

## REVIEW

by

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**Subject:** dissertation for the award of the degree of Doctor of Law in the field of higher education 3. Social, Economic and Legal Sciences, professional field 3.6 Law, scientific specialty Constitutional Law

**PhD student:** Maria Borissova Dimitrova, part-time PhD candidate in Constitutional Law Department at the Law Faculty of Sofia University "St. Kliment Ohridski" with a scientific supervisor prof. Martin Belov, PhD

**Thesis:** "The Principle of Proportionality in the Protection of Fundamental Rights"

### **1. General presentation of the procedure**

By Order No. RD-38-674 of 21 December 2023 of the President of Sofia University "St. Kliment Ohridski" (Sofia University) I have been appointed as a member of the Scientific Jury of the procedure for the defence of the dissertation on "The Principle of Proportionality in the Protection of Fundamental Rights" for the acquisition of the scientific and educational degree "Doctor of Law" at Sofia University in the field of higher education "3. Social, Economic and Legal Sciences", professional field "3.6 Law", scientific specialty "Constitutional Law".

The set of materials submitted by the PhD student for participation in the procedure is in accordance with the requirements of the Law on the Acquisition of Scientific Degrees and Academic Positions at the Sofia University. The Faculty of Law (FOL) of SU has an accredited doctoral programme in Constitutional Law. The procedure until the public defense of the dissertation was conducted before the Council of the Department in a lawful manner, the necessary documents were submitted to the Scientific Jury for the public defence. In accordance with the national minimum requirements for the educational and scientific degree "Doctor" in scientific field 3. Social, Economic and Legal Sciences, professional field 3.6. Law, scientific specialty "Constitutional Law" the PhD candidate has presented publications, as well as a declaration of originality and credibility under Article 27, paragraph 2 of the Regulations for the implementation of the law.

The scientific metric requirements in relation to the doctoral procedure have been met, with 40 points (against a requirement of 30 points) generated from the four articles submitted

for the defence. They are:

1. The Role of Parliament and the Judiciary in Human Rights Protection: is a Dialogue of Respect Possible in The Rule of Law // Atelie Doctoreaux, 2019, Cahiers Jean Monnet Vol. 6/2020, Editions des Presses de l'Université Toulouse 1 Capitole.

2. The Debate on the Means of Protection of Human Rights before the Constitutional Court in Bulgaria in the Period 1989-2020 // S.: University of St. Petersburg, Sofia. Kliment Ohridski", 2021, 17-55 (co-authored with the supervisor, without separating protocol).

3. Is the National Assembly civilly liable for damages from "bad" laws? // Constitutional Studies 2019, Constitutional Foundations in front of New Challenges. University Publishing House "St. Kliment Ohridski", 2023, 158-180.

4. The principle of proportionality in judicial review of restrictions on fundamental rights in the UK. // Contemporary Law, no. 2, 2023.

## **2. Brief biographical data about the PhD candidate Maria Dimitrova**

I know the colleague as a 2019 PhD student in the Department. She is currently a visiting lecturer in the Master's Programme "Protection of Fundamental Rights".

As a qualified lawyer (2006) Maria has successively worked in various positions in the public sector - in the Commission for Protection against Discrimination (2007-2008), the Bulgarian Division of the ECtHR (2008-2012 and 2013-2014), in the Department for the Execution of the ECtHR Judgments (2014) and as a Government Agent before the ECtHR in the Directorate "Procedural Representation of the Republic of Bulgaria before the ECtHR" in the Ministry of Justice (2014 - until now).

## **3. Dissertation Data**

### **3.1. Theme of the dissertation**

The topic of the dissertation is dedicated to a significant and topical for constitutional law and legal and other humanitarian sciences institute - a measure for limitation of fundamental rights (as an element of the constitutional status of the individual) in the realisation and protection of the fundamental rights of the individual and the citizen.

Correctly, the PhD student points out that the concept of "proportionality" in contemporary public law can be considered in different aspects in the context of the democratic state governed by the rule of law. First, it is a legal principle that sets limits (limitations) to public power so as to prevent its arbitrary exercise. Secondly, proportionality is an objective of governance. Proportional governance is just governance, which must answer the question of

how people can live together so that the human dignity of the individual, his or her rights and individual liberty are guaranteed and protected. In this second sense, the notion of proportionality in the state governed by the rule of law reflects the concept of justice<sup>1</sup>. Third, "proportionality" (proportionality in the strict sense) is a set of rules used in subsequent judicial review of the limitations of fundamental rights<sup>2</sup> set by legislative or administrative acts. The dissertation research presented here is primarily concerned with the third aspect of proportionality and that is as a principle of the constitutional status of the individual, which is a set of rules used in judicial review of restrictions of fundamental personal and political rights.

