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Proportionality and Human Rights in German, Armenian and Georgian Constitutional Adjudication



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Forward

For over 20 years now the German Federal Ministry for Economic Cooperation and Development (BMZ) has been supporting legal and judicial reforms in the South Caucasus. From the very beginning this support was implemented by the German public-benefit federal enterprise for international cooperation services for sustainable development “Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH”. Initially, this support was not provided to individual countries on a bilateral basis. Rather, GIZ provided its advisory services with a regional project, administered from the University of Bremen and covering Moldova, the South Caucasus, Central Asia and Mongolia. After additional bilateral projects were conducted in the South Caucasian and Central Asian countries, regional programs were established. Taking into account the different pathways and speed of the related reforms in these countries, options for synergies had to be developed, enabling peer to peer cooperation and establishing a regional dialogue on the Rule of Law. A flagship initiative in that regard were the Regional Academies (Formerly (2008 – 2014) called „Winter Academy“) “Transformation Lawyers – Legal Dialogue for Legal Transformation”, which were carried out 8 times in cooperation with the Hertie School of Governance and the Bucerius Law School from Hamburg to Berlin. These three-weeks academies were the kick-off for vivid dialogue and a lasting engagement between the South Caucasian countries. The participants of these academies form the Alumni Network “Transformation Lawyers” and are the great treasure of the initiative itself. Given their outstanding role as ambassadors for cross-border cooperation, we are very pleased to present the outcomes of the ongoing cooperation in this Alumni Network. Providing an inspiring forum to learn from each other and to realize joint research were major aims of this network. This very comparative analysis on the Proportionality and Human Rights in Armenian and Georgian Constitutional Adjudication proofs, that beyond the facilitation of regional cooperation, the network contributes to high quality research on legal reforms in the South Caucasus. The topic chosen for this study is of crucial importance for deeper understanding of Rule of Law in the South Caucasus countries. That the state has immanent limits in all areas of activity and can’t do anything at its sole discretion is a principle, which needs to be strengthened in all legal cultures.

In future, the importance of the Alumni Network will even increase. In our next programme phase we will accelerate the support of common comparative research projects, like we do present with this research.

Dr. Thomas Meyer

Program Manager

Legal Approximation towards European Standards in the South Caucasus (LAtEst)

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Introduction

The doctrine of proportionality (*Verhältnismäßigkeit*) is certainly one of the most important contributions of German constitutional law in the development of constitutionalism worldwide. Originating from the Prussian notion of restraint, while exercising public power, the doctrine of proportionality has evolved into one of the most important elements of the *Rechtsstaat* – Legal State. This principle is protecting the basic rights of the individual from unwarranted and unjustified interference by the state through the establishment of balancing requirement between the ends (*Zweck*), which such interference aims to achieve, and the means (*Mittel*) employed.¹ The principle may sound straightforward, but as it often happens striking the right balance is one of the most difficult issues in decision making. For this reason, three criteria - suitability, necessity and balance are employed by the German judiciary to determine whether the interference is proportional.²

The principle has successfully “migrated”, firmly establishing itself as part of the constitutional law doctrine in many legal systems. It has entered the jurisprudence of the ECtHR and has become an important tool in resolving complex issues of human rights’ limitations. The principle has also entered the constitutional law of Eastern and Central European nations, including Armenia and Georgia.

While the Constitution of Georgia does not explicitly mention the proportionality test, it has been extensively applied by Georgian courts. The concept has provided the Constitutional Court of Georgia with a common analytical framework for resolving wider constitutional and human rights matters confronting country's political communities. However, there are differences in formulation and practice of the application of proportionality doctrine, and this field requires further academic research.

Similar situation was in Armenia before the constitutional amendments in 2015 when the concept was introduced into the Constitution of Armenia. Revised Article 78 states that the

¹ *Stein: Staatsrecht*, p. 240-3, as cited by: *Cohen-Eliya/ Porat: American balancing and German proportionality*, 2010

² *Kommers/Miller: The Constitutional Jurisprudence of the Federal Republic of Germany*, 2012

means chosen for restricting fundamental rights and freedoms have to be suitable and necessary for the achievement of the aim prescribed by the Constitution. The means chosen for the restriction have to be proportionate to the significance of the fundamental right that is restricted.

Nevertheless, while the principle of proportionality constitutes a part of constitutional law in both Georgia and Armenia, there is no comprehensive comparative scholarly work on the application of that principle in the legal framework. The German and other foreign sources have not been adequately researched to provide comparative analyses, from which it would be possible to draw conclusions for the application and development of the principle in Georgia and Armenia.

This work is an attempt to research the issues and challenges of application of the proportionality principle in two South Caucasus countries, while drawing from German and ECtHR experience. For this reason, the work is structured into four parts. The first part provides the reader with an overview of the German doctrine and practice in the area. The following part reviews the jurisprudence of the European Court, to examine the general approach, as well as the application of that principle to particular rights. The third and fourth parts address the application of the proportionality principle in Armenia and Georgia respectively, by introducing the basics of legal system and the areas of application of principle and outlining the current issues.

Proportionality In German Public Law: Its Bases, Operation, And Function

by Prof. Dr. Alexander Graser, Regensburg³

Overview

The way the principle of proportionality operates in German public law has for long attracted the attention of scholars and practitioners from other legal systems. From the perspective of comparative law, this interest is understandable as the importance afforded to this principle is among the main characteristics of German public law. It may indeed be a key to understanding both, German administrative law and fundamental rights doctrine.

So, focusing on this principle can be fruitful, especially for systems that share similar traditions in these fields of the law. An exchange on the pertinent developments in the respective systems may then be particularly instructive. As a basis for such an exchange, the present contribution highlights some core aspects of the pertinent law in Germany.

The principle in a nutshell

The principle of proportionality is indeed central to German public law. It serves as a limitation to all exercise of public power that entails a burden on the individual. The principle is operationalized as a four-tier test applied to the measure in question. More specifically, it asks:

- (1) Does the measure serve a legitimate goal,
and is the measure
- (2) suitable to promote this goal,
- (3) necessary for its pursuit, and
- (4) not out of proportion if balanced against the burden it entails?

³ The author wishes to express his gratitude to Amelie Tischmacher for her research assistance.

Legality requires a positive answer to each of these questions. They are addressed in the indicated sequence. An assessment of the legality of a certain measure will typically stop once any of the four questions cannot be answered in the affirmative.

Practical relevance

In legal education, applying this test is considered a basic skill. Students are expected to know it by heart and, in written exams, to apply it in an explicit and thorough fashion. Failure to do so may in many educational contexts amount to a “kiss-of-death”. Moreover, the application of the test and especially of its last prong is often the main place where students are expected to display the skills of consistent reasoning based on the facts of a case.

In judicial decisions, too, the proportionality test is typically applied meticulously. Not every prong may always be addressed if in the given case there is no dispute about it. But whenever indicated, a court will address the issues at hand according to the structure that the test prescribes. A deviation from this practice would be unusual and likely to be perceived as an incidence of remarkable sloppiness.

Bases and roots

In light of the centrality of the principle, it may be counter-intuitive that there is hardly any explicit basis to it in written law. Most notably, neither the principle itself nor any elements of its operationalization are mentioned in the Basic Law, i.e. the German constitution. To be sure, it can be found in some statutory provisions of administrative law. But while the principle applies across all branches of administrative law, such explicit references are exceptional also in statutory law and often mention only certain elements of the test.⁴

⁴ The most common examples are the statutes that regulate the competences of the police. As this matter is mostly not a federal competence in Germany, the examples can be found in the respective laws of individual German states (Länder); cf., e.g., the Bavarian provision in Art. 4 subsections 1 and 2 of the Polizeiaufgabengesetz.

This rather unsystematic state of the law is to be understood against the background of the historical roots and the systematic bases of the proportionality principle in German law. Historically, the principle has developed gradually with the emergence of judicial review in administrative matters.⁵ It thus predates the Basic Law, which is a creation of the aftermath of World War II. Explicit references to the principle can often be traced back to its pre-war roots.

Under the Basic Law, by contrast, the principle has come to be viewed as generally applicable. So, explicit references in statutory law have become dispensable. This might explain that they are vastly absent.

Systematically, the principle of proportionality is now viewed as an implication not only of the “Rechtsstaatsprinzip” (i.e. the principle of the rule of law as enshrined in the – unamendable – provision of article 20 subsection 3 of the Basic Law), but also of the system of fundamental rights protection.⁶ Any act of public power that touches upon the sphere of a fundamental right as guaranteed in the Basic Law will be unconstitutional unless it can be justified. Such justification, in turn, presupposes that all pertinent procedural and substantive provisions of the Basic Law have been observed,⁷ including, within the latter dimension, the principle of proportionality.

Moreover, the German Federal Constitutional Court has given a very broad interpretation to the individual freedoms contained in the Basic Law, establishing, thus, a general presumption of liberty. In particular, the Court has interpreted Article 2 subsection 1 as entailing an individual right to fend off even the most miniscule restriction of personal liberty⁸ – provided, of course, that there is no justification in the above sense. By implication, proportionality has become a constitutionally mandated limitation upon any exercise of public power that entails a burden on

⁵ Cf. *Stern*, Staatsrecht der Bundesrepublik Deutschland, Volume III/2, 1994, § 84 I 2.

⁶ Cf. *Grzeszick* in: Maunz/Dürig (eds.), Grundgesetz-Kommentar, Volume VII, (last update September 2016), Art. 20, # 108; *Starck* in: Isensee/Kirchhof (eds.), Handbuch des Staatsrechts, Volume XII, 3rd Edition 2014, § 271, # 51.

⁷ Cf. the early decision of the German Federal Constitutional Court BVerfGE 6, 32 (Elfes); for an English translation see <http://bit.ly/2fuY4Rz> (Last accessed 16.11.2017)

⁸ Cf. in particular BVerfGE 80, 137. In this decision, the German Federal Constitutional Court dealt with a municipal regulation limiting the freedom to ride a horse in a certain forest; for an English translation see <http://bit.ly/2wwZxei> (Last accessed 16.11.2017) The decision includes a dissenting opinion addressing specifically the breadth of art. 2 subsection 1.

the individual. And since the entire proportionality test as sketched before is now viewed to rest upon this constitutional basis, there is no need any more to address it in statutory provisions.

The test in more detail

The individual prongs of the test as described above require further clarification. Given the context of the present contribution, I shall, however, not go into much detail. Instead, I will sketch just the most important differentiations and point out some challenges in the application of the test.

First, the legitimacy criterion⁹ hardly operates as a filter. Measures that violate a specific legal prohibition will, of course, fail this test. However, the proportionality test is but one – and often the last – of a longer list of requirements when assessing the legality of acts under public law. Hence, this kind of outright illegality will typically be identified at an earlier stage of a legal assessment.

In practical terms, this first prong of the test typically serves an auxiliary function in that it requires the identification of the aim of the measure at hand. This can, at times, be a difficult task. The aim might not always be stated explicitly, and inferences may be ambiguous. Also, there can be multiple aims, or even hidden ones, and there is no clear-cut rule that would indicate how a court should deal with such cases of ambiguity. There is no formal presumption that public actors pursue legitimate aims, to be sure. But I reckon that, informally, this is likely to be close to how courts apply this criterion.

The second prong of the test requires the suitability of the measure.¹⁰ This criterion, too, is understood in a way that renders it easy to meet. As indicated, it is just the promotion, not the achievement of the goal that the measure needs to be suitable to. So, the threshold of required effectiveness is lowered considerably.

In addition, matters of effectiveness and suitability will often depend on a prognostic assessment on part of the actor designing or implementing the measure. In reviewing such

⁹ Cf. *Sachs*, in: *Sachs* (ed.), *Grundgesetz Kommentar*, 7th Edition, 2014, Art. 20 # 149.

¹⁰ Cf. *Sachs*, *Ibid.* # 150.

prognoses, courts will often grant some leeway to the reviewed actor. And they are particularly deferent towards such assessments by the legislature.¹¹

As to the third prong, an act is "necessary" if there is no alternative measure that would be equally effective but less burdensome.¹² The underlying rationale is straightforward: In a system that adheres to the presumption of individual liberty, any burden imposed upon an individual by public power should be kept to its minimum. So, if there are ways for the state to achieve its envisaged aim by measures that are less burdensome, it is legally required to choose these.

Again, there is often a prognostic dimension also to the assessments required for the third prong. This applies to both, the effects of the measure and the entailed burden. And again, courts give considerable leeway in this regard, especially when reviewing such assessments on part of the legislature.¹³

Finally, the test requires balancing the aim(s) pursued by the measure against the burden(s) they entail.¹⁴ This fourth prong is the most problematic part in that it often requires a plain value judgment on part of the person applying it. So, the legitimacy of any judicial intervention on part of judges who, according to Montesquieu's ideal, should be "but the mouth that pronounces the words of the law",¹⁵ is particularly contestable here. Still – or all the more – lawyers are taught and expected especially in this context to make their value choices transparent and anchor them in positive law.

More specifically, it is common, first, to identify and weigh the legal recognition of the interests involved on both sides. For instance, an explicit recognition in the constitution, be it in a fundamental right or the stipulation of state aims, will indicate an increased weight. Similarly, if a certain right cannot be restricted at all or only under specific circumstances,¹⁶ this may serve as an indication of its increased importance.

¹¹ Cf. *Sachs, Ibid.* # 151.

¹² Cf. *Sachs, Ibid.* # 152.

¹³ Cf. *Sachs, Ibid.* # 153.

¹⁴ Cf. *Sachs, Ibid.* # 155.

¹⁵ Cf. *The Spirit of Laws* (1748), Book 11, Chapter 6.

¹⁶ Under the German Basic Law, there is a differentiated system of limitation (clauses). For details, cf. *Sachs* (fn. 9), vor Art. 1, ## 101-133.

Second, the application of the fourth prong typically requires that the intensity of the restriction in question be measured against other conceivable restrictions of that same right. When talking about the right to, say, religious freedom (as contained in art. 4 subsection 1 of the German Basic Law), the prohibition to practice a certain creed would be more intense if it applied only in public spaces than if it were total in its reach, and if it pertained only to the display of certain symbols but left other practices untouched, this would obviously reduce the intensity as well. Similarly, the sanctions that such imaginary rules might carry would also be relevant in assessing the specific intensity of the measure at hand. These efforts, too, will regularly refer to existing provisions of positive law and, if possible, involve comparisons to similar situations, the regulation of which may have been acknowledged as lawful or struck down in previous procedures.

Both steps are clearly meant to narrow down the scope of unfettered judicial value judgments. But even if successful in that, they rarely determine the outcome in a clear-cut and uncontestable fashion. So, they might mitigate, but certainly cannot fully avoid the above problem of the legitimacy of judicial intervention.

Proportionality in the context of specific fundamental rights

Proportionality is a general principle. All that has been said up to this point is relevant regardless of the specific legal context in which the test is applied. Indeed, the centrality of this principle largely rests upon such general applicability. This is not to say, however, that further context-dependent differentiation could not take place. And indeed, specific lines of proportionality-based jurisprudence have evolved in some field of law.

The most prominent example of this is the so-called “three step doctrine” (Drei-Stufen-Theorie)¹⁷ under Article 12 of the German Basic Law, which enshrines the freedom of occupation. As the scope of protection afforded by this fundamental right has been interpreted

¹⁷ Cf. *Scholz* in: *Maunz/Dürig* (fn. 6), Art. 12, # 335; *Breuer* in: *Isensee/Kirchhof* (fn. 6), Volume VIII, 3rd edition 2014, § 171, # 15.

broadly, the provision covers all regulation that entails a (more than incidental) limitation on activities that a person may carry as part of his or her occupation. Hence, the array of potential infringements is enormous. And in an attempt to offer guidance for their legal assessment under the proportionality test, the German Federal Constitutional Court has defined three categories of increasingly intense limitations:¹⁸

The most intense are rules that restrict access to a certain profession in absolute (“objective”) terms, such as a regional quota for pharmacists. The next category also comprises restrictions of access, but based on subjective criteria that the individual can meet, such as a bar exam before one may practice law. The third and least intense category covers all other rules that do not restrict access but pertain to the modalities of carrying out a certain job, such as limit of the maximum hours that a cab driver may work without breaks.

Related to these categories, the Court has also defined criteria for the weight of the concern that a restriction needs to be based upon in order to satisfy the balancing part of the proportionality test: While on the highest level of intensity, the Court required such concern to be “compelling”, an “important” consideration will suffice on the second. For a limitation on the lowest level of intensity, any “reasonable” ground will do.

For assessments under article 12 of the Basic Law, this scheme provides a more detailed version of the proportionality test. Still, its application leaves room to be filled in the same fashion as sketched for the general test. And while offering more guidance, it has also been criticized for its rigidity.¹⁹ But it may not always be the case that a regulation that meets the criteria for a low level of intensity is really less burdensome than the ones assigned to a higher level.

Proportionality as an element of equality review

The application of the principle of proportionality has traditionally been limited to acts of public power that restrict individual freedom, i.e. a liberty rather than an equality right. This is

¹⁸ The three-steps doctrine was first applied in BVerfGE 7, 377; for a more recent application cf. BVerfGE 102, 197.

¹⁹ Cf. *Scholz* (fn. 177), # 336; *Breuer* (fn. 17), # 16.

because both types of guarantees differ in their structure. While liberties are designed to protect against an encroachment by public power, equality rights guarantee the equal treatment. There may not even be a burden involved, namely when the individual seeks to obtain a privilege that another has received. And even when the individual seeks to have a burden removed by relying on an equality right, the argument is not (primarily) that the burden is unduly heavy, but that it has been imposed selectively on this individual and not on others. Accordingly, the legal analysis of an equality claim focuses on the question whether the disparate treatment afforded by the law can be justified by a good cause supporting the distinction.

The proportionality test, it would seem, does not fit into this setting. There is no burden that needs to be balanced against the aim for which it has been imposed. At least, this used to be the way equality claims were understood under German public law.

However, this has changed in recent times. Equality review has now evolved²⁰ into an exercise that allows for some kind of balancing. More specifically, the respective jurisprudence has identified different kinds of distinctions, some of them more, some less “suspect” (to borrow from the terminology of US law). And while, in order to be legal, all of them need to be justified by an objective reason, the new jurisprudence assumes that such reasons can have different weight.

Taken together, this opens up the space for a balancing test similar to the proportionality principle. So, the most general rendition of the test to be performed under the general equality clause (article 3 subsection 1) of the Basic Law is that for any unequal treatment (by or under the law) to be constitutional, there needs to be a reason weighty enough to support a distinction of the kind at hand.²¹ In order to operationalize this balancing exercise, many authors suggest an application of the proportionality test here as well.²² And while it may be necessary to adapt this test to fit the new setting, the transfer makes sense not just in that it promotes the systematic

²⁰ For a general account of the development of German equality jurisprudence, cf. *Osterloh* in: *Sachs* (fn. 9), Art. 3, §§ 13, 14.

²¹ The German Federal Constitutional Court adopted this approach in BVerfGE 55, 72 (88) and has since applied it without any major changes.

²² For an early discussion, cf. *Huster*, *Gleichheit und Verhältnismäßigkeit: Der allgemeine Gleichheitssatz als Eingriffsrecht*, *JuristenZeitung*, 1994, pp. 541-549.

unity of German public law, but also because the main function of the proportionality principle is warranted here as well. – But what, then, is this main function?

Function

As it has become apparent before, the proportionality principle is a way to legitimize judicial value judgments. The underlying problem does not arise when courts can simply rest their decisions on prior ones by the legislature, i.e. on legal rules that they can apply unambiguously. But normative ambiguity is widespread in practice, and maybe even unavoidable in theory. Under these conditions, one needs to look for other sources of legitimacy for judicial decision-making.

The responses are manifold. Among the most common ones are the institutions that seek to ensure judicial impartiality, independence, and expertise. The proportionality doctrine complements these in that it establishes a firm structure within which judicial value judgments are to be justified. By splitting them up into a set of standardized questions, it reduces the scope for arbitrariness and facilitates a rational exchange on them.

The problem of ambiguity is particularly salient when working with norms at a high level of generality. This is the case, in particular, for fundamental rights guarantees, as they tend to be framed as open-textured principles rather than clear-cut rules. As a consequence, a legal system that affords a strong role to its fundamental rights guarantees is likely to be faced more intensely than others with the challenges of ambiguity. It has been indicated above that the German Federal Constitutional Court has adopted a particularly extensive approach in its fundamental rights jurisprudence. These are exactly the conditions under which one would expect proportionality jurisprudence to flourish.

It should be remembered, however, that the proportionality doctrine is just a response to the ambiguity problem, not a solution. It is not a formula that could provide one single answer to any given case. All that it does is to render value judgments more transparent. But the career of the proportionality principle in German law suggests that there is much demand for that.

Proportionality Under The European Convention On Human Rights And The ECtHR Case-Law

One of the most important recipients of the principle of proportionality is European Court of Human Rights (hereinafter referred to as “the ECtHR” or “the Court”). Throughout its functioning this body of the Council of Europe has constantly referred to this principle as a methodological tool and doctrine of balancing human rights against each other or against conflicting public interests.

In the case-law of the ECtHR the proportionality principle is a recurring theme in the interpretation of the European Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as “the Convention”) and is primarily used in applying the exceptions which the Convention allows in respect of the basic rights protected by it.²³ In particular, the task of ECtHR, whenever an application is lodged, is to establish whether there was any interference with the applicant’s rights, and in case there was, the Court should establish whether it was justified. Whereas, according to the test provided by the ECtHR for the justification of the interference with one’s rights it should be prescribed by the law, pursue legitimate aim and be necessary in a democratic society. In making such an assessment, the Court usually bases its review on the proportionality principle: any disproportionate or excessive measure is deemed to be in violation of the provisions prescribed by the Convention.

The ECtHR has actually given the proportionality criteria a status of a basic principle when interpreting and applying the Convention. Whereas, the Convention itself does not expressly mention the principle of proportionality, but its essence stems from the various rights enshrined in that document. The principle of proportionality had a pervasive influence throughout the Courts’ case-law where interactions between the various concepts, norms, interests, and rights, which the Convention embodies, had to be determined.²⁴ Whereas, in certain articles the Convention establishes the requirement that any interference or restriction must be “necessary

²³ *Ellis*: The Principle of Proportionality in the Laws of Europe, 1999, p: 43, with further references therein: Harris/O’Boyle/ Warbrick: Law of the European Convention on Human Rights, 2014, p. 13

²⁴ *Greer*: The margin of appreciation: interpretation and discretion under the European Convention on Human Rights, 2000, p. 20

in a democratic society”, the word “necessary” itself implies that there must be no lesser means available, that the legitimate aim that is pursued by the interference cannot be achieved by less restrictive measures.²⁵

The Court will consider various factor in assessing the proportionality of a certain measure. In particular, in the core of its view will be the question whether there is an alternative means of protecting the relevant public interest without interference at all, or by means which are less intrusive.²⁶ Moreover, the ECtHR pays great attention to the extent to which the interference restricts the Convention right. In particular, the test of proportionality evaluates whether a fair balance of the competing rights, freedoms and interests has been achieved, whilst ensuring that the essence (or minimum core) of the right or freedom is respected. Thus, the fair balance principle is in fact used by the ECtHR as a basis for assessing the proportionality of state’s interference with the Convention rights of an applicant and for establishing when this state is subject to implied positive obligations under the Convention. Accordingly, the ECtHR will usually consider the interference as disproportionate if it impairs the very essence of the right.

Further, in assessing proportionality, the Contracting States are allowed a certain discretion or “margin of appreciation”. In considering the proportionality of a particular interference with the Convention right, the ECtHR will apply the mentioned concept: state authorities are in principle in a better position to give an opinion on the necessity of a restriction. Margin of appreciation applies within the concept of proportionality of restriction of various basic human rights enshrined under Articles 5 and 6, Articles 8 to 11, Article 14 of the Convention, Article 1 of Protocol no. 1 to the Convention, etc. The nature of the right involved is also an important factor for the justification of a wide or narrow margin of appreciation.

The following factors appear to be important when the interrelationship between the proportionality and the margin of appreciation is to be considered: the significance of the right in question, the objectivity of the restriction in questions, and the presence of a consensus in law

²⁵ *Korff*: The Standard approach under Articles 8-11 ECHR and Article 2 ECHR, <http://bit.ly/2wL1LWA> (Last accessed 16.11.2017)

²⁶ *Leach*: Taking a Case to the European Court of Human Rights, 2011, pp. 161-162

and practice among the member states.²⁷ Whereas, depending on the context, the width of the state's margin of appreciation may vary – sometime being wide (e.g. cases of abortion, interferences with property), and another time – narrow (e.g. cases of freedom of expression, protection of private life). Accordingly, throughout years of application of the proportionality test, the Court has developed both narrow and wide versions of its application, depending on the certain circumstances of the case.

Accordingly, it is clear that the doctrine of proportionality is at the heart of the ECtHR's investigation into the reasonableness of the restriction. Although the ECtHR offers a certain margin of appreciation to the Contracting States, it's main role is to ensure that the rights laid down in the Convention are not interfered arbitrarily. Thus, a limitation upon a right, or steps taken positively to protect or fulfill it, will not be proportionate where there is no evidence that the state institutions have balanced the competing individual and public interests when deciding on the interference, or where the requirements to be met to avoid or benefit from its application in a particular case are so high as not to permit a meaningful balancing process.²⁸ The practice of the Court has defined certain factors when determining the proportionality issue.²⁹

It is a common ground that the mechanism of proportionality and balancing has been invoked in numerous cases before the Court. Most of these cases relate to Article 2 (Right to life), Article 3 (Prohibition of torture), Article 5 (Deprivation of liberty), Article 6 (Fair trial), Article 8 (Right to respect for private and family life), Article 9 (Freedom of thought, conscience and religion), Article 10 (Freedom of expression), Article 11 (Freedom of assembly and association), Article 14 (Prohibition of Discrimination) and Article 1 of the Protocol no 1 to the Convention (Right to property). Accordingly, we will refer to the separate aspects of the application of proportionality doctrine under the above-mentioned articles of the Convention.

