THE DOCTRINE OF PROPORTIONALITY IN LGBT RIGHTS ADJUDICATION: CHALLENGING HUMAN RIGHTS

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Abstract

In this thesis, I will argue that the methodological framework of proportionality provides features indispensable for a modern human rights adjudicatory body, be it national or international. Proportionality is necessarily capable of increasing the reasoning quality, its clarity and, most importantly - both the internal and international legitimacy of the judgments in LGBT-related cases. At the same time, proportionality, if applied appropriately, is capable of reconciling two opposing groups of interest with regard to the equal protection of rights of LGBT groups, if all four elements of proportionality review are engaged (the legitimate aim, the rational connection between the limiting mean and its aim, the lack of less intrusive alternatives, and balancing). On the one hand, it is dignity of LGBT groups and right not to be discriminated at stake, while on the other - the protection of such values as - the traditional family and public morals. As redundant as they may often sound, these values do necessitate a comprehensive approach by human rights courts. I will attempt to defend my argument by providing two 'positive' and two 'negative', in my view, examples of proportionality test application, which will be analyzed in light of the aforementioned four-step paradigm.

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Abbreviations

CoE - Council of Europe

ECHR - Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR - European Court of Human Rights

EU - European Union

FGCC - Federal German Constitutional Court

LGBT - An umbrella term comprising lesbians, gays, bisexuals and transsexuals

SACC - South African Constitutional Court

SCC - Supreme Court of Canada

SCJ - Supreme Court of Justice of the Republic of Moldova

UK - United Kingdom

USSC - The Federal Supreme Court of the United States of America

Introduction

"The Constitution is not a recipe for suicide, and human rights are not a prescription for national annihilation"[1]

Any national or international act that provides for a set of fundamental rights, which are ought to be protected not only from being violated by a given state, but against from various values that the state might want to protest for various reasons.[2] At the same time, any state that pretends to seek for a democratic path of development will inevitably have to determine a way for providing a fair balance for the rights of individuals and the public interests or values, which might restrict the former.

A veritable democracy is based on fundamental rights, while the (arbitrary) sacrifice of these for the sake of any given public interests cannot become a routine.[3] Rather, any democratic state should provide a valid justification for the limitation of a right in favor of another value, be it another right or a public interest, while the concept of proportionality attempts to fill this gap.[4] For instance, what should have priority - the limitation of free speech as opposed to the protection of religious believer that might get offended consequent to the exercise of the former[5]; or should the prohibition of inhuman treatment be sacrificed for public safety considerations when individuals suspected of terrorist acts might possess valuable investigative information?

[1] Barak, Aharon. Proportionality: Constitutional Rights and Their Limitations. Cambridge, U.K.: Cambridge University Press, 2012, p.163 (hereinafter - Barak:1)
[2] Tsakyrakis, S. "Proportionality: An Assault on Human Rights?" JEAN MONNET WORKING PAPER, no. 09/08 (2009), p.10. Accessed March 27, 2015. http://www.jeanmonnetprogram.org/papers/08/080901.pdf
[3] Barak, Aharon, Proportionality(2), in: Rosenfeld, Michel, and András Sajó. The Oxford Handbook of Comparative Constitutional Law. Oxford, U.K.: Oxford University Press, 2012, p.749 (hereinafter - Barak:2)
[4] Ibid.
[5] Brems, Eva. Conflicts between Fundamental Rights. Antwerp: Intersentia, 2008, p.1

Proportionality attempts to provide an *ab initio* methodology for answering these questions, before a case arrives to the judge's table. It provides a mindset not only for the judiciary, but also for legislature and other state bodies before they commit acts that might excessively limit the fundamental right of an individual.[6]

The concept of proportionality firstly emerged from the German administrative and constitutional law, but later on it has become the lingua franca of modern constitutional review, resembling a culture of justification that ignores the divergences in the systems of constitutional/human rights review.[7] This is a culture of justification, because the basic question/element of proportionality analysis, notwithstanding the differences in the methodological approach in different jurisdictions, is - had the state pursued a proper aim when it limited/intended to limit a fundamental right?[8]

Methodologically proportionality asks four questions:

1. Does the law limiting a fundamental right have a proper purpose?

2. Can the purpose sought be rationally connected with the limiting means employed?

3. Could the same aim be reached by less limiting means?

4. Does the potential benefit of the limiting mean overweight the damage caused to the limited right?[9]

The purpose of proportionality is not to make everyone happy about an infringement of a given right, but rather to secure the superiority of fundamental rights once they conflict with other values.[10]

[6] Barak:2, p.749

[7] Cohen-Eliya, Moshe, and Iddo Porat. Proportionality and Constitutional Culture. Cambridge: CUP, 2013, p.153

[8] Huscroft, Grant, Bradley W. Miller, and Grégoire C. N. Webber. Proportionality and the Rule of Law: Rights, Justification, Reasoning, Cambridge: CUP, 2013, p.2

[9] Ibid. This mythology is by no means not a universal response to all the issues pertaining to constitutional review, however it is going to be applied in the relevant case-law analysis in this thesis, as, in author's view, most of its elements are engaged in thse proportionality review of the authoritative courts.

[10] Barak:2, p. 749

Proportionality is not only a form of judicial review, but also a mindset for all state institutions.[11] On the one hand, it obliges a state agent to provide in a transparent manner a legitimate aim for the limitation of a human right, on the other - it provides a transparent platform for a constitutional discourse on the legality of a limitation of a fundamental right.[12] From an interpretative point of view, proportionality allows the limitation to be assessed in the light of current social conditions[13], whereas its scope may well remain unchanged.[14]

As a case study for this thesis, I have chosen the topic of LGBT rights due to their debatable nature in the respective societies, which requires a rather "gentle" approach towards the reasoning of a case, when a human rights adjudicatory court's decision will have as a consequence the positive development of rights for LGBT groups. At the same time, the values, which are usually brought by governments for LGBT rights' limitation, are themselves rather controversial.

In this thesis I will further defend the argument that proportionality enhances the objectivity and clarity of judicial decisions if it is applied by giving due consideration to the four basic elements mentioned above. It well serves not only for improving the legitimacy of judicial decision internally, it also does improve the quality of the reasoning.[15] In addition, it provides an opportunity for the national judiciary bodies to diminish the risk of finding the respective state in violation of a fundamental right - as explained in the Moldovan case analysis.

I will argue that proportionality can improve the legitimacy of an international tribunal's decisions that run the risk of being ignored by the respective state. Proportionality does not preclude the Court from coming to the "right" or "wrong" decision, it merely provides a methodology, that

[11] Ibid.
[12] Ibid.
[13] Case of Tyrer v. United Kingdom, ECtHR Judgment. of April 25, 1978, para.31, Accessed on March 27, 2015. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57587
[14] Barak:2, Ibid.
[15] David Dyzenhaus, Proportionality and Deference in a Culture of Justification, in: Grant Huscroft et al., op.cit., p.235

inevitably obliges a human rights tribunal to adequately address the concerns of a subject that happened to violate a fundamental right. Given the tensioned "relationship" between the Strasbourg Court and Russia, the accurate application of proportionality, backed by a 'diplomatic approach', in my opinion, would increase chances of further compliance with a judgment that is highly debatable in the national realm. Furthermore, I will argue that the consistent applicantion of proportionality methodology has the potential of making the reasoning in any given decision more clear, by giving due regard to the values engaged in the dispute.

Thiss thesis structurally consists of three chapters. In the first chapter I will provide a general overview of the concept of proportionality. I will briefly introduce its historical development; argue why it is necessary and which are its aims and objects. In the second chapter I will analyze and provide a comparative overview of the four 'classic' elements of proportionality review, as well as the ones applied by the Strasbourg Court. In addition, I will introduce the concept of the margin of appreciation in the jurisprudence of ECtHR and elaborate on its interplay with balancing, as well as the categories of right that can be subject to them. Lastly, in the third chapter I will analyze the way proportionality has been applied in four LBGT-related cases of the ECtHR, Moldovan Supreme Court of Justice and the South African Constitutional Court.

Chapter 1: General considerations on the principle of proportionality in human rights adjudication

Nowadays proportionality has become a commonly accepted feature in the constitutional and human rights[16] adjudication, it seeking to monitor the aims and the justification when states attempt to impose limitations on human rights and at the same time bars them from placing limitations on human rights beyond the necessity.[17] In other words, proportionality became the "jurisprudential model at the center of the modern Constitutional Court's work"[18], although much criticized as "[failing] spectacularly to deliver what it promises".[19]

In addition, although proportionality is not the necessary sine qua non condition to the existence of constitutional review, it can rightfully be considered an instrument that can adequately preserve human rights in a pluralistic, democratic manner.[20]

The principle of proportionality is not a legal innovation dated with the 20th century, it having far-going historical roots and was applied in different legal systems, including in international law[21] before the appearance of the European Convention on Human Rights [22] (hereinafter – ECHR/Convention) or became a part of reasoning in the jurisprudence of the European Court on Human Rights (hereinafter – ECtHR), of the Inter-American Court of Human Rights or of national

[16] The concepts of human rights/fundamental rights/constitutional rights will we used in this work interchangeably.
[17] Andrew Legg, The Margin of appreciation in International Human Rights Law; Deference and Proportionality, Oxford: Oxford University Press, 2012, p.178
[18] Klatt, Matthias, and Moritz Meister. The Constitutional Structure of Proportionality. Oxford, U.K.: Oxford University Press, 2012, p.2 (hereinafter - Klatt)
[19] M.Luterin, The lost meaning of proportionality, in: Proportionality and the Rule of Law, Edited by G. Huscroft, B.W.Miller and G.Webber, Cambridge University Press, 2014, p.36
[20] Barak:1, p.457-458
[21] J. Christoffersen, Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights, Leiden, Martinus Nijhoff Publishers, 2009, p. 33
[22] Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome, 4 November, 1950. Accessed November 20, 2014: http://www.echr.coe.int/Documents/Convention_ENG.pdf

jurisdictions.[23] Additionally, given that ECtHR or by any other court with the prerogative of constitutional adjudication, for this purpose, might have its own view upon the scope of proportionality , it might be too much to say that one will not understand its essence without a historical background.[24]

Besides providing the reader with a definition of proportionality, in this chapter the author will present the historical basis of proportionality and its place beyond the boundaries of human rights law. In addition, it will answer how proportionality differs from other forms of legal analysis, thereby the function(s) of proportionality will be elaborated on. Finally, a brief overview of the existing theoretical and practical models of proportionality will be provided.

1.1 Conceptualizing proportionality

1.1.1 Proportionality in different legal fields

Proportionality principle had 'ancient' legal implications. For instance the lex talionis rule was considered a 'measured response' to the offence.[25] In terms of its criminal law origins, the notion of proportionality had been incorporated already in the early Roman law, whereas Magna Carta recognized the principle as follows: "For a trivial offence a free man shall be fined only in proportion to the degree of his offense, and for a serious offence correspondingly but not so heavily as to deprive him of his livelihood."[26]

Grotius extrapolated the ancient meaning of proportionality to the modern needs and linked the idea of justice as proportion to the idea of interest and balancing, which further was articulated in the idea of proportional self-defense of nations.[27] Subsequently the international law doctrine of

[23] A. Legg, op.cit., p.178
[24] Christoffersen, op.cit., p.31
[25] Barak:1, p.175
[26]Ibid., p.176
[27] Engle, Eric. "THE HISTORY OF THE GENERAL PRINCIPLE OF PROPORTIONALITY: AN OVERVIE." Dartmouth Law Journal, no. 10 (2009), p.5

proportionality started to emerge, particularly in the area of International Humanitarian Law (hereinafter – IHL) as part of the "Just Law" doctrine, which provided that a balance between the utility and the damage inflicted by war had to be respected.[28]

In the contemporary IHL the principle of proportionality is applied, for instance, in relation to the incidental life loss or the destruction of civilian objects.[29] However, the proportionality perception within the human rights and IHL categorically differ. Thus, in case of human rights, the means-end relationship is crucial for the proportionality assessment, and this can be easily noticed on the example of curtailing the right to life. Proportionality in IHL does not engage in measuring the quantitative loss of combatants' lives in jus in bello proportionality assessment, but considers instead only whether unnecessary suffering was inflicted upon the soldiers.[30]

1.1.2 The development of the modern concept of proportionality

The modern history of proportionality can be traced to the German legal tradition, it having its roots in administrative, criminal, and only afterwards in the constitutional tradition of the Federal German Constitutional Court (hereinafter – FGCC). However, as B.Schlink noted – there is nothing inherently German about proportionality, the latter being a mere response to a universal legal problem, on how to reconcile the fundamental rights of individuals with the extensive authority of the state.[31] Firstly the doctrine was embedded in one rule, which granted the police

[28] Ibid.

[29] Article 51 (5) (b) of the Additional Protocol 1 to Geneva Convention of August 12, 1949, Relating to the Protection of Victims of International Armed Conflicts. Accessed March 27, 2015: https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=4BEBD9920AE0AEAEC12563CD0051DC9E

[30] Newton, Michael A., and Larry May. Proportionality in International Law. Oxford: Oxford University Press, 2014, p.126

[31] B. Schlink, Proportionality, In: The Oxford Handbook of Comparative Constitutional Law, Edited by M.Rosenfeld and A. Sajo, Oxford, OUP, 2012, p.728-729 (hereinafter – Schlink:1)

virtually unlimited discretion in assuring the public safety and order.[32] Subsequently, once the idea of individual rights started to spread in Prussia, the Prussian High Administrative Court at the end of 19th century limited the powers of the police to the means that were fit, necessary and proportionate to the aim stated afore, thus equating the non-arbitrariness with proportionality.[33] However, it was the German Constitutional Court that had firstly applied the principle of proportionality in the second half of the 20th century in the Pharmacy case[34] (see Chapter 2.1) and shaped its current "success", after which the courts from most of the continental Europe, Israel, Canada and South Africa transposed the principle of proportionality into their own jurisprudence.[35]

1.2 Proportionality as a legal principle

1.2.1 No escape from proportionality?

Proportionality had become a notion, which cannot leave beyond its comprehension, to a bigger or lesser extent, any branch of law. And indeed, proportionality might rightfully be considered a part of "fairness" (in its trivial sense) in the everyday life, thus attaining far-reaching dimensions. For instance, Schlink provides us with an example of a fictitious court, which has to deal with a (potentially tort law case) based solely on the 'moral merits', i.e. in the absence of any legal rules. The example tells us the story of 2 neighbors: John, who happened to borrow Frank's car without obtaining his permission. Frank could not drive his mother, who stood in rain for several hours. Frank asked the "court" to make John 'at least apologize'. On the one hand, we have a clearly immoral act, which normally is supposed to entail some kind of deterrent and reparatory

[32] Schlink, Bernard. "PROPORTIONALITY IN CONSTITUTIONAL LAW: WHY EVERYWHERE BUT HERE?" Duke Journal of Comparative & International Law, no. 22 (2012), p.294. Accessed March 27, 2015. http://scholarship.law.duke.edu/djcil/vol22/iss2/5 (hereinafter – Schlink :2)
[33] Ibid, p.295
[34] Dorsen, Norman, Michael Rosenfeld, Andras Sajo, and Susanne Baer. Comparative Constitutionalism: Cases and Materials. 2nd ed. St. Paul, MN: Thomson/West, 2010, p.228 (hereinafter – Dorsen)
[35] Schlink:2, p.296

consequences. However, on the other hand, Jack's wife's waters have broken and he had no other alternative than borrowing the claimant's car. In addition, both of them were accustomed to borrowing each other's goods. Thus, given the state of necessity in which Jack's wife found herself (legitimate end) and the lack of other alternative and appropriate way to transport her safely and to save her life by transporting her to the hospital (necessity) will inevitably push us the judges towards a proportionality analysis, regardless of the outcome.[36]

Proportionality is thus a juxtaposition of the means used by a subject, by which we "justify, condemn the action based on the legitimacy of the end pursued and of the helpfulness, necessity, and appropriateness of the action as a means to that end"[37], a "legal standard, enforceable by the courts in the process of review of state action".[38] It is strongly inter-related, but does not (entirely) overlap with the notion of balancing, which is not necessarily clear, as we shall see, in the practical application of the concept.

1.2.2 The aims of proportionality

Proportionality is aimed at a constant (and ideally consistent) review of rational justifications upon which the state can rely in order to limit the protection a fundamental right, by taking into account the circumstances of each case.

Thus, firstly, the need of a rational justification for the limitation of a right is not exclusively a matter of judicial review, but is inherent to the very outset of sub-constitutional act's enactment, where all the relevant state bodies ought to consider the rationality of the justification.[39] It can be argued that proportionality is the best method of judicial review meant "to determine the proper

[36]Schlink:2, p.291-292
[37]Ibid, p.292
[38] Taskovska, Dobrinka. "ON HISTORICAL AND THEORETICAL ORIGINS OF THE PROPORTIONALITY PRINCIPLE." Iustinianus Primus Law Review III, no. 04 (2012), p.1. Accessed March 27, 2015. http://www.law-review.mk/pdf/04/Dobrinka Taskovska.pdf
[39] Barak:1, p.459

balance between the fundamental rights and the public interest"[40], thus having direct repercussions upon democracy and realization of the rule of law principle.[41] It resembles the "triumph of reason over necessity"[42], as it does not allow a state that does have an efficient adjudicatory body in place, to set rights' limits with an unlimited extent.