The constitutional status of the individual<sup>3</sup> includes the citizenship, the principles on which the status is based (universality, equality, inalienability and inherence of fundamental human and civil rights, proportionality (balancing) in the possible limitations on individual freedom<sup>4</sup>), fundamental rights, freedoms and duties, and the protection of fundamental rights when violated and/or threatened. In the state governed by the rule of law<sup>5</sup>, the principle of proportionality (balancing) is in a systematic and functional relationship with the inalienability of fundamental rights and allows for limitations of the fundamental rights of an individual, a group of individuals or all citizens when a legitimate public or societal interest so requires. The principle is used to assess legislative and administrative acts to determine whether the restriction of a fundamental right of the individual or the restriction of all fundamental rights of citizens is required by the respective interest and does not go beyond what is necessary to achieve the public or societal interest. By virtue of the application of the principle the legislative and administrative acts are reviewed, namely whether the limitation of a fundamental individual right or the limitations of all rights of the citizens is required by the respective interest and whether it exceeds what is necessary for the achievement of the public or societal interest.

The requirements of Art. 27, para. 2 of the Regulations for the implementation of the law, respectively of Art. 64, para. 2 of the Regulations on the Conditions and Procedure for the

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<sup>1</sup> The "rule of law" means the exercise of State power on the basis of the Constitution, within the framework of laws which are materially and formally consistent with the Constitution and which are designed to preserve human dignity, to achieve liberty, justice and legal certainty. (Reasons to Judgment No. 1 of 2005 in constitutional case no. 8/2004).

<sup>2</sup> **Jackson, V. C.** Constitutional Law in an Age of Proportionality. // The Yale Law Journal, 2015, Vol. 124, No. 8, 3094-3196, < [https://www.yalelawjournal.org/pdf/h.3094.Jackson.3196\\_fteiok9v.pdf](https://www.yalelawjournal.org/pdf/h.3094.Jackson.3196_fteiok9v.pdf)>

<sup>3</sup> **Tanchev, E.** Introduction to Constitutional Law. PART I. S.: Sibi, 2003, p. 368.

<sup>4</sup> See **Tanchev, E.** Fundamental Human Rights. S.. University Publishing House "St. Kliment Ohridski", 2002, p. 56.

<sup>5</sup> The rule of law is a state in which the activities of public entities are constitutionally compliant, lawful and take place in conditions of predictability. Otherwise, there is a risk that law enforcement and the implementation of the law will be seriously obstructed (Judgment No. 13 of 2021 in constitutional case No. 12 of 2021).

Acquisition of Scientific Degrees and Holding of Academic Positions at Sofia University "St. Kliment Ohridski" have been observed.

### **3.2. Characteristics and evaluation of the main parts of the thesis and contributions.**

The dissertation is 247 pages (font 12, spacing 1.5 Times New Roman), which includes a title page, a table of contents and a bibliography of 12 pages and 228 pages of substantive text. In terms of content, the dissertation consists of an Introduction / Preface (so stated in the Abstract), four chapters divided into paragraphs and sub-paragraphs, and a Conclusion. The thesis is balanced in terms of structure and content, with each of the main themes in the four chapters developed sufficiently fully, the aims, objectives and methods of the research set out in the Introduction, and the conclusions summarised in the Conclusion. The highlighted themes are: the nature of the principle of proportionality in the context of contemporary constitutionalism, the main characteristics of the principle of proportionality as a set of rules that are used in the ex-post control of the restriction of fundamental rights, a comparative legal review of the applicability of the principle of proportionality in Germany, the United Kingdom, France and Bulgaria.

At present "proportionality" is conceived as a principle of law in the work of national constitutional courts and international courts (tribunals) around the world<sup>6</sup>, irrespective of their nature as continental or Anglo-Saxon legal systems. "The proportionality review" which is a manifestation of the doctrine, "transgresses" national boundaries as a general methodology for evaluating legislative and/or administrative acts upon complaints about limitations of fundamental rights before constitutional courts and/or tribunals that administer justice<sup>7</sup>.

