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# PROPORTIONALITY IN CONSTITUTIONAL AND HUMAN RIGHTS INTERPRETATION*

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**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.

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**Palabras Clave:**

Derechos, interpretación, principios, proporcionalidad.

***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.*

> *[E]ye 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).

> *Right in general, may be defined as the limitation of the Freedom of any individual to the extent of its agreement with the freedom of all other individuals, in so far as this is possible by a universal Law.*
> Immanuel KANT, *On the Common Saying. 'This May be True in Theory, But it Does not Apply in Practice'"* (1793).

> *All social primary goods —liberty and opportunity, income and wealth, and the bases of self-respect— are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored.*
> John RAWLS, *A Theory of Justice*, § 46 (1971).



## 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 inexist-

[1] *Vid.* Dworkin, Ronald, *Taking Rights Seriously*, Cambridge, Massachusetts: Harvard University Press, 1977 (there is 2nd ed. with "Reply to Critics": 1978). (Hereinafter the references will be made to the revised edition.) *Vid.* also Rawls, John, *A Theory of Justice*, Cambridge, Massachusetts: Harvard University Press, 1971 (there is a Revised Edition: 1999.)

[2] *Vid.* Alexy, Robert, *A Theory of Constitutional Rights*, trans. Julian Rivers, Oxford, Oxford University Press, 2002; Barak, Aharon, *Proportionality: Constitutional Rights and their Limitations*, Cambridge, Cambridge University Press, 2012; and Möller, Kai, *The Global Model of Constitutional Rights*, Oxford, Oxford University Press, 2012.

[3] *Vid.* for example, Webber, Grégoire C. N., *The Negotiable Constitution: On the Limitation of Rights,* Cambridge, Cambridge University Press,

ence 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 propor-

2009; and Tremblay, Luc B. and Webber, Grégoire C. N. (eds.), *The Limitation of Charter Rights: Critical Essays on R. v Oakes*, Montréal, Éditions Thémis, 2009.

[4] *Vid.* for this claim and its response, Kumm, Mattias and Walen, Alec D., "Human Dignity and Proportionality: Deontic Pluralism in Balancing", in Huscroft, Grant *et al.* (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (forthcoming).

tionality 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 —*strictu 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

[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.

[6] Dworkin, Ronald, "The Model of Rules I", in Dworkin, Ronald, *Taking Rights Seriously*, *cit.*, pp. 14-45. (Originally published as "The Model of Rules", *University of Chicago Law Review*, Vol. 35, No. 1, 1967, pp. 14-46; and reprinted as "Is Law a System of Rules?", in Summers, Robert S. (ed.), *Essays in Legal Philosophy*, Oxford, Basil Blackwell, 1968, pp. 25-60.)

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 logical level, associated both with 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]

[7] *Ibidem*, p. 22.
[8] *Idem.*
[9] *Ibidem*, p. 17.
[10] *Vid. infra* note 41 and its accompanying text.

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 an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change)";[12] and, "principle" —*strictu sensu*— is "a [kind of] standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality."[13] Analogously, to the first step, either legal principles —*lato sensu*— are —and function as— policies or not. In the latter case, they are —and function as— legal principles —*strictu sensu*—instead. In sum, Legal principles —*lato sensu*— are either policies or not, *i.e.* principles —*strictu sensu*— and, in other words, they are principles or not, *i.e.* policies.

[11] Dworkin, *Taking Rights Seriously*, *cit.*, p. 22.

[12] *Idem.*

[13] *Idem.*

(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, *Henningsen 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

[14] *Idem*.
[15] *Ibidem*, pp. 22-23.
[16] *Ibidem*, p. 23.
[17] 115 N.Y. 506, 22 N.E. 188 (1889).
[18] 32 N.J. 358, 161 A.2d 69 (1960).

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 lædere*" (*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 *Henningsen*, the court denied the manufacturer a right to limit his liability and, at various parts, quoted as applicable different legal principles, among them "«[I]s 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 inequity and injustice?»" And "«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…»".[22]

(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".[23] 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

[19] Dworkin, *Taking Rights Seriously*, *cit.*, pp. 23-24.

[20] The Roman emperor Iustinian emphasized the existence of three main legal principles considered as "*præcepta iuris*" (*i.e.* "legal precepts"): "*honeste vivere*" (*i.e.* "to live respectfully/truthfully"); "*alter/um non lædere*" (*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]).

[23] Dworkin, *Taking Rights Seriously*, *cit.*, p. 24.

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 facts a rule 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".[27] In this order of

[24] *Vid*. for example, Cohen, Felix S., "Transcendental Nonsense and the Functional Approach", *Columbia Law Review*, Vol. 35, No. 6, 1935, pp. 809-49.

[25] Dworkin, *Taking Rights Seriously*, *cit.*, 24.

[26] *Idem*.

