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THE PRINCIPLE OF PROPORTIONALITY IN THE PROTECTION OF FUNDAMENTAL RIGHTS

ABSTRACT

dissertation for the award of a degree of education and science "Doctor" in professional field 3.6 Law (Constitutional Law of the Republic of Bulgaria)

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Sofia
January 2024

I. GENERAL CHARACTERISTICS OF THE DISSERTATION

1. Main thesis and relevance

Proportionality in law is a large and multi-layered topic that can be simplified into three aspects. First, proportionality is a legal principle that sets limits to public power so that it is not exercised arbitrarily. Second, proportionality is an objective of government. Proportional government is fair government, which must answer the question of how people can live together so that the freedom, individuality and dignity of each person are guaranteed. Third, proportionality is a set of rules used in judicial review of restrictions on fundamental personal, civil and political rights[1] .

The main concept of the dissertation is that in the modern European liberal-democratic state the national constitutional or supreme court has a new role in the political process at national and supranational level due to its power to examine the limitations of fundamental rights imposed by national representative institutions, most often the legislator. In this new constitutional reality, the court enters into dialogue with national representative institutions and with the two supranational courts. In the context of fundamental rights, the dialogue takes place in the language of proportionality[2]. The application of the principle of proportionality implies that the court must undertake a thorough analysis of the limitations of personal, civil and

[1] The classification is used by **Jackson, V.** Constitutional Law in an Age of Proportionality. *The Yale Law Journal*, vol. 124, no. 8, 2015, pp. 3094-196; on proportionality as a fundamental principle of modern constitutionalism, see **Jackson, V. C.** Constitutional Law in an Age of Proportionality. The Ultimate Rule of Law. Oxford; New York: Oxford University Press, 2004, p. 162), a foundational element of global constitutionalism (**Sweet, A.S. and Mathews, J.** Proportionality Balancing and Constitutionalism - In: Columbia Journal of Transnational Law, 2008, p. 160), a suitable candidate for creating a global grammar of constitutionalism (**Klatt, M. and Meister, M.** Proportionality - A Benefit to Human Rights? Remarks on the I-CON Controversy - In: International Journal of Constitutional Law, 2012, p. 3), a central idea in contemporary law in the area of constitutional rights (**Moller, K.** Balancing and the Structure of Constitutional Rights. - In: International Journal of Constitutional Law, 2007, p. 13); proportionality empire and lingua franca - **Stone Sweet, Alec and Mathews, J.** Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach (Oxford, 2019; online edn, Oxford Academic, 18 July 2019**,** p. 80; indeed, Stone Sweet and Mathews argue that the principle is now a constitutive element of rights-based constitutionalism that has global reach, ibid, p. 80**;** David Beatty even points out that proportionality is a basic rule for drafting judicial reasoning, and proportionality is part of the hard core of any constitution. Kumm goes further by saying that proportionality can also be used in political decision-making (**Kumm, M.** Democracy is not Enough: Rights, Proportionality and the Point of Judicial Review, 9-10 NYU School of Law, Public Law Research Paper, available at papers.ssrn.com/abstract=1356793, 2009, p 10), see in **Marketou, A.** Local meanings of proportionality: judicial review in France, England and Greece, Florence: European University Institute, 2018, pp 2-3; Barak considers the proportionality of a restriction on a constitutional right mostly by the legislature and says that a restriction on a right will only be constitutionally permissible if it is proportionate - see **Barak, A.** (2012). Proportionality: Constitutional Rights and their Limitations (Cambridge Studies in Constitutional Law). Cambridge: Cambridge University Press , p. 3;

[2] As some researchers have pointed out, proportionality is the lingua franca of effective rights protection, yet it is used in different dialects, to different audiences, and often for different purposes - see Stone **Sweet, A. and Mathews, J.** *Proportionality Balancing* ..., p. 80.

political rights, because they are either inherent and inalienable (right to life, prohibition of torture, right to liberty, etc.) or fundamental to the democratic legal order (freedom of speech, freedom of conscience, freedom of association, etc.). The principle of proportionality is the language in which the dialogue is conducted and has two main functions: 1) it delineates the limits to the exercise of public power through judicial review of restrictions imposed by public power on the exercise of fundamental rights, and 2) it delineates the limits to the intervention of supranational courts in matters relating to national restrictions on rights. In applying the principle of proportionality, national and supranational courts use similar rules for assessing the limitations. These rules originated in the German doctrine and practice and subsequently developed in the case law of the European Court of Human Rights. The national court, however, imbues the proportionality rules with content that refracts national constitutional identity, legal tradition, history and culture through the lens of the universal nature of rights. In doing so, the national court delineates the limits of non-intervention by the supranational court and becomes a legitimate expression of national sovereignty. This authoritative place of the national court is only achievable within a framework of wide-ranging constitutional review in which the court is familiar with and applies in practice the rules of proportionality defined in the doctrine of Robert Alexy and Aharon Barak and largely adopted by most European (and not only European) constitutional and supreme courts[3].

In the light of the above, the topic is particularly relevant for the Bulgarian legal system. Despite its affiliation with the European legal space, the Bulgarian Constitutional Court is still struggling to find its place in the dialogue on the rights. On the one hand, the reasons for this lie in the "constitutional insufficiency"[4] of the Bulgarian constitutional model, which does not allow citizens access to the Constitutional Court. On the other hand, but related to the foregoing, the Constitutional Court has not yet developed a jurisprudence on the assessment of limitations to fundamental rights based on the doctrinal model and the thorough application of the principle of proportionality as a set of rules for assessing limitations to personal, civil and political rights. In this way, the court cannot fully engage as a participant in the rights dialogue with

[3] For the spread of the principle from German law to ECtHR and EU law, and hence to the law of France, Spain, Portugal, Italy, Belgium, Greece, etc., see **Barak, A.** (2012). *Proportionality: Constitutional Rights and their Limitations* (Cambridge Studies in Constitutional Law). Cambridge: Cambridge University Press, pp 182-187. On the spread of the principle beyond Europe - ibid, pp 187-201; **Stone Sweet, Alec** and **Mathews, J.** *Proportionality Balancing and Constitutional Governance*..., pp 59-95.