The principle of proportionality is of central importance in the context of the rule of law, which for all practical purposes dominates the regime of fundamental rights protection under the Basic Law [of the FRG]<sup>8</sup>. The principle of proportionality involves the application of a

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<sup>6</sup> **Jackson, V. C.** Constitutional Law in an Age of Proportionality. // The Yale Law Journal, 2015, Vol. 124, No. 8, p. 3096, <[https://www.yalelawjournal.org/pdf/h.3094.Jackson.3196\\_fteiok9v.pdf](https://www.yalelawjournal.org/pdf/h.3094.Jackson.3196_fteiok9v.pdf)>

<sup>7</sup> The German Federal Constitutional Court has been particularly influential in developing the "proportionality review" in a way that has had an impact on other countries. See **Grimm, D.** Human Rights and Judicial Review in Germany. // - In: Human Rights and Judicial Review: A Comparative Perspective, ed. D. M. Beatty, Kluwer, 1994, 267-295; **Grimm, D.** Proportionality in Canadian and German Constitutional Jurisprudence. // - In: The University of Toronto Law Journal, Vol. 57, No. 2, Education, Administration, and Justice: Essays in Honour of Frank Iacobucci (Spring, 2007), pp. 383-397; **Kommers, D. P., Miller, R. A.** Constitutional Jurisprudence of the Federal Republic of Germany, 3rd ed. Durham: Duke University Press, 2012.

<sup>8</sup> 60 Years German Basic Law: The German Constitution and its Court Landmark Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights. **Bröhmer, J., Hill, Cl. & Spitzkatz, M.** (Eds.), 2nd Ed., Berlin: Konrad-Adenauer-Stiftung e.V., 2012, pp. 76, <<https://www.kas.de/documents/252038/7995358/60+Years+German+Basic+Law.pdf/61302ff1-3762-8d48-09ec-ee2fe6237253?version=1.0&t=1603977134582>>

three-stage test to any state action<sup>9</sup>. At the first level, the state action must actually be capable of achieving the purpose for which it is undertaken. At the second level, any state action must not go beyond what is absolutely necessary to achieve that objective effectively. Finally, at the third level, state power should not pursue, even otherwise, legitimate goals if the cost of achieving them in the form of restrictions on rights is disproportionate to the goal being pursued<sup>10</sup>. Bluntly put, the police should never shoot the thief, even if it means the thief will abscond.

**Chapter One** (The Principle of Proportionality in Modern Constitutionalism) presents the emergence and development of the principle of proportionality in the periods of liberal and democratic (modern) constitutionalism. Proportionality as an assessment (measure) of state action or of acts issued by the government was originally applicable as an element of governance in administrative law. As part of the concept of lawfulness it transgressed to the field of constitutional law in legislative activity and in law enforcement. The main characteristics of contemporary constitutionalism are outlined, which emerged under the influence of a number of factors, including globalisation, technological progress, the capital flows, and the adoption of human rights protection as a leading ideology. The following characteristics have been outlined: transnationalism, transfer (assignment is more correct) of sovereignty, judicial (constitutional as a term is much more correct) review and judicial dialogue.

The PhD student places special emphasis on the development of human rights theory and the increasing role of courts (most often constitutional courts) in the protection of fundamental rights in the second half of the 20th century and especially in the early 21st century. Of particular importance in this context is the adoption of the doctrine of proportionality and its practical application. This is so because the restrictions on the relative fundamental rights of man and citizen, even when imposed by the most democratic organ of the state - the national parliament, must always be subject to review by an independent institution - a constitutional court or a supreme court.

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<sup>9</sup> So also in Tanchev, E. Introduction to Constitutional Law. PART I. S.: Sibi, 2003, p. 385.

<sup>10</sup> The principle of proportionality is of great importance in the field of human rights, but it is not only applied there. The proportionality test is applied in many areas ranging from administrative law to international humanitarian law, i.e. the rules of war, where for example the test would apply in assessing the legal suitability of potential military targets. For more information on this principle see e.g. **Ellis, E.** (ed.) The Principle of Proportionality in the Laws of Europe. Hart Publishing, 1999, 180 pp.; **Susnjar, D.** Proportionality, Fundamental Rights and Balance of Powers. Leiden: Martinus Nijhoff Publishers, 2010, 389 pp.; **Henderson, I.** The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I, Leiden: Martinus Nijhoff Publishers, 2009, 266 pp.

After the Second World War, the individual with his dignity and fundamental rights became a fundamental value and subject of protection in various instruments at national and supranational level (the Universal Declaration of Human Rights<sup>11</sup>, the European Convention on Human Rights<sup>12</sup>, the European Union Law<sup>13</sup>). There has been a transformation in the constitutional and supreme courts in democratic countries, which have become guardians of fundamental rights and have produced case-law against their excessive restriction. In the course of this process, the principle of proportionality, traditionally used in administrative law, has taken its place as a familiar rule for judicial review of the restrictions of individual rights. The principle delineates the limits of the exercise of public power in the national state. Thus, the

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<sup>11</sup> Preamble to the Universal Declaration: "... the peoples of the United Nations have in the Charter reaffirmed their faith in *fundamental human rights, in the dignity and worth of the human person* and in the equal rights of men and women...

Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of *universal respect for and observance of human rights and fundamental freedoms*,

Whereas a *common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge*,

Now, therefore,

The General Assembly,

Proclaims this Universal Declaration of Human Rights as a *common standard* of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education *to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance*, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction. "

<sup>12</sup> Preamble to the ECHR: "... Considering that this Declaration (the Universal Declaration on Human Rights) aims at *securing the universal and effective recognition and observance of the Rights therein declared*;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further *realisation of Human Rights and Fundamental Freedoms*;

Reaffirming their profound *belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend...*"

<sup>13</sup> The EU's values are set out in Article 2 of the Lisbon Treaty and in the EU Charter of Fundamental Rights.

The European Union is founded on the following values, which have a direct bearing on fundamental human rights and their protection. They are:

- *Human dignity*; Human dignity is inviolable. It must be respected and protected and is the real foundation of fundamental rights.

- *Liberty* gives citizens the right to move and reside freely within the Union. Individual freedoms such as respect for privacy, freedom of thought, religion, expression and information are protected by the EU Charter of Fundamental Rights.

- *Democracy*; The functioning of the EU is based on representative democracy. European citizens automatically enjoy political rights. Every EU citizen of age has the right to stand as a candidate and vote in elections for European Parliament. EU citizens have the right to stand as candidates and vote in their country of residence or origin.

- *Equality*; Equality means equal rights for all citizens before the law. The principle of equality between women and men underpins all European policies and European integration. It applies in all areas.

- *Rule of law*; the EU is based on the rule of law. All its activities are based on treaties adopted voluntarily and democratically by EU countries. Justice is administered by an independent judiciary which ensures compliance with the law. EU countries have given the European Court of Justice jurisdiction to rule on legal disputes with final decisions that must be respected by all.

- *Human rights*; Human rights are protected by the EU Charter of Fundamental Rights. They cover the right to non-discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, the right to protection of personal data and the right of access to justice.

political authorities, in adopting their acts and in their practice, in order not to be attacked judicially (under the threat of constitutional or judicial review or of an application to the ECtHR), and the legal authorities (constitutional court or tribunal), in the course of the application of the law, take into account the principle of proportionality both prior and subsequently.

In **Chapter 2** (Main Characteristics of the Principle of Proportionality as a Set of Rules Used in Judicial Review of Limitations of Fundamental Rights), the doctrinally accepted structure of the principle of proportionality as a "set of rules used in constitutional review of limitations on rights" has been examined.

The analysis in the chapter is based on the concept that constitutionalism in the modern democratic state is characterised by certain features. First, it is the existence (most often) of a written constitution through which public power is normatively constrained. Next, it is the establishment of elected bodies that are the basis of political democracy. The public authorities are duty-bound to respect a catalogue of fundamental rights of the individual. Thirdly, the existence of a constitutional jurisdiction whose main functions are to protect the supremacy of the constitution and the fundamental rights. To these features, in European terms, it should be added a 'judicial dialogue' between national and supranational courts. In the context of fundamental rights, this dialogue takes place between the national courts and the European Court of Human Rights. At the same time, the supranational, constitutional and supreme courts in Europe have been adopting the principle of proportionality in the exercise of ex post normative or concrete review of the rights' limitations and have been moving towards coherence of the case-law in this area.

Chapter Two presents the main theories on the principle of proportionality that have been developed in the works of Robert Alexy and Aaron Barak. It discusses the similarities and differences in clarifying the nature of fundamental rights, their scope and permitted limitations.

Chapter Two is construed on the stages through which the "judicial review" of restrictions on fundamental rights passes. Because this review is as a rule exercised by a constitutional court, although in some countries the Supreme Court has such powers, the term 'judicial' is misleading.

The subsequent control of fundamental individual and political rights passes through two stages. First, the court assesses the scope of the alleged right and by what measures it has been restricted. The second stage is the application of the principle of proportionality, where the court assesses whether the restrictive measures have a legitimate aim, whether they are suitable to achieve the aim, whether they are necessary as the most lenient and whether they are

proportionate in a narrow sense. The final stage of the proportionality rule involves a value judgment. In considering the second stage of the ex-post review, the question of the constitutional basis of the proportionality principle is raised. In Bulgarian constitutional law doctrine and practice, the principle of proportionality is derived from the principle of the rule of law. Next, the distinct rules of the principle of proportionality are examined. In order to be proportionate, a restriction on a fundamental right of the individual and the citizen must have a legitimate aim<sup>14</sup>, must be suitable for achieving that aim, must be necessary (most lenient to the right)<sup>15</sup> and be proportionate in a narrow sense. The legislator, according to the principle of proportionality, is obliged to choose among all the options before them the option that is the most lenient to the fundamental right of man and citizen and at the same time is able to realise the purpose of the law. In assessing the constitutionality of a statute, these rules enable the national (constitutional or supreme) court to defer to the judgment of the legislature, since it is facts and not value judgments that are under consideration.