Secondly, proportionality on national and international level have somewhat similar functions: on domestic level - it balances the powers and determines the discretion of the legislature on one hand, on the other adequately considers a right at stake, depending on how strictly a court applies the proportionality principle [43] ; whereas on international level proportionality determines the discretion of states in limiting the fundamental right and freedoms to the extent admissible under the specific instrument. The latter aspect (margin of appreciation) will be discussed in more detail in the first part of the second chapter.

Thirdly, proportionality initially being a concept that operates with a highest degree of abstraction[44], is a methodological tool, composed of 4 elements: legitimate purpose, rational connection of the mean with the aim pursued, necessity and balancing (also called proportionality stricto sensu).[45] This shall be considered the working definition of proportionality used in this thesis.[46]

In other words, formally, it can be seen to reflect a rule (at least in some jurisdictions), and it might be reflected in the limitation clause (for instance Article 10, paragraph 2 of ECHR) or in the

[40]Ibid, p.472
[41]Ibid, p.473
[42] Poole, Thomas. "Proportionality in Perspective." LSE Law, Society and Economy Working Papers, no. 16 (2010), p.6. Accessed March 27, 2015. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1712449
[43] D.Susnjar, Proportionality, Fundamental Rights, and Balance of Powers, Leiden, Martinus Nijhoff Publishers, 2010, p. 3
[44] Barak:1, p.542
[45]Ibid, p.133
[46] M.Luterin, op,cit., p.21

jurisprudential developments (where a limitation clause does not exist, but is implied[47]). An "aggregate approach"[48] is necessary in order to make the abstract rule of proportionality work, meaning that all components of the proportionality test have to be considered[49] in each particular case in the same priority.

Fourthly, proportionality may be perceived as a principle as it is a response to a universal legal problem, since once it is understood that any government has a substantive discretion but also limited in dealing with its tasks, both the powers of the government and the its limits are blurry and necessitate a balance. The principle of proportionality thus represents an instrument designed to reconcile both the wide powers of the government and the unclear limits of a possible restrictions to fundamental rights.[50]

Proportionality not restricted to conflicts of state versus citizen and citizen versus citizen (conflicting interests), it also comes into play in case of conflicting state powers, given their unclear width and limits in the constitutional texts.[51] In the first case the principle of proportionality will be triggered once a conflict of interests embedded in different fundamental rights and freedoms or between the fundamental right and the power of the legislature to limit the former emerges.[52] Here one might notice the same issue of vagueness that was mentioned in the case of governmental powers. Fundamental rights have thus a wide-spreading effect over a legal system and their content is not clear cut, their scope being subject to constant change. Such is the case, for instance, of the ECHR, which due to the "living instrument"[53] doctrine of the ECtHR is applicable in an ever-widening range of contexts, consequently expanding the scope of the

[47] Klatt and Meister, op.cit., p.19
[48] Barak:1, p.132
[49] Ibid .
[50] Schlink:2, p.296
[51] Ibid, p.296
[52] Ibid, p.297
[53] Tyrer v. United Kingdom, see note 13 above, para.31

fundamental rights enshrined in the Convention, inherently expanding the obligations imposed upon the member states.[54] This issue will be tackled in more detail in the second chapter of the thesis.

Fifth, the principle of proportionality is a democratic instrument meant to reconcile opposing interests or interests of different groups. Proportionality thus serves the purpose of preservation of democratic statehood, where it plays a dual role. On one hand, by requiring a valid justification for the limitation of a fundamental right, proportionality test does not allow human rights to be annihilated for the sake of a public/national interest. On the other, it does not allow human rights "to become a weapon for the destruction of the democratic state".[55] A viable democracy is based on the mutual respect between fundamental rights and public interests, both of them "being a part of the constitutional structure, which both established the rights and enables their limitation".[56]

1.3 The interplay between the concept of proportionality and fundamental rights

1.3.1 The limited nature of fundamental rights as objects of the proportionality test

The most modern constitutions protect a wide range of rights that virtually cover all sorts of actions, behavior and expression, which is a valuable asset in the modern world, whereas the state can limit the exercise of those rights where competing interests exist, as long as it does so proportionally.[57]

The constitutional text and its interpretation by the competent body reflects the scope of the constitutional right, thus defining the content of the right and marks its boundaries. The modern

[54] Mowbray, Alastair. "The Creativity of the European Court of Human Rights." Human Rights Law Review 5, no. 1 (2005), p.58
[55]Ibid, p.163
[56] Ibid.
[57] Schlink:2, p.298

constitutional analysis entails, however, a two-stage approach. The first stage presupposes the determination of the precise scope of the right at stake, in both its negative and positive aspects. In the second stage, the rights boundaries are determined and consequently whether a lawful justification exists for the limitation of the fundamental right by the right's boundaries. Hence, a distinction is made between the determination of the right's scope and whether the limitations imposed allow its full or partial protection. The right's scope remains the same even after the second stage analysis, however its practical realization is limited as concerns the specific circumstances of any given case.[58]

Normally the limitations are imposed not at constitutional or treaty level, but operate under the constitutional authorization to limit the full realization of the fundamental right's scope. [59] This authorization would normally have the form of a general limitation clause or a limitation clause within the unit prescribing the scope of the right. The accommodation clauses will be analyzed in more detail in the second chapter.

The importance of the afore-mentioned distinction relies on the necessity and obligation of the state to justify the limitation imposed on the right, it having the burden of proof in justifying the limitation, thus the supremacy of the fundamental rights over the sub-constitutional normative acts being assured[60], the limitation of the former requiring a certain necessity threshold to be reached.

As regards the absolute rights, it is noteworthy that not all rights are subject to this distinction, meaning that the scope of some rights and the extent of their protection is equal. An example of such a right would be the prohibition of torture, inhuman and degrading treatment embedded in Article 3 of the ECHR, which does not allow any limitations, regardless of the justification.

[58] Barak:1, p.19-20
[59]Ibid, p.20
[60]Ibid, p.22

Conversely, the majority of the constitutional rights (the relative/qualified rights) enjoy only a partial protection if measured against their scope, meaning that these rights cannot be realized to their full extent.[61] An example of such a right would be the right to freedom of expression embedded in Article 10 ECHR, which contains a limitation clause in its second paragraph, thus allowing the high contracting parties to impose justified limitations upon its realization.

After giving a brief presentation upon the limited nature of fundamental rights, it is important to provide the existing views on how fundamental rights connect with the principle of proportionality, given the common assumption that fundamental rights are prima facie rights rather than rules with a definite content.[62]

The connection between fundamental rights and the principle of proportionality is important to be determined mainly as the conceptual treatment of rights might determine the outcome of an eventual conflict between two rights.[63] Additionally, it is not always clear what is weighted: principles, rules, interests or values; and in case of weighting of different components, should they possess the same weight when balanced against each other?[64] This issue is also related to the general question of how conflicts between constitutional rights should be solved.[65]

1.3.2 The object of balancing: interests or trumps?

Balancing might be perceived as a metaphorical term describing an "exceedingly important conceptual operation", the complexity of which is revealed be the understanding that either way a panel of judges goes, there will exist reasonable justification for more than one outcome, thus leaving one party advantaged and the other disadvantaged.[66] Thus, the reasoning of a Court has to

[61]Ibid, p.27
[62]Ibid, p.37
[63]Ibid, p.37
[64] Klatt and Meister, op.cit., p.15
[65] Barak:1, p.37
[66]Aleinikoff, T. Alexander. "Constitutional Law in the Age of Balancing." The Yale Law Journal 96, no. 5 (1987), p.943

demonstrate the greatest benefit (the aim) as opposed to the means employed.[67] This inevitably involves the interests of at least two entities, which is hardly a surprise for any kind of "adversarial" court proceedings. Hence, one might argue that the whole theory of constitutional balancing is built upon the balancing of competing interests, i.e. their identification, evaluation and comparison.[68] As Aleinikoff points out, "the focus is directly on the interests [, each of them seeking] recognition on its own and forced a head-to-head comparison with competing interests".[69] The concept of interest itself is not a novelty for the legal theory, nor for the legal practice. The 'interest' had been characterized as the main driving force of the law[70] and is an established be an object of adjudication under the acts of civil procedure in continental Europe. How are the interests in the human rights adjudication different?

Firstly, one has to ask himself what is to be understood by interests? These is primarily the interests of private individuals as reflected in a specific fundamental right(s) provisions, which makes the hypothetical of two opposing individual interests easier to be settled, at least from the interpretative point of view. Conversely, the interests of the government are not derived from any "rights', but from a limitation clause[71] in the best case, from the powers granted to the government by the constitution, or they might not be covered by the constitution at all.[72] And even when they are covered by the constitution by means of a limitation clause, the set of legitimate aims tends to have an open-ended nature. Common interests could be understood as "interests people living together

[67] Schlink:1, p.722
[68] Aleinikoff, op.cit., p.945
[69]Ibid.
[70]Ihering, Rudolf Von. Law as Means to and End. Boston: Boston Book Company, 1913, p.47
[71] The nature of limitation clauses is explained in the second chapter.
[72] Aleinikoff, op.cit.,p.947

in fact hold in common independently of their individual or sectional interests, with rights as 'protected', but not privileged, social interests".[73]

The interests model presupposes that all the interests are relative, i.e. could be opposed and "limited" by other, opposing interests. The mere fact that a person holds a rights against a competing interest of the government does not in itself mean that he/she is automatically protected from any kind of violation as long as the competing interest is reasonably well justified in relation to the respective mean. Consequently, any private interest can be pursued by a governmental interests, which curtails a constitutional right, hence – any right can compete with a wide range of state interests, as long as they can be covered by a limitation clause. Moreover, most importantly – any competing interests, as long as they reach the balancing stage, are seen on equal footing.[74]

Hence, it might be argued that the constitutional discourse is thus being transformed into one about the "reasonableness of governmental conduct"[75], that "this model deprives rights of their normative power […] since the legitimate aim test contained no requirements", or that such an approach is excessively utilitarian and being borrowed from the economical vocabulary, which ultimately undermines the rights' fundamental nature.[76] Tsakyrakis is especially concerned with the fact that "measures aimed at promoting a public interest may prevail unless they impose an excessive restriction compared to the benefit they secure [,] the violation [seeming] to depend rather on the intensity of the restriction than on its incompatibility with the right in case"[77]. In his opinion, the absence of a full-scale moral discourse by the court renders the human rights

[73] Greer, S. C. The European Convention on Human Rights: Achievements, Problems and Prospects. Cambridge, UK: Cambridge University Press, 2006, p.206
[74] Klatt and Meister, op. cit., p.16
[75] Aleinikoff, op.cit.,p.987
[76] Dworkin, Ronald. Taking Rights Seriously. London: Bloomsbury Academic, 2013, p.124
[77] Tsakyrakys, op.cit., p.11

adjudication superfluous.[78] In this manner, the notion of common interest normally should exclude the majoritarian interest, giving priority to the protection of fundamental rights.

The alternative view of rights is reflected in the concept of rights as trumps, meaning that those should be perceived as "reflecting the liberal intuition"[79] of "having the lexical priority of […] the rights as trumps or as side constrains".[80]

There are several alternatives proposed by the critics. Firstly, the 'strong trump model' suggests that rights should be perceived in rather absolute terms, their scope and the extent of protection overlapping, which automatically renders balancing unnecessary. Secondly, the 'medium trump model' suggests that some rights are be perceived relatively, however it rejects proportionality in rather opaque terms, by raising the bar for the justification of an infringement. Thirdly, the 'weak trump model' is the only one that incorporates the 'rights as trumps' doctrine into the proportionality framework, by taking a quasi-positivist stance upon the limitations. It requires the rights to be balanced only against other constitutionally recognized values, even as a part of an 'unwritten limitation clause'.[81] Generally, it is not clear whether there are conceptual discrepancies between the two views (right as interests/trumps), given that even in the case of principled balancing, the principled-rights provisions still serve as bars (or trumps/limitations/safeguards) against a disproportionate intrusion of the governments.

While the first two completely ignore the concept of the 'general interest of the community', the last option substantially does not differ from the existing proportionality framework, the former rather reflecting a theoretical understanding than proposing a new model. It was also argued that the trumps model might even offer less protection because, "where [judges] decide that a collective

[78]Ibid, p.28
[79] Klatt and Meister, op.cit., p.17
[80] Tsakyrakis, op.cit., p.7
[81] Klatt and Meister, op.cit., p.16-42

good should prevail over a rights, [they] have effectively conceded that the protection conferred by the right has run out and there in no jurisdiction to limit interference by non-judicial authorities any further".[82] The last sub-model, however, partially resembles the 'principled rights' model, preferred by the author of this thesis, explained below.

1.3.3 Principled balancing and opposing views

It has been argued that the principle character of proportionality is triggered by the principle nature of fundamental right and by the need of their optimization, the latter requiring suitability, necessity of the contested measure, as well as the least burdensome has to be chosen.[83] Alexy presents fundamental rights as "optimization requirements" and opposes them to "definitive commands", which ultimately evolves in what he calls the "principle theory".[84]

The aforementioned distinction makes a theoretical separation between the two categories of legal norms. The first type of norms, which Alexy labels as "rules" have a definitive content, as it reflects exactly what has to be done, whenever the conditions of validity and the conditions of application are satisfied.[85] In other words, the behavior prescribed by the rule is straightforward and does cannot entail a conflicting situation whereby the application of the proportionality principle would be entailed, i.e. no limitation is possible – these are "definitive commands".[86] As his theory is based on the German constitutional tradition, an example of a such a rule is the right to dignity as interpreted by the FGCC.[87]

[82] Greer, op.cit., p.207
[83] Susnjar, op.cit., p.72
[84] ibid.
[85] Pirker, Benedikt. Proportionality Analysis and Models of Judicial Review: A Theoretical and Comparative Study. Groningen: Law Publishing, 2013, p.46
[86] Robert Alexy, Julian Rivers, A Theory of Constitutional Rights, Oxford: OUP, 2009, p. 181
[87] Barak, Aharon. Human Dignity: The Constitutional Value and the Constitutional Right. Cambridge: Cambridge University Press, 2015, p.227

On the other hand we face the principled rights, or "ideal oughts"[88], the content of which is not definitely predetermined, hence the require a prima facie for obligation for further adjustment.[89]. Consequently, the principled rights are applied by means of balancing.[90] The whole 'principled rights' model is based on the assumption that principle-shaped rights 'collide, i.e. "if according to their scope both principles are applicable and if they lay down contradictory consequences".[91] This fact itself can raise questions of consistency, namely: how should the rights be separated into rights and principles and whether rights can collide at all.[92]

The rule versus principled rights theory also entails the rule that the absolute rights, such as the right not to be subject to ill-treatment or the prohibition of slavery, cannot be subject to proportionality analysis due their significance for the dignity[93] and development of a human being. In my opinion, those could be seen as "rule" and not as principled rights, as long as their scope virtually always corresponds with the width of their protection. Even in the light of some skepticism related to the absolute quality of some rights, for instance of Article 3 of ECHR, which prescribes the prohibition of ill treatment[94], or even in Alexy's doctrine which treats all rights as relative[95], those tend to be much less susceptible to balancing.[96] If the rule-shaped rights is, however interpreted against a principle shaped right by means of balancing, then a change in the scope of the conflicting fundamental rights might be affected.[97]

[88] A.L.Young, Proportionality is Dead: Long Live Proportionality!, in: G. Huscroft, et al, op.cit., p. 45-46
[89] Alexy R. et al, op.cit, p.181
[90] Alexy, Robert. "Constitutional Rights and Proportionality." Revus 22 (2014), p.52. Accessed March 27, 2015. http://revus.revues.org/2783.
[91] Susnjar, op.cit., p.275
[92] For a thorough discussion see: Susnjar, op.cit., pp.274-277
[93]See: Dorsen, "The Aviation Security Act Case", FGCC Judgment 115(2006), pp.1594-1599
[94]Mavronicola, Natasa. "What Is an 'absolute Right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights." Human Rights Law Review 12, no. 4 (2012), p.727. Accessed March 27, 2015. http://hrlr.oxfordjournals.org/content/12/4/723.
[95]Alexy, Robert. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, p.64
[96] Barak:1, p.29
[97]Ibid, p.97

If, however, a conflict between two rule-shaped norms emerges, it would be solved according to the general rules of interpretation: lex posterior derogate legi priori; lex specialis derogt legi generali etc.[98] Since the scope of the rule-shaped rights coincides with the width of their protection, this type of conflict affects both the validity and the scope of the right.[99]

An opposed view is reflected by the so-called "contingency theory", which claims that the possibilities of 'optimization of fundamental rights are rather limited.[100] Their nature does not reflect their principle character, rather they are principles and can be further optimized only to the extent allowed by the constitutional text.[101]