[4] In the expression of prof. Snezhana Nacheva, see **Nacheva, S.** On constitutional protection and constitutional defensibility of the right to defence - Contemporary Law, 1999, No. 4, p. 21.

supranational courts and be an authoritative articulator of national constitutional identity, legal tradition and culture.

2. Subject, aim and objectives of this study

The present work has two objectives. First, to argue that the principle of proportionality is a fundamental principle of modern constitutionalism and the modern European liberal democratic state, linked to the new role of the national court as a participant in the political processes at the national level and as an authoritative actor in the judicial dialogue with supranational courts. The second objective is to argue that a well-developed national practice on limitations of fundamental rights, in which the principle of proportionality is applied in line with the understanding of rights as universal values but also with the national context and legal tradition, is an effective way to respond to the activism of the supranational courts, in particular the European Court of Human Rights, and to delineate the limits of non-intervention in the assessment of limitations of fundamental rights.

To achieve these two objectives, the following tasks have been formulated:

(a) study of the main features of modern constitutionalism formed in the transition from Westphalian to post-Westphalian statehood;

(b) exploring the concept of judicial dialogue and proportionality as the "language" in which this dialogue is conducted;

(c) a study of the origin and development of the principle of proportionality and the reasons for its widespread diffusion and use;

(d) an examination of the various classifications of rights, the question of the scope of rights and their limitations;

(e) an analysis of the two manifestations of the principle of proportionality in the context of judicial review: as a set of rules for assessing restrictions on personal, civil and political rights, or as a reasonableness criteria for assessment of a restriction on second and third generation fundamental rights;

(f) a review and analysis of the main features of the principle of proportionality as a set of rules - legitimate aim of the restriction, suitability, necessity and proportionality in a narrow sense;

(g) an overview of the emergence and development of the principle of proportionality in the jurisprudence of Germany, Great Britain and France up to its contemporary understanding; the dialogue between national and supranational courts in this sense;

h) review and analysis of the application of the principle of proportionality in the practice of the Bulgarian Constitutional Court.

3. Scientific methodology

In the preparation of the dissertation, first of all, a legal-dogmatic method was used. Historical and comparative legal methods were used in order to trace the development of the principle and its spread in different legal systems. An interdisciplinary method, which includes philosophical, political science and sociological elements, has also been used to prove its place and importance as a fundamental principle of modern constitutionalism. The case law of national and supranational courts has been used in support of the main thesis, and in this sense the "case study" method has also been employed.

4. Bibliography

The bibliography used consists of 155 titles. There are 22 articles and books in Bulgarian and 133 in English, French and German. Along with this, the study refers to a large number of decisions of the European Court of Human Rights, the Bulgarian Constitutional Court, the Federal Constitutional Court of Germany, the Supreme Court of the United Kingdom, the French Constitutional Council, the Supreme Court of Canada, the Supreme Court of Israel, the Supreme Court of the United States.

II. CONTENT OF THE DISSERTATION

The dissertation consists of an introduction, four substantive chapters divided into sub-sections, and a conclusion. The substantive chapters are as follows: 'The principle of proportionality in contemporary constitutionalism', 'The principle of proportionality as a set of rules used in judicial review of restrictions on fundamental rights', 'The principle of proportionality in Germany, the United Kingdom and France' and 'The principle of proportionality in the practice of the Bulgarian Constitutional Court'. The content of the individual chapters will be briefly presented below.

1. Chapter One "The Principle of Proportionality in Contemporary Constitutionalism"

The principle of proportionality originated and developed in the context of the Westphalian state as defined by contemporary constitutional theory, within the evolving

administrative justice system, and has its basis in principles of legality. It becomes a main principle of post-Westphalian statehood. Chapter One examines the changes that occur in the understanding of statehood in the transition from Westphalian to post-Westphalian constitutionalism. It outlines the main features of contemporary constitutionalism that are emerging under the influence of a number of factors, including globalisation, technological developments, capital flows, and the adoption of human rights protection as a leading ideology. The following characteristics are outlined: transnationalism, transfer of sovereignty, judicial (constitutional) review and judicial dialogue.

Particular emphasis is placed on the fact that the second half of the twentieth century, and especially the beginning of the twenty-first century, is characterised first and foremost by a rapid development of human rights theory, an unprecedented increase of the role of the courts, and the emergence of an intense judicial dialogue. Of particular importance in this context is the acceptance and practical application of the idea that restrictions on citizens' fundamental rights, even when imposed by the most democratic organ of the state, the national parliament, must always be subject to review by an independent institution, most often a constitutional court[5]. Constitutional and supreme courts in many countries have assumed their place as guardians of rights and have created a significant body of case-law against their excessive restriction. In the course of the expansion of judicial review, it has become apparent that the principle of proportionality, traditionally used in administrative law, is a familiar, appropriate and convenient rule for assessing limitations on rights[6].