²⁷ Clayton/ Tomlinson: The Law of Human Rights, 2000, p. 278; „The Margin of Appreciation” – Council of Europe, Judicial Professions, The Lisbon Network <http://bit.ly/2vAVq3> (Last accessed 16.11.2017)

²⁸ *Hirst v. the United Kingdom (No. 2) [GC]*, application no. 74025/01, Judgment of 6 October 2005– absolute limits on prisoners' right to vote; and *Dickson v. the United Kingdom [GC]*, application no. 44362/04, Judgment of 4 December 2007– strict limits on prisoners' artificial insemination

²⁹ *Harris/ O'Boyle/ Warbrick: Law of the European Convention on Human Rights*, 2014, pp. 519-520

Article 2

One of the basic human rights provided under the Convention is the right to life established in Article 2 and prescribing that:

“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

a) in defence of any person from unlawful violence;

b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

As it is obvious from the above cited text, the proportionality principle does not directly appear in the Article 2 of the Convention, whereas it is clearly established in the Court’s case-law.

In particular, in a number of issues the Court has referred to the proportionality of the interference of the domestic authorities into the right to life of the applicants and/or their heirs. The issues that give rise to the concern of proportionality relate to different aspects of human life, such as the use of lethal force by the state authorities, assisted suicide or euthanasia, etc. As long as the majority of the cases under Article 2 concern the proportionality of the use of lethal force by the state authorities, in this research paper we will refer to these issues in order to understand the overall scope of application of proportionality test under Article 2 of the Convention.

In a number of cases the Court has given general principles for understanding proportionality criteria in regard to the protection of right to life. In particular, in *Nachova and others* case the Court established that the use of lethal force by the police officers may be justified in certain circumstances. However, any use of force must be “no more than absolutely necessary”, that is to say it must be strictly proportionate to the circumstances. In view of the fundamental nature

of the right to life, the circumstances in which deprivation of life may be justified must be strictly construed.³⁰ Correspondingly, the Court has established that the legitimate aim of effecting a lawful arrest can only justify putting human life at risk in circumstances of absolute necessity. Moreover, in principle there can be no such necessity where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost.³¹

The situations where deprivation of life may be justified are exhaustive and must be narrowly interpreted. The use of force which may result in the deprivation of life must be no more than “absolutely necessary” for the achievement of one of the purposes set out in Article 2 § 2 (a), (b) and (c). The use of the term “absolutely necessary” indicates that stricter and more compelling test of necessity must be employed when determining whether State action is “necessary in a democratic society” under paragraphs 2 of Articles 8 to 11 of the Convention.³² In particular, the force used must be strictly proportionate to the achievement of the aims set out in subparagraphs 2 (a), (b) and (c) of Article 2. Furthermore, according to the Court’s well-established case-law, while assessing the proportionality of the force used, the Court must subject deprivation of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination.³³

Moreover, according to the Court’s well-established case-law, besides, setting out the circumstances when deprivation of life may be justified, Article 2 also implies a primary duty on

³⁰ *Nachova and others v. Bulgaria [GC]*, applications nos. 43577/98 and 43579/98, Judgment of 6 July 2005, § 94; with further references therein

³¹ *Nachova and others v. Bulgaria [GC]*, cited above, § 95; with further reference to the Court's approach in *McCann and Others [GC]*, application no. 18984/91, Judgment of 27 September 1995, §§ 146-50, §§ 192-214, and *Makaratzis v. Greece [GC]*, application no. 50385/99, Judgment of 20 December 2004, §§ 64-66

³² *Dzhamayeva and others v. Russia*, application no. 43170/04, 8 January 2009, § 73

³³ *Dalakov v. Russia*, application no. 35152/09, Judgment of 16 February 2016; *Giuliani and Gaggio v. Italy [GC]*, application no. 23458/02, 24 March 2011, § 176; *Arzu Akhmadova and others v. Russia*, application no. 13670/03, Judgment of 8 January 2009, § 148; *McCann and Others [GC]*, cited above, §§ 147-150

the State to secure the right to life by putting in place an appropriate legal and administrative framework defining the limited circumstances in which law enforcement officials may use force and firearms, in the light of the relevant international standards. In line with the above-mentioned principle of strict proportionality inherent in Article 2, the national legal framework regulating arrest procedures must make recourse to firearms dependent on a careful assessment of the surrounding circumstances, and, in particular, on an evaluation of the nature of the offence committed by the fugitive and of the threat he or she posed.³⁴

Furthermore, Article 2 does not grant a *carte blanche*. Unregulated and arbitrary action by the State agents is incompatible with effective respect for human rights. This means that, as well as being authorized under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force.³⁵ In this regard the issue of the immunity of the State agents and the proportionality of it to the aim sought to be achieved was raised. In particular, it was established that the exclusionary rule serves a legitimate purpose, i.e. the maintenance of the effectiveness of the police service and hence to the prevention of disorder or crime. However, the complete exclusion of any possibility of civil action against the police – “blanket immunity” – is actually considered to be disproportionate to this legitimate aim.³⁶ Accordingly, under this aspect the Court also referred to the alleged violation of Article 6 § 1 stating that the applicants may or may not have failed to convince the domestic court that the police were negligent in the circumstances, however, they should have been entitled to have the police account for their actions and omissions in adversarial proceedings.³⁷

Furthermore, the principle of proportionality under Article 2 of the Convention found its application not only in the negative obligations of the State to refrain from intentional and

³⁴ *Nachova and others v. Bulgaria [GC]*, cited above, § 96; *Giuliani and Gaggio v. Italy [GC]*, cited above, § 209; *Atman v. Turkey*, application no. 62279/09, Judgment of 23 September 2014, § 30; *Putintseva v. Russia*, application no. 33498/04, Judgment of 10 May 2012, § 46, with further references therein

³⁵ *Giuliani and Gaggio v. Italy [GC]*, cited above, § 249; *Wasilewska and Kalucka v. Poland*, applications nos. 28975/04 and 33406/04, Judgment of 23 February 2010, § 45; *Makaratzis v. Greece [GC]*, cited above, § 58

³⁶ Korff: *The Right to Life: A guide to the implementation of Article 2 of the European Convention on Human Rights*, 2006, p. 68

³⁷ *Osman v. the United Kingdom [GC]*, application no. 23452/94, Judgment of 28 October 1998, § 30

unlawful taking of life, but also in its positive obligations to take appropriate steps to safeguard the lives of those within their jurisdiction.³⁸ Under the Court's case-law, positive obligations flowing from Article 2 of the Convention should "be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities". In particular, according to the ECtHR's well-established case-law:

"[...] where there is an allegation that the authorities have violated their positive obligation to protect the right to life (...), it must be established to the [Court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk" .³⁹

Finally, under Article 2 of the Convention the principle of proportionality also suggests that the degree of criminal liability and the sentence may vary with the circumstances.⁴⁰ There must be criminal liability for gross negligence resulting in death in respect of dangerous activities,⁴¹ but civil liability may be sufficient in some cases of unintentional killing.⁴² Whereas, in cases of gross disproportionality of the punishment the Court may in fact find a violation of Article 3 of the Convention. Thus, below we will also refer to that aspect of the proportionality test applied by the Court.

Article 3

Article 3 of the Convention prescribes that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. In general, the principle of proportionality is not usually

³⁸ *Öneryıldız v. Turkey*[GC], application no. 48939/99, Judgment of 30 November 2004, § 71

³⁹ *Osman v. the United Kingdom* [GC], cited above § 116; *Opuz v. Turkey* [GC], application no. 33401/02, Judgment of 9 June 2009, § 130

⁴⁰ *Harris/ O'Boyle/ Warbrick*: Law of the European Convention on Human Rights, 2014, p. 204, with further references therein

⁴¹ *Öneryıldız v. Turkey*[GC], cited above; *Railean v. Moldova*, application no. 23401/04, Judgment of 5 January 2010

⁴² *Calvelli and Ciglio v. Italy* [GC], application no. 32967/96, Judgment of 17 January 2002

applied under Article 3, which contains absolute guarantee.⁴³ But there are cases when the Court refers to the mentioned principle while considering the inhumanity of punishment under the domestic legislation.

Usually, a sentence imposed upon an individual convicted of a criminal offence is not reviewed under Article 3 and the decision on the kind of sentence or the length of a term of imprisonment is left to the discretion of the domestic authorities. However, in the case of *Harkins and Edwards* the Court stated that “a gross disproportionate sentence” would violate Article 3. It further established that “gross disproportionality” is a widely accepted and applied test for determining when a sentence will amount to inhuman or degrading punishment, or equivalent constitutional norms. Further, the Court also stated that in principle, matters of appropriate sentencing largely fall outside the scope of the Convention, and a grossly disproportionate sentence could amount to ill-treatment contrary to Article 3 at the moment of its imposition. However, it also established that “gross disproportionality” is a strict test, which will be met only in “rare and unique occasions”.⁴⁴

In addition to the “gross disproportionality” test, the Grand Chamber held in the case of *Kafkaris* that a mandatory sentence of life imprisonment without any “prospect of release” - term of “irreducible” or “whole life” sentence -will be disproportional and contrary to Article 3, if there is no possibility of review.⁴⁵ Later on, in the case of *Vinter and others* the Grand Chamber clarified that in determining whether a life sentence could be regarded as irreducible, the Court would seek to ascertain whether the prisoner could be said to have any prospect of release.⁴⁶ It held that when “national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of a prisoner”, this will be sufficient to satisfy Article 3. Further, the Grand Chamber also established that for a life sentence to remain compatible with Article 3 there had to be both a prospect of release and a possibility

⁴³ *Harris/ O'Boyle/ Warbrick*: Law of the European Convention on Human Rights, 2014, p. 13, with further references therein

⁴⁴ *Harkins and Edwards v. the United Kingdom*, applications nos. 9146/07 and 32650/07, Judgment of 17 January 2012, § 133

⁴⁵ *Kafkaris v. Cyprus [GC]*, application no. 21906/04, Judgment of 12 February 2008

⁴⁶ *Vinter and others v. UK [GC]*, applications nos. 66069/09, 130/10 and 3896/10, Judgment of 9 July 2013, § 109

of review, and it brought a number of reasons for that. The above issue is clearly linked with the application of proportionality criterion while depriving the person of his liberty under Article 5.

Article 5

Article 5 § 1 of the Convention stipulates:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...].”

As it is clear, no separate proportionality requirement is prescribed under Article 5 of the Convention. Whereas, from the case-law analyses of the Court’s judgments it becomes obvious that the general principles implied by the Convention to which the Article 5 § 1 case-law refers are:

- the rule of law,⁴⁷
- legal certainty,⁴⁸
- proportionality,⁴⁹ and
- protection against arbitrariness, which is moreover the very aim of Article 5.⁵⁰

It should be noted that the last principle is interconnected with the principle of proportionality. In particular, arbitrariness may arise, *inter alia*, where there was no relationship of proportionality between the ground of detention relied on and the detention in question.⁵¹

It is worth mentioning when referring to the Court’s position on the proportionality test applied under Article 5 of the Convention, that here the Court also applies the “fair balance” test. In particular, in *Gatt v. Malta* case the Court ruled that the domestic authorities must strike a fair balance between the importance in a democratic society of securing compliance with a

⁴⁷ *Ilaşcu and Others v. Moldova and Russia [GC]*, application no. 48787/99, Judgment of 8 July 2004, § 461

⁴⁸ *Baranowski v. Poland*, application no. 28358/95, Judgment of 28 March 2000, § 52

⁴⁹ *Enhorn v. Sweden*, application no. 56529/00, Judgment of 25 January 2005, § 36,

⁵⁰ *Simons v. Belgium* (dec.), application no 71407/10, 28 August 2012, § 32; *Erkalo v. the Netherlands*, application no. 23807/94, Judgment of 2 September 1998, § 52

⁵¹ Guide on Article 5 of the Convention: Right to Liberty and Security, Council of Europe/European Court of Human Rights, 2014, p. 9, <http://bit.ly/1XYA5Q> (Last accessed 16.11.2017)

lawful order of a court, and the importance of the right to liberty. Further, issues to be taken into consideration are the purpose of the order, the feasibility of compliance with the order, and the duration of the detention. The issue of proportionality assumes particular significance in the overall scheme of things.⁵²

Moreover, according to the well-established case-law of the Court, the detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained.⁵³ Whereas, the principle of proportionality dictates that where detention is to secure the fulfilment of an obligation provided by law, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty⁵⁴. Here the duration of the detention as well as the severity of conditions can be considered relevant factors in striking such balance.

The Court has actually referred to the issue of proportionality in a number of cases when applying Article 5 of the Convention. This principle may be considered under different aspects of Article 5 of the Convention, its paragraphs and subparagraphs. For example, in the case of *Ladent v. Poland* the Court established that detention pursuant to Article 5 § 1 (c) must equally embody a proportionality requirement.⁵⁵ Whereas, in the case of *Ambruszkiewicz v. Poland* the Court applied the principle of proportionality when considering whether the applicant's detention on remand was strictly necessary to ensure his presence at the trial and whether other, less stringent, measures could have been sufficient for that purpose.⁵⁶ A similar test is applied by the Court in relation to Article 5 § 3 in the context of pre-trial detention when

⁵² *Gatt v. Malta*, application no. 28221/08, Judgment of 27 July 2010, § 40

⁵³ *Saadi v. the United Kingdom [GC]*, application no. 13229/03, Judgment of 29 January 2008, § 70; *Witold Litwa v. Poland*, application no. 26629/95, Judgment of 4 April 2000, § 78; *Hilda Hafsteinsdóttir v. Iceland*, application no. 40905/98, Judgment of 8 June 2004, § 51; *Enhorn v. Sweden*, cited above, § 36

⁵⁴ *Saadi v. the United Kingdom [GC]*, cited above, § 70; *Vasileva v. Denmark*, application no. 52792/99, Judgment of 25 September 2003, § 37, with further references therein

⁵⁵ *Ladent v. Poland*, application no. 11036/03, Judgment of 18 March 2008, § 55

⁵⁶ *Ambruszkiewicz v. Poland*, application no. 38797/03, Judgment of 4 May 2006, §§ 29-32

examining the relevance and sufficiency of the reasons given by the domestic authorities for maintaining pre-trial detention.⁵⁷

Further, the Grand Chamber has held that the principle of proportionality applied to detention under Article 5 § 1 (f) only to the extent that the detention should not continue for unreasonable period of time; thus, it held that “any deprivation of liberty under Article 5 § 1 (f) will be justified only for as long as deportation proceedings are in progress.”⁵⁸

Moreover, the approach to assessment of proportionality of the state measures taken with reference to “punitive aims” has also evolved over recent years, with a heavier emphasis now having to be placed on the need to strike a proper balance between the punishment and rehabilitation of a prisoner.⁵⁹

Whereas the Court has also mentioned that the States are expected to develop their proportionality assessment technique enabling the authorities to balance the competing individual and public interests and to take into account peculiarities of each individual case.⁶⁰

After the pre-trial proceedings the trial stage comes on the scene, protected under Article 6.

Article 6

A reasonable relationship of proportionality is called during the court trial for assessing the acts alleged by the claimant on the one hand, and the need to protect a certain defendant based on a legitimate aim pursued by the state on the other.⁶¹

Under the trial proceedings proportionality tests are used both in the context of International Human Rights Law and in the context of constitutional law in various jurisdiction, and several

⁵⁷*Kudła v. Poland [GC]*, application no. 30210/96, Judgment of 26 October 2000, §§ 110-111; *McKay v. the United Kingdom [GC]*, application no. 543/03, Judgment of 3 October 2006, §§ 41-45

⁵⁸ *Saadi v. the United Kingdom [GC]*, cited above, § 72

⁵⁹ *Khoroshenko v. Russia [GC]*, application no. 41418/04, Judgment of 30 June 2015, § 121

⁶⁰ *Trosin v. Ukraine*, application no. 39758/05, Judgment of 23 February 2012, § 42; with further reference to *Dickson v. the United Kingdom [GC]*, application no. 44362/04, Judgment of 4 December 2007, §§ 82-85

⁶¹ *Vitkauskas/ Dikov*: Protecting the right to a fair trial under the European Convention on Human Rights Council of Europe human rights handbooks, Council of Europe, Strasbourg, 2012, p. 31

ways of structuring an overarching proportionality test are conceivable.⁶² While the Court has rarely indicated that Article 6 rights are qualified, a more extensive overview of the Convention case-law attests that some elements of this provision – such as the right of access to a court– are very close to being labelled as qualified in a similar vein as the rights guaranteed by Articles 8 to 11 of the Convention.⁶³ According to the Court what constitutes a fair trial cannot be determined by a single unvarying principle but must depend on the circumstances of a particular case, which results in the most occasions in application of a *sui generis* proportionality test under Article, also known as the essence of the right test.⁶⁴ The latter is rarely used in respect of the right to fair trial, but the Court has decided hundreds of cases on the access to court. The general interpretation of Article 6 will often separate the essence from the ordinary proportionality assessment and thus play lip-service to the absolute theory, whereas in the specific review the Court does not strictly divide the proportionality assessment from the delimitation of the essence of Article 6 § 1.⁶⁵

According to the Court's well-established case-law, the right of access to the courts is not absolute but may be subject to limitations permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals".⁶⁶

The Contracting States enjoy a certain margin of appreciation in laying down such regulation.⁶⁷ While the Court has established that whilst the final decision as to observance of the Convention's requirements rests with the Court, it is not part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be

⁶² *Settem*: Applications of the 'Fair Hearing' Norm in ECHR Article 6(1) to Civil Proceedings, With Special Emphasis on the Balance Between Procedural Safeguards and Efficiency, 2016, p. 28

⁶³ *Vitkauskas/ Dikov*: Protecting the right to a fair trial under the European Convention on Human Rights Council of Europe human rights handbooks, Council of Europe, Strasbourg, 2012, p. 9

⁶⁴ *Vitkauskas/ Dikov*: Protecting the right to a fair trial under the European Convention on Human Rights Council of Europe human rights handbooks, Council of Europe, Strasbourg, 2012, pp. 9-10

⁶⁵ *Christoffersen*: Fair balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights", Martinus Nijhoff Publishers, Boston, 2009, p. 149

⁶⁶ *Stanev v. Bulgaria [GC]*, application no. 36760/06, Judgment of 17 January 2012, § 230, *Cindrić and Bešlić v. Croatia*, application no. 72152/13, Judgment of 6 September 2016, § 117

⁶⁷ *Luordo v. Italy*, application no. 32190/96, Judgment of 17 July 2003, § 85

the best policy in this field. Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a “legitimate aim” and if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be achieved”.⁶⁸ This general approach was also established by the Court while examining a number of cases against Armenia.⁶⁹

Accordingly, where access to a court is restricted by law or practice, the Court examines whether the restriction affects the substance of the right and, in particular, whether it pursues a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.⁷⁰ This means that the right of access to a court is qualified: it is open to states to impose restrictions on would-be litigants, as long as these restrictions pursue a legitimate aim, are proportionate, and are not so wide-ranging as to destroy the very essence of the right.⁷¹ For example, the high court fee,⁷² failure of the appeal court to inform a defendant, who didn’t have a lawyer, about a new time-limit for finding a lawyer in order to lodge an appeal,⁷³ were found disproportionate restriction on the access to court. However, the restrictions to the same right for the purpose of good administration of justice were found proportionate, when the law imposed various formal restrictions for bringing

⁶⁸ *Stanev v. Bulgaria [GC]*, cited above; *Cindrić and Bešlić v. Croatia*, cited above; *Ashingdane v. the United Kingdom*, application no. 8225/78, Judgment of 28 May 1985, § 57

⁶⁹ *Domazyan v. Armenia*, application no. 22558/07, Judgment of 25 February 2016, § 36; *Tovmasyan v. Armenia*, application no. 11578/08, Judgment of 21 January 2016, § 27; *Ghuyumchyan v. Armenia*, application no. 53862/07, Judgment of 21 January 2016, § 44; *Saghatelyan v. Armenia*, application no. 7984/06, Judgment of 20 October 2015, § 45; *Shamoyan v. Armenia*, application no. 18499/08, Judgment of 7 July 2015, §28; *Nalbandyan v. Armenia*, applications nos. 9935/06 and 23339/06, Judgment of 31 March 2015, § 145; *Melikyan v. Armenia*, application no. 9737/06, Judgment of 19 February 2013, § 45; *Boyajyan v. Armenia*, application no. 38003/04, Judgment of 22 March 2011, § 42; *Mamikonyan v. Armenia*, application no. 25083/05, Judgment of 16 March 2010, § 25; *Paykar Yev Haghtanak Ltd v. Armenia*, application no. 21638/03, Judgment of 20 December 2007, § 44

⁷⁰ Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb), Council of Europe/European Court of Human Rights, 2013, <http://bit.ly/2wLcTCV> (Last accessed 16.11.2017)

⁷¹ *Vitkauskas/ Dikov*: Protecting the right to a fair trial under the European Convention on Human Rights Council of Europe human rights handbooks, Council of Europe, Strasbourg, 2012, p. 24

⁷² *Kreuz v. Poland*, application no. 28249/95, Judgment of 19 June 2001

⁷³ *Kulikowski v. Poland*, application no. 18353/03, Judgment of 19 May 2009

action or appeal,⁷⁴ for the failure to satisfy certain time-limit for appeal due to lack of diligence by the applicant in trying to obtain written version of impugned court decision.⁷⁵

Further, there are number of cases before the Court a concerning granting legal aid and the proportionality of the restrictions applied in that regard. In particular, the Court found that it is disproportionate to delay substantially right of a prisoner to have access to legal advice,⁷⁶ while the restriction is usually found proportionate in case of refusing access to legal aid in civil matters on the ground of lack of prospect of success.

Despite the margin of appreciation given to the Contracting States, the Court often reviews various decisions of domestic authorities whether the certain immunity granted to an international organization or state, or parliamentary immunities, or immunities enjoyed by judges, civil servants, or other specific types of immunities are justified. The proportionality test of the immunity requires balancing of competing public-interest in order to prevent blanket immunities. The nature of the dispute, the analysis of claimant's rights at stake and the gravity of the alleged act or omission by the defendant must be taken into account.⁷⁷ The Court will usually address the issue whether in case of applicable immunity the person concerned had reasonable alternative means to protect effectively his or her rights.

Further, there have been a number of cases before the Court concerning the application of immunity and proportionality of the restrictions, in that regard the State immunity of jurisdiction, is generally accepted by the people. According to the Court's position, measures taken by a member State, which reflect generally recognized rules of public international law on state immunity, do not automatically constitute a disproportionate restriction of the right to access court⁷⁸. In cases where the application of the principle of State immunity from jurisdiction restricts the exercise of the right of access to a court, it must be decided whether the

⁷⁴ *Stubbings and others v. the United Kingdom*, applications nos. 22083/93; 22095/93, Judgment of 22 October 1996

⁷⁵ *Jodko v. Lithuania*, application no. 39350/98, Decision of 7 September 1999

⁷⁶ *Campbell and Fell v. the United Kingdom*, applications nos. 7819/77; 7878/77, Judgment of 28 June 1984

⁷⁷ *Vitkauskas/ Dikov*: Protecting the right to a fair trial under the European Convention on Human Rights Council of Europe human rights handbooks, Council of Europe, Strasbourg, 2012, pp. 31-32

⁷⁸ *Fogarty v. the United Kingdom [GC]*, application no. 37112/97, Judgment of 21 November 2001, § 36; *McElhinney v. Ireland [GC]*, application no. 31253/96, Judgment of 21 November 2001, § 37; *Sabeh El Leil v. France [GC]*, application no. 34869/05, Judgment of 29 June 2011, § 49

circumstances of that certain case justify such restriction.⁷⁹ For example, the Court found that the application of immunity is disproportionate when it is enjoyed by a foreign embassy in view of an allegedly discriminatory dismissal, given the private-law contractual relationships at stake.⁸⁰

Parliamentary immunity is necessary for the Contracting States to ensure the freedom of speech for the parliamentarians and preventing interference with parliamentary functions. Different forms of parliamentary immunity may indeed serve to protect the effective political democracy that constitutes one of the cornerstones of the Convention system, particularly where they protect the autonomy of the legislature and the parliamentary opposition.⁸¹ Accordingly, if it pursues legitimate aim and is not disproportionate to the aims sought to be achieved, meaning that the person concerned had reasonable alternative means to protect effectively his or her rights and immunity attaches only to the exercise of parliamentary functions, the parliamentary immunity is compatible with Article 6 of the Convention. For example, the Court found that the application of the immunity was disproportionate when it is enjoyed by a member of parliament benefiting from immunity in connection with statements lacking any substantial connection with parliamentary activities.⁸² Moreover, court found to be disproportionate a civil claim against the Member of Parliament in connection with his public statement disallowed by a court on the ground of the defendant's immunity, despite the fact that the statement was made outside the context of parliamentary debate.⁸³

The Court has also referred to the principle of proportionality while considering cases under Article 6 § 3 of the Convention and addressing such issue as protection of the identity of a witness by the domestic authorities. This may be necessary in the domestic proceeding if, for example, the witness is a police agent or an informer who is usually giving testimonies and/or making statements against the accused person or about the facts that somehow firm the

⁷⁹ Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb), Council of Europe/European Court of Human Rights, 2013, <http://bit.ly/2wLcTCV> (Last accessed 16.11.2017)

⁸⁰ *Cudak v. Lithuania [GC]*, application no. 15869/02, Judgment of 23 March 2010; *Sabeh El Leil v. France [GC]*, cited above, *Fogarty v. the United Kingdom [GC]*, cited above

⁸¹ *Kart v. Turkey [GC]*, application no. 8917/05, Judgment of 3 December 2009, § 81

⁸² *Cordova v. Italy (No. 1)*, application no. 40877/98, Judgment of 30 January 2003

⁸³ *C.G.I.L. and Cofferati v. Italy*, application no. 46967/07, Judgment of 24 February 2009

position of the state authorities. These people are usually considered to be anonymous witnesses in such cases, and Article 6 § 3 leaves it to the state to decide whether recognizing anonymous witness is proportional to the aim pursued or not. But, anyway, a balancing exercise must be carried out weighing the interest of the defence in examining the witness against the public interest to protect that person. In this context, the Court has referred to the necessity to determine whether the statements of an anonymous witness can be the “sole” and “decisive” evidence for the case and if there are sufficient counterbalancing factors for the defence. The Court has expressed position and determined that the statements of an anonymous witness that were sole and decisive for convicting the accused person, and whom the defence didn’t have a chance to question, are in violation of Article 6 of the Convention.⁸⁴ Ideally, even when the statements of anonymous witnesses are not sole and decisive, the defence must be allowed to challenge their credibility by submitting written questions, to have lawyer present during the questioning while preventing disclosure of the witnesses’ identity to the applicant, to allow the applicant to ask questions during a teleconference by disguising the anonymous witnesses’ voice or appearance, and etc.

