition for the Good of All applied to recount the totality of the seats in that election because of the tension between constitutional rules. The Superior Electoral Chamber used the principle of proportionality, in particular the criteria of suitability and necessity for the scenario of opening electoral packages and noted that such opening only proceeds in "extraordinary cases". He argued that the measure should be appropriate and necessary in order not to affect the expeditious administration of justice under article 17 of the Constitution. In the opening of electoral packages several constitutional principles converge: the electoral certainty and the guarantee of audience, and the procedural economy; When both collisions occur, a reasonable, objective, and systematic solution is made. According to Sánchez Gil (2008, 2017, 2018), the Court appropriately resolved by demanding that it not necessarily be deprived of any effect to any of the rules, used the criterion of suitability as *ratio decidendi* and determined that the claim was "unassailable", coupled with "the causality between the narrated facts and the alleged generalized irregularities of the square and district computations alluded to" [9, p. 262–263; 10, p. 315].

The Toluca Regional Chamber has also used the principle of proportionality in connection with a constitutional electoral review trial initiated by the Party of the Democratic Revolution (PRD) against a decision issued by the Electoral Tribunal of the State of Michoacán [7]. The PRD considered unconstitutional Article 279, section I, of the Electoral Code of the State of Michoacán, which imposes a fine and a public reprimand in case of failure to comply with reporting obligations for the control of campaign resources. In its argument, the PRD pointed to the legal provision as disproportionate and excessive, and requested its non-application to the specific case. The Toluca Regional Chamber used the judgment of proportionality and decided that the sanctions are of a different legal nature, since they serve the purposes of protection of legal assets and of prevention and recovery of the legal order and are therefore appropriate, necessary, and proportionate to sanction the offences committed. It concluded that the article challenged by the PRD did not contravene the provisions of the Constitution.

Case to be analyzed: considering the cancellation of the registration of a local political party

Collisions between principles must be resolved, according to Alexy, by means of weighting, thus, when two principles collide, as in the case proposed to be analyzed:

"The local political party that does not obtain, at least, three percent of the total valid vote cast in any of the elections held for the renewal of the local Executive or Legislative Power, will have its registration cancelled" (Article 116, paragraph f, of the Political Constitution of the United Mexican States).

In opposition to what should be exercised in accordance with the following articles of the Political Constitution of the United Mexican States:

"The purpose of political parties is to promote the participation of the people in democratic life, to foster the principle of gender parity, to contribute to the integration of the organs of political representation, and as citizens' organizations, to make possible their access to the exercise of public power, in accordance with the programs, principles and ideas they postulate and through universal, free, secret and direct suffrage, as well as with the rules set by the electoral law to guarantee gender parity, in candidacies for the different positions of popular election. Only male and female citizens may form political parties and freely and individually join them;" (Article 41). ... (Article 41, second paragraph of section I; in line with Article 35, paragraph III: "The rights of citizens are: To associate individually and freely to take part peacefully in the political affairs of the country". Likewise, with the content of Article 134, seventh paragraph: "Public servants of the Federation, the federal entities, the Municipalities and the territorial districts of Mexico City, have at all times the obligation to apply impartially the public resources under their responsibility, without influencing the fairness of the competition between political parties".

In accordance with the above, the motive of the jurisdictional body to weigh and pronounce itself in protecting the sense of equity in the electoral contest is justified since the General Constitution of the Republic entails a coexistence of norms that enshrine fundamental rights, obligations and principles of public interest that must be harmonized with the aim of not suppressing the unity and integration that the constitutional framework signifies. Thus, when there is an incompatibility of subsistence of two constitutional provisions, it should not be assumed that one of them is of an absolute nature and, consequently, should prevail in all matters and under all circumstances, but, on the contrary, their harmonious examination leads one to consider that one of them should give way to the other, even if only for this specific case.

As a result, in the protection of fundamental rights, the balancing of principles becomes an instrument for their protection. It is for this reason that it is stated that, in concrete cases such as this one, the principles have different weight, and the conflict must be resolved according to the dimension of weight and not according to the dimension of validity.

The protection of fundamental rights requires a weighing of constitutional principles, which implies an activity of legal argumentation on the part of the members of the jurisdictional body, who in the analysis of a concrete case can make use of the criterion of weighing; it is here where the weighing of principles plays an essential role as an instrument for the protection of fundamental rights.

Based on this premise, it can be affirmed that the science of law does not only aim to describe and systematize legal orders, but also seeks to justify legal decisions, in this case by means of the weighing of principles, within the framework of a theory of legal argumentation. Thus, through the weighting of principles, it seeks to provide real and effective protection for fundamental rights to determine which of them should prevail over another in a specific case, to achieve full legal effectiveness.

Conclusion

It is considered that legal principles, like norms, are a source of law, understood, as Ronald Dworkin says, as a standard that must be observed not because it favors or ensures an economic, political, or social situation that is considered desirable, but because it is a requirement of justice, equity, or some other dimension of morality. That is, they are conceived as norms with an axiological content of justice, equity, or morality, in such a way that they constitute one of the avenues for the moral dimension in law.

Following a line of thought like that of Alexy, Dworkin points out that principles have a dimension of weight or importance that rules lack. A contradiction between principles must be resolved by giving preference to one of them, both of which are valid. In this sense, weighting is a way of applying legal principles, in such a way that one fundamental right is preferred (for axiological reasons) over another; here the ethical reasons become relevant in the face of a rigid positivism, with the aim of giving full effectiveness to fundamental rights for the specific case in which the principles collide with each other. Thus, in the face of incompatible legal provisions, they find rationality in an ethical framework of reference, to find a solution to the dispute.

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