Second, supranational institutions have taken on a significant, even dominant role as legal rule-makers, especially in the area of fundamental rights. At the same time, the supranational regimes, the European Union and the Council of Europe, have established their own courts which apply these norms and thus turn them into operative law. The European Court of Human Rights has developed case-law on fundamental rights and their limitations, using the principle of proportionality as a guiding philosophy in law enforcement. This case-law has entered national legal systems not only in harmony, but also in situations of tension and conflict, in any case in some contact with national courts. It is at this point of conflict that the problematic

[5] See **Stalev, J., Nenovski, N.** The Constitutional Court. S., 1996; **Penev, P., Ya. Zartov**. Constitutional Justice of the Republic of Bulgaria. Siela, 2004; **Drumeva, E.** Constitutional law, Siela. 2018, pp. 547-631.

[6] Proportionality is also applied in other areas of law. Horizontal conflicts of rights which are at the root of tort claims are resolved by civil courts through balancing, since the impairment of rights may arise from the realisation of rights held by other citizens or organisations. In criminal law, proportionality guides the court in determining a fair punishment for the crime committed. The passage of the principle into constitutional law, however, is a phenomenon that emerged after World War II and significantly altered the inter-institutional dynamics and philosophy of the exercise of public power in the modern liberal democratic state.

issues of identity and universality, legitimacy and democracy, the national and the global, appear.

Against the backdrop of the socio-political changes that have thus developed, contemporary constitutionalism is also confronted with a number of challenges, including questions of who is responsible for the decisions taken, how citizens participate in taking the decisions that affect them (democratic deficit) and how the rule of law is guaranteed. It is argued that these challenges create tensions in the functioning of national and supranational legal regimes. A way of reconciling the national and the international is sought in the intensive judicial dialogue[7] . According to M. Belov, judicial dialogue is an escape from the traditional limitations of fundamental rights within the framework of statehood and a way to establish the basic elements of human rights, such as core, periphery, permissible limitations, proportionality, at the crossroads between different national, international and supranational legal systems[8] . The present work is based on this model of the modern constitutional state, in which the court occupies a central place and national constitutional law is internationalised under the strong influence of the two supranational European courts. At the same time, there is also a process of constitutionalisation of international law. In this new configuration, the decisions of the authorities are examined on the basis of their effect on fundamental rights through the language of proportionality, and this leads to the juridisation of politics and the politicisation of the judiciary[9]. At the same time, the decisions of the national authorities are also subject to judicial review by supranational courts, in the field of rights in particular by the European Court of Human Rights, which further strengthens the role of the national court as a speaker for the national sovereignty. In this new European configuration of power, the national court has the task, by applying the principle of proportionality, to outline in a convincing manner the scope of rights and their legitimate limitations. It does so by drawing on national legal tradition as well as with an appreciation of the universality of rights and the evolutionary interpretation that the supranational court applies in searching for the meaning of the provisions enshrining fundamental rights.

[7] For a detailed discussion of judicial dialogue see **Belov, M.** Judicial Dialogue - Westphalian or post-Westphalian Constitutional Phenomenon?

[8] Ibid, p. 31.

[9] On the juridisation of politics and the politicisation of the judiciary in the context of judicial dialogue - see ibid., p. 35; see also **Hirschl, R.** The New Constitutionalism and the Judicialization of Pure Politics Worldwide, Fordham Law Review, vol. 75 (2006-2007), pp. 721-753 ; **Belov, M**. *Global Rule of Law instead of Global Democracy?*... p. 100.

The intensive judicial dialogue in the field of human rights is conducted in the language of proportionality. Thus, the principle of proportionality has become a fundamental principle of modern constitutionalism. The study traces its origins and development and its role as a centre in which the universality of fundamental rights, on the one hand, and concepts of national constitutional identity, legal tradition and culture, on the other, meet. It emphasises the key role of the national court in reconciling the universal and the national to ensure the protection of fundamental rights and the preservation of national sovereignty and legal tradition. The principle delineates the limits of the exercise of public power and provides another opportunity for citizens to participate in policymaking. It is in the field of this aspect that contemporary political dynamics are evolving, with two results: political bodies are beginning to apply the principle in their practice in order to prevent their decisions from being overturned by the courts, and the courts themselves are undergoing self-reflection and exercising restraint in order to maintain their legitimacy and ensure the implementation of their decisions. In the context of the dialogue with supranational courts, the principle is universal because there is agreement, both in doctrine and in practice, on its formal structure, adopted to one degree or another and not necessarily in any particular order by most constitutional and supreme courts in Europe (and outside Europe - Canada, Israel, New Zealand, etc.), as well as by the European Court of Human Rights[10]. Reaching better legal decisions and curbing excessive supranational judicial activism depends on how persuasively national judges use the language of the judicial dialogue. To this end, they need to be familiar with both national law and the practice of supranational courts, and where necessary to distinguish themselves from the latter.

2. Chapter Two "Main Features of the Principle of Proportionality as a Set of Rules Used in Judicial Review of Restrictions on Fundamental Rights"

The second chapter examines the doctrinally accepted structure of the proportionality principle as a set of rules used in constitutional review of rights limitations. The analysis in this chapter builds on the concept, elucidated in Chapter One, that constitutionalism in the modern liberal democratic state is characterized by four features. First, the existence of a (mostly) written constitution; second, the establishment of democratically elected bodies bound by a catalogue of fundamental rights; and third, a constitutional court whose primary power is to

[10] See footnote 3.

protect the rights and the constitution[11] . To these features, in European terms, should be added a judicial dialogue between national and supranational courts. In the area of fundamental rights, this dialogue takes place between national courts and the European Court of Human Rights, which in practice functions as a European constitutional court of human rights. At the same time, the supranational, constitutional and supreme courts in Europe are embracing the principle of proportionality in the exercise of judicial review of restrictions on rights and are moving towards convergence of their practice in this area.