This last positivist approach seems to oppose any kind of judicial activism, but rather seeks to limit the adjudicator to a more or less specific framework of proportionality analysis, without allowing him to be guided by what is moral and reasonable in the comparison "between punishment and crime, goods and merits, goods and work, goods and needs and rank".[102] One might also argue that it rather reflects a different model of proportionality, with specific constitutional provisions related to how the judiciary should act had a case related to conflicting rights been brought before it. The contingency theory explains the connection between fundamental rights and proportionality exclusively on the basis of how the drafters of the constitutional act had framed that proportionality issues should be solved. The vagueness of the formulation of the rights as they are formulated in the majority of the modern constitutions or human rights acts confirms this thesis. They, having an initially high level of abstraction, automatically entail the necessity, in case they reflect the property of a principled right, to balance them against conflicting interests. Those rights, as Alexy

[98]Ibid, p.84
[99] Ibid.
[100] Alexy, see note 90 supra, p.60
[101] Ibid.
[102] Schlink:1, p.721

correctly argues, "inevitably collide in a number of circumstances with other human rights an with collective goods like protection of the environment and public safety".[103] As examples of vaguely formulated rights could serve the fundamental rights provisions in the constitutions of Germany, Romania, Spain, Finland etc. Even though some of them contain more elaborate provisions on the scope of fundamental rights and their limitation, they still tend to have what Alexy calls the "ideal character of human rights", which resembles the necessity of balancing even in the event of their transformation into positive law.[104]

Alexy further argued, without denying the positivist nature of constitutional rights, that human rights have an abstract character, which in reality precludes them to be perceived as what he would have called definitive instructions, i.e. norms which are applied strictly in accordance with the will of the constitutions/human rights act's framers. In addition, he provides the "moral argument", him arguing that the "contingency theory" does not allow the state bodies to assess, ask, and argument upon fundamental rights reflects freedom and equality.[105]

An example of a principled right which is formulated, from the first view, as not allowing any kind of limitations, i.e. in absolute terms, but which is still subject to limitations can be found in Article 12 of the Federal Constitution of Germany.[106] The Article structurally makes a difference between the freedom to choose occupation in its first paragraph and the freedom to exercise a profession, whereby only the second case might be subject to limitations. Even in this case, however, the FGCC had applied the proportionality test.[107]

[103] Alexy, see note 90 supra, p.61
[104]Ibid, p.62
[105]Ibid, p.61-62
[106]Ibid. p. 62
[107]Dorsen, "Pharmacy Case", FGCC Judgment 377 (1958), pp.1339-1342

Professor Aharon Barak in his proportionality discourse has a different approach towards fundamental rights. His theory attempts to explain the way in which fundamental rights could be allowed to be balanced against each other in a sophisticated manner which does not permit their scope to be curtailed, but rather only the fraction related to their protection.[108]

Principle-shaped rights reflect fundamental values, which provide ideals aspiring for their maximum realization, without losing their fundamental nature "merely because they were not realized to their fullest extent".[109] The scope or the validity of a principle-shaped right is not curtailed as a consequence of balancing, both conflicting rights remaining valid and applicable to the specific circumstances in accordance with their own scope.[110] The conflict resolution is thus settled not within the scope of the constitutional right, but within its protective aspect, in the realization of the principle-shaped right.[111]

In Barak's view, a general presumption exists, that rights should be seen as prima facie rights, rather than rights with a definitive content.[112] The conflict between two principle-shaped rights creates a 'derivative constitutional rule', which might operate even on a sub-constitutional level, as long as it is authorized under the constitution itself.[113] This constitutional rule will, in the absolute majority of cases, operate on a sub-constitutional level, meaning that the limitation of one principled-right in favor of another principled right is normally imposed by means of an ordinary law, or even bylaw. For instance, the right to private life might be curtailed in favor of the state interest to assure the public safety (under which we could understand the protection of other

[108] Barak:1, p.86
[109] Ibid, p.84
[110]Ibid, p.88
[111]Ibid, p.89
[112]Ibid, p.37
[113] Ibid, p.84

conflicting interests within the same right, such as the right to physical integrity) under the Code of criminal procedure – which is an ordinary/organic law, but in any event a sub-constitutional act. In the same fashion, the right to privacy might conflict with the right to freedom of expression in the event of a journalist capturing events of major importance in a public place. Consequently, sub-constitutional acts might empower one private individual to litigate against another private individual by means of tort law, for instance. In this instance, the individual is provided with sub-constitutional rights.[114]

This does not mean that proportionality analysis cannot be triggered if no sub-constitutional rights exist on a specific issue. Proportionality in the wide sense will be triggered, meaning the traditional four step test, the outcome, however, will depend on the specific jurisdiction how such a conflict could be solved. The silence of the law on a conflicting issue is perceived differently at the ECtHR and at the Israeli Supreme Court (the latter being a common-law jurisdiction).

Thus, at ECtHR, the Court would not engage into proportionality stricto sensu analysis as long as there is an 'unregulated interference' in one of the relative rights provided under the Convention.[115] Conversely, in a case of a negative gap within the process of constitutional adjudication at the Israeli Supreme Court, Judges, after exhausting all the available means of interpretation, are entitled to proceed to "judicial lawmaking", which will result in ruling of sub-constitutional nature.[116]

In light of the above-mentioned hypothetical conflicts, it is important to keep in mind the findings of the Israeli Supreme Court. In the event of a conflict of two principle-shaped rights, none of them prevails or renders it to be void, meaning that both of them continue to be applied and exist within

[114]Ibid, p.90
[115] See, for instance: Case of Iordachi and others v. Moldova, ECtHR Judgment of February 10, 2009. Accessed March 27, 2015. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-91245.
[116] Barak:1, p.95

the constitutional framework.[117] Consequently none of the rights is granted more or less importance, the outcome of proportionality being focused specifically on the width of protection, to what extent the right can or cannot be realized in a specific situation, without rendering it invalid in a future dispute. A conflict between two-principle shaped right "does not require a re-determination of the boundaries of the rights, values and interests while invalidating the right, value, or interest that "lost" in the conflict".[118] Another important aspect of the outcome is that the even though one constitutional right is limited at sub-constitutional level, the boundaries of each of the conflicting rights is determined at the constitutional one.[119]

1.4 The stance of balancing within judicial review

Proportionality and balancing can be seen as two instruments designed to rationally justify a limitation to a fundamental right and to assess the weight of the justifications which the state relies upon in order to support the protected interest (aim).[120]

The act of balancing, also called proportionality in the strict sense, lays at the foundation of the proportionality in the wide sense.[121] It has the preventive task to the preserve a constitutional right from being 'downsized' by a competing marginal interest[122], operating at the highest level of abstraction.[123] This means that there is no roadmap between proportionality rule and a proportionate limitation; proportionality does provide which aim to be legitimate or measure - necessary.[124]

[117]Ibid, p.92
[118]Ibid, p.91
[119] Ibid.,p.86
[120] Ibid.,p.458
[121]Ibid, p.433
[122]Ibid.
[123]Ibid.,p.370
[124] Ibid.,p.542

1.4.1 The basic rule of balancing

Balancing is a result-oriented test (or element of the general test of proportionality), whereby any law implying potential limitation on fundamental rights has to be filtered, i.e. meet the requirements entailed by balancing, thus determining whether the relation created between the harm (mean) and the benefit (end) is detrimental to the protection of the fundamental right.[125] Before proceeding to analyzing the peculiarities of proportionality in the wide and narrow sense, it is important to emphasize what A. Barak calls the 'basic rule of balancing', which sets its focus on the interests placed on each side of the 'scales'.[126] The higher is the harm caused by a sub-constitutional act, including the potential harms that might be caused in the future – the higher should be the common interest or the interest reflected by the protection of other fundamental rights.[127] Or, as Alexy has put it: "The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other".[128] Practically it seeks to prevent mediocre interests or highly disproportionate means to limit the realization of fundamental rights[129], i.e. to prevent any harm exceeding the necessity of the means employed.[130]

1.4.2 Structure of balancing

The proportionality analysis methodologically can engage two different methods of balancing, each of them having a rather regional "representation". On one hand balancing is seen as a means-end analysis, i.e. with a dyadic structure, or at least begins with the two elements of balancing – means and ends.[131] For instance, in a criminal case, the punishment (mean) would be from the very outset measured against the crime (end), thus determining whether the sanction was proportionate

[125]Ibid, p.342
[126] Ibid, p.367
[127] Ibid.
[128]Alexy, see note 76 supra, p.54
[129] Barak:1, p.364
[130]Ibid.
[131] Schlink:1, pp.722

by finally addressing the goals of the criminal justice system.[132] This approach is rather typical for the U.S. Supreme Court, for instance.[133] On the other hand, the court would firstly look at the end of the punishment, and only afterwards "turns to an inquiry of the measure's quality as a means to this end", where the balancing represents the final stage of the proportionality analysis.[134] Here, even if the punishment itself is a legitimate means for the goals employed, it might still be found disproportionate at the end the analysis, the first approach thus leading to the second.[135] The most important aspect is, however, the scrupulosity with which either of the approaches is pursued and the strictness of the standard of reasonableness engaged by the court.[136]

1.4.3 Objectivity and balancing: three pillars of legal reasoning

Although it might be argued that the process of balancing (meaning its application to particular circumstances by an empowered judicial body) that it remains methodologically obscure due, mainly, to the criticisms of its last part and the subjectivity inherent to the balancing of opposing interests.[137] In these circumstances, one might ask himself whether objectivity and rationality of the balancing process is generally possible, given that "proportionality involves potential and actual pathologies".[138] Given that balancing shall be analyzed in more detail in the second chapter, it suffices to say at this point that the process of comparing and weighting conflicting rights, interests, principles and values contains an inherent element of subjectivity, which can be reduced only if, to a necessary extent, the legal and moral values towards which different social groups are inclined in fact and considering the already developed case-law on the issue[139]. An excessively

[132] Ibid.
[133] See, for instance: Barenblatt v. United States 360 U.S. 109(1959), in: Encyclopedia of the United States Constitution, David Andrew Schultz, Facts on File, 2009, p. 49
[134] Schlink, p. 722
[135] Schlink:1, pp.723
[136]id.
[137]Ibid.
[138]Ibid.
[139]Schlink:1, p.726

specific procedural rule of balancing might even damage the way in which a judge balances the diverse interests, given that a consensus exists among the scholars regarding balancing as the key element of proportionality: "it requires an open eye for all relevant facts, interests, rights, principles, and values, as well as a careful analysis of how different outcomes of the conflict may inflict, burden, threaten, or enhance these factors".[140] A further critique which shall be considered is the following: in the absence of a rational foundation for a decision in favor of one interest or another, is the arbitrariness inevitable[141], given the incommensurable interests which are normally brought for 'balancing' – "the rule of law demands a system in which judges reconcile incommensurable interests".[142]

Rather than struggling for an abstract value of objectivity, a more productive way of achieving the objectivity in legal reasoning would be to rely on the more generally recognized and evaluable "tents of modern legal theory", such as: coherence, consistency and universalizability.[143] Coherence means that the balancing techniques and the final outcome of the proportionality test generally, as applied to analogous circumstances should actually make sense as a whole, so that the recourse to legal protection provided under a specific legal system would be afforded equally and in the same manner (universally).[144] Consistency, meaning the absence of contradictions with regard to application of the proportionality test to similar or analogous circumstances, it concerns the practical part of the argumentation used by the empowered body.[145] Consistency could be considered the basic requirement for coherence and determines the degree of the latter.[146].

[140]Ibid.
[141]T.Endicott, Proportionality and Incommensurability, in: Proportionality and the Rule of Law, Edited by G. Huscroft, B.W.Miller and G.Webber, Cambridge University Press, 2014, p. 311
[142]Ibid, p.317
[143] Susnjar, op.cit., p.34
[144]Ibid, p.38
[145]Ibid, p.39
[146]Ibid.

The last aforementioned element is 'universalizability', which is the property of a legal rule to be applied in a given category of cases[147], i.e. to bear certain degree of (potential) abstraction. All these criteria have to be considered when one assesses the degree of objectivity the proportionality test was applied with, given the dynamic nature of legal reasoning[148], meaning the quality of legal rules to be subject to further modifications and the implied complexity of a legal system.[149] Balancing possesses two characteristics that make its application utmostly appealing: simplicity and inclusiveness, "where course of action can be represented as the outcome of a conflict between itself and its opposite".[150]

[147]Ibid, p.41
[148]Ibid, p.43
[149]Ibid, pp.43-45
[150]Tsakyrakis, op. cit., p.3

Chapter 2: The elements of proportionality and the role of the margin of appreciation doctrine

This chapter seeks to provide an overview of the classical proportionality methodology, as composed of four elements: the legitimate aim, suitability, necessity and balancing (proportionality in the strict sense).[151] These elements will be analyzed in the light of the ECtHR jurisprudence, as well as from a comparative perspective. It will be taken into account that ECtHR does use a slightly different test, with three basic elements: the legitimate aim, the provision of the limitation under national law; and the necessity in a democratic society. In addition, given that the doctrine of the margin of appreciation has a special role in the balancing exercise, its application will be analyzed in a separate sub-chapter.

2.1 Elements of proportionality

2.1.1 The limitation of a fundamental right

Although it had been claimed that it is the balancing element the one that is decisive in considering the proportionality of a limitation[152], it may be well argued that all elements of any proportionality analysis are equally decisive. A sub-constitutional rule may well be struck down by any of the elements, i.e. on any stage of proportionality analysis - due to the lack of a legitimate aim, due to the lack of a rational connection of the legitimate aim with the contested measure, due to obvious less intrusive alternatives, due to an uncertain legal framing, or, finally, due to an overall unbalanced approach towards the limitation of a right.

[151] Klatt, Matthias, and Moritz Meister. The Constitutional Structure of Proportionality. Oxford, U.K.: Oxford University Press, 2012, p.8

[152] Yutaka Arai-Takahashi, Proportionality, in: Shelton, Dinah, The Oxford Handbook of International Human Rights Law. Oxford: OUP, 2013, p 455 (hereinafter - Yutaka - Proportionality)

In this sense, before engaging in a complex analysis it is necessary to answer the following question: whether there had been a limitation of a fundamental right by the state, i.e. whether the scope of the right covers the area upon which a limitation had been imposed.[153] Thereby the existence of the right should be determined and to state whether the limitation of the respective right is authorized under national law, as the limitation/infringement of a right does not automatically constitute a violation.[154]

The limitation of a fundamental right may be authorized by a limitation clause - a rule expressly providing for a possibility for the legislator to enact norms that may infringe upon a right within the boundaries of proportionality.[155] A limitation clause may of a general character, as is the case of the Article 36 South African Constitution[156], or a specific one, i.e. related to a specific right, which is the case of the second paragraphs to Articles 8-11 of ECHR[157], although a Constitution may well provide both.[158] Conversely, a Constitutional act may lack any kind of constitutional clauses, which is the case, for instance of the American Bill of Rights[159], of some of the fundamental rights provisions of the Basic Law of Germany.[160] Both FGCC and USSC have,

[153] Barak:1, p.26. The practice regarding the determination of whether the infringement is covered by a given right may well depend on the agreement of between the parties over the existence of such. For instance: "The various measures challenged [...] were without any doubt, and the Government did not deny it, "interferences by public authority"); Case of Handyside v. United Kingdom, ECtHR Judgment. December 7, 1976, para.43. Accessed December 22, 2015. http://hudoc.echr.coe.int/eng?i=001-57499; there are rare occurrences where ECtHR would go into an inqury about the scope of a right at the beginning of its judgment, for instance where the scope of a given right is to be widened under a certain judgment: Case of Bayatyan v. Armenia, ECtHR Judgment. July 7, 2011, para.98-111. Accessed December 22, 2015. http://hudoc.echr.coe.int/eng?i=001-105611.

[154] Barak:1, p.108

[155] Barak:1, p.150

[156] Constitution of the Republic of South Africa, 1996 - Chapter 2: Bill of Rights. Accessed December 22, 2015, http://www.gov.za/documents/constitution/chapter-2-bill-rights#36

[157] Convention for the Protection of Human Rights and Fundamental Freedoms of November 5, 1950, Accessed December 22, 2015, http://www.echr.coe.int/Documents/Convention_ENG.pdf

[158] Barak:1, p.133

[159] Constitution of the United States of America, Accessed December 22, 2015, https://www.law.cornell.edu/constitution/overview

[160] Basic Law of the Federal Republic of Germany, Accessed December 22, 2015, https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf

however, recognized the possibility of a limitation in the absence of a limitation clause.[161] At the same time, the ECtHR had interpreted some rights as being susceptible of being limited, even if they do not posses a limitation clause, which is the case, for instance, of Articles 6 (right to a fair trial)[162] or of Article 14 (prohibition of discrimination)[163]. In the case of ECHR, the limitation clauses have a similar structure, however, they do differ in details[164]. All of them do provide the aforementioned proportionality elements.[165]

2.1.2 Whether the limitation is prescribed by law

As Aharon Barak rightly stated, it is incumbent for any constitutional democracy that the limitation of any fundamental right can "be traced back to a valid legal norm", while the limitation itself should be grounded on the limitation clause described above, sticking to the boundaries and conditions of the latter.[166] The element of "prescribed by law" entails several qualitative requirements for the legislatures when enacting a sub-constitutional act: the limited deference to executive bodies in the further adjustment of the limitation; the general character of the limitation; the accessibility and foreseeability of the limiting provisions, be they of a statutory or of a common-law origin. Only the last two characteristics have found a permanent reflection under the "prescribed by law" umbrella in the ECtHR's proportionality analysis.