Articles 8 to 11

Articles 8 to 11 of the Convention are the main ones where the criterion of proportionality is commonly applied. There are certain common features between Articles 8 to 11 that justify considering them together. These features are both formal and substantive. In particular, these articles of the Convention have an identical structure, consisting of two paragraphs: one of them defining the right and freedom, and the second one- prescribing the conditions upon which a state might legitimately interfere with the enjoyment of those rights. Whereas, the rights ensured under Articles 8 to 11 of the Convention are in fact inter-connected: Article 8 provides for everyone’s right to respect for one’s private and family life, his home and his

⁸⁴ *Al-Khawaja and Taheri v. the United Kingdom*, applications nos. 26766/05, 22228/06, Judgment of 15 December 2011; later this position was also expressed with some differences in *Schatschaschwili v. Germany*, application no. 9154/10, Judgment of 15 December 2015

correspondence; Article 9 prescribes everyone's right to freedom of thought, conscience and religion; Article 10 refers to the right to freedom of expression; and Article 11 provides for everyone's right to freedom of peaceful assembly and to freedom of association with others. Further, all these four articles provide for justifications of interference in cases they were:

- in accordance with the law/ prescribed by law (Articles 8 to 11)
- necessary in a democratic society (Articles 8 to 11)
- in the interests of: national security (Articles 8, 10, 11); public safety (Articles 8 to 11); economic wellbeing of a country (Article 8); prevention of disorder or crime (Articles 8, 10, 11); protection of health or morals (Articles 8 to 11); protection of the rights and freedoms of others (Articles 8, 9, 11); protection of public order (Article 9); territorial integrity (Article 10); protection of the reputation or rights of others (Article 10); prevention the disclosure of information received in confidence (Article 10); maintaining the authority and impartiality of the judiciary (Article 10).

It is worth to mention that the Court has to some degree extended the content of the protected rights under Articles 8 to 11. This generous approach has, perhaps, been acceptable to Contracting States because of their powers to intervene with the enjoyment of human rights in the second paragraphs of these articles, albeit powers subject to the supervision of the Court.⁸⁵

The text of Articles 8 to 11 only prescribes a requirement that any interference or restriction must be "necessary in a democratic society"; it does not directly mention "proportionality" criteria. Whereas, similar to the overall Convention interpretation, here also the word "necessary" itself implies that there must be no lesser means available, that the legitimate aim pursued by the interference cannot be achieved by less restrictive measures. In practice, under Articles 8 to 11 the Court must define whether the interference with the Convention rights was "necessary in a democratic society" to achieve the "legitimate aim pursued" and "proportionate" to that aim, taking into account the "margin of appreciation" provided to the states. This is, in a way, the most complex and open-ended, and potentially the most subjective test, but there are

⁸⁵ *Harris/ O'Boyle/ Warbrick: Law of the European Convention on Human Rights*, 2014, p. 503

a number of pointers.⁸⁶ For example, the Court has established that in order to act in compliance with the proportionality requirements of Article 8, the authorities should first rule out the possibility of having recourse to an alternative measure that would cause less damage to the fundamental right at issue whilst fulfilling the same aim.⁸⁷

The proportionality of the interference will vary from case to case considering the circumstances of each case, and the right in question and the type and severity of interference. The grounds of interference must be “relevant and sufficient”, the necessity for a restriction must be “convincingly established”, and the exceptions to Articles 8 to 11 should be narrowly construed.⁸⁸ Thus, choosing between the “priority to rights” or “balance” tests has become a key source of confusion between the scope of the domestic margin of appreciation and the boundaries of European review.⁸⁹

Under the second paragraphs of Articles 8 to 11, a state may restrict the protected right to the extent that is “necessary in a democratic society” for certain listed purposes. This formula has been interpreted as meaning that every “formality”, “condition”, “restriction” or “penalty” imposed in this sphere must be “proportionate to the legitimate aim pursued”.⁹⁰ Thus, the interference will be considered disproportionate if it is purposeless so that the objective cannot be achieved by the interference. In particular, the Court has held that it is not necessary to interfere with freedom of expression on grounds of protecting confidential information where the confidence has been lost because of its publication elsewhere.⁹¹ Moreover, the proportionality requirement is not satisfied where the government does not provide evidence to show the necessity of the interference. In *Kokkinakis v. Greece* case, the government of Greece claimed the right to interfere with the applicant’s right to freedom of religion because he had been attempting to convert others by “improper means”. The Court held that because no

⁸⁶ *Korff*: The Standard approach under Articles 8-11 ECHR and Article 2 ECHR, <http://bit.ly/2wL1LWA> (Last accessed 16.11.2017)

⁸⁷ *Sabanchiyeva and others v. Russia*, application no. 38450/05, Judgment of 6 June 2013, § 145

⁸⁸ *Greer*: The exceptions to Articles 8 to 11 of the European Convention on Human Rights, 1997, p. 15, with further references to the Court’s case-law therein

⁸⁹ *Ibid.*

⁹⁰ *Handyside v. UK*, application no. 5493/72, Judgment of 7 December 1976, § 49

⁹¹ *Weber v. Switzerland*, application no. 11034/84, Judgment of 22 May 1990, § 51

evidence was presented to show that what he had done fell within “improper means”, the interference was not necessary.⁹²

Furthermore, questions of proportionality are dealt in cases concerning “general measures”. According to the Court, a State can, consistently with the Convention, adopt general measures, which apply to predefined situations regardless of the individual facts of each case even if this might result in individual hard cases.⁹³ Such general measures have been found to be more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty.⁹⁴ In cases within Articles 8 to 11 of the Convention, such measures concern, for example, a State’s economic and social policy,⁹⁵ welfare and pensions,⁹⁶ assisted suicide,⁹⁷ electoral laws,⁹⁸ and other various spheres.

When determining the proportionality of such measures, the Court primarily assesses the “legislative choices” that underline them. Here the Court has held that “the quality of the parliamentary and judicial review of the necessity of the measure is of particular importance [...] including the operation of the relevant margin of appreciation”.⁹⁹ Accordingly, when ruling in *Animal Defenders International v. the United Kingdom* case the Court gave “considerable weight” to the “exacting and pertinent reviews” of the legislation by both parliament and the courts and decided that legislative prohibition of political advertising was proportionate to the aim of preventing the distortion of public interest debates and hence the democratic process, so that it was not in violation of Article 10.¹⁰⁰

⁹² *Kokkinakis v. Greece*, application no.14307/88, Judgment of 25 May 1993, § 49

⁹³ *Animal Defenders International v. the United Kingdom [GC]*, application no. 48876/08, Judgment of 22 April 2013, § 106

⁹⁴ *Animal Defenders International v. the United Kingdom [GC]*, cited above, § 108

⁹⁵ *Hatton and others v. the United Kingdom [GC]*, application no. 36022/37, Judgment of 8 July 2003

⁹⁶ *Runkee and White v. the United Kingdom*, applications nos. 42949/98 and 53134/99, Judgment of 10 May 2007; *Carson and Others v. the United Kingdom [GC]*, application no. 42184/05, Judgment of 16 March 2010

⁹⁷ *Pretty v. the United Kingdom*, application no. 2346/02, Judgment of 29 April 2002

⁹⁸ *Ždanoka v. Latvia [GC]*, application no. 58278/00, Judgment of 16 March 2006

⁹⁹ *Animal Defenders International v. the United Kingdom [GC]*, cited above, § 108,

¹⁰⁰ D.J. Harris, M. O’Boyle and Warbrick, “Law of the European Convention on Human Rights”, Oxford University Press, UK, 2014, page 520; *Animal Defenders International v. the United Kingdom [GC]*, cited above, § 116

However, there were also cases before the Court when it established that the certain measures should not imply in general manner. In particular, in *Karapetyan and others v. Armenia* case the Court found that measures directed at the need to preserve the political neutrality of a precise category of civil servants can in principle be considered legitimate and proportional for the purposes of Article 10 of the Convention, however, such a measure should not be applied in a general manner which could affect the essence of the right protected, without having in mind the functions and the role of the civil servant in question, and, in particular, the circumstances of each case.¹⁰¹

Article 14

Article 14 of the Convention prescribes that the enjoyment of the rights and freedoms set forth in it shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Similar to the test available under previous articles, under Article 14 the states also enjoy certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. However, when Court decides on the objectivity and reasonableness of justification of unequal treatment, the presence of a legitimate aim and a reasonableness of relationship of proportionality between means and goals are required.

Thus, the principle of proportionality has also been introduced into the non-discrimination rule in Article 14. It is a well-established case-law of the ECtHR that a difference of treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.¹⁰² Accordingly, the examination of a discrimination claim requires a two-tiered analysis, focusing

¹⁰¹ *Karapetyan and others v. Armenia*, application no. 59001/08, Judgment of 17 November 2016, § 48

¹⁰² *X and others v. Austria [GC]*, application no. 19010/07, Judgment of 19 February 2013, § 98; *Sommerfeld v. Germany [GC]*, application no. 31871/96, Judgment of 8 July 2003, § 92

first on the aim pursued, second on the relationship between the impugned difference in treatment and the realization of that aim.¹⁰³

The differentiated treatment will generally pass the test of non-discrimination if it pursues a legitimate aim by means of presenting a reasonable relationship of proportionality with that aim. In the *Belgian Linguistic* case, the Court established that Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which due to the public interest strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention.¹⁰⁴ Whereas, it will be required to justify the difference in treatment by “very weighty reasons” when it is based on a “suspect” ground, and the difference in treatment appears to be suitable both for the achievement of legitimate aim pursued, and necessary.¹⁰⁵ The Court has in fact established that, where a difference of treatment is based on such ground, “the margin of appreciation afforded to the state is narrow and in such situations the principle of proportionality does not merely require that the measure chosen in general suited for realizing the aim sought but it must also be shown that it was necessary in the circumstances.”¹⁰⁶

In case the Court finds a differential treatment within the ambit of rights protected under the Convention, which falls under the grounds prohibited by Article 14, it should further decide whether this difference in treatment can be justified.¹⁰⁷ The test establishes whether there is in fact reasonable relationship of proportionality between the means employed by the state and the legitimate aim pursued.¹⁰⁸ Thus, the Court will condemn arbitrary distinctions, but in their absence the public interest can justify some forms of differential treatment. When assessing the issue of public interest, the Court “cannot disregard those legal and factual features which

¹⁰³ *De Schutter*: The Prohibition of Discrimination under European Human Rights Law, European Communities, 2011, p. 15

¹⁰⁴ “*Relating to certain aspects of the laws on the use of languages in education in Belgium*” v. *Belgium*, applications nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, Judgment of 23 July 1968, § 7

¹⁰⁵ *De Schutter*: The Prohibition of Discrimination under European Human Rights Law, European Communities, 2011, p. 16

¹⁰⁶ *Kozak v. Poland*, application no. 13102/02, Judgment of 2 March 2010, § 92, with further references therein

¹⁰⁷ *Harris/ O’Boyle/ Warbrick*: Law of the European Convention on Human Rights, 2014, p. 792

¹⁰⁸ *Harris/ O’Boyle/ Warbrick*: Law of the European Convention on Human Rights, 2014, p. 794

characterize the life of the society in the state which, as a Contracting Party, has no answer for the measure in dispute".¹⁰⁹

As a general rule, if there is less evidence of the state's differential treatment departing from a common standard in the Convention states, the wider is the margin of appreciation and it is less likely that the Court will condemn it. In particular, in the *Rasmussen v. Denmark* case, there was evidence of Danish law distinguishing between the time-limits applicable to paternity proceedings of husbands and wives to be similar to in the proceedings in some other European states. Accordingly, the Court found that the distinction fell within the state's margin of appreciation and the authorities did not transgress the principle of proportionality.¹¹⁰ Whereas, in *Glor v. Switzerland* case, the applicant whose disability had been assessed at 40 per cent was obliged to pay a tax for not serving in the army, whereas those with disabilities assessed at a higher level were exempted. The Court attached weight to the fact that the payment of such tax was uncommon in Europe and there had been no possibility of challenging its proportionality. Accordingly, it found that there was a lack of fair balance between the public and private interests involved.¹¹¹

Finally, another factor in assessing proportionality under Article 14 is the possibility of the state to undertake alternative means in order to achieve the same aim. Whereas, the fact that some schemes have marked disparity with regard to their impact on separate individuals will not be conclusive that the arrangements are disproportionate if the overall effect is achieved with reasonable tolerance.¹¹²

Article 1 of Protocol no. 1

Article 1 of Protocol no. 1 to the Convention prescribes:

¹⁰⁹ "*Relating to certain aspects of the laws on the use of languages in education in Belgium*" v. *Belgium*, cited above, § 10

¹¹⁰ *Rasmussen v. Denmark*, application no. 8777/79, Judgment of 28 November 1984, § 41

¹¹¹ *Glor v. Switzerland*, application no. 13444/04, Judgment of 30 April 2009, §§ 83-94

¹¹² *Harris/ O'Boyle/ Warbrick: Law of the European Convention on Human Rights*, 2014, p. 794, with further references to the ECtHR case-law

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

In cases involving alleged violation of Article 1 of Protocol no. 1 to the Convention the Court will address the proportionality requirement in several aspects, in particular, while:

- balancing the interests at stake;
- considering the absence of disproportionate burden on the individual;
- reviewing the process (there are no express procedural requirements in Article 1 of Protocol 1, but due process plays a role for proportionality);
- considering the proportionality of the compensation provided to the applicant.

The Court after deciding that there has been an interference with the property under Article 1 of Protocol No. 1, as a rule will consider whether that interference was justified. The Court will examine whether it was lawful and served a legitimate objective in the public or general interest, and if there was a reasonable relationship of proportionality between the means employed and the aim sought to be realized.¹¹³ The burden of proof regarding the establishment of these facts lies on the State. The necessity to establish the proportionality of the interference becomes relevant only once it has been determined that the interference in question satisfied the requirement of lawfulness and was not arbitrary.¹¹⁴ As to the proportionality, the Court has stated:

“There must be a reasonable relation of proportionality between the means employed and the aim sought to be realized by measures applied by the State to control the use of the individual’s property. That requirement is expressed by the notion of a “fair balance” that

¹¹³ *Carss-Frisk*: A guide to the implementation of Article 1 of Protocol N. 1 to the European Convention on Human Rights, 2003, p. 30

¹¹⁴ *Iatridis v. Greece [GC]*, application no. 31107/96, Judgment of 25 March 1999, § 58

*must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.”*¹¹⁵

The Court applies the fair balance test in order to decide on the proportionality of the interference. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 of Protocol No. 1.¹¹⁶ While examining the applications regarding the alleged violation of Article 1 of Protocol no. 1 to the Convention this issue is the crucial and the most controversial one. Accordingly, it is clear that the proportionality criteria must be respected in all types of interference with one's property.¹¹⁷ Whereas, striking a fair balance depends on different factors.¹¹⁸

When deciding the proportionality under Article 1 of Protocol no. 1 the majority of the cases relate to the expropriation of private ownership by the State, whereas there are also cases when this principle is considered while examining the taxing measures of the State. Regarding the latter, ones the Court has established that the states have a wide margin of appreciation, then its judgment would be respected unless “devoid of reasonable foundation”.¹¹⁹

Referring to the criteria of proportionality, the Commission has clarified its content noting that the measure of proportionality clearly differs in the application of the two rules (deprivation of property and control of use) since a deprivation of property is inherently more serious than the control of its use, where full ownership is retained.¹²⁰ Thus, the proportionality must be assessed with reference to the “severity of the restriction” imposed.

Accordingly, it is obvious that the level of concern for private interests and the strictness of supervision of proportionality depend on the degree of interference with property, what seems

¹¹⁵ *Bittó and Others v. Slovakia*, application no. 30255/09, Judgment of 28 January 2014, § 97; *Novikov v. Russia*, application no. 35989/02, Judgment of 18 June 2009, § 45

¹¹⁶ *Bistrović v. Croatia*, application no. 25774/05, Judgment of 31 May 2007, § 34; *Sporrong and Lönnroth v. Sweden*, applications nos. 7151/75, 7152/75, Judgment of 23 September 1982, § 69

¹¹⁷ *Sermet*: The European Convention on Human Rights and property rights, 1998, p. 35

¹¹⁸ *Paulet v. the United Kingdom*, application no. 6219/08, Judgment of 13 May 2014, § 65

¹¹⁹ *Gasus Dosier- Und Fordertechnik GmbH v. the Netherlands*, application no. 15375/89, Judgment of 23 February 1995, § 60

¹²⁰ *O. v. Ireland*, application no. 11446/85, Decision of the Commission of 3 March 1986

to be suggesting that application of the proportionality principle as a means of supervision may vary from case to case.¹²¹

According to the Court's well established case-law, in cases of alleged violation of right to property, the State enjoys a wide margin of appreciation with regard to choosing the means of enforcement as well as ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achievement of the objective of law in question.¹²² The mentioned margin of appreciation derives from the subsidiary role of the Court in guaranteeing the protection of Convention rights and fundamental freedoms. Court considers that because of direct knowledge of their society and its needs, the national authorities are in principle in better position than the international judge to decide what is "in the public interest" as well as to determine the necessity of the restriction. In fact, the margin of appreciation in the context of proportionality is so wide that the Court has rarely found a violation of Article 1 of Protocol No.1 based on the lack of proportionality, because the interference in the use of property is, by itself, less significant than in the case of deprivation of one's possessions. Accordingly, under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures of deprivation of property.¹²³

The Court will not find any violation in principle in case of existence of another less restrictive measure to a Convention right than the one chosen, as long as both measures fall within the States' margin of appreciation. However, the existence of alternative solutions will normally be considered by the Court, when ruling on the proportionality of the interference to the aim sought to be achieved.¹²⁴ Nevertheless, the Court cannot abdicate its power of review and must determine whether the requisite fair balance was maintained in a manner consonant

¹²¹ *Sermet*: The European Convention on Human Rights and property rights, 1998, p. 35

¹²² *Scordino v. Italy (No. 1) [GC]*, application no. 36813/97, Judgment of 29 March 2006, § 94; *Chassagnou and Others v. France [GC]*, applications nos. 25088/94, 28331/95 and 28443/95, Judgment of 29 April 1999, § 75

¹²³ *Vistiņš and Perepjolkins v. Latvia [GC]*, application no. 71243/01, Judgment of 25 October 2012, § 106; *Moskal v. Poland*, application no. 10373/05, Judgment of 15 September 2009, § 61

¹²⁴ *Grgić/ Mataga/ Longar/ Vilfan*: The Right to Property under the European Convention on Human Rights, 2007, p.

with the applicants' right to the peaceful enjoyment of their possessions, within the meaning of the first sentence of Article 1 of Protocol No. 1.¹²⁵

It is worth to mention regarding the compensation that although Article 1 of Protocol No. 1 contains no explicit reference to the right to compensation for taking of property or other interference, it is implicitly required in practice. Compensation terms under the domestic procedure are material to the assessment of whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants.¹²⁶ A fair balance will not have been struck where the individual property owner is made to bear "an individual and excessive burden". Accordingly, in cases of deprivation of property, proportionality is generally respected if the dispossessed owner is awarded compensation.

The Court will address, when examining the case under Article 1 of Protocol no. 1 to the Convention, whether due to the State's interference, the applicant had to bear a disproportionate and excessive burden.¹²⁷ According to the Court's well established case-law, taking of property without the payment of an amount reasonably related to its value will normally constitute a disproportionate interference which could not be considered justifiable under Article 1.¹²⁸ However, it can be justified only in exceptional circumstances. The availability of compensation is also relevant when assessing the proportionality of other less restrictive interferences with the property. In many cases of lawful expropriation, such as distinct taking of land for road construction or other "public interest" purposes, only full compensation will be considered reasonably related to the value of property and sufficient enough not to find a violation of Article 1 of Protocol no. 1 to the Convention.¹²⁹ However, the mentioned Article does

¹²⁵ *Scordino v. Italy (No. 1) [GC]*, application no. 36813/97, Judgment of 29 March 2006, § 94; *Jahn and Others v. Germany [GC]*, applications nos. 46720/99, 72203/01 and 72552/01, Judgment of 30 June 2005, § 93

¹²⁶ *Scordino v. Italy (No. 1) [GC]*, application no. 36813/97, Judgment of 29 March 2006, § 95

¹²⁷ *Cindrić and Bešlić v. Croatia*, application no. 72152/13, Judgment of 6 September 2016, § 98

¹²⁸ *Sermet*: The European Convention on Human Rights and property rights, 1998, p. 39, with further references to the Court's case-law

¹²⁹ *Vistiņš and Perepjolkins v. Latvia [GC]*, application no. 71243/01, Judgment of 25 October 2012, § 110

not guarantee a right to full compensation in all circumstances.¹³⁰ For example, legitimate objectives of “public interest” that are pursued during the economic reform or measures that are designed to achieve greater social justice, may call for less reimbursement than the full market value.¹³¹ But the amount of compensation should at least be reasonably related to the value of the property, failing which there is an excessive interference with the individual’s rights.¹³² Some of these cases include *James and Others* (whether, in the context of leasehold-reform legislation, the conditions empowering long-term leasehold for tenants to acquire their property struck a fair balance), and *Lithgow and Others* (an issue relating to the nationalization of companies engaged in the aircraft and shipbuilding industries, as part of the economic, social and political programme run by the party that had won the elections, which was intended to provide a sounder organizational and economic footing and bring to the authorities a desirably greater degree of public control and accountability).¹³³ Moreover, less than full compensation may also be necessary when property is taken for the purposes of “such fundamental changes of a country’s constitutional system as the transition from monarchy to republic”.¹³⁴ The State has a wide margin of appreciation when enacting laws in the context of a change of political and economic regime,¹³⁵ as well as «German reunification»,¹³⁶ etc.

Last but not least, although the second paragraph of Article 1 of Protocol No. 1 contains no explicit procedural requirements, the Court will usually consider whether the proceedings as a whole afforded the applicant a reasonable opportunity for putting his case to the competent

¹³⁰ *Scordino v. Italy (No. 1) [GC]*, application no. 36813/97, Judgment of 29 March 2006, § 95; *James and Others v. the United Kingdom*, application no. 8793/79, Judgment of 21 February 1986, § 54

¹³¹ *Carss-Frisk: A guide to the implementation of Article 1 of Protocol N. 1 to the European Convention on Human Rights*, 2003, p. 39, with further reference therein

¹³² *Perdigao v. Portugal [GC]*, application no. 24768/06, Judgment of 16 November 2010, § 68

¹³³ *James and Others v. the United Kingdom*, cited above; *Lithgow and others v. the United Kingdom*, applications nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, Judgment of 8 July 1986

¹³⁴ *The former King of Greece and others v. Greece [GC]*, application no. 25701/94, Judgment of 23 November 2011, § 87

¹³⁵ *Kopecký v. Slovakia [GC]*, application no. 44912/98, 28 September 2004

¹³⁶ *Von Maltzan and Others v. Germany [GC]*, applications nos. 71916/01, 71917/01, 10260/02, Decision of 2 March 2005; and *Jahn and Others v. Germany [GC]*, cited above

authorities with a view to enabling them to establish a fair balance between the conflicting interests at stake.¹³⁷

Summarizing the application of proportionality criterion by the ECtHR in regard to the states' interference with the fundamental conventional rights, it is worth mentioning that it has in fact become a cornerstone when interpreting and applying the Convention and investigating into the reasonableness of the restriction and/or deprivation. Moreover, deciding the proportionality of the interference on almost every case is clearly going to have a pervasive influence throughout the establishment and development of the Courts' case-law in future.