The principle of proportionality as a set of rules in judicial review is not comprehensive. It applies mainly to a certain range of rights which we can define as fundamental personal, civil and political rights. These rights are either fundamental and inalienable to the human person, such as the right to life, the prohibition of torture, the right to liberty, or they are fundamental to the establishment of a democratic and legal order (such as freedom of speech, freedom of association, the active and passive right to vote, etc.). Deciding on the proportionate limitations of these rights allows the court to be a participant in political processes and defines the new role of the national court in inter-institutional and supranational dynamics. The principle of proportionality, as a requirement only of the reasonableness of the restriction, rather than as a set of rules of legitimate aim, suitability, necessity and proportionality in the narrow sense, is commonly applied when examining restrictions on socio-economic and cultural rights, as they are not inalienable and inherent, nor are they fundamental to the democratic and legal order. In the context of these rights, states have a wide margin of discretion in how to regulate and define them in the national legal order. Therefore, this aspect of the principle is not the subject of a comprehensive study in the present work.

Chapter Two explores the main theories concerning the proportionality principle that have been developed in the writings of Robert Alexy and Aharon Barak[12]. The similarities and differences in elucidating the nature of rights, their scope and permitted limitations are examined.

Chapter Two describes the stages of the judicial review of restrictions of fundamental rights. This review is most often exercised by a constitutional court, although in some countries the supreme court has such powers. Judicial review of fundamental personal, civil and political

[11] **Weinrub, J.** The Modern Constitutional State: a Defence, Queen's Law Journal, Vol. 40, 2014, 165- 211, Queen's University Legal Research Paper No. 066, Available at SSRN: https://ssrn.com/abstract=2707241 (last visited Jan. 22, 2023)

[12] **Alexy, R.** A Theory of Constitutional Rights, (translated by Julian Rivers), Oxford University Press, 2002; **Barak, A.** (2012), Proportionality.

rights unfolds in 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, whereby the court considers 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-based analysis.

In examining the first stage of judicial review, the chapter provides for a classification of fundamental rights as defined in constitutional law doctrine: absolute and relative rights, negative and positive rights, personal, civil, political and socio-economic rights. The question of the scope of a right and the limitation of a right in order to protect another right or in order to protect some other constitutional value is considered. In examining the second stage of judicial review, the chapter firstly looks into the question of the constitutional basis of the principle of proportionality. In Bulgarian constitutional doctrine and practice, the principle of proportionality is derived from the principle of the rule of law. Next, the individual rules of the principle of proportionality are examined. In order to be proportionate, a restriction of a right must have a legitimate aim, be suitable for achieving that aim, be necessary (most lenient to the right) and be proportionate in a narrow sense.

The first rule of proportionality requires that the restriction has a legitimate aim. The legitimate aim is determined by the legislator and the legislator has a wide margin of discretion to do so. A legitimate aim means that the legislator may restrict a right only for certain reasons relating to the protection of a fundamental value. The legitimate aim is the starting point for assessing the existence of the other conditions of the restriction - suitability and necessity. Having determined whether the restriction of the right has a legitimate aim, the national court then moves on to assess the suitability of the restriction to achieve the aim (whether the restriction is suitable to achieve the aim). This rule of the principle is concerned with the intention of the legislator and seeks to answer the question of why it chose those particular measures to achieve the aim. It looks for a reasonable relationship between the restrictive measures and the purpose of the law. Next comes the rule of necessity of the restrictive measure. This means that the legislator is obliged to choose, among all the options open to him, the one which is most favourable to the right and, at the same time, capable of realising the legitimate aim. According to some researchers, this is the heart of the proportionality test and the analysis should stop there. This is because suitability and necessity are rules that have a factual, rather than a value laden, basis. In addition, in assessing the constitutionality of a statute, these rules

allow the court to defer to the legislature's decision, since it is facts, not value judgments, that are being assessed[13].

However, many constitutional courts do not stop there. If they judge that the law meets these criteria, they proceed to exercise judicial review by applying the rule of proportionality in a narrow sense (or to put it another way, balancing). According to Alexie and Barak, this is the heart of the proportionality rule.

Chapter Two explores the rule of proportionality in a narrow sense. Even if a statute has a legitimate purpose, the provisions it contains which restrict a right are appropriate to achieve the purpose and are most protective of the right, it is still possible that, because of the effect of the restrictive measures on the right, they are not proportionate in the strict sense of the term. In applying the latter rule of proportionality, the courts have asked whether the legislature's reasons for restricting the right to achieve some objective and the extent to which that objective will be achieved can justify the harm to the right.[14] The first three stages of the proportionality rule consider the aim of the law and the means of achieving it. The final stage is different because it considers the relationship between the aim of the restrictive law and the constitutional right. This rule of proportionality has generated the most debate in constitutional doctrine.

The principle of proportionality, as a set of the above rules, enables judicial decisions to be reasoned in a structured and transparent manner. Structured analysis allows judges to focus on issues that are important and understandable to the parties to the proceedings and relevant to the merits of the dispute[15], motivates them to set out detailed arguments for their decisions, allows them to avoid intuitive decisions and thus formalises a process in which there is also a high degree of value analysis (the final stage, proportionality in the narrow sense)[16]. Thus, by definition, the court arrives at transparent, structured and clear decisions, which lend

[13] **Lubbe-Wolff, G.** The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court, Human Rights Law Journal, Vol. 34, No. 1-6, 29 August 2014, p. 17.

[14] In the landmark Oakes case, Justice Dickson of the Supreme Court of Canada put it this way: "Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society." - R v Oakes (1986)

[15] **Stone Sweet, A. and Matthews, J.** Proportionality Balancing and Global Constitutionalism, Oxford University Press, 2019, pp 96-97.

