Giorgio Bongiovanni
Giovanni Sartor
Chiara Valentini
Editors

Law and Philosophy Library 86

Reasonableness and Law

Springer

this paper, we will portray it as a type of operating system that constitutional judges employ in pursuit of two overlapping, general goals:

- to manage potentially explosive environments, given the politically sensitive nature of rights review.
- to establish, and then reinforce, the salience of constitutional deliberation and adjudication within the greater political system.

PA provides basic materials for achieving both objectives, in a relatively standardized, easy-to-use form. Under conditions of supremacy and a steady case load, a trustee court has powerful reasons to seek to draw the major actors in the polity into the processes it governs, and to induce them to use the modes of deliberation that it curates. In so far as they do, political elites will help to legitimize the court and its doctrines, despite or because of controversy about supremacy.

2.4.1 Balancing

A basic task of constitutional judges is to resolve intra-constitutional conflict: legal disputes in which each party pleads a constitutional norm or value against the other. Where the tension between two interests of constitutional rank cannot be interpreted away, a court could develop a conflict rule that would determine which interest prevails. In fact, most judges are loath to build *intra*-constitutional hierarchies of norms. Instead, they typically announce that no right is absolute, which thrusts them into a balancing mode.

When it comes to constitutional adjudication, balancing can never be dissociated from lawmaking: it requires judges to behave as legislators do, or to sit in judgment of a prior act of balancing performed by elected officials. We nonetheless argue that the move to balancing offers important advantages. Consider the alternatives. A court could declare that rights are absolute, or that one right must always prevail over other constitutional values, including other rights provisions. Creating such hierarchies would, in effect, *constitutionalize* winners and losers. Further, we know of no defensible procedure for doing so other than freezing in place a prior act of balancing: in so far as judges gave reasons for having conferring a higher status on one value relative to another, they have in fact balanced. A court could also generate precedent-based covering rules for determining when a right is or is not in play, or under what circumstances one interest prevails against another. The procedure can not save the court from charges that it legislates or balances. On the contrary, such a court dons the mantle of the supreme legislator whose self-appointed task is to elaborate what is, in effect, a constitutional code.

A court that explicitly acknowledges that balancing inheres in rights adjudication is a more honest court than one that claims that it only enforces a constitutional code, but neither balances nor makes law. It is also makes itself better off strategically, relative to alternatives. The move to balancing makes it clear: (a) that each party is pleading a constitutionally-legitimate norm or value; (b) that, a priori, the court

---

argumentation that enable the litigating parties and the judge to bridge the domain of law and the domain of interest-based conflict.

holds each of these interests in equally high esteem; (c) that determining which value shall prevail in any given case is not a mechanical exercise, but is a difficult judicial task involving complex policy considerations; and (d) that future cases pitting the same two legal interests against one another may well be decided differently, depending on the facts.

2.4.2 Argumentation Frameworks

In balancing situations, it is context that varies, and it is the judge's reading of context—the circumstances, fact patterns, and policy considerations at play in any case—that determines outcomes. A balancing court can, nevertheless, give some measure of coherence to adjudication by developing stable *procedures* for arriving at decisions. To the extent that it is successful, these procedures will take on some of the systematizing functions of precedent more broadly.

Our focus in this paper is on a particular type of procedure, an "argumentation framework." These are discursive structures that organize (a) how litigants plead their interests, and how they engage their opponent's arguments, and (b) how courts frame their decisions. Following Sartor (1994),[14] such frameworks embody a series of inference steps, represented by a statement justified by reasons (or inference rules) that lead to a conclusion. In balancing situations, such frameworks incorporate inconsistency—that is, argumentation—to the extent that each inference step offers both a defensible argument and counter argument, from which contradictory but defensible conclusions can be reached. In resolving disputes within these structures, judges typically choose from a menu of such conclusions.