It is worth mentioning that it is not a balancing requirement, but a threshold step. At this stage ECtHR does not engage in a balancing exercise, but merely assesses the necessary minimum

[161] Barak:1, p.136-139
[162] Case of O'Halloran and Francis v. the United Kingdom, ECtHR Judgment of June 29, 2007, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-81359
[163] Case of Sejdic and Finci v. Bosnia and Herzegovina, ECtHR Judgment of December 22, 2009, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-96491
[164] Harris, D. J., M. O'Boyle, Ed Bates, and Carla Buckley. Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights, Oxford: OUP, 2014, p. 505 (hereinafter - Harris)
[165] Barak:1, p.148
[166] Barak:1, p.108-111

quality of the specific legal rule that authorizes the limitation of a fundamental right[167], meaning that the threshold of lawfulness is relatively low and may be overlooked by the Court, should no dispute arise between the parties with this respect[168] .

Where the limiting statute defers to the an executive body the authority to limit the constitutional right, it has to provide restrictively the conditions under which such an arrangement would be possible, otherwise an unlimited discretion renders the constitutional act invalid, which is a rule-of-law principle requirement.[169] Next, a limitation is ought to have a general character, i.e. "to apply generally and not solely to an individual case".[170] It is expressly reflected in several Constitutional Acts.[171] The generality requirement may be on the one hand grounded on the separation-of-powers principles, whereby it is primarily the executive's task to deliver acts of individual character; and on the other hand - on the principle of equality, which means that no social group can be disproportionately limited in their right, or, conversely - privileged.[172]

In case of ECtHR the element of lawfulness represents a qualitative requirement, which automatically renders the contested measure disproportionate, should the domestic law regarding the limitation not be foreseeable and accessible.[173]

[167] Ibid., p.506
[168] Case of Couderc and Hachette Filipacchi Associes v. France, ECtHR Judgment of November 10, 2015, para.79, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-158861
[169] Barak:1, p.133; See also: Case of NF v. Italy, ECtHR Judgment of August 2, 2001, para.31, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-59622
[170] Barak:1, p.113
[171] See Article 19(1) of the German Basic Law, for instance: " Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law **must apply generally** and not merely to a single case."; South African constitution, section 36(1): " The rights in the Bill of Rights may be limited only in terms of law of general application"; Also reflected in the Siracusa Principles on the Limitation and Derogation Provisions in ICCPR, para 15. Accessed on December 22, 2015, http://www.refworld.org/docid/4672bc122.html
[172] Barak:1, p.113-114
[173] See, for instance: Case of Delfi AS v. Estonia, ECtHR Judgment of June 16, 2015, para.120, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-155105

The legal provision might be founded on the domestic law, but also on international[174] or regional (e.g. EU Law)[175] legal provisions. The accessibility requirement means that the law in question should be available for the general public, i.e. not be "a secret regulation promulgated behind closed doors", the same being required of the state body to which right-limiting powers were delegated.[176] Secondly, the limiting statute has to lack arbitrariness[177], i.e. a citizen must be able to understand that limitation is applicable in the given circumstances[178], even if the assistance of a qualified lawyer is necessary for this purpose.[179] The limiting law is foreseeable if it allows the citizen to "regulate his conduct [...] to a degree that is reasonable in the circumstances [and to foresee] the consequences which a given action might entail".[180] Finally, given that a limitation might be a 'dated one' and the fact that laws are applied in constantly changing social conditions, ECtHR may be willing to accept an act with a vague wording[181], meaning that forseeability is ought to be assessed in relation to the complexity of the issue at stake.[182]

2.1.3 Seeking for a legitimate aim

For a constitutional democracy is not enough to provide for a legal authorization, but the law limiting a fundamental rights has also to possess a valid aim, which may be grounded on the constitutional values of a democratic society.[183] The legitimate aim is the next (or the first)

[174] See, for instance: Case of Nada v. Switzerland, ECtHR Judgment of September 12, 2012, para.173, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-113118
[175] Case of Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland, ECtHR Judgment of June 30, 2005, para.143, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-69564
[176] Barak:1, p.115-116
[177] Harris, p.507
[178] Case of Khan v. United Kingdom, ECtHR Judgment of October 4, 2000, para.27, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-58841
[179] Case of Autronic AG v Switzerland, ECtHR Judgment of May 22, 1990, para.55, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-57630
[180] Delfi AS v. Estonia, para.121
[181]Case of Lindon, Otchakovsky-Laurens and July v. France, ECtHR Judgment of October 22, 2007, para.42, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-82846
[182] Barak:1, p.116
[183] Barak:1, p.245

threshold requirement, meaning that it is not a Court's task to determine the scope of the legitimate aim or to balance it with the contested measure[184]. Rather, the question should be: whether the alleged aim may limit the fundamental right in question[185], which in theory is a low threshold, the practical approach, however, varies. The South-African experience, for instance, does provides a rather flexible approach, where the main criterion for determining the legitimacy of the aim is whether it reflects the democratic values embedded in the South-African Constitution[186], although the South-African case analyzed in the third chapter will provide us with a slightly different perspective. Likewise, the Canadian Charter required a limitation to be "justified in a free and democratic society" [187], however, "the measure [limiting] a right [...] must of sufficient importance[..., it] must be high in order to ensure that...[trivial or irrelevant] objectives do not gain protection"[188].

The German Constitutional Court uses the concept of "objective order of values", whereby the Basic Law of FRG is not a value-neutral document, but an order of values which can limit a fundamental right where it is necessary for the free and dignified development of a personality within the community.[189]

The formula of a legitimate end/proper purpose entails a rather flexible approach, which comprise both a public interest (vertical perspective), as well a personal value/right/interest which a state is

[184] Ibid, p.246-250 . At least this is the general rule. However, exceptionally, courts may trigger confusions as regards the suggested methodology. For instance, in the Bayatyan, ECtHR has referred to the aims alleged by the Armenian government as non-convincing (while analyzing the legitimate aim element), whereas it expressly postponed to provide a conclusion on the legitimacy of the aims as the measure was in any event incompatible. This may entail some degree of confusion if to speak about the methodological accuracy of proportionality review. Bayatyan v. Armenia, para.117

[185] Barak:1, p.247

[186] Barak:1, p.257-258

[187] Canadian Charter of Rights and Freedoms, Section 1, Accessed on December 22, 2015, http://laws-lois.justice.gc.ca/eng/const/page-15.html

[188] Case of R. v. Oakes, SCC Judgment of February 28, 1986, para.69, Accessed on December22, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/117/index.do

[189] Case of Lueth case, FGCC Judgment 7, 198, in: Jurgen Schwabe, Thorsten Geisler, Selecție de decizii ale curții constituționale federale germane, Bucharest: Beck, 2013, p.232 (hereinafter - Schwabe)

obliged to protect (the horizontal perspective)[190]. It has to be reiterated here, however, that only a constitutionally protected value, i.e. a value that might harm the democratic order can pass the proper purpose test.[191]

The aim of the limiting law may be provided expressly in a limitation clause of a general or special character, however a proper purpose may also be implicitly embedded in a Constitution.[192] An example of a general (open-ended) limitation clause is the above-mentioned Canadian Rights and Freedoms Charter, which allows virtually any end that is compatible with a democratic society.[193] Essentially, the source of the aims is identical where no limitation clause exists.[194]

An example of an exhaustive (and broad) list of permissible aims are the limitation clauses provided in the second paragraphs of articles 8-11 of ECHR.[195] One would expect these to be interpreted narrowly as long as the list contains a broad range of limitation grounds.[196] And indeed, most of the policies provided under the limitation clauses of ECHR are already susceptible of a fairly wide interpretation, whereby a state can make a plausible justification for an interference.[197] A state may plausibly "shop" for a valid proper purpose while alleging several aims. Consequently, the Court would in some cases "cherry pick" the right one, as ECtHR does set a fairly low legitimate aim threshold.[198]

[190] Pirker, op.cit, p.16
[191] Barak:1, p.257
[192] Barak:1, p.260-261
[193] The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
[194] Barak:1, p.262
[195] Article 8 of ECHR, for instance, provides: " [...]the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
[196] However, this is not always the case. for instance, in the S.A.S. v. France case, ECtHR has expressly stated that the French constitutional concept of living together could be linked with the limitation of the right to wear headscarves in public as protected under Article 9 of ECHR necessary for the "protection of the rights and freedoms of others". Case of S.A.S. v. France, ECtHR Judgment of July 1, 2014, para.121, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-145466
[197] Harris, p.510
[198] Ibid.

Another peculiar aspect of any given proper purpose is its influence upon the margin of appreciation[199], which may be well decisive at a later balancing stage. Any proper purpose normally reflects a state policy in a certain area, the spectrum ranging from more decisive grounds that tend to widen the margin, to those that are likely to be overruled.[200] For instance, ECtHR is more likely to defer a case to state authorities where a plausible moral grounds argument is made, since "state authorities are in principle in a better position than the international judge to give an opinion on the exact content of the requirements of morals".[201] Other areas which may potentially broaden the margin are - the state security[202], issues associated with state sovereignty (e.g. pertaining to electoral system[203], economic and social polices[204]), or in the field of positive obligations[205]. On the other hand, there are other policy areas, where the Court will engage in a stricter scrutiny, such as: discrimination[206], due process rights[207], core aspects of private and family life.[208]

2.1.4 The rational connection

For a measure limiting a fundamental right to be recognized as proportionate, it has to rationally connect to the legitimate aim the limitation measure has set to achieve.[209] In practical terms, a

[199] Discussed in the next sub-chapter of Chapter 2.
[200] Arai-Takahashi, Yutaka. The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR. Antwerp: Intersentia, 2002, p.206 (hereinafter - Yutaka)
[201] Case of A, B, and C v. Ireland, ECtHR Judgment of December 16, 2010, para.223, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-102332
[202] Case of Klass and Other v. Germany, ECtHR Judgment of September 6, 1978, para.44, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-57510
[203] Case of Matthews v. United Kingdom, ECtHR Judgment of February 18, 1999, para.52, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-58910
[204]Case of Hatton v. United Kingdom, ECtHR Judgment of July 8, 2003, para.97, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-61188
[205] Yutaka, p.206-222
[206] Case of Marckx v. Belgium, ECtHR Judgment of June 13, 1979, para.41, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-57534
[207] Case of Airey v. Ireland, ECtHR Judgment of June 13, 1979, para.24, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-57420
[208] Case of Schalk and Kopf v. Austria, ECtHR Judgment of June 24, 2010, para.49, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-99605
[209] Barak:1, p.303

Court has to answer the question: whether the limiting law is capable of achieving the aim[210], i.e. advance the realization of a law's purpose.[211]

The rational connection test requires "the assessment of the degree of satisfaction of a value", but also of the results foreseeable consequent to the realization of the limiting law.[212] As the factual uncertainty is an issue pertaining to the possibility itself of achieving the law's purpose, there is no necessity, the certainty that the law will achieve its purpose to be absolute.[213]

At this stage of proportionality analysis there is no need to determine whether the state had chosen the less intrusive alternative, that the law is capable to fully realize the law's purpose, or whether that the approach of the state had been balanced as such.[214] The practice regarding the scrutiny of this part of proportionality analysis, however, differs.

For instance, in R v. Oakes, the Canadian Supreme Court had to address the proportionality of the reversed *onus probandi* whereby a person accused of drug trafficking had to prove his/her innocence where he had been found in possession of narcotic substances. The following criteria had been established by the Canadian Supreme Court under the reasonable connection umbrella: "measures adopted must be carefully designed to achieve the objective in question; [non]-arbitrary, unfair or based on irrational considerations".[215] The Court referred to the impugned measure as irrational, since, inter alia, the possession of a small quantity of drugs cannot attract the inference of drug trafficking, which did neglect the requirements of rationality and fairness.[216]

[210] Klatt, p.8
[211] Barak:1, p.303
[212] Pirker, op.cit, p.28
[213] Regional Council, Coast of Gaza v. Knesset of Israel, Supreme Court of Israel 1661/05, para.57, in: Barak:1, p.308-309
[214] Barak:1, p.305
[215] R. v. Oakes, para.70
[216] Ibid, para.77-78

In less demanding terms, FGCC has determined that the obligation to undertake a gun competence test was unreasonable in limiting the right to autonomy of individuals willing to hunt with falcons[217], whereby the impugned measure was aimed the protection of falcons.[218]

ECtHR does not use the rationality requirement as a separate element of proportionality test in its jurisprudence, but it might implicitly apply the element when an applicant strongly disputes the aims invoked by a government.[219]Applicants generally attempt to prove the lack of reasonableness of the proper purpose, the Court, however, seldom provides us with a full analysis of the issue.[220] For instance, in S.A.S. v France, the Court considered that a state could not justify with the protection of gender equality the prohibition of wearing face veils in public, whereas women themselves had defended the practice and unless they could be protected by the realization of their own rights.[221]

2.1.5 The necessity test

The following element of proportionality analysis is the necessity test, which is deemed to establish whether the restrictive measure is least restrictive one, as compared to the other alternative means that may be capable of advancing the limiting law's proper purpose.[222]

The necessity test requires that the closest nexus possible between the aim and the restrictive mean, whereby no other less intrusive legal measure can achieve the same degree of satisfaction in furthering the aim pursued[223] - an expression of 'Pareto efficiency'.[224] It is a hierarchical test, whereby adjudicating courts enjoy a degree of discretion when deciding upon the range of potential

[217] As protected under Article 2 para.1 of the Basic Law of Germany.
[218] Case of Judgment of the FGCC, 55, 159, 165-169 (1980), in: David. P. Currie, The Constitution of the Federal Republic of Germany, Chicago: University of Chicago Press, 1994, p.319
[219] S.A.S. v. France, para.114
[220] Harris, p.510
[221] S.A.S. v. France, para.119
[222] Barak:1, p.317
[223] Pirker, op.cit, p.29
[224] Barak:1, p.320

alternatives.[225] Finally, the necessity test does not entail a balancing exercise[226], but rather the determination of means' intrusiveness hierarchy.[227]

ECtHR is generally reluctant to apply the necessity test, which is problematic in many instances. It may be partially explained by subsidiarity considerations and the fact that ECHR provides only minimum protection, meaning that the choice of a less intrusive alternative remains for the national authorities[228], although the ECtHR jurisprudence in this respect is rather inconsistent. For instance, in Animal Defenders International v. UK the Court from the outset that "in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it".[229] However, ECtHR cautiously added that not the necessity of the intrusive measure was central for determining the proportionality of the interference, but the whether a balance had been struck, given UK's margin of appreciation.[230] Thus, ECtHR does not necessarily "bluntly [...] reject the test"[231], but rather sets a lower priority for it, if any. In other cases, ECtHR does not consider the necessity of the measure at all.[232]

The state of affairs in the national jurisdictions is slightly more optimistic in this regard. It is being used either on permanent basis as part of a proportionality methodology, or at least on a case-to-case basis.[233] For instance, the Canadian Supreme Court did mention the necessity test as part of proportionality analysis in R v Oakes.[234] In the famous German Pharmacy case, the law demanding

[225] Pirker, op.cit, p.30
[226] Barak:1, p.333
[227] Pirker, op.cit, p.29
[228] Popelier, Patricia, and Catherine Van de Heyning. 2013. "Procedural Rationality: Giving Teeth to the Proportionality Analysis". European Constitutional Law Review.9, p.234 (hereinafter - Popelier)
[229] Case of Animal Defenders International v. United Kingdom, ECtHR Judgment of April 22, 2013, para.108, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-119244
[230] Ibid, para.110
[231] Popelier, p.234
[232] Delfi AS v. Estonia, Joint Dissenting Opinion Judges Sajo and Tsotsoria, para.40
[233] Popelier, p.235
[234] "[...]even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question[...]" . R. v. Oakes, para.70

excessively restrictive requirement for licensing pharmacies had been specifically struck down on the grounds of excessive intrusiveness.[235] It must be said that the GFCC jurisprudence regarding the necessity test largely depends on the margin afforded and consequently the level of expertise of state authorities in different areas.[236] The Spanish and Belgian Constitutional Courts, on the other hand, refused to perceive the necessity test a proportionality element with separate standing, but rather as part of the balancing exercise, thus considering that the judiciary would be excessively intrusive in the state's political decision-making.[237]

2.1.6 Balancing

The last element of proportionality to be considered is proportionality in the strict sense or balancing, which may be defined as the requirement of "an adequate congruence between the benefits gained by the law's policy and the harm it may cause to the constitutional right".[238] If the previous three elements were exploring the relationship between the aim sought and the means chosen, than the last element rather deals with the value used for the limitation and the right at stake.[239]

It is the most complex element of proportionality assessment and the one that attracts most of the criticism, and indeed, here is where rationality and objectivity is most hard to achieve.[240] This may be partially explained by lack of clear methodology on how and what is being balanced on the one hand, and on the other - the moral implications and result-oriented nature of the balancing exercise.[241] At the same time, the Principles Theory discussed in the first chapter even suggests a mathematical "Weight formula", which is deemed to maximize the objectivity and predictability

[235] Case of Aphoteken-Urtei, FGCC Judgment 41, 378, in: Schwabe, p.373 (hereinafter - Pharmacy case)
[236] Popelier, p.236
[237] Popelier, p.235
[238] Barak:1, p.340
[239] Ibid, p.344
[240] Susnjar, op.cit, p.17
[241] Barak:1, p.342

of a judgment, which in itself brings quite some difficulties in the adjudicative process., as it entails an abstract quantification of values engaged.[242] One of the difficulties stems in the identification of the values which are ought to be compared, as well as in the multitude of values which might be at stake.[243] On the other hand, the exercise of quantifying the weight and attributing it to various values might be problematic in itself if to speak about the it in abstract terms.[244] At the same time, a formal quantification of weight might also bring up the problem of equal weight attributed to two concurring values.[245] In addition, the scrutiny of the balancing exercise might well depend on the right involved and the level of scrutiny engaged.