[27] *Idem*.

ideas, following the Latin maxim "*Exceptio probat 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."[28] 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".[29] 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

[28] *Ibidem*, p. 24.

[29] *Ibidem*, p. 25.

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.[30]

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 specificæ*], or something of that sort [*lex loci*, *locus regit actum*]. A legal system may also prefer the rule supported by the more important principles [*in dubio pro homine/personæ/reo*]."[31] 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,

[30] 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); Dworkin, *Taking Rights Seriously*, *cit.*, pp. 31-9 and 68-71; and Waluchow, Wilfrid J., *Inclusive Legal Positivism*, Oxford, Oxford University Press, 1994. *Vid.* also Flores, Imer B., "H. L. A. Hart's Moderate Indeterminacy Thesis Reconsidered: In Between Scylla and Charybdis?", *Problema. Anuario de Filosofía y Teoría del Derecho*, No. 5, 2011, pp. 147-73; and Shiner, Roger, "Hart on Judicial Discretion", *Problema. Anuario de Filosofía y Teoría del Derecho*, No. 5, 2011, pp. 341-62.

[31] Dworkin, *Taking Rights Seriously*, *cit.*, p. 27.

to the extent that either one of them most 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".[32]

As a consequence, of their dimension of weight, which grants them value and their validity,[33] 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.[34] 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 legal

[32] *Ibidem*, p. 26.

[33] The distinction between different forms of validity will remain largely unexplored at this time. *Vid.* Flores, Imer B., "The Quest for Legisprudence: Constitutionalism *v* Legalism", in Wintgens, Luc J. (ed.), *The Theory and Practice of Legislation: Essays on Legisprudence*, London, Ashgate, 2005, pp. 26-52.

[34] On the close relationship between principles and values, *vid.* Alexy, *A Theory of Constitutional Rights*, *cit.*, pp. 86-110.

wrongs".[35] 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 threat 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".[36] 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.[37] 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

[35] Dworkin, *Taking Rights Seriously*, *cit.*, p. 25.

[36] *Idem.*

[37] 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.

how weighty it is".[38] 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 can speak of rules as being *functionally* important or unimportant (the baseball rule that three strikes are out is more important than 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".[39]

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 *pedigree* test as Dworkin labeled it, which basically requires an uninterrupted chain of validity linking the applicable rule to the more basic or fundamental ones.[40] 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

[38] Dworkin, *Taking Rights Seriously*, *cit.*, pp. 26-7.

[39] *Ibidem*, p. 27.

[40] *Ibidem*, p. 17: "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".

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.[41]

Second —and more fundamentally— since rules are *prima facie* valid and applicable whenever the conditions provided by the general rule are met by the particular facts of the case at hand it seems that legal analysis or reasoning can be reduced to an applicative-deductive mode, by subsuming the (particular) fact(s) into the one and only applicable (general) rule —or its exception— from which the legal consequences follow logically —and almost automatically or mechanically. Moreover, a principle "does not even purport to set out conditions that make its application necessary. Rather, it states a reason that argues in one direction, but does not necessitate a particular decision".[42] In Dworkin's words:[43]

[41] Dworkin's *Justice for Hedgehogs* aims not only to attack value pluralism and value skepticism but also to defend the unity of value, I will like to point out that this thesis, *i.e.* the unity of value thesis, can be traced all the way back to the early publication of "The Model of Rules I" to the weight dimension claim, as well as to the fact that principles are interconnected and do hang together, and has remained ever since throughout his later works. *Vid.* Dworkin, *Taking Rights Seriously*, *cit.*, p. 41: "principles rather hang together than link together [as rules do]". *Vid.* also Dworkin, Ronald, *A Matter of Principle*, Cambridge, Massachusetts, Harvard University Press, 1985; Dworkin, Ronald, *Law's Empire*, Cambridge, Massachusetts, Harvard University Press, 1986; Dworkin, Ronald, *Freedom's Law. The Moral Reading of the American Constitution*, Cambridge, Massachusetts, Harvard University Press, 1996; Dworkin, Ronald, *Sovereign Virtue. A Theory and Practice of Equality*, Cambridge, Massachusetts, Harvard University Press, 2000; Dworkin, Ronald, *Justice in Robes*, Cambridge, Massachusetts, Harvard University Press, 2006; and Dworkin, Ronald, *Justice for Hedgehogs*, Cambridge, Massachusetts, Harvard University Press, 2011.

[42] Dworkin, *Taking Rights Seriously*, *cit.*, p. 26.

[43] *Idem*.

> 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 reformulated, 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."[44] 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-interpretative 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 reformulated and much less overruled, a form of "balancing" comes and must come into play to work it out.

[44] *Ibidem*, p. 35.

In that sense, Robert Alexy argues: "The nature of principles implies the principle of proportionality and vice versa".[45] 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".[46] And, finally, cited the German Federal Constitutional Court as stating that "the principle of proportionality emerges 'basically from the nature of constitutional rights themselves'."[47]

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 the point of 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

[45] Alexy, *A Theory of Constitutional Rights*, *cit.*, p. 66.