¹³⁷ *Paulet v. the United Kingdom*, application no. 6219/08, Judgment of 13 May 2014, § 65

Application of the proportionality principle In Armenia

Basic principles of the legal order

We will provide a quick overview to provide the reader with the understanding of the fundamentals of the Armenian legal system, in the wider context of which the proportionality principle will be analyzed. The Armenian legal system is centered on the Constitution, which was adopted in 1995 and underwent significant amendments in 2005 and 2015, with the latter amendments resulting in a new reading of the constitution. The human rights provisions of this latter reading have entered into force in December 2015.

The Constitution establishes Armenia as a sovereign, democratic social and legal state and encompasses the foundations of constitutional order. Chapters two and three of the 2015 reading are devoted to basic rights and freedoms of the human being and the citizen, as well as legislative guarantees and main objectives of state policy in the social, economic, and cultural spheres respectively. The constitution is the supreme law of the land and all inferior legal acts including constitutional laws, laws, acts of the president and the executive should be in conformity with the constitution (art. 5). Treaties can be ratified only if they do not contradict the constitution, and any legal act, except the constitution, is inapplicable if it contradicts a ratified treaty (art. 5, para 3).

It is important to distinguish among the fundamentals of the legal order article 3 of the constitution, which declares the human being, his dignity and the fundamental human rights and freedoms to be an ultimate value, placing upon the public authority an obligation to respect and protect basic rights and freedoms of a human and a citizen. Under the said provision the state is restrained by basic rights and freedoms of a human and a citizen as directly applicable law.

As to the substance of the constitutional rights, since 1995 Constitution has guaranteed significant amount of basic human rights in line with the provisions of international human rights instruments, such as the *Universal Declaration of Human Rights (UDHR)*, *International Covenant on Civil and Political Rights (ICCPR)*, *International Covenant on Social and Economic and Cultural*

Rights (ICSECR) etc. Among those are right to life, personal liberty and security, equality before the law, non-discrimination, respect for family and private life, inviolability of home, freedom of thought, conscience and religion, etc. The basic rights and freedoms are guaranteed by Chapter two of the Constitution, which after 2015 reform does not include certain social rights, such as the right to a standard of living adequate for himself and for his family, including housing (former art. 34), right to social security during old age, disability, loss of breadwinner, unemployment and other cases prescribed by the law (former art. 37) etc. In contrast the 2015 reading encompasses many social guarantees in Chapter three, titled Legislative guarantees and main objectives of state policy in the social, economic, and cultural spheres. This chapter guarantees rights to healthy labor conditions, social security, decent existence and minimum salary and healthcare in accordance with the law. In addition, it also encompasses provisions on the main aims of the state policy such as improving business environment, to supporting the employment of the population and improving working conditions, fostering housing construction etc.

It is also noteworthy, that the principles for basic rights' restrictions, such as the proportionality principle and certainty principle are encompassed in the Chapter two of the 2015 reading of the constitution. Those principle were not directly enshrined in the previous reading, however paragraph 1 of article 43 provided that fundamental human and civil rights and freedoms set forth in Articles 23-25 (respect for private and family life, inviolability of the residence, right to freedom of movement), Article 27 (right to freely express opinion), Articles 28-30 (right to freedom of association, right to freedom of assembly, right to take part in the elections and referenda), Article 30.1 (citizenship), Part 3 of Article 32 (right to strike) may be restricted only by law if it is necessary in a democratic society in the interests of national security, public order, crime prevention, protection of public health and morality, constitutional rights and freedoms, as well as the honor and reputation of others.

In contrast, Article 78 of the 2015 reading does not distinguish between basic rights, but states that the means chosen for restricting fundamental rights and freedoms have to be suitable and necessary for the achievement of the aim prescribed by the Constitution. The means chosen for restriction have to be proportionate to the significance of the fundamental

right that is restricted. Furthermore, Article 80 of the Constitution guarantees the inviolability of the essence of provisions on fundamental rights and freedoms.

Another important constitutional norm is the provision according to which basic human rights can be restricted only by law i. e. act of parliament. This important guarantee has been present since 2005 and presently forms part of the principle of certainty, guaranteed in Article 79, according to which in case of restriction of fundamental rights and freedoms, the preconditions and the scope of restrictions shall be stipulated by law; the latter shall be sufficiently certain for the holders of fundamental rights and the addressees to be able to engage in appropriate conduct. Accordingly, Article 6 states out the possibility of delegating the right to legislate in other issues, stating that bodies foreseen by the Constitution, based on the Constitution and laws and with the purpose of ensuring their implementation, may be authorized by the law to adopt sub-legislative normative legal acts. It further requires the authorizing norms to comply with the principle of legal certainty.

Armenian constitution as to the institutional structure in its 2015 reading provides for a parliamentary system. From the point of view of the present research it is important to outline the constitutional control system, which in Armenia's case is based on the Kelsenian model of strong centralized Constitutional Court (CC)¹³⁸. The CC exists outside and independently of the courts of general jurisdiction. The latter is headed by the Court of Cassation – the highest judicial instance for all issues, except constitutional justice (Article 171).

In contrast, matters of constitutional justice form the exclusive domain of the CC (art. 167). In the view of the CC itself this precludes any other court from expressing opinion on constitutionality of a legal act it is about to apply¹³⁹, which is common to European constitutional orders.¹⁴⁰ The constitutional court exercises abstract ex post constitutional review, determining constitutionality of laws, decisions of the National Assembly, acts of the President, decisions of

¹³⁸ *Garlicki*: Constitutional courts versus supreme courts, 2007, pp. 44-68.

¹³⁹ Constitutional Court of The Republic of Armenia, Decision SDO-1010 (6 March, 2012), where the CC found the Administrative court in excess of its authority where it expressed an opinion on the constitutionality of the applicable law. However, the reasoning behind this ruling is unclear.

¹⁴⁰ *Comella*: The European model of constitutional review of legislation: Toward decentralization? Pp. 461-491. <http://bit.ly/2Aoi8KL> (Last accessed 16.11.2017)

the Government, Prime Minister and sub-legislative normative legal acts (art. 168), and ex ante review of treaties and in some cases laws (if the president refuses to promulgate a law or the legal act in question is going to be put on vote in a referendum) the latter not applicable until approximately 2018, when the appropriate provision enters legal force.^{141 142}

Moreover, while only state bodies or members of parliament can apply for abstract review, since 2005 any person may utilize the *amparo procedure* to apply to the CC in a concrete case when there is a final act of court, all judicial remedies have been exhausted, and the person challenges the constitutionality of a provision of a normative legal act applied by such act of court in relation to him, which has led to a violation of his fundamental rights and freedoms. (Article 169) However, this review is restricted by the 2015 reading and considers only the computability with basic rights and freedoms guaranteed in Chapter 2 of the Constitution, but not “legislative guarantees and main objectives of state policy in the social, economic, and cultural spheres”, of Chapter 3. (Article 169)

While exercising constitutional review the CC takes into account the text of the challenged legal act, but also the practice of its application (1995 Law of Republic of Armenia on Constitutional Court, Article 67, 2006 Law of Republic of Armenia on Constitutional Court Article 63).¹⁴³ This provision has been incorporated into Article 169 of the 2015 reading of the constitution, albeit only in relation to concrete review under the *amparo procedure*.

Another issue worth mentioning is the legal status and significance of the CC decisions. The CC’s view has been reputedly expressed in its decisions. In particular it has been stated, that the court through its decisions ensures the uniform and systematic interpretation and application of the constitutional norm, and that such decisions are an important source of constitutional law.¹⁴⁴ The CC has characterized its legal positions as official interpretations of the Constitution, which

¹⁴¹ Under provisions of art. 209 of the 2015 reading of the Constitution the norms regulating presidency enter into force with the taking of office by the newly elected president, which is anticipated in the first half of 2018.

¹⁴² For comparative perspective see: *Rosenfeld: Constitutional adjudication in Europe and the United States: Paradoxes and contrasts*, 2004, pp. 633–668. <http://bit.ly/2ztpUWe> (Last accessed 16.11.2017)

¹⁴³ For the early application of this principle see: Constitutional Court of The Republic of Armenia, Decision SDO-563 (May 6, 2005).

¹⁴⁴ Constitutional Court of The Republic of Armenia, Decision SDO-943 (February 25, 2011)

are general, clarifying and having precedential value for all actors in the realm of public law.¹⁴⁵

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Furthermore, before starting to examine the application of this principle in Armenian constitutional practice, one should start with the understanding of the fact that the Armenian practice in the area of human rights has been heavily influenced by the practice of the European Court of Human Rights. Armenia has become member of the COE in 2001. The constitutional amendments of 2005 enshrined a new provision into Article 43, according to paragraph 2 of which limitations on fundamental human and civil rights and freedoms may not exceed the scope defined by the international commitments assumed by the Republic of Armenia. The Constitutional Court of the Republic of Armenia (hereinafter the CC) has since¹⁴⁸ often relied on this article to apply ECHR provisions and ECtHR rulings to determine the scope of human rights guaranteed by the constitution. The CC jurisprudence in the period between 2005 and 2015 is full of such cases.¹⁴⁹

The court of cassation has also excessively cited the ECtHR case-law, and relied on the principle of proportionality in particular. For example, the Court in ԵՇԴ/0177/02/11 addressed the issue of proportionality of compensation, citing ECtHR judgments concerning Art. 1 protocol 1, stating that the issue of compensation should be resolved on the basis of the principle of proportionality.¹⁵⁰

This approach evolved further in the direction of expending the role of international human rights instruments as integral to the constitutional rights' system. This idea expanded from mere reference to non-restriction beyond international law limits, but resulted in recognition of the international instruments, as well as jurisprudence of international courts and tribunals in determining the substance of constitutional rights in general. Under Article 81 of the 2015

¹⁴⁵ Constitutional Court of The Republic of Armenia, Decision SDO-943 (February 25, 2011)

¹⁴⁶ Constitutional Court of The Republic of Armenia, Decision SDO-1319 (November 1, 2016)

¹⁴⁷ On the place of the CC decisions in the legal system see generally: *Manasyan*: The place of the Constitutional Court decisions in the legal system of RA and their role in guaranteeing the stability of the Constitution, 2013.

¹⁴⁸ Constitutional Court of The Republic of Armenia, Decision SDO-630 (April 18, 2006), para. 9

¹⁴⁹ For early examples see: Constitutional Court of The Republic of Armenia, Decision SDO-652 (October 18, 2006); Constitutional Court of The Republic of Armenia, Decision SDO-669 (December 22, 2006).

¹⁵⁰ Court of Cassation of the Republic of Armenia, Decision of October 19, 2012, case EShD/0177/02/11

reading of the Armenian Constitution the practice of bodies operating on the basis of international human rights treaties, to which the Republic of Armenia is a party, shall be taken into account when interpreting the provisions of the Constitution on fundamental rights and freedoms. Given the complex correlation between domestic and international law and their hierarchy adopted approach may be questioned, but unlike other jurisdictions¹⁵¹, Armenia seems to have accepted a more constructive approach, aimed at reconciling both through harmonized interpretation. In the same spirit Armenia also amended the constitutional provisions to accommodate the *Hirst*¹⁵²(Article 48). However, it is important to note that the ECtHR utilizes the margin of appreciation doctrine, which allows it in many instances to defer certain questions to the judgment of national authorities that are better placed to decide them.¹⁵³

Proportionality in Armenian Constitutional law: application to civil and political rights

It is correct first to turn to the principle of proportionality applied in criminal and administrative law before turning to the examination of the principle of proportionality in the Armenian constitutional law. In this sense the principle of proportionality between crime and punishment has been long established in Armenian criminal law.¹⁵⁴ This principle has also been incorporated in Article 71 of 2015 Constitution, which provides, that the punishment prescribed

¹⁵¹ See for examples: *Hirst v. the United Kingdom (No. 2)* (application no. [74025/01](#)) judgment of the European Court of Human Rights (ECtHR) October 6, 2005; Постановление Конституционного Суда Российской Федерации от 19 апреля 2016 года по делу о разрешении вопроса о возможности исполнения в соответствии с Конституцией Российской Федерации постановления Европейского Суда по правам человека от 4 июля 2013 года по делу «Анчугов и Гладков против России» в связи с запросом Министерства юстиции Российской Федерации

¹⁵² *Hirst v. the United Kingdom (No. 2)* (application No. [74025/01](#)) judgment of the European Court of Human Rights (ECtHR) on 6 October 2005,

¹⁵³ *Brauch: The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 2005; See also: *I. A. v. Turkey*, App. No. 42571/98 (Sept. 13, 2005), § 25.

¹⁵⁴ Constitutional Court of The Republic of Armenia, Decision SDO-920 (October 12, 2010); Constitutional Court of The Republic of Armenia, Decision SDO-924 (November 16, 2010); Constitutional Court of The Republic of Armenia, Decision SDO-927 (November 16, 2010)

by the law and the imposed specific sentence type and severity shall be proportionate to the committed crime.¹⁵⁵

Furthermore, the principle of proportionality also constitutes the fundamental principle of administrative law. Under Article 8 of the Law on Fundamentals of Administrative Action and Administrative Proceedings an administrative action must be directed at an objective pursued under the Constitution and laws of the Republic of Armenia, and the measures for achieving that objective must be suitable, necessary and proportional.

This principle has often been cited in the same vein as in criminal law, implying proportionality between an administrative offence and punishment for it.¹⁵⁶ However this principle is far wider in its scope. It refers to any interference by an administrative body and seems to echo the early German administrative law concept of restraint. Moreover, some authors consider it to be extreme manifestation of the constitutional principle of proportionality.¹⁵⁷ Indeed, the Constitutional Court in one of its earliest decisions has affirmed the general nature of this principle for administrative law, stating that exercise of public authority in general is restricted by the principle of proportionality.¹⁵⁸ This principle has been reconfirmed in numerous cases.¹⁵⁹ Most recently the court once again specifically mentioned the wide nature of the principle in administrative law. It stated that the realization of the police powers, which have compelling nature, should be directed at an aim, pursued by the Constitution and the laws and the means of achieving those goals should be suitable, necessary and measured.¹⁶⁰ Nevertheless the principle has been most often applied in the context of administrative penalties.¹⁶¹

However as has already been mentioned it was the ECtHR jurisprudence that served as the entry avenue for the proportionality doctrine as a general principle of Armenian constitutional

¹⁵⁵ For application of that norm see: Constitutional Court of The Republic of Armenia, Decision SDO-1304 (September 20, 2016)

¹⁵⁶ For examples see: Constitutional Court of The Republic of Armenia, Decision SDO-1291 (July 08, 2016)

¹⁵⁷ *Ghambaryan: Theory of state and law*, 2014, pp. 190-192, where principle is slightly misinterpreted.

¹⁵⁸ Constitutional Court of The Republic of Armenia, Decision SDO-920 (October 12, 2010)

¹⁵⁹ Constitutional Court of The Republic of Armenia, Decision SDO-1291 (July 8, 2016)

¹⁶⁰ Constitutional Court of The Republic of Armenia, Decision SDO-1304 (September 20, 2016)

¹⁶¹ Constitutional Court of The Republic of Armenia, Decision SDO-1130 (December 17, 2013)

human rights law. Thus, the issue of proportionality has first been mentioned in the context of the ECHR. In a decision from January 2001 concerning the constitutionality of certain sections of the Law on Television and Radio the CC referred to the ECHR and ICCPR provisions on freedom of expression, mentioning that it can be restricted if such a law takes into consideration the following:

“a) in terms of establishment and regulation of relations a law must be predominantly more general and abstract, rather than concrete;

b) envisaged restrictions must be proportionate and stem from both international legal and domestic legal principles of democracy;

c) a restriction should not endanger the essential substance of the right.”¹⁶²

The issue of proportionality was not confronted by the CC again until October 2006, when a highly controversial case on social security numbers was brought before the court. The case concerned the dispute on constitutionality of requirements of holding a social security card in order to be able to utilize public services, including pensions etc. Here the CC referred to the principle of proportionality as a “fundamental principle of international human rights protection law.”¹⁶³ It based its reliance on this principle on Constitutional provisions, guaranteeing non-application of greater restrictions, then allowed under Armenia’s international legal obligations. However, the court in this case went on to note that in the given case disproportionate restriction was not an issue, but rather the restriction of certain rights, that are not subject to restrictions, barring state of emergency or war.¹⁶⁴

The concept, that the provisions of 2005 constitution implicitly incorporate the principle of proportionality took root and was further developed by the CC. In its seminal ruling in February 2007, the CC referred to the issue of proportionality in which it stated that “Article 43 paragraph one indirectly prescribes one of the most important principles for the protection of constitutional rights – the proportionality principle, according to which a law may contain only such limitations upon basic rights of a person and a citizen, which are in conformity with the aim,

¹⁶² Constitutional Court of The Republic of Armenia, Decision SDO-278 (January 11, 2001), para. 6

¹⁶³ Constitutional Court of The Republic of Armenia, Decision SDO-649 (October 4, 2006), para X

¹⁶⁴ *Ibid.*

prescribed by the Constitution and are suitable, necessary and legitimate to meet that aim.¹⁶⁵ However the principle was referred to *inter alia* as the court was tasked with addressing the issue of constitutionality of certain provisions of the labor code, which restricted the right to strike, connecting it only to disputes unresolved during collective bargaining. The CC ruled that such restrictive interpretation ran contrary to Armenia's international obligations under The European Social Charter (revised) part 2 Article 6, and therefore void.¹⁶⁶

Thus, the court sketched the familiar four-element principle, however the last element of the system, which should be balancing or proportionality *stricto sensu* was named in a somewhat misleading manner, as the use of term "legitimate" refers to the aim of the interference, rather than the necessity for balancing competing values.

The CC reiterated the principle in another decision, where it addressed the issue of pension payments to military service veterans. Here the court added, "The RA Constitution and a number of international legal obligations unequivocally require the limitation upon the right to be established by the law, be proportionate, and not distort the essence of the right."¹⁶⁷ More significantly the court noted that the right to receive a pension is in its essence a form of right to property.¹⁶⁸

However, the CC has on numerous occasions referred to the scope of rights, to which the proportionality principle is applicable. In the case of social security numbers quoted above CC found the proportionality principle inapplicable where the restriction is of a right that is not subject to limitations.¹⁶⁹ Most recently in late 2015 the CC once again referred to certain rights, which cannot be restricted.¹⁷⁰ Although the court used the term "rights not subject to restrictions" it also frequently distinguishes between absolute and non-absolute rights.¹⁷¹

¹⁶⁵ Constitutional Court of The Republic of Armenia, Decision SDO-677 (February 7, 2007), para. 5

¹⁶⁶ Constitutional Court of The Republic of Armenia, Decision SDO-677 (February 7, 2007), para. 7

¹⁶⁷ Constitutional Court of The Republic of Armenia, Decision SDO-865 (February 10, 2010), para. 7

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ Constitutional Court of The Republic of Armenia, Decision SDO-1244 (December 8, 2015)

¹⁷¹ For a most recent case see; Constitutional Court of The Republic of Armenia, Decision SDO-1344 (February 7, 2017)

At this point one should examine the distinction between absolute and relative rights. The “black letter rule” of the constitutional doctrine distinguishes between those groups of rights, providing that unlike relative rights, which can be limited in accordance with the proportionality principle, absolute rights are not subject to limitations.¹⁷² There is widespread support for the view, that the absolute rights include such mostly absolute prohibitions.¹⁷³ These include “*holding* another in slavery or servitude; *performing* torture or cruel, inhuman or degrading treatment or punishment; arbitrarily *arresting, detaining, or exiling* another; *finding* another guilty of a retroactive criminal offence or *imposing* a retroactive criminal penalty on another; arbitrarily *interfering* with another’s privacy, family, home or correspondence or *attacking* another’s honor and reputation; arbitrarily *depriving* another of his or her nationality or *denying* him or her the right to change nationality; arbitrarily *depriving* another of his or her property; and *compelling* another to belong to an association.”¹⁷⁴

In light of this view a number of prominent authors have expressed views, on inapplicability of the proportionality principle to the absolute rights. Thus “Indeed, proportionality may only be operable when the right in question is relative, that is, when it is not protected to the fullest extent of its scope. Whenever a right is absolute – which is the essence of the anti-consequentialist concept – there is no room for proportionality. Similarly, there is no place for proportionality whenever the public interest is perceived as absolute. Indeed, proportionality can only operate when the weights of the conflicting principles at issue are larger than zero and smaller than infinity.”¹⁷⁵

A similar view is expressed by Moller, who states, that “While it is true that some rights are absolute – for example the right to freedom from torture, – most rights – including the rights to life, physical integrity, privacy, property, freedom of religion, expression, assembly and association – can be limited in line with the proportionality test.”¹⁷⁶

¹⁷² Møller: US. Constitutional Law, Proportionality and the Global Model, 2016

¹⁷³ Webber: Proportionality and Absolute Rights, 2016, p. 2

¹⁷⁴ *Ibid.*

¹⁷⁵ Barak: Proportionality: Constitutional Rights and their Limitations, 2012, p. 471

¹⁷⁶ Møller: US. Constitutional Law, Proportionality and the Global Model, 2016

In this sense the right to human dignity, recognized as the foundation of the human rights system as a whole has particular importance. This importance has been demonstrated in the German Constitutional Court decision in the often-referenced case on constitutionality of terrorist-captured plain being hit by the security forces.¹⁷⁷ Here the court held, that “all human beings possess this dignity as persons, irrespective of their qualities, their physical or mental state, their achievements and their social status” and accordingly deprivation of life of innocent passengers on board hijacked plane, even if it was about to crush into innocent bystanders.¹⁷⁸ Such a view rejects the possibility of balancing vis-à-vis human dignity regardless of the competing value, which is at the core of proportionality principle. The German court thus even refused to balance the right to life and dignity of the hostages vis-à-vis the same rights of potential victims on land.

The presented viewpoint also created ground for criticism from both opponents¹⁷⁹, and proponents of the proportionality doctrine.¹⁸⁰ To address the issue some authors favor the “weak trump model”, which in contrast to “interest model” (which sees human rights as mere competing interests on par with others), maintains the superiority of constitutional right over other values. Thus, the right “trumps” if a balancing exercise is performed unless it is being balanced against another constitutional value.¹⁸¹

From this perspective Klatt and Meister consider the issue of balancing vis-à-vis absolute rights and argue that “the decisive point here is that the purported absoluteness of the right to human dignity is only an apparent absoluteness.”¹⁸². In this they quote Alexy’s view that under numerous conditions “we can say with a high degree of certainty that the human dignity takes precedence”¹⁸³

¹⁷⁷ BVerfGE 1 BvR 357/05, February 15, 2006, BVerfGE 119

¹⁷⁸ *Ibid.*

¹⁷⁹ *Webber: Proportionality, Balancing, and the Cult of Constitutional Rights’ Scholarship*, 2010, p.199

¹⁸⁰ *Klatt/ Meister: The Constitutional Structure of Proportionality*, 2012, pp. 30-33

¹⁸¹ *Klatt/Meister: The Constitutional Structure of Proportionality*, 2012, p. 23, citing: *Alexy: A Theory of Constitutional Rights*, 2002, p. 185

¹⁸² *Klatt/ Meister: The Constitutional Structure of Proportionality*, 2012, pp. 30-33

¹⁸³ *Alexy: A Theory of Constitutional Rights*, 2002, p. 64

Indeed in Alexy's view balancing is "unavoidable, since there is no other rational way in which the reason for the limitation can be put in relation to the constitutional right"¹⁸⁴ Similarly Möller refers to the right not to be a slave and argues that the right in question is regarded as absolute "because the balance of interests will (almost) always favor the would-be slave: 'While theoretically the prohibition of using others as a means is not absolute but can be overcome in extreme cases, it is implausible to assume that such an extreme case could ever occur' because 'the harm imposed on the autonomy of a slave is so enormous'." ¹⁸⁵ Thus it is presumed that the absolute nature of the right is not a derivative of the assumption of non-derogability per se, but of the presumption, that in any given situation of balancing the right of the potential slave will prevail over any other consideration.¹⁸⁶

Indeed, the absolute nature of rights is still determined by comparison to all other considerations on the theoretical level, where the importance of some is judged so high, as to trump any other known value. This can not exclude the theoretical possibility of an extreme situation where another value, such as the survival of a nation or a large population may trump.¹⁸⁷

Nevertheless the CC's position on inapplicability of proportionality principle to limitations of absolute rights is based upon solid theoretical foundation. If a value, such as human dignity is considered to be of such a high importance, that it has been elevated to the level of a right, from which no derogation whatsoever is allowed it demonstrates the futility of proportionality exercise. Thus the court tasked with the issue should (as it did in the case analyzed above) task itself with the determination of absolute or relative nature of the right in question.

This task is also not as straightforward as it may seem. Barak considering this issue provides the useful examples of UNDH on the one side, which provides for a general limitation clause, and , ECHR on the other, which incorporates the possible limitation grounds into each

¹⁸⁴ Alexy: A Theory of Constitutional Rights, 2002, pp. 48, 49, 57, 74

¹⁸⁵ Webber: Proportionality and Absolute Rights, 2016; Forthcoming in *Jackson/ Tushnet: Proportionality: New Frontiers, New Challenges*, 2016; citing: *Möller: The Global Model of Constitutional Rights*, 2012, p. 148.