Given that no actual scales exist, balancing has a purely normative nature.[246] The comparable values are, one the one hand - the marginal benefit gained by the fulfillment of the limiting law's aim, and on the other - the marginal harm produced for the limited right[247], which is always done within a specific factual framework.[248]

Last but not least, proportionality operates within a specific constitutional framework, whereby Constitutional Court should not substitute the legislator, while the reasons of a legislator for the limitation of a constitutional right should be addressed cautiously - both are requirements of the separation of powers principle.[249]

Thus, in the Pharmacy case, the FGCC included the balancing element in the case analysis, whereby it stated that as regards the subjective conditions of acceding to a specific profession, the state must undertake a "strict scrutiny" analysis of the aim that determines the application of the

[242] Pirker, op.cit, p.31-32
[243] Ibid, p.33
[244] Ibid, p.34-35
[245] Ibid, p.35
[246] Barak:1, p.346
[247] Ibid, p.348-350
[248] Yutaka - Proportionality, p.452
[249] Barak:1, p.394-399

restrictive mean, whereas only a major threat to the right of third parties may justify such a restriction.[250]

SCC likewise applies the balancing exercise in the final stage of proportionality analysis. Thus, in the Rocket case, SCC has found that although a law limiting the freedom of expression of dentists expressed in commercial advertizing has had a legitimate mad aim of upholding professionalism and protection against misleading advertizing. The overly intrusive measure, however, was held disproportional since the law did "prohibit[ed] expression which in no way further[ed] its objectives ", while the exclusion of speech was not necessary.[251]

The requirement of proportionality under the ECtHR jurisprudence stems in the phrase "necessary in a democratic society", whereby a "pressing social need" is necessary for the limitation of a fundamental right[252]. An additional variable is brought in ECtHR's proportionality analysis - the margin of appreciation - which shall be analyzed in more detail in the following sub-chapter, along with the ECtHR's approach towards balancing. The general approach in case of qualified rights suggests that ECtHR will analyze on a case-by-case basis whether the arguments brought by a respondent government were 'relevant and sufficient' for a limitation, an ambiguous standard which has not been defined by the Court yet.[253]

[250] Pharmacy case, p.367
[251] Case of Rocket v. Royal College of Dental Surgeons of Ontario, SCC Judgment [1990] S.C.R. 232, Accessed on December 22, 2015, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/628/index.do
[252] Case of Amihalachioaie v. Moldova, ECtHR Judgment of July 20, 2004, para.30, Accessed on December 22, 2015, http://hudoc.echr.coe.int/eng?i=001-61716
[253] Gerards, J. "How to Improve the Necessity Test of the European Court of Human Rights." International Journal of Constitutional Law, 2013, p. 466 (hereinafter - Gerards)

2.2 The stance of the margin of appreciation and balancing in the ECtHR jurisprudence

2.2.1 The margin of appreciation concept

The margin of appreciation is first and foremost a compromise, which provides a certain discretion on the side of the national authorities, including the courts[254], whereby it is up to them to choose the fashion in which a certain conventional provision should be implemented into the domestic system of law, given the specific legal, cultural peculiarities of each high contracting party.[255] In practical terms, ECtHR in the Handyside v UK explained that domestic authorities are in principle better positioned than a international judge to provide a judgment on the requirements of morality and the necessity of a limitation of a right which is ought to observe them.[256] The doctrine had been developed to strike a balance between the differing view on how the substantive conventional provisions should be implemented, but at the time to ensure their uniform application.[257]

The 'doctrinary' nature itself of the margin of appreciation is being questioned due to the lack of a clear theoretical grounding and consistency, which would allow the margin of appreciation to be from the outset annihilate the obscurity of the concept and would improve the legal predictability of its application.[258] On the other hand, the doctrine is criticized for being "at odds with the concept of the universality of human rights".[259] It is claimed that the margin does obstruct the correct way of establishing uniform human rights standards by tribunals[260], whereas ECtHR uses it "in order

[254] Popelier, p.232
[255] Yutaka, p.2
[256] Handyside v. United Kingdom, see note 153 above, para.48
[257] Yutaka, p.3
[258] Popelier, p.244
[259] Legg A., op.cit, p.41
[260] Ibid, p.50

to evade articulating the reasons for its decision".[261] Furthermore, it might be argued that ECtHR is not always coherent in the way it confers the width of margin to a respondent state and the fashion in which it decides whether the respondent state in a given case had overstepped the boundaries of discretion.[262]

2.2.2 The interplay between deference and balancing

The ECtHR has not yet developed a clear theory on the interplay between the margin of appreciation and the principle of proportionality.[263] It is certain, however, that the margin often has a determinative weight when considering the proportionality of an interference in a right which may be an object of proportionality analysis. Or, as Yutaka has put it: "proportionality appraisal should be deemed as a crucial yardstick for assessing whether or not national authorities have overstepped their bounds of appreciation"[264], whereas the notion of necessary in a democratic society ”epitomizes the Convention's underlying tension between the rights of the individual and the interest of society as a whole".[265]

From a theoretical point of view it may be asserted that the doctrines (discussed in the first chapter) that consider the fundamental rights to have the role of interests in the proportionality analysis will have a higher degree of compatibility with the margin of appreciation, however they cannot fully explain or justify the existence of the margin.[266] It is rather clear that from an interest perspective the right is seen as a part of an equation where the societal interests, such as public health/security/rights of others etc., have to be coordinated in a balanced/proportionate way, where

[261] Schokkenbroek, Jeroen. "The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the case-law of the European Court of Human Rights." HRLJ 19, no. 1 (1998), p.30
[262] Poperlier, p.240
[263] Yutaka, p.193
[264] Ibid, p.193
[265] Ibid, p.12
[266] Legg A., op. cit, p.193

one interest necessarily excludes the other.[267] However, the necessity to balance two conflicting interests does not necessarily imply that the margin has to have its own stance in the balancing equation, as ECtHR cannot be "excessively deferential to the views of a public authority where it overrides fundamental rights".[268]

From a methodological point of view, when it constitutes an element in the assessment of proportionality of a disputed measure, the margin of appreciation normally comes into play when the court analyzes the third component of the ECtHR's methodology of proportionality - "necessary in a democratic society"[269], where the proportionality in the strict sense is assessed.

At the same time, it noteworthy that margin of appreciation and proportionality have a reciprocal influence upon each other. On the one hand, proportionality restricts the margin, where the measure chosen by the state overburdens and individual right, or as Judge Spielmann has put it "the proportionality principle constitutes the strongest bulwark against the over-use of the margin of appreciation doctrine".[270] On the other hand, proportionality in the strict sense might not come into play at all where the Court uses the margin as the main argument in determining whether there had been a violation.[271] These two aspects may be treated as two congruent aspects of the margin.[272] In practice however, the margin most often does not possess a separate stance within

[267] Ibid, p.193
[268] Popelier, p.237
[269] As provided under the limitation clauses of the ECHR and in ECtHR jurisprudence.
[270] Spielmann, Dean. "Allowing the Right Margin: the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?" ECtHR, p.7, Accessed on December 22, 2015. http://www.echr.coe.int/Documents/Speech_20140113_Heidelberg_ENG.pdf
[271] S.A.S. v. France, para.155-157
[272] Letsas distinguishes between: 1. the substantive concept of the margin of appreciation, whereby ECtHR decides upon the proportionality of an interference by taking into account political, moral and other considerations used for deference; and 2. the court does not involve itself in a proportionality analysis but merely provides abstract interpretational reasons, such as the consensus among the high contracting parties upon a given issue. See: Letsas, G. "Two Concepts of the Margin of Appreciation." Oxford Journal of Legal Studies 26, no. 4 (2006): 705

proportionality analysis, but rather a flexible element, the assessment of which varies depending on the interpretative methods and policies, which are invoked by ECtHR on a case-by-case basis. The extent of the margin and the elements to be considered within the balancing exercised are analyzed in a rather casuistic manner, or as it might be argued: "courts[...]cross the line between legal and opportunity review".[273] However, there are several policies[274] and principles of interpretation that have impact the margin width and balancing outcome. First of all, a concept, which opposes the margin[275], in the sense of a total withdrawal of the discretion concerning a certain issue, is the evolutive interpretation of the convention. Thereby ECtHR interprets the Convention in light of the new social changes that have emerged in the CoE Member States, a phenomenon referred by as the "diachronic variability" of the margin of appreciation.[276] It is one of the main factors that might restrict the margin of a state and consequently require a stricter balancing exercise.

Along with it comes one of the most influential concepts - consensus, which was developed as "an adjunct to the margin of appreciation".[277] Conceptually, it is supposed to narrow the margin where a majority of CoE states have evolved regarding a certain aspect of a right, however the Court still has not explained to what extent should it be considered binding[278].

Both concepts may well have as a finality the extension of the scope of a certain aspect of a right protected under the Convention. For instance, in Bayatyan the Court expressly stated that that before its judgment, ECtHR was deliberately excluding conscientious objectors from the protection afforded under Article 9, which means that a proportionality test in such circumstances

[273]Popelier, p.230
[274] The relevant policies have been overviewed in part 2.1.3.
[275] Yutaka, p.203
[276] Ibid, p.197
[277] Wildhaber, Luzius, Arnaldur Hjartarson, and Stephen Donnelly. "No consensus on consensus? The Practice of the European Court of Human Rights." HRLJ 33, no. 7-12 (2013), p.248
[278] Ibid, p.249

was not possible to be launched.[279] On the other hand, the consensus barely played any role in S.A.S., where an extensive prohibition of public wearing of head veils has been prohibited in France, or in A.B.C. v. Ireland, where the public morals had a greater weight.[280] The Court's case law in this respect has been rightfully described as fluid, least to say.[281]

Thirdly, the theory of autonomous interpretation of certain definitions has the effect of narrowing down the deference afforded to states, where a contracting party invokes the legal definitions provide under domestic provisions as an excuse for the limitation of a right.[282] For instance, in *Chassagnou*, ECtHR concluded that for the interpretation of the term 'associations"' under Article 11 of the Convention, the interpretation under the national law has only a "relative meaning", while under the Convention is possesses an autonomous meaning.[283]

2.2.3 The applicability of margin of appreciation and balancing to different categories of rights

From a practical point of view the margin of appreciation might be applicable to a bigger or lesser extent to all the substantive rights embedded in the ECHR[284], depending on the nature of a given right[285], although it has been argued the latter does not always affect the width of the margin in a direct way.[286] The application of the margin, as we shall see below, is not always explicit[287], as the text of the convention of the Convention does not provide for any express indications on the width

[279] Bayatyan v. Armenia, para. 99
[280] See note 201.
[281] Wildhaber et al, op.cit, p. 262
[282] Letsas, G. "The Truth in Autonomous Concepts: How To Interpret the ECHR." European Journal of International Law 15, no. 2 (2004), p.282
[283] Case of Chassagnou and Others v. France, ECtHR Judgment of April 29, 1999, para.100, Accessed on January 10, 2016, http://hudoc.echr.coe.int/eng?i=001-58288
[284] Brems, Eva. „The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights" (1996) Heidelberg Journal of International Law, no.56 (2013), p.242 (Hereinafter - Brems - Margin)
[285] Legg A., op.cit, p.200
[286] Ibid, p.201
[287] Brems-Margin, p.242

of the margin which is ought to be applied.[288] The margin is rather a concept developed by the Court 'of its own motion'. The margin is applicable both in the case of negative obligations, as well as of positive ones, whereby "the domestic margin of appreciation takes the shape of a national discretion to determine the means by which to protect a right".[289] The margin of appreciation, in cases involving the assessment of proportionality of an act of a state that followed a positive obligation, will tend to wider than in the case of a "negative infringement"[290], although in several cases the Court had determined that the width of the margin in cases involving positive and negative obligations should be essentially the same.[291]

2.2.4 Deference and balancing in case of absolute rights

As concerns the absolute rights embedded in the Convention - right to life, right to not to be tortured, the prohibition of slavery and nullum crimen/poena sine lege[292] - the (in)applicability of both concepts cannot be entirely left aside. Some aspects of the mentioned rights might become part of a margin of appreciation argument, since "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of individual's fundamental rights".[293]

For instance, in A, B, C v. Ireland, which concerned the prohibition of abortion, the Court had stated that it is up to each high contracting party to determine the moment of when one should be considered to be protected under Article 2, from the moment of conception or birth. The Court further stated that "since the rights claimed on behalf of the foetus and those of the mother are

[288] Legg A., op.cit, p.203
[289] Brems-margin, p.246
[290] Case of Powell and Rayner v. the United Kingdom, ECtHR Judgment of February 21, 1990, para.45, Accessed on January 10, 2016, http://hudoc.echr.coe.int/eng?i=001-57622
[291] Brems-margin, p.247
[292] Article 2,3,4,7 of the ECHR respectively.
[293] Case of Soering v. the United Kingdom, ECtHR Judgment of July 7, 1989, para.89, Accessed on January 10, 2016, http://hudoc.echr.coe.int/eng?i=001-57619

inextricably interconnected, the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother".[294] In the A,B,C case the right to life temporal dimension had been decided within the Article 8 proportionality analysis, where in another abortion case - VO v France, the Court had made an important finding within the Article 2 scope analysis. Thereby it expressly stated that the temporal dimension of the beginning of the right to life is ought to be decided by each state separately, given the margin of appreciation "which the Court generally considers that States should enjoy in this sphere", since at the time there had been no consensus among the contracting states, whereas the issue had been an object of a wide-spread public debate in the French society.[295] In this sense, at least speaking from the perspective of the VO case, ECtHR did not employ a proportionality test, but the Court has attempted to balance the interests involved by, inter alia, assessing the alternative remedies which were available under the French law in response to therapeutically abortion caused by medical negligence.[296] Given that this analysis had been provided by the Court under the limb of Article 2, it seems reasonable to think about it as about a proportionality stricto sensu exercise. The Court thus did defer to the respondent states, whereas the margin of appreciation had a strong stance in the balancing exercise, this having led to a minimum scrutiny. [297]

2.2.5 Deference and balancing in case of relative rights

On the other hand, it is certain that in case of a qualified right's adjudication, the probability that the margin of appreciation and proportionality (*lato* or *stricto sensu*) will come into play rather

[294] A, B and C. v. Ireland, para.237
[295] Case of VO v. France, ECtHR Judgment of July 8, 2004, para.82, Accessed on January 15, 2016, http://hudoc.echr.coe.int/eng?i=001-61887
[296] Ibid, para.86-95
[297] Legg A., op.cit, p.206

reflects the general rule. Margin, in a similar fashion with proportionality, is not in a strict sense dependant on the presence of a limitation clause[298].

For instance, in Bayatyan v. Armenya[299], the Court did bring the argument that a contracting party does enjoy a certain margin of appreciation in deciding the necessity and the extent of the interference in a person's right to conscientious objection, i.e. to refuse to observe the compulsory military service based on the applicant's religious beliefs.[300] However, given that Armenia was at the time one of the last states among CoE not to establish an alternative for the compulsory military service, the Court had concluded that the margin enjoyed by Armenia had to be a narrow one. It is important because the European Court does tend to establish a connection between the width of the margin and the standard applied by the ECtHR when deciding upon the balancing component, while in this case "**convincing and compelling reasons** to justify any interference[...and that it] corresponds to a **pressing social need**".[301] After considering a wide range of interpretative arguments (which exceed the scope of this part of the thesis) the Court had concluded that the imprisonment of the applicant for refusing to serve in army on religious grounds had been disproportionate with the aim pursued by the state[302], namely - the protection of public order and of the rights of others.[303] In this particular case the concept of consensus had been used for the narrowing of the margin, whereas the threshold of an admissible interference had been raised (below - more).