In Chapter Two, analysed here, the PhD candidate examines in detail the rule of proportionality in a narrow sense. Ms Dimitrova rightly points out that even if a parliamentary law has a legitimate aim, the provisions that place limitations on a fundamental right are appropriate to achieve the aim and are the most protective of that fundamental right, it is still possible that, because of the effect of the restrictive measures on right, they may not be proportionate in the strict sense of the term. In applying the last rule of proportionality, the courts inquire whether the legislature's reasons for restricting the right in order to achieve the legitimate aim, and the extent to which that aim will be achieved, can justify the harm to the subjective right.

Chapter Two is the theoretical core of the dissertation and it leads to an important conclusion drawn by the PhD candidate about the benefits of applying the principle of proportionality in the "judicial" review of the restrictions on fundamental individual and political rights. The view that it is a guarantee for the democratic order and the rule of law as is correct. According to the author, the principle of proportionality performs two functions. Firstly, it enhances the legitimacy of the decisions taken [by national courts] and restores the

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<sup>14</sup> The legitimate aim is defined in a parliamentary act and the legislator has wide discretion in this respect. A legitimate aim means that the legislator can restrict a fundamental right only for certain reasons relating to the protection of a fundamental value. The legitimate aim is the starting point for the assessment of the rules regarding the restriction - suitability and necessity.

<sup>15</sup> Having determined whether the restriction on the fundamental right has a legitimate aim, the national court then proceeds to assess the suitability of the restriction to achieve the aim (whether the restriction is appropriate to achieve the aim). This rule deals with the intention of the legislator and seeks to answer the question of why he chose these particular measures to achieve the aim. It looks for a reasonable relationship between the restrictive measures and the purpose of the law.

citizens' confidence in the courts by allowing the courts to overrule the legislature's decisions in an authoritative manner without causing an institutional crisis and a departure from /violation of/ the principle of separation of powers. Secondly, it allows the national courts to apply the national legal framework, to raise arguments drawn from the national legal tradition and to place fundamental rights in their appropriate social context. In doing so, they delineate the limits of the European Court of Human Rights' intervention and propel it towards an active application of the principle of subsidiarity.

**Chapter Three** (The Principle of Proportionality in Germany, the UK and France) aims to trace how the practice of applying the principle of proportionality emerged and developed in the objective law of three European countries - Germany, the UK and France, what the influence of the ECtHR has been on the development of this case-law, and what role the principle of proportionality plays in the 'judicial' dialogue with supranational courts in order to draw the boundaries of non-intervention. The three countries exemplify the adoption of the principle in the case-law of reviewing limitations on rights in constitutional justice, its modification in order to reflect the national legal traditions, and its use in the dialogue with the legislature and with supranational courts.

The principle of proportionality was first established in German constitutional jurisprudence in the 1950s. It has gradually spread as a fundamental principle of Western European constitutionalism, as a generally recognised principle of international law<sup>16</sup> and of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>17</sup>, and has also been adopted in European Union law<sup>18</sup>.

In German doctrine since the adoption of the Basic Law of the Federal Republic of Germany, the prevailing understanding has been that the current model of fundamental rights protection in Germany, in which the unwritten principle of proportionality played a central role, has been the result of the interaction between centuries of administrative doctrine and practice and modern human rights standards embodied in the 1949 constitutional act. The consistent application of the principle of proportionality in the case law on the review of the fundamental rights limitations in Germany has led to permanent and fruitful dialogue between the Federal Constitutional Court and the European Court of Human Rights. This consequence could be observed in the more recent ECtHR case law against Germany that the PhD candidate presents.

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<sup>16</sup> See Articles 31-33 of the 1969 Vienna Convention on the Law of Treaties (Journal of Laws 1987, No. 87).

<sup>17</sup> **van Dyck, P., van Huff, G. Ѐ. H.**, The European Convention on Human Rights - Theory and Practice, S.: ed. by Bulgarian Lawyers for Human Rights Foundation, 2000, p. 66.

<sup>18</sup> **Shaw, Jo.** Law of the European Union, L., 1996, 186-187; **van Raepenbusch, Sean** Droit institutionnel de l'Union europeenne, Lacier, 2005, 433-435.