¹⁸⁶ *Ibid.*

¹⁸⁷ See for example: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, International Court of Justice (ICJ) Reports 1996, p. 226, 8/7/1996; see also: *Barak: Proportionality: Constitutional Rights and their Limitations*, 2012, pp. 29-30

relevant article.¹⁸⁸ The 2015 Constitution in this sense provides a mixture of both approaches. On the one hand certain basic rights provisions, such as the right to physical and mental integrity (article 25), personal liberty (article 27), inviolability of the home (article 32) contain limitation clauses. Those clauses enumerate the aims of such limitations, such as protecting state security, the public order, health and morals, and the fundamental rights and freedoms of others and etc. On the other hand, there are general limitation clauses of articles 77-81, including the proportionality principle.

Thus, the rights with limitation aims ascribed are obviously subject to limitations and therefore the proportionality principle applies. Moreover Article 78 specifically limits the possible aims for limitation to “aim prescribed by the Constitution.” Thus, the questions arise of a) distinguishing the absolute rights from relative rights lacking specific limitation clauses b) determining the aims for limitation of such relative rights.

The answer to the first question can be found by way of referring to relevant international instruments. As mentioned above right to human dignity, prohibition of torture, inhuman or degrading treatment are examples of rights, the absolute character of which has solid support.

On the contrary, some rights are widely regarded as being subject to limitation or have distinctions between their different elements. The practice concerning the right to fair trial and judicial protection provides a vivid example. These rights are guaranteed in articles 63 and 61 of the 2015 Constitution respectively. None of the mentioned rights is accompanied by specific limitation clauses, yet since 2006¹⁸⁹ the CC has consistently quoted ECtHR positions on proportionality in determining legality of restrictions upon the mentioned rights. The CC has on numerous occasions ruled on the constitutionality of different restrictions to these rights.¹⁹⁰

Most recently the CC faced with the issue of determination of constitutionality of returning the appeal due to formal requirements not being met. In dismissing the case the CC *inter alia* noted that “the ECtHR has in numerous rulings referred to the rights to judicial protection and

¹⁸⁸ Barak: Proportionality: Constitutional Rights and their Limitations, 2012, pp. 27-28

¹⁸⁹ See: Constitutional Court of The Republic of Armenia, Decision SDO-652 (October 18, 2006)

¹⁹⁰ Constitutional Court of The Republic of Armenia, Decision SDO-765 (October 8, 2008), para 16; Constitutional Court of The Republic of Armenia, Decision SDO-1192 (March 03, 2015); Constitutional Court of The Republic of Armenia, Decision SDO-1344 (February 7, 2017).

fair hearing and has noted, that the rights to fair hearing, guaranteed by ECHR Article 6 paragraph 1 of which a right to access to court is an element, is not absolute and can be subject to limitations, especially referring to the admissibility of a complaint, because by its nature it requires regulation by the state, which can vary depending on time and place, in accordance with the needs of both the society and specific persons. In this sense the state enjoys a margin of appreciation. Nevertheless, the right to access to court cannot be restricted in a manner and in limits, as to be damaging to its essence. These restrictions are in conformity with Article 6 paragraph 1 of ECHR if they pursue a legitimate aim and there is a just balance between the means chosen and goals pursued.”¹⁹¹

Furthermore, the CC has also viewed a number of interests as being legitimate aims, allowing, as a matter of principle, limitations upon those rights. These interests include “ensuring composition of high quality cassation complaints”¹⁹², “conduct of the physical and legal persons’ representation by skilled and experienced professionals” (concerning limitation on the ability to submit appeals to Court of Cassation only through a qualified attorney),¹⁹³ “promote effective and full realization of the right to judicial protection of rights and freedoms of a person”¹⁹⁴, “safeguarding the orderly process of court’s work”¹⁹⁵ “protection of mentally unsound persons, protection of interests of others and necessity to proper conduct of justice,”¹⁹⁶ “enabling the authorized body to examine the request submitted through a motion.”¹⁹⁷ The aims in question

¹⁹¹ Constitutional Court of The Republic of Armenia, Decision SDO-1344 (February 7, 2017), para. 6, citing: *Golder v. United Kingdom*, 21 Feb. 1975, *Fayed v. United Kingdom*, 25 Aug. 1994, *Ashingdane v. United Kingdom*, 28 May 1985, *Garcia Manibardo v. Spain* (15 Feb. 2000), 29.06.2000, *Bellet v. France*, 20 Nov. 1995, *Philis v. Greece*, 27 Aug. 1991, *Tolstoy Miloslavsky v. United Kingdom*, 23 Jun. 1995; see also: Constitutional Court of The Republic of Armenia, Decision SDO-1192 (March 3, 2015), para. 10

¹⁹² Constitutional Court of The Republic of Armenia, Decision, SDO-765 (October 8, 2008), para. 16, where the requirement to file the complaint only through a specially licensed attorney was found inefficient and violating the essence of the right.

¹⁹³ *Ibid. para. 18*,

¹⁹⁴ Constitutional Court of The Republic of Armenia, Decision SDO-1192 (March 3, 2015), para. 9, where the issue concerned filing appeals only through an attorney and was found to be a “disproportionate social burden.

¹⁹⁵ Constitutional Court of The Republic of Armenia, Decision SDO-1191 (February 24, 2015)

¹⁹⁶ Constitutional Court of The Republic of Armenia, Decision SDO-1197 (April 7, 2015)

¹⁹⁷ Constitutional Court of The Republic of Armenia, Decision SDO-1249 (December 22, 2015), where the court found the requirement to file a motion to restore lapsed time limits as perusing such a legitimate aim.

have been specified both before and after the 2015 amendments to the constitution, moreover the CC has constantly reaffirmed its position on the issue.¹⁹⁸

This also seems to be the view adopted by the German Federal Constitutional Court. As mentioned by professor Alexy, aims such as “preservation and support of the manual crafts” or “maintenance of German merchant navy”, may be considered as legitimate for the purpose of basic rights’ limitations.¹⁹⁹ Alexy thus concludes that where a limitation of a constitutional right is allowed the legislature bears discretionary end-setting powers base on the pursuit of common good.²⁰⁰

Nevertheless, the CC has contrasted this view with its assessment that some elements of the rights in question are not subject to limitations. Thus in 2002 the court came to the conclusion that “the right to judicial protection of a breached right” aside from limitations imposed in extraordinary situations of war or emergency, is not subject to limitations, whereas the right to fair and public hearing is not subject to limitations at all.²⁰¹ Later the Court noted that the aim of Article 18 of 2005 Constitution (right to a judicial remedy, right to defense) is to guarantee the judicial examination of the claims to rights’ violations and the elimination of the consequences of such violations, and therefore this right is not subject to limitations.²⁰² Most recently in 2015 the court further reiterated its view that the right mentioned is not subject to limitations.²⁰³

Thus, it is obvious that the CC has acknowledged the distinction between rights which are subject to limitations, and those which are not. Moreover, it seems that the absence of a specific limitation clause does not automatically render the right to be absolute.

Opposing argument may be formulated based on the text of 2015 Constitution, which expressly mentions the grounds for limitation in case of some rights and requires proportionality to be assessed on the basis of the aims “prescribed by the constitution.” Indeed, one of the

¹⁹⁸ Constitutional Court of The Republic of Armenia, Decision SDO-1344 (February 7, 2017), para. 6

¹⁹⁹ Alexy: A Theory of Constitutional Rights, 2002, p. 395

²⁰⁰ *Ibid.*

²⁰¹ Constitutional Court of The Republic of Armenia, Decision SDO-389 (October 1, 2002), para. 9

²⁰² Constitutional Court of The Republic of Armenia, Decision SDO-673 (January 16, 2007), see also: Constitutional Court of The Republic of Armenia, Decision SDO-1051 (October 9, 2012)

²⁰³ Constitutional Court of The Republic of Armenia, Decision SDO-1222 (June 26, 2015), para. 9

members of Constitutional Commission, charged with reviewing the constitution, Vardan Poghosyan in his comments to the new constitutional text has expressed such a view.²⁰⁴

However, the CC in its post-2015 jurisprudence has adopted a different view as regarding the right to access to court in particular. In a number of decisions, the Court has revisited the issue only to confirm its previous position on possibility of limitations subject to the proportionality principle.²⁰⁵

Moreover, if one assumes, that any right lacking specific limitation clause is not subject to any limitations whatsoever, this interpretation will run contrary to the ECtHR practice, particularly concerning the elements of the right to a fair trial, which as we have seen may be subject to limitations. Therefore, the issue should be decided on the bases of constitutional value assessment, as well as the international human rights law and judicial practice, including ECtHR practice, as required by article 81 of 2015 Constitution. A separate issue however is the determination of legitimate aims, for the sake of which a right could be limited.

Legitimate Aim

The legitimate aim is the first element subject to examination while applying the proportionality principle. It is widely viewed to be a threshold requirement, and as Barak puts it the court is required to assess, “whether, in a constitutional democracy, a constitutional right can be limited to realize the purpose underlying the limiting law.”²⁰⁶

Here again if one applies the lens of the Armenian Constitution the distinction between the rights with explicit limitation clauses and those lacking them is apparent. The former has a concrete set of purposes directly mentioned as being legitimate. These may include protecting state security, the public order, health and morals, and the fundamental rights and freedoms of

²⁰⁴ *Poghosyan/Sargsyan*: The 2015 Reading of the Republic of Armenia Constitution, 2016, p. 82

²⁰⁵ Constitutional Court of The Republic of Armenia, Decision SDO-1334 (December 27 2016); Constitutional Court of The Republic of Armenia, Decision SDO-1334, (December 27, 2016), see also: *Barak*: Proportionality: Constitutional Rights and their Limitations, 2012, p. 262, who supports this view.

²⁰⁶ *Barak*: Proportionality: Constitutional Rights and their Limitations, 2012, pp. 246-247.

others and etc. These aims generally follow the line of international instruments, such as the ECHR.

The CC has had little difficulty in applying such explicit norms. A vivid example is the decision on constitutionality of a statute demanding source disclosure from journalists. The relevant provisions of the law allowed disclosure demands to be presented only if it was the last resort to solve a serious crime and the interests of the criminal prosecution outweigh the interests of securing the source confidentiality. The CC ruled the statute to be constitutional as it, *inter alia*, pursued a legitimate aim.²⁰⁷

The Court noted that the limitation upon person's right to seek information and ideas may be justified by the necessity to guarantee such important constitutional rights as the right to life, right to freedom and security, the right to an effective remedy before a court or other state body, the right to restoration of a violated right.²⁰⁸

The court further ruled, that the "the legitimate interest of the source disclosure may be recognised as superior to the public interest of its non-disclosure in the case, when the disclosure of the source is necessary for the protection of life, prevention of a serious (or very serious) crime, to ensure the judicial defence of a person accused of a serious (or very serious) crime".²⁰⁹ Thus the court based the limitation upon the constitutionally prescribed aim of protracting rights and freedoms of others.

The issue of legitimacy in the context of the rights lacking specific limitation clauses can be more contentious. As already mentioned the CC in its practice has referred to a number of such legitimate aims, meriting restrictions upon basic rights. However, the newly incorporated Article 78 of the constitution seems to reflect the view that only constitutionally acknowledged aims may be legitimate for such limitations to meet the criteria of proportionality test.

Undoubtedly, such aims should be consistent with the principles of democratic society and human rights protection, including the protection of human dignity as an underlying principle. In this sense the CC has acknowledged that alongside being proportionate the measure should be

²⁰⁷ Constitutional Court of The Republic of Armenia, Decision SDO-1234 (October 20, 2015)

²⁰⁸ Constitutional Court of The Republic of Armenia, Decision SDO-1234 (October 20, 2015)

²⁰⁹ Constitutional Court of The Republic of Armenia, Decision SDO-1234 (October 20, 2015)

necessary in a democratic society,²¹⁰ while the aim should be viewed through the prism of the rule of law principle.²¹¹ Thus the state may have to limit certain basic rights with the view of achieving public good for the democratic society, including the “continued existence of the state, national security, public order, tolerance, protection of a person’s feelings, and other interests that do not constitute constitutional rights.”²¹² Therefore the interests of preserving the democratic society and its core values may under certain circumstances be viewed as legitimate aims in limiting qualified basic rights, lacking specific limitation clauses. This view would however require a broader interpretation of the term “aim prescribed by the Constitution”, which in its context points to the specifically defined aims enumerated under the specific limitation clause.

Another issue is the evaluation of Chapter 3 provisions of 2015 reading which sets out specific ends that the legislature is under an obligation to promote. Among these are for example the promotion of healthcare and protection of persons’ health (Article 85), which may be a legitimate aim in limiting basic rights. The question then arises of whether these considerations of public interest may serve legitimate aim in limiting basic rights.

Indeed, the laws in force do limit certain basic rights with the aim of health preservation. Thus, the public service laws allow for persons suffering from certain diseases not be eligible for such employment. However, one should keep in mind the consideration, that not any consideration of public good may be viewed as sufficient to serve as a legitimate aim for limitations on basic rights.²¹³ The consideration in question should be of such high importance and urgency, that the society would view it as “crucial enough to justify a limitation on its constitutional rights.”²¹⁴

²¹⁰ Constitutional Court of The Republic of Armenia, Decision SDO-1244 (December 08, 2015)

²¹¹ Constitutional Court of The Republic of Armenia, Decision SDO-1196 (March 17, 2015)

²¹² *Barak*: Proportionality: Constitutional Rights and their Limitations, 2012, p. 254

²¹³ *Mcharg*: Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights, 1999, p. 671; See also: Meyerson: Why Courts Should Not Balance Rights Against the Public Interest, 2007, pp. 801-830

²¹⁴ *Barak*: Proportionality: Constitutional Rights and their Limitations, 2012, p. 266

Rational connection (suitableness, appropriateness)

Following the structure of the proportionality principle it is necessary to further establish whether the measure chosen was in fact rationally connected to the legitimate aim pursued. The adjudicating body thus needs to determine, whether the means employed could rationally advance the underlying purpose. In the words of Barak “It is therefore required that the means chosen be pertinent to the realization of the purpose in the sense that the limiting law increases the likelihood of realizing its purpose. Accordingly, if the realization of the means does not contribute to the realization of the law’s purpose, the use of such means would be disproportional.”²¹⁵

The CC jurisprudence on this element seems insufficient, due to “wholesale” application of proportionality principle without elaborating its elements. Thus, for example in one of the cases the CC was tasked with resolving the issue of constitutionality of Civil Code provisions regulating taking of pledged property by the creditors. The provisions in question provided that the court could suspend the taking if the pledgor provided security equal to the value of the pledge object. According to the Code this requirement aimed at the protection of the rights of the pledge in remedying his possible losses. The CC applied the principle of proportionality to conclude that the measure unduly restricted the rights of the pledgor, as it required security not in the amount of possible losses the pledge could suffer, but in the amount of the value of the pledge, which could have significantly higher value than the amount of potential losses and even the principle obligation itself.²¹⁶

Based on this reasoning the court found the measure to be a disproportionate limitation and therefore unconstitutional in that it could require security in an amount exceeding possible losses the creditor could sustain.²¹⁷

To apply the proportionality test to the sequence of element of the case in question one might discover that the first element is present and the legitimate aim of protection of other’s rights is evident, as the measure is intended to protect the creditors from possible losses, caused

²¹⁵ Barak: Proportionality: Constitutional Rights and their Limitations, 2012, p. 303

²¹⁶ Constitutional Court of The Republic of Armenia, Decision SDO-1294 (July 19, 2016)

²¹⁷ *Ibid.*

by unjustified protraction of their case. However, the missing part is the rational connection, as limiting pledgor's rights above the amount of possible losses in no manner contributes to the achievement of that aim.

Such situations are not uncommon. To provide a comparison one could refer to a German case concerning hunting permits. The law required knowledge of the use of firearms as a precondition for granting hunting permits. This norm was challenged before the German Constitutional Court, where it was argued, that such a provision was unconstitutional in its application to hunting with eagles. The German Constitutional Court in that case found no rational connection between the purpose of the law (guaranteeing the community's protection from hunting weapons) and the means used by the law – the requirement of technical knowledge of firearms regarding hunting with eagles – which is connected to an activity that has nothing to do with firearms.²¹⁸ In another case, the German Constitutional Court reached a similar conclusion in assessing suitability of a requirement to demonstrate business experience in case of tobacco sale through operation of cigarette vending machines to the purpose of consumer protection.²¹⁹

Unlike the German Constitutional Court, the CC failed to make clear articulation of the elements, lack of which resulted in the unconstitutionality of the measure as it simply referred to the general provision of Article 78 of the Constitution. Such mode of application leaves the legislature and other actors “in the dark” as to the actual contemplation of the court and does not allow the clear understanding of the measures that need to be taken to avoid such instances.

This is even more relevant to an earlier CC case, in which the court assessed the constitutionality of the prohibition to exit Armenian citizenship if a person had outstanding obligations. The CC found that such a provision would be compatible with the constitution only if interpreted to refer to the obligations, which are “by their nature inseparably connected to the status of a citizen”.²²⁰ A different interpretation, the court noted, would impose a disproportionate limitation and in case of other obligations become “an unnecessary measure”

²¹⁸ *Barak: Proportionality: Constitutional Rights and their Limitations*, 2012, p. 304

²¹⁹ BVerfGE 19, 330 (338 f.)

²²⁰ Constitutional Court of The Republic of Armenia, Decision SDO-945 (March 15, 2011)

in achieving person's compliance with his/her obligations.²²¹ Here again the court correctly judged the measure to be incapable of achieving the intended aim, yet referred to it as unnecessary, rather than inappropriate.

The highlighted problems are also similar to the ones highlighted by Stavros Tsakyrakis²²² in relation to the *F v. Switzerland*²²³, where ECHR created similar problem. Here the ECtHR found the measure inappropriate²²⁴, but nevertheless referred to it as disproportionate to the legitimate aim.²²⁵ Although Madhav Khosla has subsequently demonstrated that this cannot be viewed as a basis for a successful argument against the proportionality doctrine as such,²²⁶ but it creates confusion and allows a room for criticism, as well as an interpretation of the decision as acknowledgement of the appropriateness of the measure in question.

Necessity

If a measure pursued legitimate aim and is reasonably capable of achieving it, the question arises of the availability of alternatives. Under the necessity component one is tasked with the determination of whether the aim in question may be achieved through less intrusive means. In Barak words "the requirement established by the necessity test, therefore, is that, in order to achieve the law's purpose, rational means should be chosen such that the intensity of the realization is no less than that of the limiting law, and those means limit the constitutional right to the lesser extent."²²⁷ Thus, the necessity test requires, that the measure be weighed against possible alternatives capable of achieving the very same goal, and determining, whether the latter is the least intrusive when it comes to the basic rights' limitations.

The CC has invoked this element on relatively rare occasions. One such case is the ruling on

²²¹ *Ibid.*

²²² *Tsakyrakis: Proportionality: An Assault on Human Rights?* 2009, p. 486

²²³ *F v. Switzerland* App. No. 11329/85 (Dec. 18, 1987)

²²⁴ *Ibid.* para. 36

²²⁵ *Ibid.* para. 40

²²⁶ *Khosla: Proportionality: An assault on human rights?* A reply, 2010, p. 304 <http://bit.ly/2m5rLeI> (Last accessed 16.11.2017)

²²⁷ *Barak: Proportionality: Constitutional Rights and their Limitations*, 2012, p. 320

constitutionality of Civil Procedure Code's requirement that the judicial acts, referred to in the appeal to the Cassation Court be annexed to the appeal. In this case the CC ruled that the judicial acts are available to all parties to the dispute, including free access and availability on the Internet. The CC also ruled that there is a legitimate purpose in requiring an appeal to be well founded and supported by the relevant legal arguments. Thus, the purpose of the act could be achieved without such intrusive measures, as strict requirement to annex all judicial acts.²²⁸

The case presented above is similar to a much quoted German case, where the candy manufacturers were prohibited from selling goods containing rice. This provision was found to be unconstitutional on the grounds, that while limiting the right to freedom of occupation with the purpose of consumer protection, the ban was not necessary as the aim could be achieved through less intrusive measures, such as labeling requirements.²²⁹

It is common for the CC to discuss the issue of possible alternatives to the disputed regulations. Therefore, for example in one of the cases the CC considered the limitation, imposed upon the incapacitated persons in their right to challenge such incapacitation in court. Neither the Civil Code, nor the Civil Procedural Code allowed such application. The CC found the limitation to be unconstitutional, as it deprived the incapacitated person of his/her right to access to court.²³⁰ However the court went on to *inter alia* discuss the Civil Code norms on incapacitation. It quoted ECtHR ruling in *Shtukaturov v. Russia*²³¹ and noted, that the only measure available to protect the rights and legitimate interests concerning mentally ill persons was full incapacitation, whereas less intrusive measures could be available, such as limitation of capacity for some forms of mental illnesses. This measure was prescribed for alcohol, drug and gambling abusers and could in the CC's opinion be used as a less intrusive measure.²³²

Two issues should be noted here. First, the application of necessity test requires examining the possibility of achieving the same result by alternative measures, while not imposing any new

²²⁸ Constitutional Court of The Republic of Armenia, Decision SDO-1293, (July 12, 2016), para. 9

²²⁹ *Barak: Proportionality: Constitutional Rights and their Limitations*, 2012, p. 319; *Alexy, A Theory of Constitutional Rights*, 2002, p. 398

²³⁰ Constitutional Court of The Republic of Armenia, Decision SDO-1197 (April 7, 2015), para. 8

²³¹ *Shtukaturov v. Russia (Application no. 44009/05)* Judgment of 27 March 2008

²³² *Ibid.*, para. 9

limitations on other rights or requiring financial allocation. In Barak's words "the necessity test is based on the assumption that the only change that should be brought about by the alternative means is that the limitation on the constitutional right would be of a lesser extent."²³³

The ability of the Courts to decide on possible alternatives is narrowed down to a point, where nothing can be changed except the measure and result in limiting the basic right in question. The principle therefore leaves nothing to the discretion of the legislature beyond this narrow patch and cannot allow examination of any alternative that could be more viable, yet somewhat costly to the state or in any other manner alter the state policy or impose other burdens.

It is also difficult to see, how this approach can be applied in practice. One could refer to a recent CC case to illustrate the point, where the issue in question was the constitutionality of the provisions of Law on Bankruptcy, allowing the external manager to require annulment of gratuitous transactions for five years prior to the bankruptcy, if the bankrupt person concluded them with affiliated persons. As the CC acknowledged, the purpose of the norm was the protection of the rights of creditors by way of preventing deliberate hiding of debtor's assets, which was presumed in the transactions of said case. While acknowledging the purpose of law to be proper, the CC went on to criticize the rational connection between the measure and a theoretical situation, where the debtor concluded the transaction three or four years prior accruing serious debts, which resulted in bankruptcy. In the CC's opinion such a case could hardly qualify as deliberate hiding of assets the statute aimed to prevent. Finally, the court came to the conclusion, that the measure would be unnecessary to achieve the result and favored an alternative interpretation, according to which the measure would be constitutional, if the provision was applicable to transactions, "which are found by the court to be ones, clearly demonstrating the debtor's intention to avoid execution of its obligations towards the creditors."²³⁴

Aside from the issue of distinguishing between the rational connection and necessity in the cited case, it is evident, that unlike presumption, that the transactions were intended at avoiding

²³³ Barak: Proportionality: Constitutional Rights and their Limitations, 2012, p. 325

²³⁴ Constitutional Court of The Republic of Armenia, Decision SDO-1340 (June 31, 2017)

debt payments, the alternative of requiring proof of such intentions is clearly increasing the burden upon the bankruptcy manager and makes it less likely for the creditors to receive payments on the debts owed to them. Thus, the measure is lessening the level of protection for the rights of others, and the question remains open of whether such an application is of the necessity or balancing component.

Another issue is the implied need to estimate the consequences of measures at hand. The court may for example face an issue of pension reform, which it did on numerous occasions, and establish whether the specific pension framework is going to provide better social security than the alternative. In a similar situation the German Federal Constitutional Court applied the test of “scientifically based knowledge, which necessarily points to the correctness” of one of the options.²³⁵ If such knowledge is absent, the court defers to the legislative discretion.²³⁶ However, this approach merits further consideration within the scope of balancing element.

Balancing (Proportionality *stricto sensu*)

Balancing or proportionality *stricto sensu* is arguably the most challenging component of the proportionality principle. Once the adjudicating body establishes the legitimate aim, suitability and necessity of the measure, it has to evaluate the relative importance of the sacrificed right vis-à-vis the gained benefit for the legitimate interest or another right.

Alexy describes the law of balancing as follows: “The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the interest of satisfying the other.”²³⁷ Further Alexy describes the act of balancing in its three stages: determining the degree of detriment to or non-satisfaction of the right being restricted, determining the importance of satisfying the competing principle, and determining, whether the importance of the latter principle’s satisfaction justifies the detriment to the former principle.²³⁸

²³⁵ BVerfGE 90, 145 (182 f.)

²³⁶ Alexy: A Theory of Constitutional Rights, 2002, p. 399

²³⁷ Alexy: A Theory of Constitutional Rights, 2002, p. 102

²³⁸ Alexy, A Theory of Constitutional Rights, 2002, p. 401

This is indeed the essence of the balancing act and both the Armenian legislature and the CC have often engaged in the very same act of balancing. Consider the case of journalistic source disclosure, quoted above.²³⁹ The task of balancing here should be performed in the similar pattern of reasoning. Firstly, the CC determined the weight to be given to the freedom of expression and its component – the freedom of the press in its right not to disclose the sources. Afterwards, it turned to the degree, to which that right was restricted under the law demanding disclosure.²⁴⁰ The next step, if Alexy’s pattern is followed, would be to determine the competing interests and assessing the benefits, gained by that interest. The CC put the rights of others (right to life, right to freedom and security, the right to an effective remedy before a court or other state body, the right to restoration of a violated right) as a competing principle, meriting protection, it did not however explicitly assess the degree to which those interested gained benefits, instead this was implied as the court referred to the disclosure being the last resort in solving serious crime.²⁴¹ In weighting the mention detriment to the freedom of expression against the protection of others’ rights the CC reasoned the measure to be proportionate²⁴², and therefore acknowledged that the gains outweighed the losses.