It is our view that a balancing court seeking to manage its environment can do no better than to propagate appropriate argumentation frameworks. Once in place, the court will know, in advance, how the parties to an intra-constitutional dispute will plead, and each side will know how the court will proceed to its decisions. Under conditions of supremacy (given a steady case load), consistency on the part of the court will entrench the framework as constitutional doctrine. To the extent that arguing outside of the framework is ineffective, skilled legal actors will use the framework, thereby reproducing and legitimizing it.

2.4.3 Proportionality

PA is an argumentation framework, seemingly tailor-made for dealing with intra-constitutional tensions (the indeterminacy of rights adjudication). The framework clearly indicates to litigating parties the type and sequence of arguments that can and must made, and the path through which the judges will reason to their decision. Along this path, PA provides ample occasion for the balancing court to express its respect, even reverence, for the relative positions of each of the parties. This latter point is crucial. In situations where the judges can not avoid declaring a winner,

[14] For a fuller discussion, see Stone Sweet (2002a).

they can at least make a series of ritual bows to the losing party. Indeed, the court that moves to balancing *stricto senso* is stating, in effect, that each side has some significant constitutional right on its side, but that the court must, nevertheless, take a decision. The court can then credibly claim that it shares some of the loser's distress in the outcome.

2.5 The Structure of Constitutional Rights

In contemporary rights adjudication, balancing holds sway for three basic reasons. First, rights provisions are relatively open-ended norms, that is, they are both indeterminate and in danger of being construed in an inflexible and partisan manner. As discussed, judges have good reasons to formalize a balancing procedure, and to impose this on litigating parties. PA is such a formalization.

Second, most post-World War II constitutions state unambiguously that most rights provisions are not absolute but, rather, are capable of being limited by another value of constitutional rank. In fact, limitation clauses are the norm. Take the following examples:

- In Germany (1949), Article 2.1 of the Basic Law (GG) states that "everyone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend the constitutional order or moral code."
- In the Spanish Constitution of 1978, Article 20.1.a proclaims the right to free expression, which Article 20.4 then "delimits" with reference to "other rights, including personal honor and privacy." Article 33.1 declares the right to private property, while Article 33.3 provides for the restriction of property rights for "public benefit," as determined by statute.
- Section 1 of the Canadian Constitution Act (1982) declares that: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
- Article 17 of the Charter of Rights of the Czech Republic (1993) states: "freedom of expression and the right to seek and disseminate information may be limited by law in the case of measures essential in a democratic society for protecting the rights and freedoms of others, the security of the State, public security, public health, and morality."
- In South Africa (1996), the extensive Bill of Rights is followed by Section 36.1, announcing that: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose."

In each of these settings (see Section 4), constitutional judges have adopted PA to manage the intra-constitutional conflicts associated with rights. Put differently, judges do not develop doctrines that enable them to "enforce" limitation clauses; a law is struck down when it fails the test of proportionality. In Canada, judges apply a least-restrictive means test when they are asked to enforce the "reasonable limits" prescription of Section 1 of the Charter of Rights and Freedoms. In South Africa, LRM testing is required by the Bill of Rights itself, but the founders based this provision on a prior ruling of the Constitutional Court to adopt proportionality as an overarching principle of rights adjudication.[15] Across, post-1989 Central Europe, PA is automatically activated whenever the "necessity," or "essential" nature, or "reasonableness," of governmental measures is challenged under a rights provision.

A third reason: many modern constitutions (or constitutional theory or doctrine) require state organs, including the legislature and the executive, to work to protect or enhance the enjoyment of rights. It is a core function of constitutional and supreme courts to supervise this activity. In such situations, governments will develop arguments to the effect that their measures are not opposed to rights, but in fact stand-in for a specific right. The classic conflict—between right X and the will of the "majority" as expressed in a statute—is recast, as one between right X and a government action designed to facilitate the development or enjoyment of right Y. Courts can, and often do, interpret these disputes as tensions between two rights. Apart from adopting a formal balancing framework such as PA, we do not see how a court could position itself better to deal with such cases.