[46] *Idem* (footnote is omitted).

[47] *Idem*. *Vid*. BVerfGE 19, 342 (348 f.); 65, 1 (44).

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*[48] 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.[49] 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

[48] [1986] 1 S.C.R. 103.

[49] For the migration of constitutional ideas, in general, *vid*. for example, Sujit Choudhry (ed.), *The Migration of Constitutional Ideas*, Cambridge, Cambridge University Press, 2006; and, for the principle of proportionality, in particular, *vid*. Deschamps, Marie, *The Cross-Fertilisation of Jurisprudence and the Principle of Proportionality. Process and Result from a Canadian Perspective* (on file with the author).

proportionality between the effect of the limitation upon the right and the objective achieved by that limitation.[50]

Similarly, to Canada and Germany,[51] 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 Revisión 543/2003* 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.[52] The argument at the core of the dissenting opinion runs as follow:

> 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

[50] [1986] 1 S.C.R. 138-9.

[51] 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.

[52] *Vid.* Flores, Imer B., "Igualdad, no discriminación (y políticas públicas): A propósito de la constitucionalidad o no del artículo 68 de la Ley General de Población", in Torre Martínez, Carlos de la (ed.), *El derecho a la no discriminación*, México, UNAM, 2006, pp. 263-306. *Vid.* also Aguirre Anguiano, Sergio Salvador *et al.*, "Igualdad y discriminación en Mexico. Un análisis constitucional", *Este país*, No. 163, 2004, pp. 36-44.

> 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 classificatory 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 affectation 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.[53] It is also worth to mention that previously

[53] 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.

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.[54]

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

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., "Legisprudence: The Forms and Limits of Legislation", *Problema. Anuario de Filosofía y Teoría del Derecho*, No. 1, 2007, pp. 247, 257-260; and Flores, Imer B., "Legisprudence: 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. *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.

"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*,[55] 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".[56] 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.[57]

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

[55] 128 S. Ct. 2783 (2008).

[56] *Idem.* at 2851.

[57] The relationship between the American balancing and the German proportionality will remain large unexplored at this time. *Vid.* for example, Cohen-Eliya, Moshe and Porat, Iddo, "American Balancing and German Proportionality: The Historical Origins", *International Journal of Constitutional Law*, Vol. 8, No. 2, 2010, pp. 263-86.

Case) or *Caso del Poeta Maldito* (*i.e.* Wicked Poet Case). To make a long story short: A poet, *i.e.* Sergio Hernán Witz Rodriguez, who was charged with the federal crime of "*ultraje a los símbolos patrios*" (*i.e.* outraging 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 criminalize 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, incited 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 speech 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 citi-

zens, 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 disproportional 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 the same as he. What did competed us to determine is what a person has a right to say in Mexico without suffering a criminal prosecution that marks he/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 resolution that gives plenty practical operation to what our Constitution establishes, granting plenty operation to the civil rights of the citizens, element over which the construction of the democracy our Constitution foresees must be built. That did obligated us to protect the petitioner against article 191 of the Federal Criminal Code, as an imperative measure to safeguard the nucleus of his/her right to express freely in our country, and to divulge his/her own ideas through the publication of writings.
>
> Protecting the petitioner in this case neither does imply —is important to stress it out— to do a general declaration of unconstitutionality of the article 191 of the Federal Criminal Code, nor a definitive expulsion from the legal ordering. As it is proper from the writ of *amparo* in our legal system, which does not exercise a judicial review of legislation with *erga omnes* effects, but *inter partes*, that is, to the concrete case and not in an abstract way, the crime of outraging the national symbols will remain in the Criminal Code and may constitute the parameter to criminally persecute conducts so deserving. In a case such as the one debated, in which what is at stake is the preservation of the essential content of the freedom of expression (since writing poems is perhaps the more classic and less challenged manifestation of such liberty), the respect to the constitutional order obligated this Chamber to declare it inapplicable, because the simple fact that leaving open the door to a judge who may use it to consider criminally the conduct of mister Witz implies legitimating a violation to his more basic liberties.

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*[58] striking down a conviction under Texas flag-burning local statute; and *United States v Eichman*[59] 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*[62] three-trimester triple 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 so-

[58] 109 S. Ct. 2533 (1989).

[59] 110 S. Ct. 2404 (1990).

[60] *Texas v. Johnson*, 109 S. Ct. 2533, 2548 (1989) (Kennedy, J., concurring).

[61] *United States v Eichman*, 110 S. Ct. 2404, 2407 (1990).

[62] 410 U.S. 113 (1973).

cieties), 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 enact-

ment 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 *sociedades 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 heterosexuals 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.

## 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.[63] As it is well-know, 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 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.

[63] *Vid*. Rawls, *A Theory of Justice*, *cit.*, pp. 75-83.