Thus, the outlined pattern is inherent to the proportionality components application. A way more serious issue is the determination of relevant weights to be assigned to each value being balanced.

This pattern of reasoning is not as clear in other contentious cases. For example, in a landmark case the CC was tasked with reviewing the constitutionality of civil code provisions, protecting against defamation. The mentioned provisions allowed the claims of monetary compensation of up to 1 million AMD (approx. 2500 USD) in case of insult and up to 2 million AMD (approx. 5000 USD) in case of slander. A series of cases followed, that resulted in significant fines being imposed upon number of media organizations. While reviewing the constitutionality of the mentioned provisions, the CC ruled, that the proper purpose of protecting dignity of a

²³⁹ *Ibid.* p. 60

²⁴⁰ Constitutional Court of The Republic of Armenia, Decision SDO-1234 (October 20, 2015)

²⁴¹ *Ibid.*

²⁴² *Ibid.*

person was present, however a balance should be reached between the degree of protection for that legitimate interest and interference into the right to freedom of expression and press, including the proportionality between the damage caused and compensation sought.²⁴³

However, the CC went on to assess the relevant importance of the freedom of the press in a democratic society. It cited a number of ECtHR rulings emphasizing the importance of protecting those rights and referring the wide scope of its protection.²⁴⁴ Later the Court came up with a number of criteria based on comparative assessment, including the need to balance those interests and to use only necessary measures, not apply the measures in question vis-à-vis the state, to consider defamation as a deliberate act etc.²⁴⁵

Moreover, the CC significantly limited the possibility of claiming monetary compensation for defamation, stating that evaluating statements cannot result in claims for monetary damages'. The fact, that the defendant is a media organization can not in itself result in higher amount of damages, and finally that "special restraint should be exercised in assigning monetary compensation" given the need for tolerance. Furthermore, the court stated that the monetary compensation should be the least desirable form of compensation and the non-monetary measures should be favored. If the monetary compensation is assigned it should not be a ruinous financial burden for the defendant and in general the consequences for the freedom of expression should be properly assessed.²⁴⁶ Thus the court significantly limited the possibility of imposing financial compensation for defamation.

A parallel may be drawn between this case and a German Federal Constitutional Court judgment. In a German case a satirical magazine made certain remarks about a person, particularly describing him among other expressions as a "cripple". The German lower court ruled in favor of the affected person, granting a monetary compensation of 12.000 DM. The Federal Constitutional Court assessed that interference with the freedom of expression was present, which had a proper purpose to protect the personality right. It thus engaged into

²⁴³ Constitutional Court of The Republic of Armenia, Decision SDO-997 (November 15, 2011), para. 9

²⁴⁴ *Ibid.* para. 10

²⁴⁵ *Ibid.* para. 11

²⁴⁶ *Ibid.*

balancing between the freedom of expression and the possible detrimental impact upon publishing of the magazine and the protection of personality right by way of fines, precluding future violations. The Court found the word “cripple” to be humiliating and disrespectful towards disabled persons and due to seriousness of the insult ruled the interference justified.²⁴⁷ However the court ruled other less significant expressions, such as play of words with the person’s surname not to be significant enough in the context of a satirical magazine to merit interference.²⁴⁸

The described cases present vivid examples of balancing between competing rights, which the adjudicatory bodies tend to determine on case by case basis, given the importance of the rights in question, as well as the degree of interference in any specific case, also given the general background and context against which the issue is decided. Nevertheless, the balancing exercise is never an easy task and requires value assignment upon equally important interests.

However, Alexy has attempted to formalize the process of balancing through determination of variables at play and weight assignment to them.²⁴⁹ Thus Alexy considers the following variables in play while assessing the balance between values W_i and W_j ; P_i and P_j or the abstract weights of the respective principles, which can be either equal (where two equally important values, such as basic rights) are at play or unequal (where there is distinction in value, for example higher weight of one right); I_i and I_j or the intensity of the specific interference in question; R_i^e and R_j^e empirical premises for the realization/non realization of the principle; R_i^n and R_j^n normative premises for the realization/non realization of the principle.²⁵⁰ These variables are incorporated into the “weight formula”²⁵¹, which reads as follows:

$$W_{i,j} = \frac{W_i \cdot I_i \cdot R_i^e \cdot R_i^n}{W_j \cdot I_j \cdot R_j^e \cdot R_j^n}$$

²⁴⁷ BVerfGE 86, 1 (11)

²⁴⁸ *Ibid.*

²⁴⁹ Alexy, *A Theory of Constitutional Rights*, 2002, p. 408

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

Furthermore, it has been suggested, that each element be evaluated on a triadic scale of light (l), moderate (m) and serious (s).²⁵² This is used for all elements, for example it should be assessed, whether the interference is light, moderate or serious and accordingly a coefficient is applied. This is however done on based on the scale used by the German Federal Constitutional Court.²⁵³

Unfortunately, the CC's jurisprudence does not allow establishment of such distinction, while this would undoubtedly be valuable in applying the balancing principle. Nevertheless, it is still possible to apply the mentioned formula to a particular case due to its universal nature and the fact that it incorporates the main variables the CC has to do so and in practice does address, albeit in a less structured manner.

Proportionality and social rights

There has been significant debate in legal doctrine on the issue of applicability of the proportionality principle to social rights.²⁵⁴ This is especially so in times of economic downturn, when states are finding themselves in need to better allocate scarce resources and even implement austerity measures. The issue has been considered in different aspects by the Armenian Constitutional Court, which has laid out a number of important principles. This is also true for proportionality principle.

It has been established that the proportionality principle still applies in relation to social rights, such as the right to receive a pension allowance. However, it is questionable in the light of the adopted approach to state, that threefold approach of rational connection, necessity and proportionality *stricto sensu* still applies. If the proportionality is still applicable, it means that either the proportionality *stricto sensu* is not applicable at all, or that the default value of the public interest is so high in this particular instance, that it renders possibility of finding a measure

²⁵² Alexy, The Weight Formula, in: Studies in the Philosophy of Law: Frontiers of the Economic Analysis of Law (Stelmach/Brozek/Zaluski (eds.) 2007, p. 15

²⁵³ Klatt/Meister, The Constitutional Structure of Proportionality, 2012, p. 12

²⁵⁴ Bilchitz: Socio-economic rights, economic crisis, and legal doctrine, 2014, pp. 710–739; Contiades/ Fotiadou: Socio-economic Rights and Legal Doctrine: A Reply to David Bilchitz, 2014, pp. 740–746

disproportionate in a very limited form. This is due to the fact that economic conditions and budgetary issues may lead to necessity of reducing social spending, which has direct rational connection to pensions as a government spending.

Indeed, the content of social rights is “ever dependent upon the competition of interests and the resources available. This means that where social rights are concerned, the discretion available to the legislator to make political choices is even wider.”²⁵⁵ One cannot therefore claim that in such a situation, where necessity and rational connection are demonstrated, combined with a simultaneous increase in the burden of proof the measure is unbalanced, unless it is manifestly unreasonable. However, another constitutional provision, namely that of the inviolability of the essence of a right would not allow for those rights to be restricted to such an extent, that their essence is defeated. No such measure may deprive the right of its essence or endanger its very existence.²⁵⁶

In general, prior to the 2015 amendments to the Constitution the CC consistently applied the principle of proportionality to restrictions of social rights, especially concerning the pension regulations, which due to their sensitive nature often become a point of contention. In one case the CC examined constitutionality of certain provisions of the Law on State Pensions, where it inter alia addressed the issue of proportionality *stricto sensu* in case of social rights restrictions. Relying upon ECtHR rulings in a number of cases the CC accepted the principle for determining proportionality of a restriction and stated, that “in the area of social legislation including in the area of pensions States enjoy a wide margin of appreciation, which in the interests of social justice and economic well-being may legitimately lead them to adjust, cap or even reduce the amount of pensions normally payable to the qualifying population including, like in the instant case, by means of rules on incompatibility between the receipt of a pension and paid employment. However, any such measures must be implemented in a nondiscriminatory manner and comply with the requirements of proportionality. Therefore, the margin of appreciation available to the legislature in implementing such policies should be wide , and its judgment as to

²⁵⁵ *Contiades/ Fotiadou*: Social rights in the age of proportionality: Global economic crisis and constitutional litigation, 2012, p. 667

²⁵⁶ Constitutional Court of The Republic of Armenia, Decision SDO-649 (October 4, 2006), para. X

what is “in the public interest” should be respected unless that judgment is manifestly without reasonable foundation”²⁵⁷ The CC went on to quote ECtHR in that “while it must not be overlooked that Article 1 of Protocol No. 1 [ECHR] does not restrict a State’s freedom to choose the type or amount of benefits that it provides under a social security scheme, it is also important to verify whether an applicant’s right to derive benefits from the social security scheme in question has been infringed in a manner resulting in the impairment of the essence of his pension rights”²⁵⁸

In a later case the CC revisited the pensions issue stating, that “it is the discretion of the legislature to choose the volume and form of social security, and given the demands of the fundamental principles of proportionality and balance in the given field the limits of discretion on the one hand are based upon the socioeconomic capabilities of the state, and on the other upon the constitutional requirements of a social state.”²⁵⁹

Here again it can be understood, that in the domestic setting it is for the legislative power to exercise the wide margin of appreciation, in this particular case in the area of social rights. The problem which arises in this case is not about a legitimate aim (which is the use of resources for other ends), or rational connection (saving money in one may contribute to its use in some other) and often not even of necessity, but of proportionality *stricto sensu* or balancing.

This results in situation as described by judge Sumpton when there are “competing claims on a limited pot of money”²⁶⁰. Indeed, it is difficult to assess the relative importance of a certain public service, such as providing pension allowance, with other goals, such as physical security or

²⁵⁷ Case of *Lakićević and others v. Montenegro and Serbia* (Applications nos. 27458/06, 37205/06, 37207/06 and 33604/07) 13 December 2011, para. 61; Constitutional Court of The Republic of Armenia, Decision SDO-1061 (December 14, 2012), citing: *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, 16 March 2010; *Andrejeva v. Latvia* [GC], no. 55707/00, § 83, 18 February 2009; as well as *Moskal v. Poland*, no. 10373/05, § 61, 15 September 2009

²⁵⁸ Case of *Lakićević and others v. Montenegro and Serbia* (Applications nos. 27458/06, 37205/06, 37207/06 and 33604/07) 13 December 2011, para. 61; Constitutional Court of The Republic of Armenia, Decision SDO-1061 (December 14, 2012), citing: *Stec and Others v. The United Kingdom* [GC], no. 65731/01, p. 53, ECHR 2006-VI, *Wieczorek v. Poland*, no. 18176/05, p. 57, 8 December 2009

²⁵⁹ Constitutional Court of The Republic of Armenia, Decision SDO-1224 (July 07, 2015)

²⁶⁰ *Sumpton, Jonathan* in: Lord Sumpton gives the 27th Sultan Azlan Shah Lecture, Kuala Lumpur The Limits of Law 20 November 2013, available at: <http://bit.ly/2m7UBv3> (Last accessed 16.11.2017)

protection from natural disasters. These are the situations, which may give rise to objections, such as the claim that proportionality relegates basic human rights to the level of interests competing on par with other values.

Nevertheless, the CC has further reaffirmed^{261 262} that while the state is allowed under the constitution to reform the pension system, it cannot do it in such a manner as to repel the pensions already allocated in accordance with the preexisting legal regime.²⁶³ It follows from the abovementioned that the CC has acknowledged that social rights, such as pension allowance, have a minimum justiciable core. In this sense such right is not a mere duty upon the state to advance the given social interest to the extent resources are available, but to guarantee at least its core, while regulating its margins. This has been *inter alia* reaffirmed subsequent to 2015 amendments.²⁶⁴

It should also be noted, that the CC has further connected the issue of pension rights limitations to the principle of legal certainty. In this the court has stated on numerous occasions, that the legitimate expectations of those, entitled by the constitution and/or international legal instruments to receive pensions should be taken into account.²⁶⁵

The 2015 reading of the constitution, while still guaranteeing many social rights as basic rights, including pensions, education etc., views rights to healthcare, social security and working conditions as part of “legal guarantees”, rather than basic rights. In this sense the question arises, of whether those rights still fall into the scope of proportionality and minimum core rules, outlined above.

The CC still has its say on the issue. However, the fact that the Constitution refers to the said provisions as “rights” provides the grounds for the conclusion that the state is under an obligation to ensure those. Indeed, according to the comments by one of the drafters Vardan Poghosyan those provisions while not creating direct subjective rights for persons, do bind the

²⁶¹ Constitutional Court of The Republic of Armenia, Decision SDO-723 (January 15, 2008)

²⁶² Constitutional Court of The Republic of Armenia, Decision SDO-1061 (December 14, 2012)

²⁶³ *Ibid.*

²⁶⁴ Constitutional Court of The Republic of Armenia, Decision SDO-1302 (September 16, 2016)

²⁶⁵ *Ibid.*; Constitutional Court of The Republic of Armenia, Decision SDO-1061 (December 14, 2012)

legislature and the executive.²⁶⁶ In Poghosyan's view the fact that some social rights are framed in such a manner does not preclude the possibility of constitutional review, and laws, regulating those rights may still be found unconstitutional by the court on the bases of breaching those rights.²⁶⁷ Therefore one can come to the conclusion that constitutional rights' principles, including proportionality principle, should still apply together with the concepts of broad legislative discretion and undeniable core of the rights.

²⁶⁶ Poghosyan/ Sargsyan, *The 2015 Reading of the Republic of Armenia Constitution*, 2016, p. 85

²⁶⁷ *Ibid.*

Application of the proportionality principle in Georgia

Proportionality Clause in the Text of the Constitution of Georgia

Article 7 of the Constitution of Georgia²⁶⁸ holds the most important wording on the protection of basic human rights and freedoms:

The State shall recognize and protect universally recognized human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the State shall be bound by these rights and freedoms as directly applicable law.

This provision recognizes human rights as ‘eternal’ and ‘supreme human values’. It means that rights are not privileges and they are indispensable to any human being. When a person is born, the rights and freedoms derive automatically.

Chapter 2 of the Constitution of Georgia contains enumerated basic human rights and freedoms. Additionally, Article 39 of the Constitution states that the rights that are not referred individually in the Constitution, are not denied and they are protected accordingly if they stem inherently from the principle of the Constitution.

Certainly, the rights are not limitless. Their horizontal and vertical application requires balancing in each individual case.²⁶⁹ For that reason it is important to define special test which can be used for the measurement of the interference in basic rights. This will ensure universal application of the law, transparency and prevent abuse of powers.

²⁶⁸ Official English translation of the Constitution of Georgia is available on the web-page of Legislative Herald of Georgia: <http://bit.ly/2AxGPoH> (Last accessed 16.11.2017) Following citations from the Constitution of Georgia will be provided from this official source.

²⁶⁹ This premise isn't applicable to the so called “absolute rights” (for instance, prohibition of retroactive application of criminal law).

Unlike many other constitutions²⁷⁰, Georgian Constitution does not have general human rights limitation clause (like for instance Canada). The following provisions are defining some features of the limitation clauses in the Constitution of Georgia:

- Constitution defines the *formal requirement* of the limitation clause - 'the law' and 'the organic law' are for instance indicated in the Article 21 for the limitation of the property rights. Therefore, these basic rights can't be limited for instance in the form of bylaw or ordinance;
- Some *legitimate aims* are enumerated in the Constitution of Georgia for the limitation clauses – for instance Article 19 states that manifestation of freedom of speech and the religion can be limited if expression thereof infringes the rights of others;
- Proportionality analysis is included in different provisions of the constitution. There are two different wordings for this:
 - a. Article 21 of the Constitution provides that the property rights may be restricted for *pressing social needs* in the case and under the procedure provided for by law;
 - b. Article 24 of the Constitution²⁷¹ states that freedom of receiving and importing the information can be limited in a following way: 'exercise of rights listed in the first and second paragraphs of this article may be restricted by law, to the extent and insofar as is *necessary in a democratic society*, in order to guarantee state security, territorial integrity or public safety, to prevent crime, to safeguard rights and dignity of others, to prevent the disclosure of information acknowledged as confidential, or to ensure the independence and impartiality of justice'.
- Article 46 of the Constitution contains limitation clause for human rights during the emergency or martial law;
- Several provisions of the Constitution contain special procedural requirements for the limitation of human rights. For instance, in Article 20 of the Constitution, it is indicated that the rights may only be limited by the consent of the judge; Article 18 contains special

²⁷⁰ The International Institute for Democracy and Electoral Assistance, „Limitation Clauses”, November 2014, Available online: <http://bit.ly/2zu0ckm> (Last accessed 16.11.2017)

²⁷¹ As well as Article 22 of the Constitution.

guarantees for the arrested person (officials who are authorized to arrest, duration and cause of arrest and etc.).

Even though the Constitution contains some indication and components of the limitation clauses, the Constitutional Court's case law²⁷² is the major source for the definition of respective standards.

Constitutional Court of Georgia (hereafter referred as "the Court") has identified proportionality test for civil and political rights. Additionally, the Court recognized separate tests for dealing discrimination cases as well as cases of social-economic rights. Comparison of proportionality and the later tests will be provided in this paper also.

Proportionality and the Right to Property in the Constitution of Georgia

The Constitution of Georgia in Article 21 guaranties right to property to every physical or legal person. It reads as follows:

1. The right to own and inherit property shall be recognized and inviolable. Abrogation of the universal right to ownership, acquisition, alienation, or inheritance of property shall be inadmissible.
2. The rights listed in the first paragraph of this article may be restricted for pressing social needs in the case and under the procedure provided for by law so that the essence of property right is not violated.
3. Property may be deprived for pressing social needs as provided for by law, by court decision, or if urgently necessary under an organic law, provided that preliminary, full, and fair compensation is made. Compensation shall be exempted from any taxes and fees.

The Constitutional Court of Georgia has interpreted this provision in many cases. In different instances, importance of the right to property was stated explicitly. The Court found

²⁷² Acts of the (Decisions, Judgments and Judicial Notices) the Constitutional Court of Georgia are available online on the official web page of the Court: <http://bit.ly/2zlkZBQ> (Last accessed 16.11.2017). Some of the acts are translated into English and available online.

correlation between the right to dignity and the right to property;²⁷³ it was regarded as an important precondition of entrepreneurship²⁷⁴ and also as a “major social development” after the collapse of the Soviet Union²⁷⁵.

Initially, it has to be noted that the case law identifies 3 possible ways of limiting the right to property:²⁷⁶

- 1) *Control of the property* – It is the limitation which is inherently included in the first paragraph of Article 21;
- 2) *Limitation of the right to property* (certain restriction) – The Court assesses this scenario under the second paragraph of Article 21;
- 3) *Deprivation of the right to property* – The Court relies on the third paragraph of Article 21 and checks whether social need existed and whether respective constitutional procedures were complied;

For each limitation clause, the Constitutional Court elaborated respective elements of the test. There is a general requirement for every test - limitation should not diminish or violate the essence of the right. This is the requirement of Article 21 and also the case law of the Constitutional Court²⁷⁷ set this as a mandatory requirement before it was explicitly included in the Constitution after 2010 Amendments. Constitutional Court noted that:²⁷⁸

The limitation implies fair balancing and not such cases where one interest is replaced by another. ... While in any case undesired outcomes are unfavorable for an entrepreneur this is not justified when a right is violated in a way which is unjustified and fails to meet the requirements of common sense.

²⁷³ Constitutional Court of Georgia, Judgment #1/2/384 (July 2, 2007) II, para. 5

²⁷⁴ Constitutional Court of Georgia, Judgment #1/2/411 (December 19, 2008) II, para. 23

²⁷⁵ Constitutional Court of Georgia, Judgment #1/14/184,228 (July 28, 2005) para. 2

²⁷⁶ *Tugushi/ Burjanadze/ Mshvenieradze/ Gotsiridze/ Menabde*: Human Rights and the Case Law of the Constitutional Court of Georgia, 2013, pp. 253-55

²⁷⁷ Constitutional Court of Georgia, Judgment #1/1/103/117/137/147-148,152-153 (July 7, 2001)

²⁷⁸ Constitutional Court of Georgia, Judgment #1/2/411 (December 19, 2008) II, para. 27

Control of property is regarded to be the least intrusive interference according to the case law of the Constitutional Court of Georgia. This is the instance when the state controls or otherwise supervises the use of the property for the general interests (legitimate aim). Besides this, the means used by the state should *reasonably commensurate* to the aim pursued.²⁷⁹ This test was only used once and since it doesn't contain strict requirements (preconditions), the Court found the impugned provision to be compatible to the Constitution. Unfortunately, no other piece of case law contains more details of this test.

The Constitutional Court of Georgia has not yet decided the case on the **Deprivation of the Property**. Since there is some similar wording in the Constitution for the limitation and deprivation clauses²⁸⁰, the Court just differentiated these two concepts in its case law and elaborated respective standards.²⁸¹ Firstly it has to be noted that, any deprivation of any object doesn't fall automatically under Article 21, Paragraph 3 of the Constitution (Deprivation of Property Clause). The later provision only includes expropriations. This conception does not cover any case of losing property by an individual against his/her will. Secondly, while confiscating property in accordance with Article 21 Paragraph 3 the Constitution, in the case of the existence of necessary public need, government seeks to act individually, purposefully towards private property so that determined public interests are accomplished at the expense of confiscating property of an individual. Thirdly, measures under Article 21, Paragraph 3 is of single use, while Limitation of Property clause is of more general application. And fourthly, it has to be noted that for deprivation of property, monetary compensation is must. On the other hand, when limiting the right of the property, the object might be confiscated and physically taken out of the owner; nevertheless, it doesn't require monetary compensation *per se*. Other methods of balancing of interests might be used.

Constitutional Court defined the concept of '*pressing social need*'. As the Court noted it is the legitimate aim, which is the ground of limitation of the property or its deprivation. Initially it

²⁷⁹ Constitutional Court of Georgia, Judgment #2/5/309,310,311 (July 13, 2005), para. 2

²⁸⁰ For both of them, the text of the Constitution uses the term '*pressing social need*' when speaking on its limitation.

²⁸¹ Constitutional Court of Georgia, Judgment #1/2/384 (July 2, 2007) II, para. 13

has to be mentioned, that margin of appreciation for the state is broader when limiting the property rights (Article 21, Paragraph 2) rather than when depriving it.²⁸² This is premised by the fact that deprivation of property is stricter measure and state can rely on it exceptionally. For the purpose of limiting the right of property the state authorities have broader margin of appreciation; however, this should not lead to abuse of power and limiting the rights for other shielded purposes.²⁸³

Pressing social need should be identifiable in the piece of legislation. It may not be explicitly mentioned; however, the judge should have clear²⁸⁴ indication on the legitimate aims.²⁸⁵ The burden of proof in the Constitutional Court is on respondent, which is the official state authority rendering and promulgating the legislation.²⁸⁶

Limitation of property is broader concept. First of all, it has to be noted that it requires formal ground of the limitation and it is the 'law'. No by-law, administrative ordonnance or other piece of legislation issued under delegated powers of executive branch, can limit the property rights. Unless it is the control of the property (under Article 21, Par 1) the interference in the right to property will be against the constitution if not issued in the form of the law.²⁸⁷

When formal requirement is complied, the Court checks whether there is pressing social need for the interference (so called 'legitimate aim'). Constitutional provision doesn't contain enumerated grounds for limiting the right and any ground can be stemmed by the government. However, the Court looks at its 'content' and 'importance'. If the impugned legitimate aim has real and valid meaning, it is regarded as a pressing social need.²⁸⁸

If formal requirement is complied and legitimate aim is provided, the court goes to proportionality analysis. At this stage, the court assesses:

²⁸² Constitutional Court of Georgia, Judgment #2/1-370,382,390,402,405 (May 18, 2007) II, para. 16

²⁸³ Constitutional Court of Georgia, Judgment #1/3/611 (September 30, 2016) II, para. 67

²⁸⁴ Constitutional Court of Georgia, Judgment #1/2/384 (July 2, 2007) II, para. 12

²⁸⁵ Constitutional Court of Georgia, Judgment #2/1-370,382,390,402,405 (May 18, 2007) II, para. 15

²⁸⁶ Constitutional Court of Georgia, Judgment #3/1/512 (June 26, 2012) II, para. 61

²⁸⁷ Constitutional Court of Georgia, Judgment #1/3/611 (September 30, 2016) II, para. 45

²⁸⁸ Constitutional Court of Georgia, Judgment #1/1/543 (January 29, 2014) II, para. 62

- 1) Admissibility and necessity of the interference (reasonable connection between interference and legitimate aim).²⁸⁹ In some cases the Court referred to the fairness of legitimate aims.²⁹⁰ The Court assessed whether the legitimate aim can achieve the results attained;
- 2) Minimum impairment rule – the means used for limiting property rights, should not overstep certain limits and only those restrictions are acceptable which doesn't have less intrusive alternatives. The Court found the provisions of immediate execution of civil judgments unconstitutional, since several other procedural alternatives existed for ensuring legitimate aims attained by the legislator;²⁹¹
- 3) Balancing adverse interests – The Court assesses the proportionality of private and public interests. Major aim for the Court is to avoid arbitrariness and prevent limitation of private interests without respective justification and grounds.²⁹² When the Court is balancing individual and public goods, it gives certain wide or narrow margin to the legislator. For instance, when the state is regulating specific case of acquiring state property, certain limitations are more acceptable,²⁹³ than for instance in the case when the law requires individual to sell the property²⁹⁴.