Thad leads her to conclude that the principle of subsidiarity has been consistently applied where the national court had applied the principle of proportionality.

The United Kingdom is the home of constitutionalism, but the principle of proportionality entered the national legal system predominantly under the influence of European law and practice, rather than being a natural product of the development of national legal thought. The principle of proportionality in the UK developed under the influence of two main features of judicial review. The first is that the constitutional principle of the supremacy of Parliament continues to apply in the UK. The courts therefore have no jurisdiction to strike down or block the application of statutory provisions. There is also no constitutional catalogue of rights in the UK. As the UK does not have a written constitution, until the Human Rights Act (1998), fundamental human rights were in separate Acts of Parliament and were formulated negatively back in the past<sup>19</sup>. The English courts currently apply the principle of proportionality when hearing cases under the Human Rights Act. In exercising judicial review in cases which fall outside its scope, the courts continue in principle to apply a traditional test of reasonableness.

In France, the principle of proportionality has developed in the context of the protection of fundamental human rights. The modern nature of this principle is the fruit of the historical development of the concept of human rights in France, formulated positively (tradition of legal positivism) and the dominance of the understanding that the law as a normative act is the main source of law. The specific way in which the principle enters into the jurisprudence is conditioned by the republican tradition, in which the principle of the separation of powers, the idea of the law as the expression of the general will and the traditionally limited role of the national judge are the guiding principles. As in Germany and the United Kingdom, the principle first emerged and developed in administrative law in the context of control over administrative action, especially after the establishment of the Council of State (1880).

A peculiarity of the French model of the application of the proportionality principle until the constitutional reform of 2008, to which the PhD student pays fair attention, is that the protection of fundamental rights in France and the corresponding application of the proportionality principle in specific cases are carried out under the strong influence of the Convention and the case law of the ECtHR, in particular by the ordinary courts. As a

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<sup>19</sup> Before 1998 the content of fundamental rights was formulated in two manners - they are derived in the case-law of the English courts through (judicial) precedent (a typical example being procedural rights) or in the interpretation of legislation in the light of Convention law. This lack of clarity as to what the rights are, their scope and permitted limitations has had its impact on the development of judicial review of administrative acts which affected fundamental rights of citizens.

consequence to the lack of access of citizens to the Constitutional Council, the latter was largely excluded from the dialogue on the rights until 2008. This situation changed in 2008 when a major reform of the constitutional justice system was implemented. The so-called indirect constitutional complaint was introduced, and the Constitutional Council became actively involved in the dialogue on fundamental rights and their justified limitations.

At the end of Chapter Three, a comparative analysis is made of the application of the principle of proportionality in the three European countries.

**Chapter Four** is dedicated to the principle of proportionality in the case-law of the Bulgarian Constitutional Court. In Bulgaria, the application of the principle of proportionality in constitutional justice is gradually starting to resemble its application by other national constitutional courts with developed case-law on fundamental rights and with the doctrinal model presented in Chapter Two.

The PhD candidate presents, first of all, the legal and institutional context in which the Constitutional Court decides cases in the field of fundamental human and civil rights through examples from its practice on the application of the principle of proportionality. Independently, two examples are highlighted through two decisions of the Constitutional Court - of successful and unsuccessful dialogue with the European Court of Human Rights. Next, the types of fundamental human and civil rights and the scope of their limitation are presented through the practice of the Constitutional Court and the particular opinions of individual constitutional judges. Thirdly, the principle of proportionality in the Bulgarian context is presented through the case law of the Constitutional Court.

The Constitutional Court does not distinguish rules for the application of the principle of proportionality, although it recognizes them, according to the PhD candidate. She reveals the process of applying the principle. Usually, the legitimate aim is considered a separate component and then proportionality is examined in its entirety, without analysing whether the restriction is suitable and necessary to achieve the aim and whether it is proportionate in a narrow sense. The Constitutional Court underlines that the principle of proportionality in the context of the restriction of fundamental rights is not explicitly stated but is implicit in a number of legal constructions. The Court recognises that the principle has a wide application in the modern state governed by the rule of law and a major significance for the restriction of public power exercised by the yardstick of fundamental rights. According to the Court, the principle applies as a decisive criterion for the type and scope of constitutionally permissible limitations by law, as well as for the definition of specific limits in the exercise of fundamental rights. It is concluded on the strength of the analysed case-law of the Constitutional Court that the principle

of proportionality as a component of the state governed by the rule of law limits the legislator's discretion. The case-law of the Constitutional Court to consider the limitation of one right as deriving from another right and proceeding to balancing the rights has been critically presented. This approach has been criticised in the submission.