2.5.1 The Trustee Court and Rights Adjudication

The move to proportionality generates what we earlier called a "second-order" legitimacy problem, in that it fully exposes the lawmaking capacities of the rights-protecting judge. The point has been made forcefully by Hans Kelsen, the founder of the modern constitutional court, and of another important strain of positivism. In his constitutional theory, Kelsen focused on the legal system as a hierarchy of norms, which judges are enlisted to defend as a means of securing the system's validity and legitimacy. In the inter-war years, Kelsen labored to rationalize constitutional review, in the face of longstanding political hostility to sharing power with judges. Most important, he distinguished what legislators and constitutional judges do, when they make law (Kelsen 1928). Parliaments are "positive legislators," since they make law freely, subject only to constitutional constraints (rules of procedure). Constitutional judges, on the other hand, are "negative legislators," whose legislative authority is restricted to the annulment of statute when it conflicts with the constitutional law. The distinction between the positive and the negative legislator rests on the absence, within the constitutional law, of enforceable human rights. Although this fact is ignored by his modern-day followers, Kelsen explicitly warned of the "dangers" of providing for rights of constitutional rank, which he equated

[15] S. v. Makwanyane and Another 1995 (3) SA 391 (CC) at 436 (S.Afr.). Discussed in Section 4.1.2.

with natural law. The court that sought to protect rights would inevitably obliterate the distinction between the "negative" and the "positive" legislator (ibid., 221–41). Through their quest to discover the content and scope of rights, constitutional judges would, inevitably in his view, become super-legislators.

The passage to new constitutionalism proved Kelsen right: a rights-protecting, trustee court is a positive legislator whose discretionary lawmaking authority, at least on paper, is potentially limitless. But the context for Kelsen's arguments has radically changed (Section 4). After WWII, rights and constitutional review became central to the very idea of constitutionalism. In most places with new constitutions, it would be a relatively simple matter to defend judicial supremacy from the standpoint of delegation theory: a political commitment to rights requires massive delegation to judges; and, if the judges do their jobs properly, they will at times impinge upon policy processes and outcomes. One could also argue that, under the new constitutionalism, there is no legitimacy problem, since the constitution itself expressly provides for rights, rights review, and the structural supremacy of the constitutional judge in certain (policy-relevant) processes. What is interesting is that neither argument has succeeded in shutting down the controversy that attends supremacy or what judges do with it. We discuss the politics of PA further in Section 5.

2.6 Balancing as Optimization

Robert Alexy's book, *A Theory of Constitutional Rights*, is arguably the most important and influential work of constitutional theory written in the last fifty years. Alexy develops a "structural theory" of rights and proportionality balancing in light of the case law of the German Federal Constitutional Court (GFCC) (Alexy 2002). But the theory has far wider application, since it speaks directly to major issues raised by the new constitutionalism, and in this paper. At this point in time, Alexy's ideas constitute the basic conceptual foundations of PA. In this brief Subsection, we briefly highlight some of the claims Alexy makes, focusing on concepts to be used further along in the paper.

For our purposes, Alexy makes two original contributions. First, he distinguishes between *rules* and *principles* and then conceptualizes principles as "optimization requirements" (ibid., 44–61). Rules "contain fixed points in the field of the factually and legally possible"; that is, a rule is a norm that is either "fulfilled or not" (ibid., 47–48). For Alexy, principles, such as those contained in rights provisions, are norms that "require that something be realized to the greatest extent possible given the legal and factual possibilities" (ibid., 47). The distinction makes a difference in adjudication. Whereas a conflict between two rules can be resolved through invalidating, or establishing an "appropriate exception" to, one of the rules, a conflict between two principles can only be managed through balancing. One principle outweighs the other, but only in a particular set of circumstances. The "scope of the legally possible" is thus determined by the opposition between principles, which is

itself a product of the contextual basis of the conflict.[16] "Conflicts of rules are played out at the level of validity," Alexy argues, whereas "competitions between principles are played out in the dimension of weight," given a specific context (Alexy 2002, 50).