[16] **Jackson, V.** Being Proportional about Proportionality (Review of David M. Beatty, the Ultimate Rule of Law, 21 Const. Comm. 803, 859 (2004), pp. 30-32.

additional legitimacy to constitutional review and increase the confidence of citizens and institutions in the court.

In the context of the judicial dialogue with supranational courts, the following should be pointed out. In judicial review of restrictions on fundamental rights, the constitutional court may reach two decisions on the merits: to declare the legislative decision unconstitutional or to uphold it[17]. In striking down a right-limiting legislative decision as disproportionate, the court enters into an inter-institutional dialogue with Parliament, encourages compliance with proportionality rules in the legislative process and ultimately brings the exercise of public power closer to the ideal of proportional government. According to Kumm, the adoption of the principle of proportionality in judicial practice has a disciplining effect *vis-à-vis* other authorities and especially the legislator. This, in turn, motivates the courts to exercise more restraint in assessing the decisions of the legislature[18]. Proportionality can thus be seen as reflecting two principles of the liberal democratic state, namely the principle of the protection of fundamental rights and the principle of democratic governance[19]. As Jackson points out, the principle of proportionality can be both important for democracy and for the protection of fundamental rights, insofar as it engages the legislator in applying the rules of proportionality to the restriction of rights, so that the measures restricting the fundamental right are suited to the achievement of the legitimate aim, are necessary as less intrusive on the right, and the benefits of achieving the aim outweigh the harms that result from violating the right[20] .

At the same time, the constitutional judge may reject the claim of unconstitutionality, considering that the restriction established in the law is proportionate and thus give additional legitimacy to the legislative decision. In the European context, the court uses the case law of the European Court of Human Rights both as a binding source of law and as a source of argumentation and accordingly (may) reasons its decision in the light of that case law. It may also distinguish its judgment from the supranational case-law by explaining why, in the particular situation, the limitation of the right is justified in view of the specificities of the national context. If the national court's analysis follows the established rules of proportionality, its decision will in most cases be understandable to the supranational court. In this situation, the supranational court, relying on the principle of subsidiarity and the rule that the national judge

[17] **Kumm, M.** Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate; Authority and the Point of Judicial Review, 1 EUROPEAN JOURNAL OF LEGAL STUDIES 1, 11 (2007)
[18] The decision *Animal Defenders International v. the United Kingdom* of the European Court of Human Rights is an interesting example in this respect.
[19] **Jackson, V.** *Constitutional Law in an Age of Proportionality*...., p. 3145.
[20] Ibid. p. 3146.

has a better knowledge of the national legal system, will refrain from intervening and re-assessing the issue[21].

Finally, Chapter Two concludes on the benefits of applying the principle of proportionality to judicial review of restrictions on fundamental personal, civil and political rights and on the view that it is a guarantee of democratic order and the rule of law. The principle has two important functions. Firstly, it enhances the legitimacy of decisions taken and the confidence of citizens in the courts by allowing the courts to overrule the legislature's decisions in an authoritative manner without causing an institutional crisis and violating the principle of separation of powers. Secondly, it allows national courts to apply the national legal framework in a clear and categorical manner, to draw arguments from the legal tradition and to place rights in their appropriate social context[22]. In doing so, they delineate the limits of the European Court of Human Rights' intervention and push it towards an active application of the principle of subsidiarity. In both contexts, the application of the proportionality principle as a set of consistent rules leads us to a new model of constitutional rights and has a disciplining effect against the use of excessive discretion[23].

This construction has its critics. In their view, the principle excessively restricts rights, leads to excessive interference of the judge with the prerogatives of other authorities, and implies a degree of incommensurability. These criticisms are valid, but they must be thought of in the context of the traditional idea of democracy as a system of checks and balances whose purpose is to distribute power so as to avoid tyranny. If this question is placed in the context of contemporary constitutionalism, it would appear that the principle of proportionality is not just a necessity, it is a familiar and convenient tool for legal analysis in a legal reality in which the judge applies not only the law but also supranational legal instruments and even foreign case law. In this sense, the impression of irrationality stems from the modern weakening of the ideas of normativism, and the entry of moral categories into law and its application.

The second chapter also builds on the conclusion drawn in Chapter One that, based on the case law of the German Federal Constitutional Court, the doctrine has created a general model of the principle of proportionality. This general pattern is familiar to constitutional courts in European countries and followed to one degree or another by them in deciding their cases.

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[21] See ECtHR case-law to this effect, Animal Defenders International v. the UK (GC), no. 48876/08, judgment of 22 April 2013, § 115, Von Hannover v. Germany (no. 2) (GC), no. 40660/08, § 107, Perincek v. Switzerland (GC), no. 27510/08, judgment of 15 October 2015, §§ 198 (v)-199.

[22] See **Barak, A.** Op.cit., p. 221.

[23] **Moller, K.** The Global Model of Constitutional Rights, 277-314 (2012); **Cohen-Eliya, M. and Porat, I.** *Proportionality and Constitutional Culture* ...

Indeed, the courts do not give reasons for each stage, and do not always follow the rules in their logical sequence. The relevance of each stage of the proportionality principle is important because the more consistently the court follows this pattern and the better it gives reasons for applying each stage of the proportionality principle, the more authoritatively it participates in the interinstitutional dialogue with national Parliament and in the supranational dialogue with the European Court of Human Rights. In this sense, applying the principle of proportionality does not mean blindly applying supranational case law to national cases; on the contrary, following the doctrine of proportionality implies reconciling national legal identity with the universal nature of human rights.