Chapter Four has a clear practical orientation. The PhD candidate analyses the practice of constitutional jurisdiction based on the analysis of the legitimate aim<sup>20</sup>, the suitability and necessity of the fundamental rights' limitations, and the balancing (proportionality in a narrow sense). Special attention is paid to the restrictions of fundamental rights during a state of emergency.

The last paragraph of Chapter Five is dedicated to the analysis of the possibility of a dialogue between the Bulgarian Constitutional Court and the European Court of Human Rights. By the end of 2023, the possibility of dialogue was obstructed severely by the lack of citizens' access to constitutional justice. According to the PhD candidate, there are two manners in which the Constitutional Court and the ECtHR converse. Firstly, by virtue of the Constitutional Court referring to the case law of the European Court of Human Rights or, conversely, by the European Court referring to the case law of the Constitutional Court. Secondly, the dialogue can also be on a specific case. In view of the Constitutional Court's lack of jurisdiction to hear individual complaints, such practice has been almost non-existent by the end of 2023.<sup>21</sup>

The right of a panel of the Supreme Court of Cassation or the Supreme Administrative Court to refer a specific legal dispute to the Constitutional Court was expanded by amending the second paragraph of Article 150 of the Constitution. Henceforth, any court hearing a legal dispute may, at the request of a litigant or on its own initiative, refer a case to the Constitutional Court for a declaration of inconsistency between a law applicable to the particular case and the Constitution. Although it is not explicitly stated, as in the case of the Ombudsman and the

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<sup>20</sup> The fundamental rights may be restricted, for instance, for the purpose of "revelation and prevention of serious crimes" (Art. 34(2)), "protection of national security" (Art. 35(1), 37(2); 41(1)), "protection of public health" (Art. 35(1), Art. 37, ал. 2, чл. 41, ал. 1) „protection of rights and freedoms of other citizens“ (чл. 35, ал. 1, чл. 37, ал. 2; чл. 41, ал. 1, чл. 44, ал. 2), to protect "public order" (Art. 37, para. 2; Art. 41, para. 1), to protect "morals" or "good morals" (Art. 37, para. 2; Art. 40, para. 2; Art. 41, para. 1). Rights may also be restricted in the case of "incitement to violent change of the constitutionally established order" (art. 39, para. 2; art. 40, para. 2), i.e. in order to protect the constitutionally established order, in the case of "incitement to commit crimes" (art. 39, para. 2; art. 40, para. 2). 39, para. 2; Art. 40, para. 2) - for the protection of public order; in the case of "incitement to enmity", "incitement to violence against an individual" (Art. 39, para. 2; Art. 40, para. 2; Art. 44, para. 2) - in order to protect public order; and when directed against "the reputation of other citizens" (Art. 41, para. 1) - in order to protect the rights of other citizens; when directed against "the sovereignty, territorial integrity and unity of the nation (Art. 44, para. 2) - in order to protect these values, and are exercised to "incite racial, national, ethnic or religious hatred" (art. 44, para. 2) - in order to protect public order and the rights of citizens.

<sup>21</sup> It can be assumed that after the entry into force of the Constitutional Amendment Act of the Republic of Bulgaria (Official Gazette of the Republic of Bulgaria, as amended and supplemented, No. 106 of 22.12.2023) the situation will change.

Supreme Bar Council, that the referral to the Constitutional Court is a request to establish the unconstitutionality of a law that violates the rights and freedoms of citizens, it can be assumed that the referral will henceforth have the effect of an indirect constitutional complaint. A request for a declaration of inconsistency between a law applicable in a particular case and the Constitution under Article 150(2) goes beyond the subject matter of a request for a declaration of unconstitutionality of a law that violates the rights and freedoms of citizens within the meaning of Article 150(4) and (5) of the Constitution. However, this is a possible development of the constitutional practice in the future and will be a reason for amendments in the text of the dissertation in view of a future publication.

### **3.3. Scientific apparatus**

The bibliography used consists of 155 titles. There are 22 articles and books in Cyrillic and 133 in Latin. In terms of Latin sources, books and articles in English, French and German were used.

In addition, the study refers to a number of decisions of the Constitutional Court of the Republic of Bulgaria, as well as to acts of other national and supranational courts.

It is noteworthy that the PhD candidate refers to all the authors she has included in 456 footnotes. They include both references to actually used and researched works and citations to acts of national and supranational jurisdictions. The sources have been correctly cited according to established standards. The translations and interpretation of the original texts of the sources relevant to the subject of the dissertation, which are in English and French but have not been translated into Bulgarian are also of great importance.