If rights are "optimization requirements," binding on all public (and in some cases, private) authorities, then rights adjudication (and therefore lawmaking more generally) reduces to balancing.[17] Further, the purpose of balancing must be both to resolve alleged conflicts between principles, and to aid *all of the organs of the state* in their task of optimizing rights and other countervailing principles properly.

Alexy's second major contribution follows from his construction of balancing as a kind of *meta-constitutional rule* (Alexy does not use that phrase; in our view, he presupposes PA and balancing as a Grundnorm). A conflict between principles places judges under a duty to balance and to optimize. Although we now skip a number of steps in the argument, Alexy theorizes the necessity prong of PA—the LRM test—in terms of Pareto-optimality (ibid., 399). Accordingly, there can be no defensible justification for allowing a public authority to infringe more on a right than is necessary for it to realize any second principle, given that the right could be optimized: the bearer of the right could be made better off if the government were to choose less onerous means. Optimization is also built into Alexy's "law of balancing," which governs the "proportionality in the narrow sense" phase of PA: "The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other" (ibid., 102).

Alexy acknowledges that the question of what relative weight judges should give to opposed principles, in any given dispute, falls completely outside the theory (ibid., 100, 105). In our view, any proponent of PA must admit that the move to proportionality balancing reveals, rather than disguises, Kelsen's positive legislator, the rights-protecting, trustee court. Alexy can nonetheless claim, as we have, that PA generates a particular form of argumentation, and places the judge under an obligation to justify her decisions in terms of certain constraints.[18] Thus, to the extent that judges actually search for Pareto-optimal solutions (the necessity phase) and actually seek to comply with the law of balancing (the final balancing phase), PA is less vulnerable to the charge that it proceeds in the absence of rational criteria, and is no more than a means to package a court's (unconstrained) policy choices.

From the point of view of 2-against-1 and judicial lawmaking, it should be obvious that rulings that conform to the law of balancing, or can be portrayed as falling on some point along a Pareto frontier, will be more palatable than those that are not Pareto-optimal. From a broader-based political economy perspective, such rulings enable judges to deal with conflicts between (a) those social interests that are likely

---

[16] Rather than being a fixed property of the norms themselves (in the abstract, they are of equal weight).

[17] "Constitutions with constitutional rights are attempts simultaneously to organize collective action and secure individual rights." Alexy (2002, 425).

[18] As Alexy notes, the law of balancing is "not valueless [. . . but] identifies what is significant in balancing exercises." Alexy 2002, 105.

to lose the most and (b) those social interests standing to gain the most, from any new allocation of collective goods being produced by the government measure under review. The court, in effect, is stating that it took every pain to minimize the negative consequences of its ruling for the losing party or interest: the right or interest or value being pleaded by the loser requires as much. If the judges do so, then it will *always* be possible for some observers to claim that the policy effects of their rulings are an inevitable by-product of adjudicating rights claims, rather than outcomes that judges seek to impose on the polity. After all, the policy context—and the menu of options available to the court—were generated by the parties, not the court.

2.7 Summary

Our argument to this point rests on two logics that are separate in principle, but are inseparable in practice. First, at least in theory, PA can help judges respond to a set of acute overlapping dilemmas, related to 2-against-1, lawmaking, and judicial supremacy. Second, PA fits the structure of rights provisions in a world dominated by the precepts of the "new constitutionalism." Most important, new constitutions proclaim rights and then immediately provide for legitimate exceptions to them, in the guise of various constitutionally-recognized public interests. Intra-constitutional conflicts are inevitable in such normative systems, hence extensive delegation to constitutional judges.[19] In our view, the two logics will typically overlap in rights adjudication. Our explanation thus blends "political" (or "strategic") and "legal" factors, theorized in particular ways.