3. Chapter Three "The principle of proportionality in Germany, the United Kingdom and France"

Chapter Three aims to trace how the practice of applying the principle of proportionality has developed in the law of three European countries - Germany, the UK and France, what the influence of the ECtHR has been on the development of this practice, and what role the principle of proportionality plays in the judicial dialogue with supranational courts to delineate the limits of non-intervention. The three countries exemplify the adoption of the principle in the practice of reviewing limitations on rights in constitutional justice, its modification in a way that reflects national legal traditions, and its use in dialogue with the legislature and supranational courts.

The principle of proportionality emerged and developed in Germany as a result of the spread of natural law and contract theories of the nature of the state, the industrial revolution, the growth of the role and powers of administration in the 18th-19th centuries, and the need to control its acts and actions. In the absence of a stable constitution and a catalogue of fundamental human rights, the question of rights and their limitations has long been addressed in administrative law, which has been subject to the will of the legislature[24] . Until the Nazi regime came to power in 1933, administrative law doctrine and jurisprudence developed the principles of legality and respect for the fundamental rights of citizens, albeit within the framework of the formalistic approach to law characteristic of German legal doctrine. When

[24] Otto Mayer (1846-1924), the renowned German legal scholar and pioneer of administrative law in Germany, said, "Constitutional law comes and goes; administrative law is here to stay." This phrase greatly illustrates the centrality of administrative law in the 19th century German legal system, where constitutions changed but the state and its expanding administration continued to function.

the Nazis came to power, positive legal theories taken to the extreme, combined with German formalism, became a powerful weapon in the hands of totalitarian power[25] .

The historical development of restrictions on fundamental rights in Germany and their control, including by tracing the development of the principle of proportionality, is an important starting point for understanding the German model of constitutional review after World War II, the progressive and activist stance of the Federal Constitutional Court (FCC), and its significant influence on the case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). Through the jurisprudence of the two supranational courts, the doctrine of proportionality, developed mainly in German jurisprudence, has spread to other European countries and beyond Europe's borders, to Israel, South Africa, Canada, Australia and New Zealand.

The German Constitution of 1949 led to a drastic change in administrative law after World War II. The principle in the Constitution that human dignity is an inalienable and absolute right binds all state organs, and constitutional rights are fundamental to the functioning of state powers, including the executive.

In German doctrine today, the prevailing understanding is that the current model of fundamental rights protection in Germany, in which the unwritten principle of proportionality plays a central role, is the result of the interaction between centuries of administrative doctrine and practice and modern human rights standards embodied in the new constitution. The consistent application of the principle of proportionality in the practice of controlling restrictions on fundamental rights in Germany has led to mutual influence and a constant and fruitful dialogue between the FCC and the ECtHR. More recent ECtHR case law against Germany shows a consistent application of the principle of subsidiarity where the national court has applied the principle of proportionality[26] .

In the UK, 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.

[25] **Becker, F.** (2017). The Development of German Administrative Law. George Mason Law Review, 24, 453-476.

[26] See for example Cabucak v. Germany, no. 18706/16, judgment of 20 December 2018 (Article 8), Wunderlich v. Germany, no. 18925/15, judgment of 10 January 2019 (Article 8), Bild GmbH and Co. KG and Axel Springer v. Germany, nos. 62721/13 and 62741/13, judgment of 10 January 2019 (Article 10), Axel Springer SE v. Germany, no. 8964/18, judgment of 17 January 2023 (Article 10).

Parliament's special place prevents its acts from being subject to full judicial review for constitutionality. Although this concept is changing and now allows a form of review through the procedure for declaring a statute inconsistent with human rights provisions, the courts still have no jurisdiction to strike down or block the application of statutory provisions. This is a serious departure from modern constitutional justice postulates, particularly those developed in Germany and France. Secondly, there is no constitutional catalogue of rights in the UK. As the UK has no written constitution, until the Human Rights Act 1998, fundamental human rights were undefined. They are defined in two ways - they are inferred in the practice of the English courts through precedent (procedural rights are a typical example) or sporadically in the interpretation of legislation in the light of Convention law and comparative legal analysis[27] . This lack of clarity as to what the rights are, their scope and permitted limitations also has implications for the development of judicial review of administrative acts affecting fundamental rights of citizens.

A review of the development of the proportionality principle in the UK shows that English courts now apply the proportionality principle when hearing cases under the Human Rights Act. When exercising judicial review in cases that fall outside this area, the courts continue in principle to apply a traditional test of reasonableness. This demonstrates that the two types of review, which are exercised in both the constitutional and administrative law spheres, can be successfully applied in parallel with regard to the subject matter test. This differentiated approach implies a greater understanding of the separation of powers and the competences of the various authorities and gives the administrative authority freedom in areas where its expertise is crucial and decisive.

The prevailing view in the UK on the principle of proportionality is that it has many advantages in assessing restrictions/impairments on fundamental rights. First, it offers a structured approach to the consideration of legislative and administrative acts. Secondly, this structured approach implies clearer and more reasoned administrative acts, judicial decisions, but also a clear and coherent legislative process. Thirdly, in proportionality analysis, the court enters into a more comprehensive examination of the administrative act. Here, the court examines the manner in which the decision was reached as well as the substance of the decision itself.

In France, the principle of proportionality is developing simultaneously and as a result of the strengthening of the protection of fundamental human rights. The contemporary nature

[27] See **Leyland, P. and Gordon, A.** Textbook on Administrative Law, Oxford University Press, 2005, pp 211-212.

of this principle is the fruit of the historical development of the concept of human rights in France *vis-a-vis the* postulates of legal positivism and the centrality of law as a normative act. The specific way in which the principle has entered 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 have been the guiding principles. As in Germany and the UK, the principle naturally emerged and developed first in administrative law in the context of control over administrative activity, especially after the separation of the Council of State from the administration in 1880.