Even though the Constitutional text is not explicit, the Constitutional Court has managed to elaborate clear test for the limitation of property rights. Proportionality analysis gives possibility to judges to access each individual case and gives specific weight to particular interests. Existence of unambiguous balancing test results in more transparent and well systemized case law of the Court.

²⁸⁹ Constitutional Court of Georgia, Judgment #3/1/512 (June 26, 2012) II, para. 63

²⁹⁰ Constitutional Court of Georgia, Judgment #1/14/184,228 (July 28, 2005, para. 3

²⁹¹ Constitutional Court of Georgia, Judgment #1/5/675,681 (September 30, 2016) II, para. 40

²⁹² Constitutional Court of Georgia, Judgment #1/2/384 (July 2, 2007) II, para. 21

²⁹³ Constitutional Court of Georgia, Judgment #2/3/522,553 (December 27, 2013) II, para. 56

²⁹⁴ Constitutional Court of Georgia, Judgment #3/1/512 (June 26, 2012) II, para. 81

Proportionality and the Right to Privacy in the Constitution of Georgia

Right to privacy in the Constitution of Georgia is embedded in three different provisions. Different components of the privacy are included in:²⁹⁵

- Art 16 – Freedom of Developing a Personality;
- Art 20 – Right not to be Interfered Unduly;
- Art 41 – Inviolability of Private Materials;

Freedom of Developing a Personality is one of the most crucial rights enshrined in the Constitution of Georgia. According to the Constitutional Court of Georgia:²⁹⁶

Freedom of development of one's personality first of all implies general freedom of one's conduct. For person's autonomy, his/her free and full-fledged development, it is particularly important to have freedom of independent determination of relationship with outer world, as well as - physical and social identity, immunity of intimate life, personal connections with certain circles of people with such intensity as is necessary for one's personal perfection.

This right is not absolute and the Constitutional Court uses proportionality analysis for assessing its limitation. The Court underlines the obligation of the legislator to exercise particular caution when regulating sensitive spheres – where the need of protection of rights is particularly important (especially with vulnerable groups such as for instance sexual minorities).²⁹⁷ First of all the Court assesses whether there is legitimate aim for limiting the basic right. This legitimate aim should be of such importance to correspond the weight of the basic right.²⁹⁸ The Court individually assesses each legitimate aim and in one case the Court found the violation of Article 16 of the Constitution when the state stemmed non-genuine aim.²⁹⁹ Secondly, achieving

²⁹⁵ Constitutional Court of Georgia, Ruling #1/2/458 (June 9, 2009) II, para. 12

²⁹⁶ Constitutional Court of Georgia, Judgment #2/1/536 (February 4, 2014) II, para. 55

²⁹⁷ *Ibid.* para. 68.

²⁹⁸ Constitutional Court of Georgia, Judgment #2/4/570 (August 4, 2016) II, para. 17

²⁹⁹ *Ibid.* Paras 24-33

legitimate aim should be realistic and not abstract.³⁰⁰ Moreover, limitation of the right must be minimal.³⁰¹ At the fourth stage, the Constitutional Court balances individual rights with legitimate aim and concludes whether the limitation of the right was justified. At this stage the Court looks whether the limitation is blanket or indefinite in time.³⁰² Both of the factors are taken into account in the assessment process, the more blanket or more time indefinite is the limitation clause, the more important counterbalancing interests should be at place from the government.

Right not to be interfered unduly in the private sphere is guaranteed in Article 20 of the Constitution. The text reads as follows:

1. Every individual's private life, home, personal papers, correspondence, communication by telephone, and by other technical means, including messages received through other technical means, shall be inviolable. The above rights may be restricted only by a court decision, or in absence of a court decision, if urgently necessary, as provided for by law.

Even though this provision includes the term “private life” it is not covering all aspects of privacy. Article 20 of the Constitution only includes those scenarios, when the state might interfere in the private sphere of the individual and therefore is regarded as a “negative guarantee”. Communication, home and other private areas are covered and protected by Article 20 of the Constitution. The term “private life” is to cover all similar areas under one “catch-all provision”, based on the *ejusdem generis* principle.³⁰³

Limitation of Article 20 of the Constitution is permissible when (1) procedural guarantees are at place and (2) interference is in compliance with proportionality analysis. The former for the purpose of Article 20 of the Constitution is (a) the decision of the court or (b) the case when there is urgent necessity. Urgent necessity requires that the decision should be made also by the

³⁰⁰ Constitutional Court of Georgia, Judgment #2/1/536 (February 4, 2014) II, para. 71

³⁰¹ Constitutional Court of Georgia, Judgment #2/4/570 (August 4, 2016) II, para. 16

³⁰² Constitutional Court of Georgia, Judgment #2/1/536 (February 4, 2014), para. 76

³⁰³ Constitutional Court of Georgia, Decision #1/2/458 (June 10, 2009) II, para. 17

court afterwards when respective emergency need elapses.³⁰⁴ According to the Constitutional Court of Georgia, the procedural guarantee on judicial decision ensures that neutral arbiter is present in the case and rights of the individual are not limited unfairly or arbitrarily.³⁰⁵

The Court refers to proportionality analysis after the procedural guarantees are ensured. The Court first looks at the law and assess its foreseeability and accessibility. If this criteria is fulfilled the Court checks the legitimate aims and then goes to balancing of individual and public interests.

Accessibility of the law is compiled when the law is promulgated and published officially. On the other hand, the foreseeability of the law is more strictly assessed under Article 20 of the Constitution. The reason for this is that the interference in the right is mostly conducted secretly, usually *in camera* proceedings are being conducted (secret surveillance for instance) and the risk of affecting the rights of the third parties is also high.³⁰⁶ The law should provide clear guidance regarding the responsible person to conduct interference in private life and respective scope of any interference.³⁰⁷ The Court finds the provision unconstitutional when the provisions are ambiguous and allows the possibility of interference without due process guarantees. For instance, when the Court found that the State Security Agency of Georgia was in possession of the special equipment for interception of communication and no respective guarantees were present (at practical and legislative level), the provision was found unconstitutional.³⁰⁸ Additionally, when the law is not clear and gives possibility of different readings, the Court repeals the law.³⁰⁹

The Constitutional Court of Georgia clearly indicated that interference in private life for the purpose of Article 20 of the Constitution requires the existence of the legitimate aim. In one of the cases the Court explicitly indicated that legitimate aims for Article 20 of the Constitution are the same as enumerated in Article 8 Paragraph 2 of the European Convention of Human Rights

³⁰⁴ Constitutional Court of Georgia, Judgment #2/1/484 (February 29, 2012) II, paras. 23-24

³⁰⁵ Constitutional Court of Georgia, Judgment #1/3/407 (December 26, 2007) II, para. 24

³⁰⁶ *Ibid.* para. 13

³⁰⁷ *Ibid.* para. 14

³⁰⁸ Constitutional Court of Georgia, Judgment #1/625,640 (April 14, 2016) II, para. 79

³⁰⁹ Constitutional court of Georgia, Judgment #1/2/519 (October 24, 2012) II, para. 30

(“...in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”).³¹⁰ Any interference to the private life should be *ultima ratio* and less intrusive measures should not be available.³¹¹

In order the interference to be justified under Article 20 of the Constitution, it should be proportional also. This means that the state institutions can limit the rights when they have real necessity and protected public well-being outweighs individual needs.³¹²

Inviolability of Private Materials is defined in the Article 41 Paragraph 2 of the Constitution of Georgia. According to the Constitution and the case law of the Constitutional Court of Georgia, this guarantee protects information kept in official records (either state or private (created under the law) databases), is related to identifiable individual and where there is expectation of keeping this information private.³¹³ The Constitution identifies three types of information that is regarded as private under Article 41 Paragraph 2 – information on health related issues (1), finances (2) and other private materials (3).

The test for the limitation of Article 41 Paragraph 2 of the Constitution is enshrined in the text itself and unfortunately the Constitutional Court has not decided any case yet to define its components in more details:

Information contained in official records pertaining to health, finances, or other private matters of an individual shall not be made available to anyone without the prior consent of the individual in question, *except as determined by law, when doing so is necessary to safeguard national security or public safety, or the health, rights, and freedoms of others.* [Italic added]

³¹⁰ Constitutional Court of Georgia, Judgment #1/3/407 (December 26, 2007) II, para. 8

³¹¹ Constitutional Court of Georgia, Judgment #1/625,640 (April 14, 2016) II, para. 27

³¹² *Ibid.* para. 9.

³¹³ Constitutional Court of Georgia, Judgment #2/3/406,408 (October 30, 2008) II, para. 22

Proportionality and Fair Trial in the Constitution of Georgia

Article 42 of the Constitution contains several fundamental guarantees regarding fair trial. First it contains access to justice provision, after that is the right to effective defense. This is followed by absolute rights *ne bis in idem* and *nullum crimen sine lege*. In this chapter we will analyze and provide the case-law for access to justice provision and the right to defense. Both of them are relative rights, which can be interfered based on the proportionality test.

Access to Justice

Every individual in the jurisdiction of Georgia, irrespective of its citizenship, is guaranteed to have access to the court which must be based on the law and be impartial and independent. The term “court” means Courts of General Jurisdiction (1st Instance Court, Appellate Courts and Supreme Court) and the Constitutional Court. Access to the court should have the purpose of protecting other rights, freedoms or legitimate interests, therefore this is instrumental guarantee.³¹⁴

Guarantee of access to justice right means that the court should be impartial and independent and that it should be established by the law. These components are absolute and there can't be limitation. The legislator can only set impediments to direct application of the court, set court fees and sometimes prohibit the application to the court; however, the Constitutional Court assesses the restriction and makes the final judgment if this limitation is justified. The test laid below is being used by the Court in assessing the limitation: “The limitation should have legitimate aim and there should be reasonable proportionality between the limitation and the legitimate aim”.³¹⁵

The Court is very careful in assessing the limitation of the access to justice guarantee. When there is total prohibition of applying to the court the Constitutional Court quashes the impugned provision. The Court considers this situation with outmost attention since legislative

³¹⁴ Constitutional Court of Georgia, Decision #1/4/440 (April 4, 2008) II, para. 1

³¹⁵ Constitutional Court of Georgia, Judgment #2/6/624 (December 21, 2004) II, para. 2

branch leaves no room for the judiciary to balance political power.³¹⁶ Below we will provide examples from different cases which will identify respective details of the tests more clearly.

In one case the Court was assessing whether the prohibition of appealing the decision on sequester was constitutional for the non-defendant individual whose property was interfered. The respondent claimed that the legitimate aim for this prohibition was to avoid administrative impediments in the administration of criminal justice. The Court recognized the legitimate aim admissible, however found the impugned provision unconstitutional, since the blanket ban on the appeal could not be justified by the mere argument of administrative hindrance.³¹⁷

Plea bargaining in criminal justice was also appealed before the Court. The victim of the crime was claiming that he/she was unable to appeal the judgement rendered based on plea agreement. The Court found that the victim has the right to claim for civil redress and therefore found that there was interference in the access to justice guarantee. However, the Court recognized the impugned provision in full compliance with the Constitution. The limitation of access to justice clause was analyzed within the current procedural order, which was based on adversarial proceedings and where the victim's legal position was minimized. The Court found that the interest of fast and effective criminal justice outweighed the victim's individual interests and thus the provision was in full compliance with the Constitution.³¹⁸

Georgian law provided statute of limitation for reopening civil cases. Two respective cases were appealed to the Constitutional Court. In the first case that was decided in 2004, the Court found the law to be compatible with the constitution since it provided for the legitimate purpose – stability of a court decisions and respective legal order. The law was in compliance with respective procedural regulation also and proportionality requirements were met.³¹⁹ Later on, in another case the Court found the same provision was partially unconstitutional. The unconstitutionality was present in cases when the person didn't know (and shouldn't have known by other available means) about the grounds for reopening the case and the information

³¹⁶ Constitutional Court of Georgia, Judgment #1/3/421,422 (November 10, 2009) II, paras. 1 and 2

³¹⁷ Constitutional Court of Georgia, Judgment #2/6/624 (December 21, 2004) II, para. 2

³¹⁸ Constitutional Court of Georgia, Judgment #1/1/403,427 (December 19, 2008) II, para. 10

³¹⁹ Constitutional Court of Georgia, Judgment #1/3/161 (April 30, 2003) II, para. 4

was made available him/her after passing 5 years statute of limitation period. The Court found that the impugned provision definitely had legitimate aim (stability of court decisions). However, the proportionality was not present since, the interests of the above mentioned persons were infringed unduly and no other remedy was made available to them.³²⁰

Certain administrative impediments were found to be compatible with the access to justice regulation. The impugned provision defined that it was necessary to apply to the administrative institution first before addressing the court. The Court found this type of limitation in compliance with the Constitution.³²¹

There was the case when the lawyer applied to the Constitutional Court. The impugned provision empowered the judge to expel him for being late at the hearing without due reason. The Court stated that the hearing is necessary precondition for the access to justice clause. The legitimate aim was present in the case and it was the speedy proceedings. The logical connection was present between impugned provision and legitimate aim. However, the limitation wasn't regarded as a minimal infringement and other avenues were recognized to be available for the legislator to limit the right. For that reason, the regulation was repealed.³²²

The former mayor of Tbilisi applied to the Constitutional Court for the request to repeal the provision of the Criminal Procedure Code of Georgia which empowered the court to remove the defendant from his/her official position without oral hearing. The impugned provision had legitimate aim – speedy proceedings and was in logical connection with the legitimate aim. However, the provision was found to be disproportional since it empowered the court to make final decision even when there was factual dispute between parties. In this scenario, the party of the proceedings was refrained from providing arguments and therefore no other avenue was available for cross-examining the evidence produced by the prosecutor.³²³

Enforcement of the decision is the part of the access to justice clause according to the Constitutional Court of Georgia. One applicant applied to the Court and requested to repeal the

³²⁰ Constitutional Court of Georgia, Judgment #3/1/531 (November 5, 2013) II, para. 38

³²¹ Constitutional Court of Georgia, Judgment #2/1/263 (February 4, 2005) II, para. 7

³²² Constitutional Court of Georgia, Judgment #2/2/558 (February 27, 2014) II, para. 49

³²³ Constitutional Court of Georgia, Judgment #3/2/574 (May 23, 2014) II, para. 90

provision of the “Law of Enforcement” which empowered the administrative body to suspend the execution of the judgment. The Court found the provision unconstitutional since this procedure was not less intrusive and administrative bodies could rely on other less restrictive solutions.³²⁴

The Court examined several cases when the law prohibited access to justice. In one of the old cases, the law refrained prosecutors, judges and other officials to complaint in the court for labor related issues. The Court found the limitation unconstitutional.³²⁵ In another case, the applicant was demanding for repealing the provision, which restricted the right to appeal the methodology on the assessment of socio-economic situation to the court. The limitation was found to be disproportionate since no other avenue was available to the individuals.³²⁶

As already mentioned above, the access to justice clause guarantees the right to apply to the Constitutional Court also. The Court has dealt with 3 cases where impugned provisions were restricting the right to complaint before the Constitutional Court or set respective hindrances for the constitutional litigation process.

In the first case, the foreigners not residing Georgia and legal persons registered in other countries were restricted to apply to the Court. The Court found no legitimate aim for this limitation.³²⁷ Additionally it was defined that, when the law restricts access to the Constitutional Court it is *per se* unconstitutional if:

- 1) Only the Constitutional Court is the remedy for the violation *or*;
- 2) Restitution by the Constitutional Court, leads to different results and it is necessary for effective remedy;

When these two grounds are in place, the Constitutional Court will find the law unconstitutional, irrespective of legitimate aims.³²⁸

In the second case the applicant claimed that an interim measure in the Constitutional Court, which means temporal suspension of the operation of the impugned provision, was

³²⁴ Constitutional Court of Georgia, Judgment #1/2/596 (September 30, 2016) II, para. 44

³²⁵ Constitutional Court of Georgia, Judgment #2/3/13 (December 5, 1996), para. 1

³²⁶ Constitutional Court of Georgia, Judgment #1/2/434 (August 27, 2009) II, para. 12

³²⁷ Constitutional Court of Georgia, Judgment # 1/466 (June 28, 2010) II, para. 20

³²⁸ *Ibid.* para. 21

hindered by the new amendment. According to it, when the decision on the suspension of the law was made by the Court, the law required the final decision to be rendered in 2 months period. The Court found that access to justice clause includes the Constitutional Court to be effective in operation. Interim measures are necessary for its effectiveness and therefore any impediment amounts to interference in access to justice clause. The Court found that this restriction was for the purpose of the protection of the rights of others (namely those people whose rights were restricted, when the law was suspended). However, the Court found that this restriction was not the minimum restriction and the legislator could have relied on other less restrictive alternatives.³²⁹

The third case was more complex and included vast majority of constitutional problems. In June 2016, the Parliament of Georgia adopted the law on reforming the Constitutional Court of Georgia. It was subject to mass controversy, the President vetoed the bill and referred it to the Venice Commission of the Council of Europe.³³⁰ Irrespective of resistance from national and international actors, the law was passed anyway. The opposition members of Parliament, NGOs and citizens applied to the Constitutional Court to assess the constitutionality of the impugned provisions. The applicants claimed that the law was in contradiction to the access to justice clause of the Constitution, since it diminished the effectiveness of the Court. It should be noted that Polish Constitutional Court has rendered the similar judgment.³³¹

The Court indicated that the legislative branch had limited discretion when regulating the legislation on the Constitutional Court. This discretion ends when the effectiveness, proper functioning and promptness of the Court is at risk.³³² The legislator is also limited by the principle of separation of powers³³³ and basic human rights³³⁴.

The first question before the Court was the 10-year life tenure of the judge of the Constitutional Court. The law defined that the judicial 10-year term expired automatically and

³²⁹ Constitutional Court of Georgia, Judgment #3/2/577 (December 24, 2014) II, paras. 26 and 43

³³⁰ The Opinion is available online: <http://bit.ly/2iohORp> (Last accessed 01.14.2017)

³³¹ The judgment is available online: <http://bit.ly/2AvsDMR> (Last accessed 01.22.2017)

³³² Constitutional Court of Georgia, Judgment #3/5/768,769,790,792 (December 29, 2016) II, para. 16

³³³ *Ibid.* para. 17

³³⁴ *Ibid.* para. 18

the individual judge was not given opportunity to end the case. The applicant was claiming that when the individual was applying to the Court and the judge was not able to end the case and this resulted in the necessity of rehearing, thus unduly prolonged the time of the proceedings. The Court stated that it was interference in the access to justice guarantee. Although the legitimate aim was present, balancing of interests was not at place. When the judge of the Constitutional Court ends the term and the new judge is not appointed by the respective state institution, which results in impossibility of rendering the judgment, the judge should be empowered to decide the case. For that reason, the impugned provision was found unconstitutional, since it disproportionately limited the access to justice clause.³³⁵

The second question before the Court was the *quorum* of the court hearing. The Court is empowered to render the decision on the constitutionality of the organic law when at least 7 out of 9 judges are present. The applicant claimed that access to justice guarantee was interfered since this high *quorum* was too high for normal operation of the Court. The Court stated that the *quorum* might be unconstitutional, if it creates the problems at an institutional level or it creates the risks of impeding everyday operation of the Court.³³⁶ The Court found the existing *quorum* rule constitutional since, no such risks were present. .,

The third question was about the minimum necessary votes for rendering the decision by the Court when assessing the constitutionality of the Organic Law. The impugned provision reiterated that the Court (sitting in plenum³³⁷) can render the decision by the majority of *in pleno* branch (majority out of 9 judges – 5 votes). The Court stated that the minimum vote rule was not defined in the Constitution and therefore the legislator was empowered to regulate it. However, this legislative discretion was limited by the access to justice clause of the Constitution.³³⁸ The Court defined that for the purpose of Article 42 (Access to Justice Clause) the necessary vote

³³⁵ *Ibid.* para. 89

³³⁶ *Ibid.* para. 105

³³⁷ Plenum means 9 judges (full branch). In contrast, the Court can operate also within the chamber. There are two chambers and they consist of 4 judges each. In plenum the Court seats in full bench, however, the law gives possibility of deciding the case by 7 judges. 7 judges are minimum requirement when ruling on the constitutionality of the organic law.

³³⁸ Constitutional Court of Georgia, Judgment #3/5/768,769,790,792 (December 29, 2016) II, para. 109

requirement is simple majority, rather than majority of *in pleno* composition.³³⁹ This reasoning is premised by the high moral and professional status of the judges of the Court. It is presumed that each justice is elected/appointed due to his/her high reputation and respective outstanding skills. Therefore, it is presumed that each justice makes correct judgement on individual case. When the judges make decision collectively, it is presumed that majority of each hearing makes correct reasoning. For that reason, ordinary rule for rendering the judgments of the Court for the purpose of access to justice clause is simple majority in each individual case.³⁴⁰ For that reason, the limitation of the general rule (by requiring *in pleno* majority in every case) of rendering the decisions/judgments was found to be unconstitutional.

The next issue in the case before the Court was the interim measures. The legislation gave possibility of suspending the operation of the impugned acts when they could cause unavoidable consequences for the applicant. However, the law provided the possibility of suspending the piece of legislation at the admissibility hearing only. If the risks for the applicants appeared afterwards, they can't motion for suspending the act temporarily. The Court reiterated previous case-law and stated that access to justice guarantee should not be illusory and on the other hand, it must be realistic. The Court additionally specified that the interim measure, namely suspending of the act, was necessary for the effective use of access to justice guarantee by the complainants. The Court premised its effectiveness to the competence of suspending the act at any stage of the hearing when there is respective risk.³⁴¹ For that reason the law was repealed and found unconstitutional.

In this case the fifth issue was also on suspending the impugned act. The regulation defined that when the applicant motioned for the suspension of the act, this should be done only by the plenum of the Court. For instance, when the chamber of the Court is hearing the case and there is respective motion, the case should have been examined by the chamber and if there was prima facie evidence for the suspension, it should be referred to the plenum of the Court. This regulation was found to be incompatible to the Constitution, since it defined for additional

³³⁹ *Ibid.* para. 111

³⁴⁰ *Ibid.* para. 112

³⁴¹ *Ibid.* para. 133

procedural barriers which were not necessary and justified.³⁴² In other words, no respective legitimate aim was identified.

The seventh and the last issue before the Court was the delivery of the judgment of the Court. The impugned provision stated that the Court should read the full text of the judgement when delivering it. The Court found no legitimate interest for this regulation and therefore regarded the provision unconstitutional. The reasoning was that it hindered effectiveness and prompt operation of the Court.³⁴³

Right to Effective Defense

Right to effective defense is the cornerstone for the fair trial. Access to justice clause will be illusory and fictional, unless the party of the proceedings is not empowered with sufficient guarantees. The right to effective defense means the right to have the possibility of defending the interests personally and also with the assistance of the lawyer before the court.³⁴⁴

The Court has identified several dimensions for this clause:

- Quantitative – The guarantee doesn't limit the person/defendant to have lawyers in the court. The law which restricted the number of lawyers per defendant was repealed;³⁴⁵
- Qualitative – The clause ensures that the person should have the possibility of communicating with the lawyer for reasonable time period. It should not be unduly restricted. The meeting with the lawyer for maximum 1 hour per day was found unconstitutional.³⁴⁶

The Court stated that the person should have the reasonable time and the possibility to prepare for the defense, also to meet the lawyer of his/her choice.³⁴⁷

³⁴² *Ibid.* para. 160

³⁴³ *Ibid.* para. 196

³⁴⁴ Constitutional Court of Georgia, Judgment #1/3/393,397 (December 15, 2006) II, para. 2

³⁴⁵ Constitutional Court of Georgia, Judgment #2/3/182,185,191 (January 29, 2003), para. 2

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*

The limitation of the right to defense was examined in the case where the applicant claimed that in absentia criminal proceedings were unconstitutional. In this case the general test of proportionality was used by the Constitutional Court. Additionally, the Court relied on ECHR case law and standards regarding *in absentia* proceedings.³⁴⁸

There was also the case before the Constitutional Court, where the applicant was claiming that she was not entitled to have a possibility of oral hearing in the court of cassation. The votes in this case were split – two judges voted for the constitutionality of the impugned act and two other judges on the contrary. According to the legislation on the Constitutional Court, in this case the impugned provision is found constitutional. The justices, who voted for the constitutionality, relied on the argument that right to effective defense was not absolute right and it can be limited. The limitation was found to be justified for the economy of the judicial resources in the upper court instances.³⁴⁹

Proportionality and the Test used by the Constitutional Court of Georgia for the Discrimination Cases

Proportionality analysis is used by the Constitutional Court of Georgia for all civil and political rights. The components are almost identical, only mere difference can be stemmed from respective case law of the Court. However, the Court elaborated different test for the discrimination cases. It is also based on the balancing of interests. The Court checks inequality between two/more persons and at the end checks the causes and reasons for this difference. At this last stage, the Court looks at different interests and uses balancing, similar to traditional proportionality analysis.