[298] Christoferssen, op.cit, p.69
[299] See note 184 above.
[300] Ibid, para.124-128
[301] Ibid, para.123
[302] Ibid, para.124
[303] Ibid, para.117

In contrast to the standard[304] of balancing applied by the Court in the above case, it seems to be different when a state enjoys a wide margin of appreciation, where the role of balancing has been described as marginal.[305] For instance, in A. v Norway[306]; where the Court had to balance the right of the applicant to protection of honor and reputation as opposed to the right of the press to impart information of a public concern, in the context of criminal proceedings where a previous convict had been interrogated as a witness within the investigation of rape and murder.[307] The applicant had not received the legal state of a suspect or defendant, nevertheless an average person could conclude based on the newspaper articles published that the applicant was the main suspect.[308] Given the public interest in the investigation of the case, the Court has granted a wide margin of appreciation[309] to the respondent state, whereas the standard applied was "a fair balance" and "reasonable relationship of proportionality".[310] The part 'reasonable relationship' might create the confusion that the ECtHR implicitly applies the test of rational connection as the second step of the classic proportionality test, which seeks to determine that the measure imposed by the state has the potential to advance the realization of a given right, without deciding upon the necessity or proportionality of the contested measure.[311] It is, however, a mere balancing qualification.

The Court does not seem to be excessively consistent, as it does not define, nor did it create a theory on the criteria which would are deemed to be observed when deciding upon the balancing component. The qualification of the margin as wide or narrow means nothing else then the level

[304] It might be rightfully called a "soft" standard as the stringency with which the Court applies tends to have a rather casuistic nature.
[305] Popelier, p.240
[306] Case of A. v. Norway, ECtHR Judgment of April 9, 2009, para.68-74, Accessed on January 15, 2016, http://hudoc.echr.coe.int/eng?i=001-92137
[307] Ibid, para.65
[308] Ibid, para.68-69
[309]Ibid, para.66
[310]Ibid, para.74
[311] Barak:1, p.303,305

of discretion allowed to the state, whereby the imputed measure falls within the ambit of national authorities, including courts[312], taking into account the specific circumstances of any given case. Regardless of the margin that is being afforded to a respondent state, the basic rules of proportionality assessment in connection with the margin of appreciation have a general applicability. Thus, where two conventional rights have to be balanced, or where a right has to be balanced with an interest vested within one of the limitation clauses, the Court will most probably afford a certain/narrow/wide margin of appreciation, which will be subjected to the supervision of the ECtHR. Thereby, both the legislative decisions, and the ways in which those are used in the national adjudication proceedings shall be considered under the proportionality test, namely - whether the "interference complained of in the case as a whole [...] was proportionate to the legitimate aim pursued".[313]

[312] Popelier, p.234
[313] Delfi AS v. Estonia, see note 173 above, para.131

Chapter 3: Proportionality applied in LGBT-related case-law

3.1 ECtHR approach to proportionality

Within the human rights adjudication proceedings, the proportionality test has become a "trivial" notion in terms of its formal application – the European Court of Human Rights (hereinafter – ECtHR) has a longstanding history of its application in the matters arising under the Convention. It is not trivial, however, when one thinks about proportionality as about a standardized analytical framework, that penetrates each and every limitation of a given human right.

However, both the formal (methodological) aspect of proportionality and its substance, as applied by ECtHR, are problematic. The methodological part is problematic because the Court, as I will attempt to show further, lacks predictability and consistency in the way it applies the proportionality test. On the other hand, on a substantive level the Court is criticized for the lack of clarity and consistency in the last part of the proportionality test – necessity (proportionality in the narrow sense/balancing).[314] What I will try to emphasize, is that the Court itself lacks a clear stance on why kind of test is it using – balancing or, a methodologically more accurate test with enhances potential for objectivity – proportionality.

3.1.2 Alekseyev v. Russia

In Alekseyev v. Russia[315], the applicant, a Russian LGBT rights activist, attempted for several times to organize a gay pride in 2006 in Moscow, in order to "promote respect for human rights and freedoms and to call for tolerance on the part of Russian authorities and the public at large".[316] The previous mayor of Moscow's press secretary announced that the Muscovite local government

[314]See: Gerards, p.466
[315]Case of Alekseyev v. Russia, ECtHR Judgment from October 21, 2010, Accessed on: May 10, 2015: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101257
[316]Ibid, para.6

would never allow a LGBT rights manifestation under any pretext, even as a human rights demonstration, promising to impose a ban on a parade because of the society's negative attitudes and his personal convictions.[317] Later he stated that LGBT rights demonstrations should not be allowed on grounds of public morality, because all the major religious bodies were against it.[318] Subsequently he instructed the local authority to take all the necessary measures to prevent LGBT rights related manifestations, whereas the applicant's petition to hold a LGBT rights rally in Moscow was refused on grounds of public order, stating that numerous third parties expressed their negative views upon any public LGBT rights manifestations.[319] The ban was upheld by the judiciary, mainly on safety grounds, the obligation of the organizers to submit a new time and venue being reiterated.[320]

In 2007 the petition of the applicant to hold a gay pride march was again refused by the Department for Liaison with Security Authorities of the Moscow Government, essentially on "grounds of potential breaches of public order and violence against the participants"[321], which was again upheld by the judiciary bodies[322]. In 2008, the mentioned facts occurred again.[323]

The proportionality test requires first and foremost an interference in the rights of the applicants.[324] In the present case, the presence of the interference had not been disputed by the parties, the ban to hold a LGBT rights manifestation clearly amounted to a limitation of the freedom of peaceful assembly, as guaranteed by Article 11 of the Convention. In addition, the same actions of the

[317]Ibid, para.7-8
[318]Ibid, para.16
[319]Ibid, para.12
[320]Ibid, para.15, 17, 26, 27
[321]Ibid, para.30
[322]Ibid, para.37-38
[323]Ibid, para.39-48
[324] Case of Demir and Baykara v Turkey, ECtHR Judgment of November 12, 2008, para.111, Accessed on January 15, 2015, http://hudoc.echr.coe.int/eng?i=001-89558

respondent government amounted to an interference in the rights protected under Articles 13 and 14 of the Convention.

Article 11 protects a qualified right, meaning that the Court would have to engage into the proportionality analysis, by determining whether there was a sufficiently foreseeable and accessible normative act[325] enacted for the purposes of the interference and whether the legitimate aim pursued by the act had a rational connection[326] with the limitative measure. Only if the measure had passed the mentioned stages of the test, the Court would have to engage into proportionality in the strict sense (balancing) scrutiny.

The Court, regrettably, chose a different path. Immediately after finding an interference, it merely stated the disagreements between the parties upon the "prescribed by law requirement" and the legitimacy of the interference, adding that "the Court may dispense with ruling on these points because, irrespective of the aim and the domestic lawfulness of the ban, it fell short of being necessary in a democratic society, for the reasons set out below. To the extent that these issues are relevant to the assessment of the proportionality of the interference they will be addressed … below".[327]

This means that the Court has refused to engage into a 3-step analysis[328], but jumped straight to the assessment of proportionality stricto sensu. It might be argued that without scrutinizing the relevant legal rules and the aim pursued by them, the Court did not actually engage into proportionality, but it scrutinized the plain ban on LGBT rights manifestations in relation to the aim pursued, as opposed to the interests of the applicant protected under the Convention – which

[325] Case of Konovalova v. Russia, ECtHR Judgment of October 10,2014, para.42, Accessed on: 10/05/2015: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146773
[326]Barak:1, p.303
[327]Alekseyev v. Russia, para.69
[328] Finding: 1. whether the interference was proscribed under domestic law; 2. whether a legitimate aim existed; 3. whether the interference was necessary in a democratic society. See Chapter 3.1.2.

rather resembles a balancing exercise. Secondly, it might be argued that the Court, as we shall see further, could have found a violation on an earlier proportionality stage, which would make more sense, if to consider the necessity to maintain a consistent and methodologically foreseeable proportionality test. On the other hand – as a counter-argument, it might be argued that the Court's approach in this case is beneficial from the point of view of its policy towards LGBT rights. This means that the court intended thus to dismiss all the government's arguments on the necessity of the interference. In addition, a clear message was sent to the Council of Europe member states that the ban of gay rights rallies should be subject to a strict scrutiny on national level, the states having a narrow margin regarding the homosexuality-related issues.[329] Thus, it demonstrated its willingness to condemn strongly the interference of state's authorities in the right to hold peaceful protests of LGBT organizations.[330]

The Russian norms, which allowed the interference to happen, were not subject to the classic foreseeability and accessibility scrutiny. This is normally a threshold requirement, meaning that the law has to reflect the mentioned qualitative features. The limitation had not been based on an act specifically tailored in order to curtail any public LGBT rights related manifestations, but rather on the general limitation clause envisioned in art.55(3) of the Russian Constitution and on the wide interpretation of the Federal Law on Assemblies.[331] It might be argued that a limitation to a Constitutional right cannot operate merely on constitutional level, but it requires a specific, narrowly tailored sub-constitutional norm, which would set the limitation and the scope of the limitation[332]. It cannot be said, in my opinion, that in this case there had been a sufficiently

[329]Ibid, para.83
[330]Johnson, P. "Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the European Court of Human Rights: Alekseyev v Russia." Human Rights Law Review 11, no. 3 (2011), p.582
[331]Alekseyev v. Russia, , para.49-50
[332]Barak:1, p.147

foreseeable sub-constitutional act, whereas the obligation of the local authorities to ensure the public safety (sic; as provided under the sections 12 and 14 of the Assemblies Act) could hardly be foreseen as a limitation of a constitutional right. On the other hand, it is already well-established case-law, which provides that even though third parties might not agree upon the expression of some ideas by means of a peaceful assembly, it is the states obligation nevertheless to allow such meetings.[333] Moreover, Russia did bear the positive obligation at the time to provide efficient protection for the protesters, so that they could have express their will in a peaceful manner and without fear sentiments.[334] Last but not least, in GENDERDOC-M v. Moldova, ECtHR had already summarily found a violation of Article 11 in fairly similar circumstances.[335]

The next step would have been the identification of the legitimate aim and whether it connected well with the imposed measure. This is, again, a mere threshold requirement, with a relatively low level of scrutiny. The government contended that, due to the numerous petitions coming from political, religious, governmental and non-governmental organizations, some of which included threats of violence, triggered the necessity to maintain the public order.[336] The respondent government further asserted the protection of public morality, invoking that the applicant's manifestation would have a destructive influence upon the society's fundamentals[337]. Finally, the rights and freedoms of others were asserted – namely – the government alleged that the LGBT rights public manifestations breach the rights of "those people, whose religious and moral beliefs included a negative attitude towards homosexuality".[338] The Court dismissed all three legitimate

[333] Case of United Macedonian Organisation Ilinden and Ivanov v. Bulgaria, ECtHR Judgment of February 15, 2006, para.115, Accessed on January 15, 2016, http://hudoc.echr.coe.int/eng?i=001-70678
[334] Case of Plattform "Ärzte für das Leben" v. Austria, ECtHR Judgment of June 21, 1988, para.32, Accessed on January 15, 2016, http://hudoc.echr.coe.int/eng?i=001-57558
[335] Case of GENDERDOC-M v Moldova, ECtHR Judgment of September 12, 2012, para.39-41, 53-55, Accessed on January 15, 2016, http://hudoc.echr.coe.int/eng?i=001-111394
[336]Alekseyev v. Russia, para.57
[337]Ibid, para.60
[338]Ibid, para.60

aims, although in a curious way. Because the Court did not subject the aims to the traditionally low level of scrutiny under the "legitimate aim" head of the proportionality test, the Court scrutinized all the three aims as part of the balancing exercise, most of the Court's criticism being directed towards them. Otherwise, it might be argued that all three aims were legitimate, had the Court applied the regular proportionality test.

Speaking about the rational connection of the interference in the strict sense, i.e. whether the means employed had a rational connection with the final aim, which, again, is a mere threshold criterion[339], it might be argued that the blanket ban on LGBT rights manifestations could have had a positive impact upon the rights and freedoms as others as interpreted by the government and the public morality. One might argue that the government could reasonably expect that since the public would not be exposed to any kind of information, then the public morality would be reinforced, whereas the religious majority of the population would have less things to worry about. At the same time, the protesters themselves could reasonably expect to be safer had the pro-LGBT rights manifestations not happened.

In terms of the necessity (in the strict sense) requirement, i.e. whether the measure employed by the government could have had a less intrusive alternative with the same level of efficiency[340], another layer of complexity would be added. With regard to the aim of public safety, it might be argued that, contrary to the state's contention[341], it is the state who should have assured the public safety of the applicant and his organization, which was also an obligation under the national legislation. Such a measure would barely have any negative impact upon the freedom of assembly,

[339]Barak:1, p.303
[340]Barak:1, p.317
[341]Alekseyev v. Russia, para.58

whereas the public safety interests would have been protected. Concurrently, the other two aims seem to lack an equally adequate alternative, considering how the government has framed them.

In any event, the Court took a somewhat aggressive stance, and dismissed all the legitimate aims in relation to the LGBT rights manifestations when it came to the balancing exercise. After reiterating the general rules emerging from the Article 11 jurisprudence[342], the Court first and foremost dismissed the government's allegation of the public safety as an aim justifying the measure: "the Court concludes that the Government failed to carry out an adequate assessment of the risk to the safety of the participants [;] if every probability of tension and heated exchange between opposing groups during a demonstration were to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion". At the same time, the Court pointed to the obligation of the government to protect the homosexuals from hate speech[343], or at least this could be implied.[344]

Even though the government contended that the applicant's manifestations would have contravened with the norms of public morality in the absence of a relevant rule in the domestic law[345], the Court went further by making a fairly controversial argument. The Court did "not find that the events organized by the applicant would have caused the level of controversy claimed by the Government"[346], a mere public debate not being able to trigger the level of social distress necessary for the ban. At the same time, the mere fact that the views expressed by the applicant are be shocking and unacceptable for the public authorities cannot serve as premise for the

[342]Ibid, para.70
[343]Johnson, P., op. cit., p.586
[344]Alekseyev v. Russia, para.75-76
[345]Ibid, para.79
[346]Ibid, para.82

rejection of democratic principles.[347] Further, the Court brought the jurisprudence on homosexuality, most of which related to private and family life issues, the consensus being partially attained with regard to some of the issues, but their general relevance, for the sake of consensus is questionable.[348] As the Court later stated, there is a consensus upon the issue of promotion of LGBT right by means of assembly, which seems more like a bold statement. In my opinion, the court should have engaged in a deeper analysis with this respect.[349] Subsequently, the Court stated the importance of a social dialogue upon the issues of sexual minorities and pointed out the lack of scientific evidence that an open public debate on sexual minorities' status could bring an harm to children and "vulnerable adults".[350] This last point is especially important, because it factually narrows down the margin of the member states when their policies impose the risk of a further spread of homophobia.

The ECtHR's judgment in Alekseyev is of utmost importance in terms of advancement of the promoting information and enhancing the public discourse on LGBT rights.[351] However, the judgment would have been more balanced, in my opinion, if a "proper" proportionality test had been used. This might have enhanced the dialogue between the Russian Federation and the Court on LGBT rights promotion, which is clearly lacking now, given the existing laws on the prohibition of "homosexual propaganda".[352]

I am not claiming that the Court should have come to a different conclusion, but rather that it should have taken more of a diplomatic stance towards Russia. This is especially important when we think about the increasing tensions between Russia and the Council of Europe (among others),

[347]Ibid, para.80
[348]Ibid, para.83
[349]Ibid, para.84
[350]Ibid, para.86
[351]Johnson, P., op. cit., p.593
[352] Kristen L. Thomas, "We're Here, We're queer, Get Used to It: Freedom of assembly and gay pride in Alekseyev v. Russia" 14 Or. Rev. Int'l L. 473, 2012, p.507

following the ECtHR judgment in the Yukos case.[353] ECtHR is a court of international jurisdiction - a fact that extends the Court from being a mere watchdog of the Convention, but also an important catalyst of a policy change[354] the Russian Federation does have a strong claim about. A judicially careful approach in assessing the proportionality of a politically acute issue might help avoid the least to say unstable state of affairs in which Russia and ECtHR find themselves[355].

