

Proportionality, Fundamental Rights, and Balance of Powers

Davor Šušnjar

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By
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Proportionality, Fundamental Rights, and Balance of Powers

*Mojim Roditeljima**

* This book is dedicated to my parents.

Preface

The idea for this study was born in 2004/05 during a project directed by Felix Ekardt. During that time I had the first opportunity to think about proportionality, fundamental rights, and the balance between powers of government. In 2005, Felix Ekardt and I agreed that this idea should be pursued. In 2006, after my graduation, I decided to shift the focus to the European level. Before, I focused on German law. In that year I was mainly occupied with preparatory work. In January 2007, the Studienstiftung des Deutschen Volkes started to fund my project. The major part of this book was written between January 2007 and December 2008. The thesis was submitted to the examination board in January 2009, the viva took place in May 2009. During autumn/winter 2009, the thesis was prepared for publication.

I am very much indebted to Felix Ekardt for giving me the unique opportunity to conduct this study under this direction within his working group. Without his efforts and encouragement, you could not read these lines and those to come. I greatly enjoyed his inspiration, motivation, and critique. All members of this working group are thanked for their patience in listening to my theses, for asking questions, and for always helpful critique.

I am also grateful for Josef Falke's help with fund raising and his advice during all stages of this study.

This book is dedicated to my parents, who ever supported and encouraged me.

Many others helped me by reading proofs of this study or the exposé, commenting on presentations, offering mental and social support, and/or giving advice and hints: Daniel Buscher, Bettina Hennig, Andreas Heym, Nadine Holzapfel, Elisabeth Linek, Till Markus, Nina Neumann, Torsten Preuß, Heiko Sabatzki, Andrea Schmeichel, Sebastian Schwenen, Jan Seidel, and Stefanie Woborschil.

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I also find it appropriate to mention the authors of the great pieces of software that helped me writing this book: (pdf)T_EX and L^AT_EX, VIM, and Perl. With these tools, composing such a large document was a joy.

I appreciate that the University offered an office and printing opportunities.

The Studienstiftung des Deutschen Volkes is thanked for their grateful financial support.

Note on Citations

Provisions from the Treaty, directives, regulations, statutes, and international treaties are cited in a uniform manner:

art. <a> § <s> paragraph <p> subparagraph <ss> <title of instrument>

The title of the instrument is omitted if it is obvious from the context which one is meant. German statutes are only cited by section numbers, not articles.

Examples:

art. 6 § 2 TEU

§ 1 German Unfair Competition Act

art. 100 § 1 GG

German commentaries are cited in this form:

<contributor>, in: <editor>, <short title>, <section/article> para. <paragraph no>

for example:

Starck, in: Hermann von Mangoldt et al., *Kommentar zum Grundgesetz: Präambel, Artikel 1 bis 19* vol. 1 (Vahlen, Munich, 5th edn., 2005), Art. 1 Abs. 3, para. 194.

Dreier, in: Horst Dreier, *Grundgesetz: Kommentar: Präambel, Artikel 1–19* vol. 1 (Mohr Siebeck, Tübingen, 2nd edn., 2004), Art. 1 III, para. 1

The <section/article> portion *is retained from the original without change*, which results in some variety between, for example, “Art. 1 Abs. 3”, “Art. 1 III”, and the convention of this study. Older German commentaries do not provide paragraph numbers. In that case, page numbers are given and preceded by “p. ” instead of “para. ”.

Some texts are available in English and German.* Citing these texts, unbracketed page numbers refer to the German text, while page numbers in angle brackets refer to the English text.

* Aulis Aarnio et al., ‘Grundlagen juristischer Argumentation’, in: Krawietz, Werner and Aarnio, Aulis (eds.): *Metatheorie juristischer Argumentation* (Duncker Humblot, Berlin, 1983), p. 9/Aulis Aarnio et al., ‘The Foundation of Legal Reasoning’ 12 (1981) *Rechtstheorie*, p. 133; Jürgen Habermas, *Faktizität und Geltung* (Suhrkamp, Frankfurt am Main, 2nd edn., 1992)/Jürgen Habermas, *Between Facts and Mores: Contributions to a Discourse Theory of Law and Democracy* (Polity Press, Cambridge, 2004); Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt am Main, 2nd edn., 1997)/Niklas Luhmann et al., *Law as a Social System* (Oxford Univ. Press, Oxford, 2004); Robert Alexy, *Theorie der Grundrechte* (Suhrkamp, Frankfurt am Main, 1994)/Robert Alexy, *Theory of Constitutional Rights* (Oxford University Press, Oxford, 2002)

List of Symbols

$\forall$	for all
$\rightarrow$	implication
$ $	given, for example: $P(A B)$, probability (P) of A given B
P	preferred to
$\succ$	greater than
$\prec$	less than
$=$	equal
$\geq$	greater or equal
$\leq$	less or equal
$\succsim$	preferred to
$\succsim \succsim$	preferred or indifferent to
$\sim$	indifferent to
$\precsim$	subordinated to
$\precsim \precsim$	indifferent or subordinated to
$\sum$	summation: $\sum_n^i a_n = a_n + a_{n+1} + a_{n+2} + \cdots + a_{n+i}$
$\simeq$	comparison
$\simeq$	comparison
$\neg$	negation
$\approx$	approximately

Operators from cited works are retained even if it leads to inconsistencies with the conventions of this study because it eases further reading. So, while Alexy uses **P**, I use $\succ$.

Abbreviations

AG	Advocate General
BSE	Bovine spongiform encephalopathy
BVerfGG	Bundesverfassungsgerichtsgesetz [Federal Constitutional Court Act]
CFI	European Court of First Instance
CFREU	Charter of Fundamental Rights of the European Union
CMLR	Common Market Law Reports
CT	Treaty Establishing a Constitution for Europe
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECSC	Treaty Establishing the European Coal and Steel Community
ECtHR	European Court of Human Rights
EEC	European Economic Community
EU	European Union
Euroatom	European Atomic Energy Community
GATT	General Agreement on Tariffs and Trade
GDR	German Democratic Republic
GFCC	German Federal Constitutional Court
GG	Grundgesetz
GMO	Genetically modified organism
IA	Impact Assessment
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OJ	Official Journal
RP	Rules of Procedure for the European Court of Justice
SEU	Subjective expected utility
TAC	Total allowable catch
TEC	Treaty Establishing the European Community
TEU	Treaty on Establishing the European Union
UNCLOS	United Nations Convention on the Law of the Sea
USA	United States of America
VC	Vienna Convention on Law of Treaties
VdstRL	Vereinigung der Deutschen Staatsrechtslehrer
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer
VwGO	Verwaltungsgerichtsordnung [German Rules of Procedure for the Administrative Courts]

Abbreviations

WRV	Weimarer Reichsverfassung [Constitution of the Weimar Republic]
WTO	World Trade Organization
WWF	Worldwide Fund for Nature

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