### **3.4. Abstract**

The doctoral candidate has submitted an abstract of 26 pages. It fully meets the requirements for the presentation of the dissertation, reflecting truly and accurately its content and the main points of contribution.

## **4. Assessment of publications**

The PhD student has submitted 4 publications, 3 of which are on the topic of the dissertation in referred and indexed periodicals and in compilation conference proceedings and scientific readings. The publications present particular aspects of the topic, further developing the theses of the dissertation.

## **5. Recommendations for future use of the dissertation contributions and results**

**5.1.** In accordance with the requirements of the Law on the Development of the Academic Staff in Republic of Bulgaria, the dissertation of Maria Dimitrova presents scientific results constituting an original contribution to science, demonstrating in-depth theoretical knowledge in the relevant specialty and the ability to produce a scientific work.

**5.2.** Some recommendations can always be made both for the theses supported by the PhD candidate and for the structure of the thesis. Disputable theses in legal scholarship have been presented as established and unquestionably accepted and applicable.

Greater precision is needed in presenting the views of authors who have worked in the field of human rights, and in dealing with the terminology of fundamental rights and personal freedoms and their classifications<sup>22</sup>.

The topic is extremely promising and I believe that the PhD candidate has sufficient knowledge and opportunities to continue further her scientific work on some of the researched aspects. In a future publication of the dissertation, which I would recommend, the PhD candidate could undoubtedly make bolder predictions about the future of constitutional justice in Bulgaria in the field of the rights of the individual and the citizen.

**5.3.** In view of that, I address the following questions to the PhD candidate Maria Dimitrova:

- What is embedded in the term "civil rights" as part of the phrase "fundamental personal, civil, and political rights" used in both the dissertation text (p. 4, p. 78, p. 83, p. 87, p. 94) and the abstract (p. 3, p. 11, p. 12, p. 15)?

- When referring to the national/constitutional judge applying the principle of proportionality what does she mean - the court (as a body or as a panel) or each individual judge as used in the thesis and in the abstract?

- Does the PhD candidate draw an equivalence between "judicial review, most often within constitutional justice" /constitutional jurisdiction outside the judiciary/ (e.g., p. 7 of the dissertation) and "judicial review" exercised by bodies within the judiciary?

- If the Constitutional Court is transformed finally into a "human rights court" by expanding its competence to adjudicate on fundamental rights issues, as the PhD candidate points out, it will be able to determine the substance and content of fundamental rights in a contextually appropriate manner. This would also increase the possibilities for judicial dialogue between the Constitutional Court and the European Court of Human Rights and for delineating

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<sup>22</sup> One example only. The opinion expressed on p. 185, that Bulgarian doctrine does not deal with the classification of rights as absolute and relative within the meaning of the constitutional law, but that instead the Constitutional Court has dealt with this classification.

the limits of national sovereignty (pp. 178-179 of the thesis). Would the transformation of the Constitutional Court into a 'human rights court' and the possibility for a subsequent recourse to the ECtHR challenge the finality (non-appealability) of Constitutional Court judgments?

- The principle of proportionality in restricting socio-economic and cultural rights "is applied differently, by examining the reasonableness of the restriction and allowing the legislator a wider margin of appreciation" (p. 184 of the thesis). I would like the PhD candidate to provide her personal opinion as to what in her view applying the principle "differently" means.

## CONCLUSION

The dissertation of Maria Borissova Dimitrova "The Principle of Proportionality in the Protection of Fundamental Rights" contains scientific results that represent an original contribution to science and meet the requirements of the Law for the Development of Academic Staff in the Republic of Bulgaria, the Regulations for the Implementation of this Law and the Regulations for the Conditions and Procedure for the Acquisition of Scientific Degrees and the Occupation of Academic Positions at Sofia University "St. Kliment Ohridski". The submitted materials and dissertation results comply with the regulatory requirements. The dissertation work demonstrates that the PhD candidate possesses in-depth theoretical knowledge and professional skills in Constitutional and Comparative Constitutional Law, Theory and History of Law, qualities and skills for conducting scientific research with original and significant scientific contributions.

In view of the above, I confidently give my **positive assessment of** the dissertation presented in the defence procedure "The Principle of Proportionality in the Protection of Fundamental Rights", I recommend it to the honorable Scientific Jury and I will vote positively for the PhD candidate Maria Borissova Dimitrova to acquire the educational and scientific degree "Doctor" in the field of higher education "Social, Economic and Legal Sciences", professional field 3.6 Law, scientific specialty Constitutional Law.

4 February 2024.

Natalia Kiselova