3.1.2 Dudgeon v. United Kingdom

It is somewhat a paradox that the Court did manifest a judicially diplomatic approach in the first case[356] where it had to recognize the criminalization of consensual homosexual intercourse performed by adults (21 years at the time) as contradicting Article 8 provisions - right to private life, in the case of Dudgeon v. United Kingdom.[357]

As concerns the actual facts of the case, they are more complicated from the Northern Ireland's constitutional position within the United Kingdom and the changing complex legal system at the time. The applicant, at the time when the complaint had been lodged, was a 35 y.o. male, who had been consciously a homosexual since he was fourteen, a resident of Northern Ireland[358], and who contested the rules of criminal law that outlawed homosexual acts performed by consenting adult individuals.[359] In 1976 a Drug Squad, under the Misuse of Drugs Act, law-enforcement agents

[353] See: Case of OAO Neftyanaya Kompaniya YUKOS v. Russia, ECtHR Judgment of March 8, 2012, Accessed on January 15, 2016, http://hudoc.echr.coe.int/eng?i=001-106308
[354] Anagnostou, Dia. The European Court of Human Rights Implementing Strasbourg's Judgments on Domestic Policy. Edinburgh: Edinburgh University Press, 2013, p.19
[355] A bill has been recently passed that allows the Constitutional Court of Russia to decide on whether an ECtHR judgment should be obeyed on domestic level as long as the Russian Constitution affords a higher level of protection. In: Vladimir Putin Signs Law Allowing Russia To Overthrow Human Rights Court Verdicts, Accessed on January 15, 2016
http://www.huffingtonpost.com/entry/russia-human-rights-law_566fc6bbe4b011b83a6c7040
[356] Grigolo, Michele. 2003. "Sexualities the ECHR: Introducing the Universal Sexual Legal Subject". European Journal of International Law. p. 1030
[357] Case of Dudgeon v. United Kingdom, Judgment of October 22, 1981, Accessed on January 15, 2016, http://hudoc.echr.coe.int/eng?i=001-57473
[358] Ibid., para.32
[359] Ibid., para.13

have performed a number of raids in the properties of homosexuals.[360] Because of the correspondence found in the applicant's house, a criminal case has been launched under the crime of gross indecency between males, which had been subsequently discontinued due to the lack of public interest in the prosecution.[361] The respective criminal provisions were provided under two Acts passed in 1861 and 1885. The first one criminalized the offence of "buggery", which was defined at the time, among others, as per anum intercourse performed between men or per vaginam between a men and an animal.[362] The second Act included several other homosexual practices, such as mutual masturbation and oral-genital contact, which was punishable by two years imprisonment maximum, while the attempt by a virtually unlimited term.[363]

The aforementioned acts had general applicability in the United Kingdom. Subsequently however, the "anti-gay" legislation was amended by the 1956 and 1967 Acts, that, as a consequence of a committee report on homosexual offences, did make it legal, as a matter of exception, for consenting males to commit the same acts of buggery and gross indecency, but this time only for those over 21 y.o. and only in private (as compared to the much lower age of consent for heterosexuals - 17 y.o.). Scotland did likewise update its legislation in 1980. Between 1920 and 1972 Northern Ireland had its own parliament, which did not however amend the respective legislation. After 1972 the legislative powers over Northern Ireland went back to the Westminster Parliament, that in 1976 addressed the issue of harmonization of the Northern Irish and English legislation. Given the political tensions, however, the views of the Northern Irish population were to be taken into account. A dedicated commission did recommend the amendment of the existing

[360] McLoughlin, M., "Crystal or Glass?: A Review of Dudgeon v. United Kingdom on the Fifteenth Anniversary of the Decision", MUEJL, Vol.3, 3 (1996), para.15, Accessed on January 15, 2016, http://www.austlii.edu.au/au/journals/MurUEJL/1996/36.html
[361] Dudgeon v. United Kingdom, see note 357 above, para.33
[362] Ibid, para.14
[363] Ibid, para.14

anti-homosexuality provisions in Northern Ireland, stating that at the time there was no majority that would oppose the reform. The responsible Minister, however, refused to pursue the reform, since a substantial number of people were opposed to it, a view subsequently criticized by the aforementioned commission.[364]

Firstly (and most importantly), the applicant claimed a breach of Article 8, whereby his right to private life has been violated due to the distress expressed in form of "fear, suffering, psychological distress, fear of harassment and blackmail" caused by the respective criminal provisions had he manifested homosexual behavior; and secondly Mr. Dudgeon had complained of a violation of the right to private life on account of the police searches and seized personal documents.[365] It was not homosexuality that was prohibited under the Northern Irish law[366], but rather criminal law acts had an impact upon the lives of homosexuals that went markedly beyond a mere de minimis degree of interference.

Although proportionality is a concept that has not captured a wide-spread attention among theorists at the time when the case had been decided, the Court had applied a consistent proportionality test, based on the following elements: the identification of whether an interference had occurred with Article 8, the existence of a justification, and the necessity of the interference (proportionality *stricto sensu*).

As regards the finding of the Court that there had been an interference, ECtHR likewise did commence from the premise that the UK government did not dispute the applicant's allegation that an in interference had been in place, [367]. However, this time the Court did go *ex proprio motu* with an explanation on such conclusion.

[364] Ibid, para.15-26
[365] Ibid, para.37
[366] Ibid, para.39
[367] Ibid, para.40

First, the Court re-stated the two folded nature of the interference. Namely, it had agreed with the applicant in considering the mere existence of the impugned criminal law legislation as limiting his right to private life as had be abided the criminal provisions in question he would have to refrain from homosexual acts against his will as manifested by his homosexual tendencies. Otherwise, Mr. Dudgeon becomes liable for the breach of the said norms, which inevitably entails a sanction that infringes his personal autonomy. It could have been added that the legislation in question reinforces the homophobic beliefs, which amplify the risk for the applicant to be blackmailed, for instance, which might have disabled the argument that the law was not anymore applied towards consensual males over 21 y.o.[368].

It may be rightfully pointed out that the Court did not subject the contested criminal legislation to the scrutiny of its common accessibility and forseeability test, but rather limited itself to the fact that none of the parties contested the fact that the interference was accessible of foreseeable, and since "the interference is plainly in accordance with the law".[369] For the sake of further consistency of methodology and form of proportionality analysis, it would still have been more beneficial, in my opinion, had the Court assessed the quality of the legislation in question. My argument would be that given that at the time, the British government had to prerogative of modifying the relevant legal provisions, and given that, UK is a unitary and not a federal state[370], it would have been interesting had the Court expressed its opinion on the predictability of a formula where some UK acts were not applied in Northern Ireland (as part of the UK). On the other hand, the impugned legislation, although without a special policy in place, was not applied for quite some time with regard to consensual homosexual practices for subjects aged over 21, but only to those who

[368] Ibid, para.41 dudgeon
[369] Ibid, para.44 dudgeon
[370] Burgess, Michael, "The British Tradition of Federalism.", Fairleigh Dickinson Univ Press, 1995, p.16

committed the offences in question with males under 21 y.o. or with mentally disabled males.[371] In any event, it is doubtful that the impugned legislation would not have passed the forseeability test as it had been clear for the applicant that the former did obviously criminalize certain homosexual practices. The Court did not further apply the tests of legislative scrutiny in the subsequent cases regarding the criminalization of certain homosexual practices, namely in Norris v. Ireland[372], nor in Modinos v. Cyprus[373].

The next stage of proportionality analysis determined the existence of a proper purpose for the stated interference, whereby ECtHR had from the outset brought the two umbrella justifications invoked by UK, namely - the protection of morals and of the rights of third persons.[374] As previously noted, the finding whether the aim had been legitimate is a mere threshold requirement, and does not involve a balancing exercise.

The Court has accepted the "general aim" followed by the impugned limiting legislation had been the protection of morals, as applied only on the territory of the Northern Ireland as part of the United Kingdom.[375] This is a fairly important observation, since, strictly speaking, while the territorial application of the law was limited to Northern Ireland, it might have been questioned whether determining the proper purpose to a specific territory as contravening to a territorial limitation of the Convention's application. At the same time, the notification required under the present Article 45 of the Convention had not been addressed by the UK with regard to Northern Ireland. Moreover, two other elements should have been in my opinion addressed. Firstly, it had been noted in the facts of the case, that the population of the Northern Ireland that supported the

[371] Dudgeon v. United Kingdom, see note 357 above, 40-41
[372] Case of Norris v. Ireland, ECtHR Judgment of October 26, 1988, para.40, Accessed on January 15, 2016, http://hudoc.echr.coe.int/eng?i=001-57547
[373] Case of Modinos v. Cypru, ECtHR Judgment of April 22, 1993, para.25-26, Accessed on January 15, 2016, http://hudoc.echr.coe.int/eng?i=001-57834
[374] Dudgeon v. United Kingdom, para.45
[375] Ibid, para.46

impugned legislation, was at the time limited to religious groups[376], which hardly represented its population[377]. Secondly, more of a theoretical argument would be that, as mentioned in the second chapter, only a conventionally protected value could constitute a legitimate aim, while it might have been argued that as the law has had a bluntly discriminatory nature.[378] This is not to imply that the conclusion of the Court should have differed.

At the final stage of proportionality analysis, the Court did perform a balancing exercise, whereby it had to determine whether the limitation was necessary in a democratic society[379], in concreto - whether the limitation followed a "pressing social need"[380]. Importantly, however, ECtHR has endorsed the opinion of the of the so-called Wolfenden report, that did find the "public order and decency" to be the proper purpose for such a limitation[381], which, even as matter of example, does not serve the consistency of the Court's proportionality analysis.

The Court took as a starting point the fact that a state does have the margin to legislate in the field of homosexual activities between males, even if performed in private, where necessary for the protection of vulnerable groups.[382] Consequently the Court brought in the margin of appreciation doctrine, stating that its scope differs depending on the aims restricting a given right.[383] Here I would raise the theoretical question of whether in abstract terms the scope of the margin of appreciation coincides with the scope of the limitation permitted under the limitation clause. While giving an affirmative answer is quite tempting, as in this specific case the Court instantly addressed

[376] Ibid, para.25
[377] Ibid, para.23
[378] Which had been confirmed in the further case law, ECtHR found a violation of Article 14 taken in conjunction with Article 8. See: Case of L. and V. v. Austria. ECtHR Judgment of April 9, 2003, para.52, Accessed on January 15, 2016
[379] Dudgeon v. United Kingdom, para.48
[380] Ibid, para.51
[381] Ibid, para.49
[382] Ibid, para.49
[383] Ibid, para.52

the UK's inference from the Handyside[384] judgment, whereby the Court granted a wide margin for the protection of public morals.[385]. The Court rightly noted that not only the aim is to determine the width of the margin, but, most importantly, the ”nature of the activities involved", adding that Mr. Dudgeon's "most intimate aspect of private life" had been affected.[386] The Court did not define what it meant by "activities involved", but rather connected these two aspects. In my opinion the what ECtHR meant is that it involves the nature of the right coupled with the extent of the interference. This conclusion is reinforced by the fact that in the instant case the Court required "particularly serious reasons" for the limitation of the applicant's right to private life.[387] Furthermore, it is 'tolerance and broadmindedness' that have to be reinforced under a limiting law, and not curtailed.[388] These factors have implicitly determined a narrow margin of appreciation to be applied. Finally, ECtHR mentions the standard of "relevant and sufficient" reasons for a limitation[389], which was defined by Judge Sajo as a threshold test on how the margin doctrine should be applied, whereby the way a given state applied the ECHR standards and assessed the relevant facts is addressed[390] - which is a legitimate part of the balancing exercise. This might include the assessment of legislative choices a state has in the given circumstances.[391] However, as previously noted, ECtHR seldom goes expressly into this part of proportionality analysis. In this respect the Court considered the protection of morality of the people living in Northern Ireland[392] and the potentially damaging effect to its moral fabric to be relevant factors, while the

[384] See note 153 above.
[385] Dudgeon v. United Kingdom, para.52.
[386] Ibid, para.52
[387] Ibid.
[388] Ibid, para.53
[389] Ibid, para.54
[390] Dissenting Opinion of Judge Sajo and Judge Tsotsoria in the case of Delfi AS v. Estonia, see note 232 above, para.25
[391] Barak:1, p.401
[392] Dudgeon v. United Kingdom, para.56

absence of regulation of the same intrusiveness degree in other CoE states does not a priori mean that the measure is unnecessary.[393] At the same time, ECtHR concluded that while the issues pertaining to UK's constitutional setting[394] and the fact that the UK government acted carefully and in good faith[395] are both relevant factors, but not necessarily decisive. The last Court's observation is fairly important, since the mere fact that a given state assesses carefully the negative implication into a person's right does not a priori entail the conclusion that the measure is proportionate.

The Court took note of the fact that most CoE member-states had legislative provisions in this field, but Northern Ireland differed from the majority of states in the absolute nature of the prohibitions, which, given the previously mentioned doctrine of consensus, naturally could not play in UK's favor[396]. Therefore, the Court stated that the majority of CoE states no longer consider the contested legislative measure to be necessary, while law enforcement agencies of the Northern Ireland themselves have refrained at the time from the applying the criminal law for the applicants. Moreover, in my opinion the Court did implicitly apply the classical necessity test within the balancing exercise, by considering that in the given circumstances there had been no need for criminalization, or that there had been a public demand for it.[397] While it was up to the state to chose the appropriate safeguards for the protection of morality (below the degree of criminalization), the Court did recognize the measure as excessively intrusive, inter alia, because of its "breadth and absolute character".[398] Finally, although homosexuality in any of its forms of

[393] Ibid, para.56
[394] Ibid, para.58
[395] Ibid, para.59
[396] Ibid, para.49
[397] Ibid, para.60
[398] Ibid.

expression might have been shocking for some part of the Northern Irish population, UK could not have considered the impugned means to be proportionate, given the degree of harm caused.[399] It had been argued that not even did the ECtHR lay down the foundation for later developments of LGBT rights, but most importantly - that in Dudgeon the Strasbourg Court implicitly recognized the sexual orientation as a ground of discrimination, while an interference in it shall require a particularly serious reasons. Later on the Court gave more of a far-reaching[400] effect to this decision, by covering the public/private space (of exercising affection) difference[401]; will expressly require particularly weighty reasons for an interference which even goes below a criminal sanction, and which will further extend the scope of protection of LGBT individuals to the right to family life thus widening its interpretation.[402] This shows the undeniable impact, which the judgment has had upon the further jurisprudence and, most importantly, upon the adjacent (anti-)LGBT policies of the CoE member-states.

3.2 The Moldovan approach to proportionality in GENDERDOC-M v. Marchel, the Bishop of Bălți and Fălești

The Republic of Moldova has a three-layered court system, which consists of first instance courts, appellate courts, and the Supreme Court of Justice (hereinafter- SCJ). The sole state body that has the prerogative of constitutional adjudication is the Constitutional Court, meaning that only it has the right to interpret the constitutional provisions[403], including the interpretation of the scope of

[399] Ibid, para.60
[400] McLoughlin, M., op.cit, para.85
[401] Which is an argument still used in the Russian debate, for instance, as may be noticed in the Russia's argument sin Alexeyev. See: Case of Niemietz v. Germany, ECtHR Judgment of December 16, 1992, para.29, Accessed on January 15, 2016, http://hudoc.echr.coe.int/eng?i=001-57887
[402] Wintemute, R., Sexual Orientation and Human Rights: The United States Constitution, the European Convention, Clarendon Press (1997), p.130-131
[403] Article 134 (1) of the Constitution of the Republic of Moldova, Accessed on January 15, 2016, http://lex.justice.md/document_rom.php?id=44B9F30E:7AC17731

fundamental rights as provided under the Convention. Only a limited group of state institutions has standing before the Constitutional Court, whereas individuals may only observe its proceedings. And while Moldova is a party to CoE, ECHR may be applied by court of all levels as it is part of domestic legislation.[404]

The recent judgment of SCJ in the case of GENDERDOC-M v. Marchel, the Bishop of Bălți and Fălești[405] in my opinion has been underpinned by a stringent necessity to improve at least the balancing exercise, or ideally to consider the application of proportionality. This would bring quality and clarity to SCJ judgments that concern conflicting human rights and values, which did in my opinion lack in this case.

The facts of the case were as follows. Within an interview on a nation-wide television, the Bishop has claimed that the Law on chance equality [406] created excessively good conditions for homosexuals; and that they should not be employed in medical, educational and in public catering services, since 92% of them are HIV infected and in case such an individual would perform a blood transfusion - it would end up tragically.[407] Shortly after, the claimant - a leading national NGO in the field of LGBT rights advocacy had submitted a civil claim against the Bishop, thereby asking the First Instance Court to oblige him to recall his statements and cover the moral damages suffered by the homosexual community. The main underlying argument was that these statements violated the rights of homosexuals to honor and dignity, since they did not have any factual grounding. The claimant considered that Bishop, by abusing his religious position, regarded the homosexuals as

[404] Ibid, Article 4
[405] Case of GENDERDOC-M v. Marchel, the Bishop of Bălți and Fălești, SCJ Judgment of Septermber 16, 2015, Accessed on January 15, 2016, http://jurisprudenta.csj.md/search_col_civil.php?id=22002 (hereinafter - Bishop)
[406] The "Law on ensuring equality" had been adopted after "heated" discussion on its implications for LGBT community, namely, whether it did provide "more" rights for the latter. In fact it only reinforced the previous non-discrimination provisions that already existed in various laws, while creating an executive agency that was designed to examine the observance of the law, including by means of individual petitions. See: Law on inuring equality nr.121 of May 25, 2012, Accessed on January 15, 2016, http://lex.justice.md/md/343361/
[407] Bishop, p.1

being unworthy and dangerous for obtaining the jobs mentioned above. The first instance court and the appellate court decided the case in claimant's favor. The SCJ, however, decided that it has had sufficient grounds for quashing the previous decisions, considering that the lower courts should not have applied the provisions protecting the homosexuals against discrimination or those regarding their reputation.[408] Instead, SCJ has given priority to the defendant's freedom of religion and freedom of expression. The Court considered that both according to the national and ECHR law, only a proportionate limitation of the Article 10 is allowed, which the lower courts failed to do.[409]

If to look into the Court's reasoning, however, one might notice that SCJ did rather apply a balancing exercise, as the only two elements of proportionality present in the judgment are the legitimate aim and proportionality of the limitation in the strict sense. The Court did have a quite unique approach , whereas it had started the assessment of the justification by invoking the necessity to efficiently protect the Bishop's right to freedom of religion and expression.[410]

Meanwhile, at the very end of the judgment, the Court has stated that the scope of application of the right not to be discriminated did not cover the claimant's allegation, given the state's margin of appreciation and since the claimant failed to prove that he had been in a comparably different situation (*sic*).[411] In my opinion, ending a judgment with such a statement means that there was rather no practical reason to provide reasoning since there was lack of a substantive claim ab initio, thus the judgment should have been dismissed.