France is a prime example of consistent respect for the principle of separation of powers and a cautious attitude towards judicial intervention in the prerogative of the legislative and executive branches. At the same time, there is effective protection of human rights in France today, both in the context of specialised constitutional justice and by the ordinary courts, through the application of the Convention and ECtHR case law in priority to ordinary law. In addition, there is a well-developed national jurisprudence of administrative review in France Indeed, the application of the proportionality principle in French review of restrictions on rights has developed in a specific and peculiar way, to the extent that theory speaks of a French "specificity" of application of the proportionality principle[28] . The term proportionality for the French jurist means much more than a legal principle. In France, proportionality is a value that precedes its use in jurisprudence. According to French jurists, the spread of the principle of proportionality in jurisprudence is a natural necessity, the result of the growing role of human rights in modern legal systems[29] .

A peculiarity of the French model of application of the principle of proportionality until the constitutional reform of 2008 is that the protection of fundamental rights in France and the corresponding application of the principle of proportionality in specific cases is carried out under the strong influence of the Convention and the case law of the ECtHR[30] and especially by the ordinary courts. Due to the lack of access of citizens to the Constitutional Council, it was largely excluded from the rights dialogue until 2008. This situation creates a tension between the practice of the ordinary courts and the national Constitution. Thus, influenced by a number of factors, not least a sense of national pride, a desire to bring rights protection 'back home' and

[28] **Marketou, A.** (2021). Local Meanings of Proportionality (Cambridge Studies in Constitutional Law). Cambridge: Cambridge University Press. doi:10.1017/9781108993364 ; Bousta, Rhita. (2007). La "spécificité" du contrôle constitutionnel français de proportionnalité. Revue internationale de droit comparé. 59. 859-877. 10.3406/ridc.2007.19551. p. 875.

[29] **Martens, Paul.** L'irrésistible ascension du principe de proportionnalité. N.p., 1992.

[30] See also Comparative study on the implementation of the ECHR at the national level, Council of Europe, pp. 168-175.

a desire to respect national constitutional identity, a major reform of constitutional justice was implemented in 2008 after years of effort and political negotiation. The so-called indirect constitutional complaint was introduced[31] , and the Constitutional Council actively engaged in dialogue about rights and their justifiable limitations.

The development of the principle of proportionality takes place in the context of three features of the French legal system. First, the law has traditionally been at the heart of the French legal system. Secondly, the body closest to the facts (administrative or legislative) is required to apply the principle of proportionality, not the courts. Thirdly, the national court should refrain from interfering excessively with the discretion of the administrative authority or the legislator, so that the concept of restraint rather than activism is the guiding principle in France. However, since 2010, constitutional judges have applied the principle of proportionality as a set of rules of legitimate aim, appropriateness, necessity and proportionality in the strict sense. It should be noted, however, that these rules are not applied systematically every time. The Constitutional Council has been criticized for inconsistent application of the principle, as well as for the brevity and vagueness of its reasoning in its decisions. In recent years, the Constitutional Council has changed this practice and sought to participate more actively in the dialogue with other courts.

The study of the above three countries shows some similarities in the application of the proportionality principle. In the first place, it originated and developed first in administrative law and is associated with ideas of the legality of administrative activity. With the development of the theory of the protection of fundamental rights, the application of the principle leads to a more thorough examination of the limitation of the right and pushes the court to enter into the discretion of the administrative authority. Further, the dialogue with the European Court of Human Rights led to a new development of the principle and finally shaped it as rules of legitimate aim of the restriction, appropriateness, necessity and proportionality in a narrow sense. It is noteworthy, however, that this process is not unilateral. The European Court of Human Rights models the principle of proportionality, but the content that the national judge puts into it also consists of national legal concepts related to tradition and identity. In this way, national courts engage in a dialogue about rights and their limitations, drawing the boundaries of non-intervention and inviting the supranational court to exercise greater restraint.

4. Chapter Four "The Principle of Proportionality in the Practice of the Bulgarian Constitutional Court".

[31] See **Tsekov, A. The** Indirect Constitutional Complaint, in. "Contemporary Law", 2018, № 3

The topic of proportionality in the practice of the Bulgarian Constitutional Court is poorly studied in the doctrine[32] . However, the principle of proportionality has been consistently applied by the Constitutional Court in its case law on the review of restrictions on fundamental rights. In fact, the main problem regarding the application of the principle of proportionality in the Bulgarian model of constitutional review is not rooted in the Court's apparent reluctance to apply it, but in its inherently limited capacity to rule on human rights and their limitations.

Chapter 4 examines the principle of proportionality on the basis of two theses, which are based on the scarce case law of the Constitutional Court on the consideration of restrictions on fundamental rights (about 80 decisions). First, the need for an individual constitutional complaint, or other means of ensuring citizens' access to the Constitutional Court, is now quite palpable. Allowing citizens to refer specific disputes to the Constitutional Court would enable it to develop a jurisprudence on the scope of rights and their proportionate limitations so as to engage actively in dialogue with the European Court of Human Rights and the Court of Justice of the European Union. In this way, important and controversial questions about rights and their limitations will be considered in the context of proportionality, within the framework of the national human rights system, and the Constitutional Court will have the opportunity to argue convincingly for one or another national legal position on these issues. Secondly, and in the context of the foregoing, the European Court of Human Rights' concern to apply the principle of subsidiarity[33] and the principle of proportionality should be borne in mind. To this end, the European Court of Human Rights has repeatedly stated that, where a national court has applied the principle of proportionality in accordance with the criteria set out in its case law, the ECtHR will only interfere with its assessment as a last resort[34] . In Bulgaria, the application of the principle of proportionality in constitutional justice is gradually converging with the way it is applied in other national constitutional courts with developed rights jurisprudence and with the doctrinal model we described in Chapter Two. This trend is particularly evident in the Court's

[32] Emilia Drumeva has a short presentation on the topic in the textbook Constitutional Law of the Republic of Bulgaria, Ciela, 2018, pp. 684-687.