The Court differentiates two types of cases when assessing the discrimination:

- 1) When the law treats equal persons unequally;
- 2) When the law treats unequal persons equally;

³⁴⁸ Constitutional Court of Georgia, Judgment #1/3/393,397 (December 15, 2006) II, para. 2

³⁴⁹ Constitutional Court of Georgia, Judgment #2/6/205/232 (July 3, 2003), para. 1

For the both scenarios, the Court assess whether there is a discrimination. Discrimination ground is not based on the principle of *numerus clausus* and can be based on any identifiable ground.³⁵⁰

When the Court finds that there is inequality between two/more persons (or groups) based on respective ground(s), it goes to the assessment on the alleged discrimination. For that reason the Court has elaborated two tests: (1) Rational Differentiation Test; (2) Strict Test. The first test is used when the difference between comparators is not high. On the other hand, when the difference is high or the ground of alleged discrimination is explicitly enumerated in the Constitution, the Court uses the strict test.

- **Rational differentiation test** is used by the Court when the difference is rational, which means that the difference is realistic, inevitable or necessary. For the second step of this test, the Court assess whether there is rational and realistic connection between objective reasons of difference and the results of its effects;
- **Strict Test** means that the state has to provide for the legitimate aim and it should be absolutely necessary to use differentiated approach. In other words, the state should provide arguments for compelling state interest.³⁵¹

The Court takes into account the reason for the differentiation (legitimate aim) and checks whether it is justified. For that part, traditional proportionality analysis and equality tests are quite similar. They are both based on balancing and the Court is using some legislative and factual arguments in its reasoning.

³⁵⁰ Constitutional Court of Georgia, Judgment #2/1/392 (March 31, 2008) II, para. 2

³⁵¹ Constitutional Court of Georgia, Judgment #1/1/493 (December 27, 2010) II, para. 6

Social Rights and Proportionality in Georgian Constitutional Adjudication

Introduction

Social rights³⁵² are an integral part of human rights. Yet, the justiciability of social rights remains intensely contested for long. Despite the legal and often ideological contradiction over this issue, it is safe to say that the constitutional courts of several states have already discussed cases involving the question of constitutionality of legislation with regard to social rights. Court opinions concerning social rights have raised genuinely new questions in political and legal sciences. One of such issues is related to the use of proportionality principle in the social rights constitutional adjudication.

Proportionality principle is nearly the only universal and exclusive mean for defining the content of human right and determining the extent of its lawful limitation. While referring to proportionality as the mean of constitutional control over human rights, scholars primarily mean civil and political rights under them. However, now, when social rights invade the constitutional court rooms, it is important to determine how this principle and social rights interrelate.

This article is aimed at analyzing the relation between proportionality principle and social rights. The first part discusses the main idea of proportionality principle and the path of its development. In this context, the focus is made on the use of proportionality in the process of constitutional control over social rights. This part of the article concerns the constitutional court practices in different countries with regard to social rights. The second part of the article studies the case law of the Constitutional Court of Georgia regarding social rights. In the final part of the article, we will try to generalize the practice of the Constitutional Court of Georgia and present it in relation to the principle of proportionality. As the study of mentioned decisions reveals, the Constitutional Court of Georgia, though implicitly, still uses a few elements of proportionality principle while reviewing human rights.

³⁵² The answer to the question – which rights are meant under social rights – is heterogeneous. For the goals to be reached in this article, under social rights we mean the rights given under the International Covenant on Social, Economic and Cultural Rights, including the right to work, the rights to social security, housing, education and healthcare.

Proportionality as a Paradigm for Constitutional Review of Rights

To speak of human rights is to speak of proportionality.³⁵³ Proportionality, as the determining principle of the idea of human rights, has permeated the liberal theory of human rights and defined the methods of reviewing violations of rights. Historical geography of proportionality principle shows that it originates in the public law of Germany at the beginning of the 19th century and, through integration into the European law, it makes first for western European states and then finds its way to England, Ireland and Canada; then it leaves for New Zealand and Australia and then South Africa; once the Soviet Union collapses, it penetrates central and eastern European states and later finds itself in South Caucasus; gradually it enters Asian and South American countries.³⁵⁴ Having waded through the hurdles of continental law, common law, Asian and hybrid legal systems definitely emphasizes how successful and legally flexible the principle of proportionality is.³⁵⁵

Proportionality principle and the constitutional-judicial test based on it, as a rule, are exercised through a three-stage research. *After the government has shown that its action, which infringed the constitutional rights in question, had a legitimate purpose, courts across the globe undertake a proportionality analysis. First, it will examine whether the means that were applied further the legitimate governmental end (the rationality test); second, whether the government chose the least restrictive means to further that end (the necessity test); third, whether benefits of the governmental objective are proportionate to the violation of the constitutional rights (the balancing test).*³⁵⁶ The success of proportionality principle can be explained by different reasons. Some scholars note that, a standardized test of proportionality allows the constitutional court to

³⁵³ *Huscroft/ Miller/ Webber: Introduction in Proportionality and the Rule of Law: Rights, Justification, Reasoning, 2014, pp.1-3*

³⁵⁴ *Barak, Proportionality: Constitutional Rights and their Limitations, 2012, pp. 178-201*

³⁵⁵ According to a conventional point of view, the Constitution of the United States is the only exceptional constitution, which casts doubts on the proportionality principle. However, according to some scholars, the constitutional evaluative tests worked out by the Supreme Court of the United States, substantially follows the main elements of proportionality principle, especially with regards to the first amendment of the constitution of the United States. See: *Yowell: Proportionality in the United States Constitutional Law in Reasoning Rights: Comparative Judicial Engagement, 2013*

³⁵⁶ *Cohen-Eliya/ Pora: Proportionality and the Culture of Justification, 2011, p.464*

rule the case flexibly, though without any abused discretion.³⁵⁷ This position implies that proportionality test is a response to the risk concerning judicial encroachment into the power of political bodies. Besides, proportionality principle allows the court to discuss not broad political issues, but specific facts and the context where these facts currently occur.³⁵⁸

Some other scholars associate the prevalence of proportionality with the trauma of the World War II that is suspicion toward popular democracy and unchecked political power. Under this approach, *every government action is in need of justification, since justification, rather than mere authority, is the main source of legitimacy.*³⁵⁹ It is believed that the state policy is as much lawful as it is substantiated: the mentioned three-stage test of proportionality tests the quality of this substantiation.

While being spread, proportionality principle gets criticized as well.³⁶⁰ One of the most influential critics of the principle is Jürgen Habermas,³⁶¹ who believes that proportionality is irrational and deprives the rights of their real, normative power. According to this point of view, if the idea of the right is contextual and its limitation depends upon the degree of arguments from the state, then the rights have no stable meaning and they just represent mere aims and values. Despite this and other critical attitudes, the efficiency of the proportionality test, as a legitimate instrument for reviewing violations of rights, has never been vigorously questioned.

³⁵⁷ The language of constitutional provisions is general and ambiguous and the Constitutional Court has the possibility of wide discretion while interpreting them. See: *Alexy: Constitutional Rights, Balancing, and Rationality*, 2003, pp. 135-140

³⁵⁸ *Eskridge: Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 2005, p. 1279; See also: *Sunstein: Incompletely Theorized Agreements*, 1995, p. 1733

³⁵⁹ *Cohen-Eliya/ Porat: Proportionality and the Culture of Justification*, 2011, p. 463; See also: *Mureinik: A Bridge to Where? Introducing the Interim Bill of Rights*, 1994, p. 31

³⁶⁰ See, e.g. *Urbina: A Critique of Proportionality*, 2012, p. 49; See also: *Möller: Proportionality: Challenging the Critics*, 2012, p. 709

³⁶¹ *Habermas: Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, 1996

Social Rights and the Principle of Proportionality - Comparative Perspective

The relation between social rights and proportionality is one of the under-researched issues in the human rights theory and practice. On one hand, it is certain that proportionality is almost an exclusive mean in defining the content of human right and determining the extent of its lawful limitation, but one question that remains obscure is: what is the influence of the proportionality test with regard to social rights? The relation between social rights and proportionality has become especially vital in the last two decades,³⁶² when the justiciability of social rights attains different level of significance and dimension.

This uncertainty is partly determined by liberal political theory of the 20th century. There have been several conventional arguments against the justiciability of social rights. According to the first approach, social rights are positive and civil-political rights are negative; the preference, due to this argument, should be given to the negative right.³⁶³ Many scientists already note that each right implies positive and negative responsibilities of the state at the same time. According to the second argument, social rights are costly, expensive rights and civil and political rights are free of charge, with no expenses. The supporters of this idea forget that in some cases it is possible to ensure social rights without expenses and realization of civil and political rights calls for material resources.³⁶⁴ According to the third argument against social rights, the constitutional court has no ability to judge social rights due to the principles of the separation of power. This argument is counterweighed by the examples of decisions made by the courts of several countries throughout the world including Lithuania, Hungary, Germany, Canada, India, Africa, and several Latin American countries.³⁶⁵

³⁶² The growing number of cases involving judicial review of social rights is determined by different reasons: the consequences of colonialism in India, Apartheid legacy in South Africa, financial crisis in Europe and North America, the impact of Military Regimes in Latin America, inequality and poverty caused by the collapse of the Soviet Union and transition to free market economy in former socialistic states.

³⁶³ See, e.g.: Lavrysen, L., *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia, 2016);

³⁶⁴ See, e.g.: Holmes, S., Sunstein, C. R., *The Cost of Rights: Why Liberty Depends on Taxes* (New York & London, 2010);

³⁶⁵ We have to note that despite similarities there are differences between social and civil-political rights. See, e.g.: Atria, F., Social Rights, Social Contract, Socialism, *Social and Legal Studies*, 24(4) (2015) p. 598). However, as this

Indeed, the courts of different states have made huge progress with regard to the justiciability of social rights in the last two decades. Observation of court decisions reveals that courts use different methods of reviewing social rights violations. These practices undoubtedly differ,³⁶⁶ but most of them are considerably related to the test of proportionality and show the tendency of its further development and its positive use in the light of social rights.

There is a very good example of using proportionality test in the practice of the Canadian Supreme Court. The Canadian Supreme Court also utilizes a structured use of proportionality. In the famous NAPE case, the Court approached the impact of the financial crisis on the scope available to the elected government to take measures, admitting that a significant scope must be available to elected governments, under the condition however that all measures are subject to proportionality. The decision enunciated that courts will continue *to look with strong skepticism at attempts to justify infringements of Charter rights on the basis of budgetary constraints*. However, the decision also reads that the courts cannot close their eyes to the periodic occurrences of financial emergencies.³⁶⁷

In Latvia, the constitutional court considered that there had been an infringement of the rights of pension recipients to social security. The court indicated that even during the economic recession the government cannot decline social responsibility and noted that it is obliged to work out coordinated, properly deliberated legislation while planning and implementing its social policy. The court explained that the legislator is required to meticulously and carefully analyze and envisage the consequences while working out social policy. The court also enunciated that the lawmaker, in this case, had not "carried out objective and well-weighted analysis neither regarding the consequences of the adoption of the impugned provisions, nor regarding other, less restrictive means for the attainment of the legitimate end. Using the

issue is beyond the interests of this article and it entails different critical theories to be reviewed, we will not extend further here;

³⁶⁶ The Constitutional Courts use different models while reviewing social rights, including dialogic, categorical, managerial, peremptory models. See: *Young: A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review*, 2010, p.

³⁶⁷ *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 S.C.C. 66, [2004] 3 S.C.R. 381 (Can.)

proportionality principle, the court arrived at the conclusion that the legislative body of Latvia had violated the constitutional social rights and the principle of proportionality.³⁶⁸

The Constitutional Court of South Africa also had to judge the constitutionality of social rights limitation. In the famous case of *Grootboom*, the court examined constitutionality of the state's policy on the right to decent housing. Referring to the constitution, the court noted that the government is required to carry out reasonable legislative actions and take care of it to be realized progressively, taking into account the extant resources. Within this obligation, as the court indicated, the state is lawfully bound to have at least a plan how to solve the problem of housing. After having studied the pertinent policy, the court concluded that state already had a long-term plan how to realize this right, but it had not worked out a plan how to solve the immediate problem of providing temporary residence facilities for the homeless. Since the problem was partially solved by the government, the court found the state policy of housing incompatible with the constitution.³⁶⁹

The justiciability of social rights is opposed not only by the supporters of the liberal theory of human rights, but by those who fight for social rights in the political area. They believe that judicial review of social rights vitiates important political and economic issues and turn them into legal questions, thus diminishing real power and significance of social rights. According to this point of view, it is impossible that the problem concerning social welfare be solved by the court - the least democratic and inherently most conservative branch of government.³⁷⁰ (We certainly cannot oversee the fact that the wave of judicial amenability of social rights had no significant impact on social inequality.³⁷¹ We will revert to this issue after having discussed the practice of the Constitutional Court of Georgia.)

³⁶⁸ Constitutional Court of the Republic of Latvia, 2009-43-01

³⁶⁹ The Government of the republic of South Africa and others v. Irene Grootboom and others, 2001

³⁷⁰ About the democratic deficit see: *Waldron: Law and Disagreement*, 2004, pp. 209-282

³⁷¹ Professor Lehman, while reviewing the practice of the Constitutional Court of South Africa, notes that constitutionalisation of social rights and their further review had no significant impact on social inequality and poverty. Since the post-apartheid transformative constitution was adopted a decade has passed and 40 percent of South Africans are unemployed and 30 percent of them have no decent living conditions. Lehman notes that one of the prime reasons for such consequences is the test/method improperly used by the court, while judging social

Social Rights and the Principle of Proportionality in Georgia

The preamble to the Constitution of Georgia declares that establishing a welfare state is the firm will of the citizens of Georgia. The principle of welfare state must be regarded as a material, state goal determining principle of the constitution.³⁷² Besides the social state principle, the Constitution of Georgia also includes a few social rights. The constitution recognizes the right for education, according to which the state takes on the responsibility to fully finance basic education (Article 35); it is recognized that everyone has the right to live in healthy environment and enjoy the natural and cultural environment and to enjoy accessible free medical aid in accordance with a procedure prescribed by law (Article 37); the constitution obliges the state to promote the unemployed citizen to be employed and provide him/her with a minimum standard of living, as determined by law (Article 32); the constitution also prohibits forced labor and obliges the official authorities to create decent labor conditions (Article 30); the constitution also secures the right for to trade unions (Article 26) and the right to strike (Article 33).

Despite this, it is widely accepted that the second chapter of the Constitution of Georgia contains a narrow list of social rights. The scarcity of social rights is especially noticeable in contrast with other former Soviet states. Sadurski has found out that the Constitution of Georgia is one of the two exceptions in the former soviet states, which do not include a wide range of social and economic rights.³⁷³ We cannot find fundamental rights, determined by the international law of human rights, such as the right to housing and social security, in the Constitution of Georgia.

Despite a narrow list of social rights, the Constitutional Court of Georgia has made some very important decisions in this direction. We will discuss these decisions separately. Although they were not made using the proportionality test explicitly, the analysis reveals that the

rights. See: *Lehman*: In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core, 2006, p. 163

³⁷² *Loladze*: The Principles of Welfare State (unpublished article, in author's possession)

³⁷³ *Sadurski*: Constitutional Courts in the Process of Articulating Constitutional Rights in the Post-Communist States of Central and Eastern Europe. Part I: Economic and social rights, 2002

Constitutional Court of Georgia still follows the principles of proportionality while judging social rights.

The Case of Social Benefits of Veterans³⁷⁴

The Constitutional Court of Georgia indicated that the rights to social security is covered by Article 39 of the Constitution of Georgia, which implies recognizing the rights that are not explicitly given in the second chapter of the Constitution but stem from its principles.

The decision emphasized responsibilities of the government in securing social rights. As the court considered, the government must guarantee at least a minimum standard of social security and its actions in this direction must be stable, evolutionary and distinguished with positive dynamics. According to the decision, by adopting controversial norms, the government ignored this requirement.

The court indicated that distribution of goods in terms of market economy does not exclude the possibility of imposing special benefits for certain categories of citizens, which may be regarded as the expression of public support and solidarity. The court considered that the government is obliged to guarantee at least a minimum standard of social rights of its citizens, using the extant resources; governmental actions in this direction must be *stable, evolutionary and distinguished with positive dynamics*. The court also indicated that in this particular case, the benefits were not reasonably reduced but made so nominal that it carries only symbolic significance. Thus, the court did not directly use the proportionality principle, but still relied on a very important element of proportionality test, such as limitation of the right with the least restrictive means.

³⁷⁴ The decision made by the Constitutional Court of Georgia on April 18, 2002, N1/1/126, 129, 158 on the case *Citizens of Georgia – (1) Bachua Gachechiladze, Simon Turvandishvili, Shota Buadze, Solomon Sanadiradze and Levan Kvatsbaia, (2) Vladimer Doborjginidze, Nineli Andriadze, Guram Demetrashvili and Shota Papiashvili, (3) Givi Donadze against the Parliament of Georgia*.

The Case of Electricity Pricing³⁷⁵

There was a constitutional lawsuit against several statutory acts concerning electric power distribution. The issue of constitutionality of privatization of certain electricity transmitting lines was also reviewed. However, the core topic of discussion was the electricity tariff and the rule of fixed billing.

The decision emphasized the importance of securing the rights of consumers who are unable to pay the bills and the obligation of the government in provision of vitally necessary goods for such citizens. The Constitutional Court examined that electricity tariffs stymied and burdened the consumers, which was not in accordance with the principles of welfare state. The decision also made emphasis on the responsibility of the elected government to mitigate the hard consequences of unstable economy and as the court considered this responsibility must be taken by the government. Besides, the state has to take on this responsibility by taking not perfunctory and superficial but active measures. The court considered that the actions carried out by the state should not be merely nominal and symbolic but actually mitigate hard conditions for the citizens.

The Case of Professors³⁷⁶

In this case, the Court examined constitutionality of law concerning the right to work of university professors. The court indicated that the constitution not only prohibits forced labor, but also secures the rights to work and denies their arbitrary limitation. Under the idea of the right to work, the court meant the right to choose a job and also the right to do this job in decent conditions, to be secured against unemployment and *the regulations which directly allow the possibility to be dismissed in a groundless, unfair and arbitrary manner*. As the court claimed,

³⁷⁵ The decision made by the Constitutional Court of Georgia on December 30, 2002, N1/3/136 on the case *the citizen of Georgia Shalva Natelashvili against the Parliament of Georgia, the President of Georgia and Georgian National Energy and Water Supply Regulatory Commission*.

³⁷⁶ The decision made by the Constitutional Court of Georgia on October 26, 2007, N2/2-389 on the case *the citizen of Georgia Maia Natadze and others against the Parliament of Georgia and the President of Georgia*.

labor, on one hand, is the way to maintain a person materially, but on the other hand it is the means for personal self-realization and development.

While reviewing the restriction of professors' right to work, the court indicated that the legislator is not obliged *to wait for the expiration of term of office for a certain official and then start to carry out a reform in different fields*. However, the court explained that while planning the reform the legislator must have evaluated the situation and juxtaposed the legitimate interest of the reform and the professors' constitutional right to work. In this light, the Court, referring to the proportionality principle, concluded that in this particular case the benefits obtained from the reform outweighed the negative consequences of limiting right to work and, thus, the principle of proportionality had not been violated.

The Case of Social Aid³⁷⁷

The law of Georgia on social protection prohibited individuals to challenge before the court the amount of social benefits and eligibility criteria for receiving social aid, prescribed by the law. The complainant, the public defender of Georgia, believed that it violated the right to defend your rights of social security and social protection.

The court indicated in the decision that Article 42 of the Constitution of Georgia envisages the right of judicial accessibility not only in case the right is violated, but also while resolving the issues, which can influence the content and restriction of the person's right. The debatable norm was interpreted by the court as a prohibition of lawsuit in common and constitutional courts and considered the norm to be restricting the right to a fair trial. Therein, the claim was satisfied and the norm was declared unconstitutional.

The positions of the court members split with regard to the constitutional review of the right of social security and social protection. The minority of the Court believed that the right of social security stems from the principle of welfare state prescribed in preamble of the Constitution of Georgia. The minority opinion reads that the principle of welfare state *is not just*

³⁷⁷ The decision made by the Constitutional Court of Georgia on August 27, 2009, N1/2/434 on the case *the public defender of Georgia against the Parliament of Georgia*.

a declarative, programmatic statement, which does not impose any obligations on the state in certain time and space. In the concurring opinion, judges stated that the principle of welfare state provides the government with a wide discretion to select the ways to secure social rights, but there are two unconditional obligations: recognition of social rights by the legislation and providing a person with a minimum standard of living in case she is indigent or disabled. As the judges believe, in this case the state has no choice and denying this responsibility ignores the principle of a social state.

The Impact of the Proportionality Adjudication on Social Rights

Cass Sunstein, a prominent American legal scholar in the field of constitutional law, wrote as soon as the constitutions were adopted in the central and eastern European states, that inclusion of social rights in the constitutions of former socialistic states' was *a large mistake, possibly a disaster*.³⁷⁸ Sunstein develops an ambiguous approach towards constitutionalisation of social rights: he is against involving social rights into the constitution only in those countries which are undertaking transition from the authoritarian and specifically communistic into free market models; he believes that unregulated free market relations, that exert pernicious influence on the social policy, are in direct conflict with social rights.³⁷⁹ Thus, it is argued that entrenching social rights in the constitution and enabling constitutional review of social rights will impede the process of forming free market economy.

Indeed, the Constitutional Court of Hungary, while considering the case of one of the social rights, stroke down a set of social laws adopted by the legislative body, which was based on the austerity policy.³⁸⁰ All of a sudden, the government of Hungary, on the demand of international financial institutions, including International Monetary Fund, completely changed the state's legislation concerning retirement policy and social security. The Constitutional Court indicated that the government has the certain leeway to carry out a reform in socio-economic direction,

³⁷⁸ *Tushnet: Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, 2009, p. 227

³⁷⁹ *Ibid.* p. 234

³⁸⁰ *Solyom/ Brunner: Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court*, pp. 322-332, 2000

but it also noted that sudden and inadvertent changes put the citizens into unstable and unsecure conditions; the court indicated that while planning such reforms, the state must consider the transition period, when the citizens can rearrange their legitimate expectations and plans; relying on the proportionality principle the court also noted that such short-term social benefits as the aid for pregnant women, should only be restricted in exceptionally critical situations.³⁸¹

Andras Sajó, the prominent Hungarian constitutional law scholar and later the Judge of the European Court of Human Rights, referred to the decision of the Constitutional Court of Hungary as a disaster.³⁸² Like Sunstein, for him, satisfying the demands of international financial institutions was the premise for development of social security system in Hungary and therefore, as he believed, this decision endangered the process of transition into a free market model.

This decision made by the Constitutional Court of Hungary, by its judgment and recognition of social security principles, resembles the decisions made by the Constitutional Court of Georgia, including the cases discussed above on electricity tariffs and the professors' case. The Constitutional Court of Georgia in the case of electricity pricing, emphasized the state's obligation to secure social rights, mitigate the influence of unstable economic consequences and take the responsibility ease off austere living conditions; as for the professors' case, the court admitted the state had the right to carry out reforms, but therein indicated that the state had to ponder and realize these reforms in accordance with the constitutional rights. These decisions made by the Constitutional Court of Georgia have not drawn international attention, but intrinsically they are similar to the Hungarian far-famed case.

It is interesting what the impact of the decision of the Constitutional Court of Hungary was on the process of free market transition and austerity reforms. Professor Scheppele, who studied the impact of the Hungarian case law, argues that *the disaster that critics of the Court predicted did not come to pass*.³⁸³ She claims that the court did not actually prohibit the free market

³⁸¹ *Ibid.*

³⁸² Interestingly, the title of Sajó's article is "How the Rule of Law Killed Hungarian Welfare Reform". See: Sajó, How the Rule of Law Killed Hungarian Welfare Reform, 5/1, 1996 cited in: *Tushnet*, 2009, p. 235

³⁸³ Scheppele: A Realpolitik Defense of Social Rights, *Texas Law Review*, 82, 2004, p. 1921 cited: *Tushnet*, 2009, p. 236

economic model; as well as, it did not support the communistic economic model;³⁸⁴ but the court demonstrated the importance of well-thought-through policy choices. According to Scheppele, the Hungarian Constitutional Court told the international lenders that they have to adjust their commitment to austerity in the light of the lenders' own commitment to the ideal of the rule of law.³⁸⁵

Concluding Remarks: the Political and the Legal in Social Rights Adjudication

The relation between social rights and proportionality and the use of proportionality principle in the judicial review of social rights revealed not only new important meanings in the fields of social rights, but a new dimension of the proportionality principle as well. The proportionality principle in case of civil and political rights is the mechanism against violation of rights, while it may be considered as a determiner of the content of the right with regard to social rights.³⁸⁶

The study of the decisions made by the Constitutional Court of Georgia and the court of other states reveals that the judicial review of social rights using the proportionality principle allows different branches of the government to discuss the correlation between their policy and a social right in question. Under proportionality analysis, the government has to substantiate that, while working on certain social and economic policies, it comprehensively studied the issue and chose the least restrictive means for reaching the goal. Consequently, political decisions are made by political bodies, but they have to justify their decisions before courts.

The possibility that social legislation worked out by a political body may appear in the constitutional court forces the legislator to carefully and mindfully consider the process of law-making in the field of social and economic rights. Thus, the proportionality principle not only appears in court rooms but it also occupies the political area and forces the political bodies to

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*

³⁸⁶ *Contiades/Fotiadou: Social rights in the age of proportionality: Global economic crisis and constitutional litigation, 2012, p. 665*

carefully set the legitimate governmental ends and elaborately and thoroughly choose the means that are least restrictive and proportional towards social rights.

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