3 The German Genealogy

The German Basic Law (1949) established a system of constitutional justice that not only transformed German law, politics, and state theory, but has impacted heavily on the development of constitutionalism across the globe. The GFCC has been the main agent of these changes. Our concern is with one contribution of the German experience to global constitutionalism: the emergence of PA as a formal procedure for dealing with rights claims. We trace the antecedents of the proportionality framework back two centuries, to a corner of German law—police law (*Polizeirecht*). Long before courts were applying PA to invalidate state action, the rudiments of PA emerged as a theoretical construct for assessing when the interventions of the state in the private sphere were justified. In the second half of the nineteenth century, as courts emerged with the institutional capacity to review administrative actions, elements of PA, notably the LRM test, emerged as a core

[19] One could also portray the second logic in strictly formal terms: the structure of modern rights provisions necessarily implies PA. Judges, however, have choices in how best to manage rights-based, intra-constitutional conflict—they were not required to adopt PA.

administrative law principle. In the post-war order, with the advent of a constitutional court and a new solicitude for human rights, proportionality migrated to the constitutional law in the 1950s and, under the tutelage of the GFCC, developed into the expansive balancing framework.

3.1 From Scholars to Judges

Scholars proposed an embryonic version of PA in the late eighteenth century, when they began to contemplate new forms of state intervention and, therefore, the prospect of regular conflict between public purposes and individual freedoms. Leading legal and political thinkers sought to ground the legitimacy of police interventions—i.e., administrative actions—on stable principles capable of mediating the conflict between private autonomy and the public good. The conflict was taken seriously because private autonomy was highly valued in the social contractarian theories that undergirded public law thinking in late eighteenth century Germany. In the view of jurists such as Carl Gottlieb Svarez (1746–1798), individuals possessed natural rights that were permanent and prior to the state, but they had given up some of their freedom in order to realize collective goods, through the state. The social contract justified the state's authority, but also fixed the outer bounds of that authority. Proportionality was given a central place in these early theories of the police power, as a standard governing the legality of state measures. In the words of Günther Heinrich von Berg (1765–1843):

> The first law [. . .] is this: the police power may go no farther than its own goals require. The police law may abridge the natural freedom of the subject, but only insofar as a lawful goal requires as much. This is its second law.(Würtenberger 1999, 55, 63)

Berg's laws capture the essence of the suitability and LRM tests: the police may invade citizens' freedoms only in the service of lawful goals, and their measures may restrict those freedoms no more than necessary. The third distinctive element of PA—balancing in the strict sense—was also recognized in the eighteenth century. In his treatise, *Lectures on the State and Law*, Svarez described the balancing exercise, but insisted that it proceed with a thumb on the scale in favor of rights:

> Only the achievement of a weightier good for the whole can justify the state in demanding from an individual the sacrifice of a less substantial good. So long as the difference in weights is not obvious, the natural freedom must prevail [. . .]. The [social] hardship, which is to be averted through the restriction of the freedom of the individual, has to be more substantial by a wide margin than the disadvantage to the individual or the whole that results from the infringement.[20]

Although jurists had thus already devised a proportionality test for the legitimacy of state intervention in private freedoms before 1800, it is important to note that PA was not yet being deployed as a constraint on state action. It would be many decades before the judicial review of administrative acts would appear in any of the German

[20] Carl Gottlieb Svarez quoted in Würtenberger (1999, 62).

states.[21] Svarez, who presented his arguments in lectures delivered to Crown Prince Friedrich Wilhelm, the later King Friedrich Wilhelm III, was in effect proposing a principle that the state should adopt for its conduct; was not describing positive law (Heinsohn 1997).

Throughout the nineteenth century, scholars continued to reiterate and refine proportionality-based standards for the exercise of police power, and these ideas were finally given agency with the establishments of administrative courts. The most important of these courts, Prussia's *Oberverwaltungsgericht*, or Higher Administrative Court, began operating in 1875. Fed by a steady stream of cases, that court quickly gained a reputation across Germany as the leading expositor of administrative law principles (Stolleis 2001, 283). By the 1880s, it had begun to annul police measures on LRM grounds. The court grounded this LRM review textually in the provision of the Prussian General Law of 1794 (*Allgemeines Landrecht*) governing police powers. This clause reads: "The office of the police is to take the necessary measures for the maintenance of public peace, security, and order." Accordingly, the court reasoned, actions *not* necessary to pursue these ends are beyond the police's authority. Administrative courts in the other German states soon began following Prussia's lead, striking down police measures on LRM grounds.