[33] With the entry into force of Protocol No. 15 to the Convention, the principle of subsidiarity and the discretion of States was included in the text of the Preamble to the Convention - "...Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention..".

[34] See Animal Defenders International v. the UK (GC), no. 48876/08, judgment of 22 April 2013, § 115, Von Hannover v. Germany (no. 2) (GC), no. 40660/08, § 107, Aksu v. Turkey (GC), no. 4149/04, judgment of 15 March 2012, § 67, Perincek v. Switzerland (GC), no. 27510/08, judgment of 15 October 2015, §§ 198 (v)-199, MGN Limited v. the UK, no. 39401/04, judgment of 18 January 2011, §§ 150 and 155, Palomo Sanchez v. Spain (GC), no. 28955/06, judgment of 12 September 2011, § 57, Axel Springer AG v. Germany, no. 39954/08, judgment of 7 February 2012, § 88, and many others.

more recent jurisprudence. At the same time, at this stage the Constitutional Court does not yet consider the various components in detail and consistently, and this leads to ambiguities and sometimes contradictions in its practice. It is common for the analysis of limitations of rights to be more general, and for the various rules of proportionality to be mixed and overlap.

Chapter 4 examines the legal and institutional context in which the Constitutional Court has adjudicated in the field of rights and traces systematically its jurisprudence on the application of the principle of proportionality in the context of the four rules of proportionality. Two examples of judicial dialogue - realized and unrealized - with the European Court of Human Rights are given. The lack of dialogue does not prevent the two courts from referring to each other's jurisprudence; in this sense, Bulgaria is not excluded from the trends of constitutionalisation of international law and internationalisation of constitutional law. However, a genuine dialogue is lacking due to the extremely limited capacity of the Constitutional Court to decide individual cases. In practice, the constitutional framework deprives the Constitutional Court of effective participation in the human rights protection system in Bulgaria. Therefore, this study argues that expanding access to constitutional justice and applying the principle of proportionality as a set of rules for assessing limitations on individual, civil and political rights will allow the Constitutional Court to fully participate in the national inter-institutional dialogue and, most importantly, will include it as an equal participant in the dialogue with supranational courts.

Chapter Four concludes by arguing that one of the central issues in contemporary constitutionalism is that of the right to defend against the perverse exercise of public power. In the Bulgarian Constitution, this right is enshrined in Article 56(1): 'Every citizen has the right to a defence when his rights or legitimate interests are violated or threatened' and is the subject of extensive study in Bulgarian doctrine[35] . Contemporary constitutionalism requires that this right be linked to its basic features and, above all, to the judicial protection of fundamental rights within a comprehensive constitutional justice system. In the context of the above, it is clear that the Bulgarian Constitutional Court does not fully participate in the dialogue on rights and their limitations and does not fully apply the principle of proportionality as an instrument for the protection of rights and a guarantor of their fair limitation. In this line of thought, the

[35] See **Nenovsky, N.** The right to protection under Article 56 of the Constitution - Legal thought, 1/1994, pp. 15-18; **Nenovski, N.** The constitutional right to protection, Sibi Publishing House, 1998; **Nacheva, S.** The right to protection - reflection on one of its constitutional aspects. - In. Constitutional principles of civil society". UNWE Offset Edition. S., 1997, pp. 31-40; **Nacheva, S.** On constitutional protection and constitutional defensibility of the right to protection - Contemporary Law, 4/1999, pp. 18 - 29; **Nacheva, S.** Again on the constitutional protectibility of the right to protection - Society and Law, 1-2/2006, pp. 6-17

Bulgarian Constitutional Court has not yet entered into the role that the new constitutionalism assigns to it - that of a guardian of rights, an active participant in political processes, an expressor of national sovereignty and a bearer of the Bulgarian, but also European legal tradition.

III. CONTRIBUTORY MOMENTS

The main contributions of the development are the following:

(a) The work examines the changes in constitutional doctrine under the influence of globalisation, the technological revolution, the development of human rights doctrine and international law and places the principle of proportionality in the context of modern European constitutionalism. Particular attention is paid to the new role of the national court as an actor in the political processes at the national level and an expressor of national sovereignty (constitutional identity) at the supranational level.

B) The in-depth study of the principle of proportionality in judicial review of restrictions on personal, civil and political rights. The classifications of rights accepted in constitutional doctrine are examined and the various manifestations of the principle of proportionality are explained in the light of the nature of the right in question. The nature of the four rules underlying the principle of proportionality - legitimate purpose of the restriction on the right, appropriateness, necessity and proportionality in the narrow sense - is explored.

C) The practice of the Constitutional Court on the application of the principle of proportionality is summarized and analyzed against the background of the development of the principle of proportionality in the jurisprudence of Germany, Great Britain and France. The conclusion drawn about the institutional but also legal "insufficiency" of judicial review of limitations on rights and the pressing need for the Constitutional Court to engage in an active dialogue with national representative institutions in order to achieve just governance in defence of human freedom, and with the supranational court to delineate the limits of non-intervention through an authoritative and thorough definition of rights and their justifiable limitations both in the context of their universality and through the prism of

IV. PUBLICATIONS

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