By the end of the nineteenth century, the principle of proportionality enjoyed a secure place in administrative law, both in judicial decisions and scholarly treatises. As noted, judges initially seemed to regard proportionality primarily in LRM terms, but courts did not always distinguish between the various ways that administrative measures might be disproportionate (see Hirschberg 1981, 6). Over time, balancing was also contemplated and employed, but the practice was far from uniform.

Constitutional rights review proved to be more problematic. Although the constitutions of most German states did contain bills of rights in the later nineteenth century, courts did not enforce those rights as trumps against otherwise legal state action. During the 1875–1918 period, administrative review had become in some respects "a functional substitute for constitutional review" (Stolleis 2003, 270–71), and administrative judges routinely invoked rights, in the form of principles binding on the executive. But statutes were, at least technically, immune from judicial control.

The Weimar Constitution (1919–1933) established a republic. It also contained a catalogue of "rights"—perhaps better described as a list of programmatic aspirations, since they could be overridden by ordinary statute. Nonetheless, in the 1920s, with political authority weak and divided, some judges seized on a discourse of rights to wage what legal historian Michael Stolleis has termed a reactionary "war" on politicians, triggered by takings and debt cases (ibid., 273. See also Huber 1992, 36). From 1921, the *Reichsgericht* (the Supreme Court) claimed for itself the authority to review the conformity of statutes with basic rights, especially property rights, which it characterized as "sacred" (Stolleis 2003, 272). At the same

[21] Ibid., 64–65, 67. The first was Baden (1863); second Prussia (1875).

time, leading jurists—including Carl Schmitt, Heinrich Triepel, Rudolph Smend, and the young Gerhard Leibholz—began to theorize rights as the foundational basis of all constitutional legality. Much of this scholarship was conservative and anti-parliamentarian, but not all of it. Triepel and Smend, for instance, argued that rights were best understood as a system of "legalized values," and that these values ought to infuse all of the constitutional law, and to impose positive duties on government. Although these efforts were upended by the Third Reich, they laid the groundwork for the rights jurisprudence of the post-war constitutional order. Smend renewed his efforts after 1945, and Leibholz, who joined the first GFCC in 1951, worked hard to have the Court adopt these ideas (see Günther 2004, 190–91).

Had the Weimar Republic survived, it is at least possible that the Supreme Court would have generated a rights-oriented jurisprudence with proportionality doctrines at its core. The advent of the Third Reich mooted the question, as judicial review came under attack from the Nazis and their new doctrinal establishment (Stolleis 1998, 134). Labeling a state measure "political" was usually enough to shield it from judicial review (ibid.).

3.2 The Constitutionalization of Proportionality

Drafted under the watchful gaze of occupying forces, the German Basic Law of 1949 established the Federal Republic as a new constitutional order grounded in a commitment to human rights enforceable as higher law. Immediately, jurists began arguing for the recognition of proportionality as a constitutional principle. Some, such as Herbert Krüger, were "close associates" or followers of Rudolph Smend, and Smend's theories about rights and constitutional "integration" enjoyed a privileged position throughout the 1950s.(Günther 2004, 180). At the same time, rights-oriented scholars, such as Gerhard Leibholz, were appointed to the GFCC.

In hindsight, one sees the hugely important role that legal scholars played in elevating proportionality to a constitutional principle. They refined the concepts that courts employed, and provided the rationales for proportionality's expansion. Two figures stand out in particular: Rupprecht Krauss and Peter Lerche. Krauss's influential 1953 dissertation made the case for treating proportionality as a constitutional principle. Krauss coined the term, "proportionality in the narrow sense," and presented it as a latent strain already present in the very concept of proportionality. Krauss's insistence that the concept of proportionality implied a balancing test reflected a heightened solicitude for rights. He wrote: "if the measure [of legality] is only necessity [i.e., the least restrictive means test], then a quite negligible public interest could lead to a severe right infringement, without being unlawful" (ibid., 15). Peter Lerche made his contribution as the constitutionalization of proportionality was underway, in his 1961 dissertation. While Lerche was careful to distinguish between the least restrictive means test and proportionality in the strict sense, like Krauss, he argued that the two were logically connected. The least restrictive means test on its own would be ineffectual, since "any measures at all could be

presented as "necessary," if the purpose they serve is defined in wide enough terms" (Lerche 1961, 20). Proportionality in the strict sense must be added to the least restrictive means test, "if the principle of necessity is not to lose all substance" (ibid.).

From Svarez to Lerche, then, one finds a remarkable continuity in doctrinal commitment to developing a proportionality-based account of rights. Germany's constitutional judges echoed this commitment from the earliest days of the post-war order. The Bavarian Constitutional Court applied a LRM test to statutory restrictions on state constitutional rights in 1949,[22] and by 1956 had asserted that the Proportionality Principle was implied by the very nature of the rights guaranteed in the Bavarian constitution, combined with the "*Rechtsstaat*" principle.[23] The GFCC moved almost as quickly. Indeed, by the close of the 1950s, the GFCC had elaborated the familiar multi-stage PA framework,[24] albeit without citing authority or giving a rationale for its application. To this day, the Court has not explicated the source of proportionality. As Dieter Grimm (Justice on the GFCC, 1987–1999) puts it: "The principle was introduced as if it could be taken for granted" (Grimm 2007, 387).

If the Court were to justify its move to PA today, we would argue, it would invoke these considerations: the priority of rights, given the recent Nazi past; the structure of rights, taking account of the modern welfare state and commitments to social democracy; and the rationality of the proportionality principle as a well-theorized general principle of law that "flows," in Grimm's words, "from the rule of law or the essence of fundamental rights" (ibid., 385), and confers basic legitimacy on the system as a whole.

In any event, in the 1960s, the GFCC's invocations of PA became more confident and the structure of its analysis more formalized. In 1963, the Court suggested that it would deploy PA to all cases in which a right is restricted[25] and, in 1965, it announced, with no supporting citations, that "in the Federal Republic of Germany, the principle of proportionality possesses constitutional status."[26] In 1968, the GFCC declared proportionality to be a "transcendent standard for all state action" binding all public authorities.[27] While, at this time, the Court did not always employ all the steps of PA to decide a case, especially when proportionality was only one of the legal issues raised, in subsequent cases it took care to be explicit about how it would use the different elements of PA.

---

[22] Bayerischer Verfassungsgerichtshof [BayVerfGH] [Bavarian Constitutional Court] July 7, 1949, 1 II Entscheidungen des Bayerischen Verfassungsgerichtshofs [BayVerfGHE] 64 (76, 78) (F.R.G.).

[23] BayVerfGH Dec. 28, 1956, 9 II BayVerfGHE 158 (177); see also Stern 1993, 171.

[24] In *Apothekenurteil*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 11, 1958, Entscheidungen des Bundesverfassungsgericht [BVerfGE] 7, 377 (404–05)(F.R.G.).

[25] BVerfG June 10, 1963, BVerfGE 16, 194 (201) (1963).

[26] BVerfG December 15, 1965, BVerfGE 19, 342 (348–49). In this case, the court found that a lower court violated the plaintiff's constitutional rights by not considering whether the pre-trial detention of the plaintiff, a 75-year-old retired admiral charged with murder in connection with an order he gave during World War II, was consistent with the principle of proportionality.

[27] BVerfG March 5, 1968, BVerfGE 23, 127 (133).