As concerns the legislation under which the limitation produced by SCJ's judgment became possible, the Court has vaguely referred to the Moldovan Law on the freedom of expression, and

[408] Ibid, p.2-3,8
[409] Ibid, p.7
[410] Ibid, p.4
[411] Ibid, p.8

Law on the freedom of religion, without however expressly specifying the provision which would allow hate-speech in any circumstances as long as they are grounded on religious beliefs.[412] And more importantly, SCJ failed to consider the domestic law provisions that expressly forbid the promotion of labor discrimination based on sexual orientation via mass-media (that is treated as a "serious form of discrimination"), which may constitute a lawful limitation for the freedom of expression.[413]

In my opinion, the wording that was used by the Bishop did unequivocally trigger a prima facie case of such discrimination. The failure to address those issues in the balancing exercise, let alone to subject the case to a proportionality analysis in the wide sense did impede the quality of the judgment. Hence, in my opinion, had the Court made a slightly deeper inquiry into the law applicable to the present case as part of the lawfulness of the interference assessment, the solution given by SCJ would have been different.

Thus, the Court went on to protect the Bishop's speech in terms of protection of rights of others, since it straightaway put on the table the protection afforded to him by freedom of expression and freedom of religion regulations. Sometimes SCJ triggered the impression that it has addressed the manifestation of religion as *lex specialis* to freedom of expression, whereas it restated for numerous times both rights throughout the reasoning.[414]

As regards the facts that SCJ considered relevant and sufficient, the Court first paid attention to the Bishop's religious position, which obliged him to propagate certain views and idea, aimed at religious education, by calling people for caution, since the biblical test says that homosexuality is a sin.[415] In addition, the church (Moldovan Metropoly) does not 'judge' sinners, but the sinful

[412] Bishop, p.4
[413] Articles 4,5 of the Law on ensuring equality, see note 406 above
[414] Bishop, p.4,-6-8
[415] Ibid, p.4

lifestyle.[416] Hence, the Court concluded (in the second paragraph of the reasoning) that the views expressed by the Bishop were perfectly in line with the freedom of expression limits, as he was not against homosexuality as such, since it manifests regardless of the Bishop's will (*sic*).[417] Moreover, the Bishop was entitled to such an opinion since the absolute majority of Moldovans are Christians[418], which fairly well resembles the UK arguments in Dudgeon, which had been decided quite some time ago.

Leaving aside the fact that from the above statement might be drawn the conclusion that Moldova endorses such a position, this judicial peculiarity might have been well avoided, had SCJ applied a full-fledged proportionality test, whereby the scope of the infringed right of the applicant could have been assessed.

Without pretending to re-write SCJ's decision, it is worth mentioning that when a cleric of such a rank declares homosexuals unworthy to work in education, medical or catering services, he inevitably influences the public opinion. It might have been from the outset beneficial at very least to look into the possibility of limitation of him spreading hatred against homosexuals by defining the scope of their right not to be discriminated against and their right to reputation[419], coupled with the right not to be discriminated against. Contrary to SCJ's argument[420], hatred is not necessarily manifested call for violence against homosexuals, but may entail "ridicule or slandering specific groups of the population" (homosexuals in the instant case), while discrimination based on sexual orientation is not less of a ground than race.[421]

[416] Ibid.
[417] Ibid.
[418] Ibid.
[419] As provided under article 8 of the Convention. See: Case of Pfeifer v. Austria, ECtHR Judgment of November 15, 2008, para.35, Accessed on January 15, 2016, http://hudoc.echr.coe.int/eng?i=001-83294
[420] Bishop, p.4
[421] Case of Vejdeland and Others v. Sweden, ECtHR Judgment of May 5, 2012, para.55, Accessed on January 15, 2016, http://hudoc.echr.coe.int/eng?i=001-109046

In my opinion, these are a few important considerations that SCJ failed to address either in what should have been the beginning of proportionality analysis - i.e. the definition of the rights' scope, or to consider them in the balancing part.

Instead, the SCJ has reiterated numerous times that Bishop's statement was a mere value judgment, since he had been unprepared and it reflected a hypothetical, only his opinion[422], which means that it should have not been susceptible of proof[423], which the Court tried to reinforce by briefly mentioning the Handyside case formula on the legality of offensive speech.[424] At the same time, the Court did provide a link to web site, which stated the information that in USA, in 1981, 95% of those registered with HIV had been homosexuals[425]. It is noteworthy that the Bishop had made a quite different statement, while the incitement to hatred to hatred against homosexuals in Moldova does not have causal connection and cannot be reasonably justified by 1981 USA statistics. In my opinion, the qualification of the Bishop's speech as value judgments had been slightly farfetched.[426]

In conclusion, even if to put aside the inconsistency of the arguments provided by SCJ, which might raise a separate issue under Article 6 of ECHR (right to a fair trial)[427], in my opinion, the application of a proportionality test would well serve both the predictability and improve the quality of the Court's reasoning.

[422] Bishop, p.7.
[423] Case of Pedersen and Baadsgaard v. Denmark, ECtHR Judgment December 17, 2004, para.76, Accessed on January 15, 2016, http://hudoc.echr.coe.int/eng?i=001-67818
[424] Bishop, p.5; Handyside, para.49, see note 153 above
[425] Bishop, p.5
[426] Case of Flux v Moldova, ECtHR Judgment of February 20, 2008, para.29, Accessed on January 15, 2016, http://hudoc.echr.coe.int/eng?i=001-83386; Case of Nikowitz and Verlagsgruppe News GmbH v. Austria, ECtHR Judgment of May 22, 2007, para.25-26, Accessed on January 15, 2016, http://hudoc.echr.coe.int/eng?i=001-79572
[427] Case of Garcia Ruiz v. Spain, ECtHR Judgment of January 21, 1999, para.26, Accessed on January 15, 2016, http://hudoc.echr.coe.int/eng?i=001-58907

3.3 The South-African approach in the case of National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs

Leaving aside the jurisdictional differences between the Moldovan SCJ and the Constitutional Court of Africa (hereinafter - SACC), the second one brings a better, although less orthodox example to follow when speaking about the methodology in applying a classic proportionality methodology. As per the standing rules of constitutional adjudication, the so-called objective constitutionality concept had been adopted by the Court, which allowed an individual to bring his/her case before the Constitutional Court, even if he/she had not personally suffered from an allege violation.[428]

SACC has had an increasingly progressive jurisprudence related to discrimination of same-sex couples, starting with decriminalization of "sodomy" in 1998, consequently declaring the common-law definition of marriage as being discriminatory towards same-sex couples.[429] In the case of National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others, claimants have contended that the Aliens Control Act 96 of 1991 (hereinafter - the Act) were unconstitutional. The main reason invoked had been that since the Section 25(5) of the Act did provide the possibility for the regional committees to grant on a case-by-case basis immigration permits only for the spouses of South-African legal residents, while members of same-sex partnership, *per a contrario*, were excluded from this process[430]. The first applicant was an association of 69 NGO fighting for LGBT rights in South Africa; the rest thirteen applicants had been either South-African residents and had non-residential partners, or individuals who were

[428] Case of National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others, SACC Judgment (CCT10/99) [1999] ZACC17, para.29, Accessed on January 15, 2016, http://www.saflii.org/za/cases/ZACC/1999/17.pdf (hereinafter - Migration case)
[429] Man Yee Karen Lee, "Equality, Dignity, and Same-Sex Marriage: A Rights Disagreement in Democratic Societies", BRILL (2010), p.36
[430] Migration case, para.1

precluded from migrating to South-Africa because of the contented restriction.[431] At the same time, the Minister for Home Affairs, under the provisions of Section 28(2) of the same Act could grant exemptions were "special circumstances" existed; whereas the first applicant had successfully lobbied for the exemption of some thirteen same-sex partners of South-African residents in 1997[432], a practice upon which subsequently a blanket ban had been set, thus leaving the same-sex partners of South-African residents without the possibility of obtaining the exemption.[433]

At the same time, while the South-Africa did not at the time recognize same-sex marriages, the wording of the Act was not interpreted by SACC in a way that would allow the concept of "spouses" to cover same-sex unions.[434] Such an interpretation, although constituting a logical argument within the decision, had been criticized for providing a "dictionary", narrow definition of marriage, that could preclude the family concept from a further inclusion of same-sex partnerships.[435]

From the facts of the case, it may be well noticed, that the circumstances described by the Court went well beyond issues pertaining to migration law, but called for the consideration of possibility and admissible margin for gay and lesbian couples to be included in the concept of family.[436] Moreover, in its structurally short yet extensive proportionality review, the Court went on to dismantle many of the existing prejudices related to homosexual marriages.[437]

It is noteworthy that the proportionality test applied by SACC largely resembles the classical one, whereby, as stated in the Makwanyane case, the Court should assess the nature of the limited right,

[431] Ibid, para.17
[432] Ibid, para.19
[433] Ibid, para.20
[434] Ibid, para.25
[435] Ronald Louw, "Gay And Lesbian Partner Immigration And The Redefining Of Family", SAJHR, 16 (2000), p.317
[436] Ibid, p.313
[437] Woolman, Stu, Constitutional Conversations, Pretoria: PUPL, 2008, p.240

the purpose of the limitation, and, given the extent of the limitation, whether it had been necessary.[438] The SACC approach is however, different from the structural application seen in the case of SCC or FGCC, since it rather sees the proportionality elements as part of a bigger balancing exercise[439], or, as SACC has stated in the Manamela case: "the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list".[440]

In the instant case, the largest part of the proportionality assessment constitutes the scope of anti-discrimination provision, where the Court went well beyond finding a mere limitation of the fundamental rights.[441] The Court has proposed that the determination of rights' limitation to be analyzed cumulatively[442] in light of equality (that included, inter alia, the right no to be discriminated)[443] and right to dignity.[444]

The Constitutional Court went on to state that discrimination has to be analyzed in a context broader than specific areas of law, whereby discrimination is underpinned by an "experience of subordination" of an oppressed group of individuals[445], while stating that the state of law in South-Africa at that time did not recognize same-sex partnerships.[446] Therefore, the Court had concluded that same-sex partners were "in a different position from homosexual partners".[447] It proceeded to analyze the nature of the limitation, where the Court had inserted rather inspiring rhetoric on the

[438] Case of S v Makwanyane and Another (CCT3/94) [1995] ZACC 3, SACC Judgment, para. 104Accessed on January 15, 2016, http://www.saflii.org/za/cases/ZACC/1995/3.html; Migration case, para.41
[439] Petersen, Niels, "Proportionality and the Incommensurability Challenge – Some Lessons from the South African Constitutional Court", (2013). New York University Public Law and Legal Theory Working Papers. Paper 384, p.1, Accessed on January 15, 2016, http://lsr.nellco.org/cgi/viewcontent.cgi?article=1385&context=nyu_plltwp
[440] Case S v Manamela and Another (CCT25/99) [2000] ZACC 5, SACC Judgment, para.32, Accessed on January 15, 2016, http://www.saflii.org/za/cases/ZACC/2000/5.pdf
[441] Migration case, para.31
[442] Ibid.
[443] Section 9 para.3 of the South-African Constitution, see note 156 above
[444] Ibid, Section 10
[445] Migration case, para.35
[446] Ibid, para.37
[447] Ibid, para.38

general discrimination of gays and lesbians, such as "The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways."[448], concluding that "a significant disadvantage and vulnerability" preceded the case.[449]

By providing an analysis of this fashion of the general issues gays and lesbians are struggling with because of lack of equality, the Court, in my opinion, had shown that it takes rather seriously the finding of a limitation, as it went well beyond the scope of finding "merely" a limitation. In my opinion, the Court had shown a rather activist position, by assessing impact of the discrimination upon gays and lesbians, and their position in the society generally.[450] These considerations might have been relevant for the balancing exercise, in my opinion, as they speak about the way the contested legislation, among others, damages the state of equality towards gays and lesbians, or, at least for the necessity part - where the extent of a limitation is addressed.[451] In any event, compared to ECtHR, this Court appears to give priority to the negative effect of the provision along the whole judgment, as compared to a somewhat formal approach one could notice in Dudgeon.

After, the Court had considered the presence of a proper purpose for the existence of the limitation, namely - had it protected family life of "lawful marriages". However, without providing a conclusion on the issue, it returned back to the assessment of the negative impact of the contested provisions.[452] It found unnecessary to address the scope of the "traditional marriage" as a proper purpose, but rather concentrated on the increasingly positive attitudes towards same-sex marriages,

[448] Ibid, para.42
[449] Ibid, para.44
[450] Motara, S., "Making The Bill Of Rights A Reality For Gay And Lesbian Couples", AJHR, 16, 344 (2000), p.347
[451] Case of S v Makwanyane and Another (CCT3/94) [1995] ZACC 3, SACC Judgment, para.104, Accessed on January 15, 2016, http://www.saflii.org/za/cases/ZACC/1995/3.pdf
[452] Migration case, para.45

including from a comparative perspective[453], while actively engaging in an exercise of refutation of stereotypes on same-sex marriages.[454] Again, in my opinion, these elements belong to a later balancing exercise. SACC had shown a less formalistic approach, while it stated that the impugned acts reinforced the stereotypes against lesbians and constituted a "crass, blunt, cruel and serious invasion of their dignity".[455]

Finally, the Court concludes that the state did not provide a proper purpose for the limitation, as the contested law "unjustifiably limits the constitutional rights of partners in a permanent same-sex life partnership".[456] From one perspective, such a conclusion would rather pertain to a balancing exercise, where it could address sufficient reasons for and against the limitation. A better explanation, in my opinion, is that this Court imposes a rather high threshold even for the proper purpose of a limitation, which is, again, a different approach than the more lenient proper purpose test used by ECtHR. Furthermore, the Constitutional Court had stated that there had been a lack of rational connection between aims sought and the measure, as the extension of the Section 25(5) exemption to same-sex couples could negatively impact the protection allegedly afforded by the state for traditional families[457], which speaks about a rather high threshold of perception of the rational connection test.

Although the Constitutional Court remedied the under-inclusiveness of the impugned act[458], it seemed that, the Court sees the balancing exercise as a central one in proportionality assessment, as it perpetrates the analysis of other elements of proportionality. At the same time, its approach

[453] Ibid, para.48
[454] Ibid, para.49-52
[455] Ibid, para.54
[456] Ibid, para.55
[457] Ibid, para.56
[458] Leckey, R., Bill of Rights in the Common Law, Cambrinde, Cambridge University Press , 2015, p.101

towards assessing different elements of proportionality yet more demanding then it is the case of ECtHR, or of the FGCC for this purpose.

Conclusions

Proportionality proves to be a general principle of law[459] with historically deep roots, which nowadays penetrates the whole system of human rights adjudication, but is certainly not limited to this field. It is indispensable in any modern human rights court's interpretative arsenal. In human right law, it has, however, the specific purpose of providing an objective forum for the reconciliation of opposing rights or opposing rights and interests. Whichever is the theory on the objects of proportionality - it seems that it has a rather small practical meaning, as the text of the analyzed judgments suggests that the respective Courts are rather focused on the interpretation of substantive rights, than on the mean of interpretation.

Moreover, proportionality requires all the state bodies to follow the rule that a right may be limited only when done with a proper purpose and by necessary means, consequently limiting the discretion of state bodies on the national level and of states internationally.

Proportionality is an abstract methodological tool, which comprises four elements that necessitate consecutive application: the proper purpose that is grounded on the constitutional values of a democratic society[460], which shall not be based on irrational considerations, necessity, and balancing.[461] These are the elements, which may be found to a smaller or bigger extent in the jurisprudence of the SCC, FGSC, SACC and partially - ECtHR. In addition to them, the adjudicatory court has firstly to determine the scope of the right and whether it was limited. Last but not least, it has to be determined whether the limitation had been allowed under an explicit or

[459] Ellis, E., The Principle of Proportionality in the Laws of Europe, Portland: Hart Publishing , 1999, p.2
[460] Barak:1, p.245
[461] Ibid, p.133

implicit limitation clause[462], although it is noteworthy that even in its absence, which is the case of absolute rights, ECtHR still does engage in a balancing exercise, albeit to a limited extent.

The Strasbourg Court applies an additional element in its review - whether the limitation had been prescribed by law, which only adds objectivity to the test by inquiring if the law was sufficiently accessible and foreseeable at the moment of infringement of a fundamental right.[463] In order to be objective, however, the mentioned elements have to be applied consistently, while enjoying a high degree of coherence and univesalizability.

However, the inconsistent application of the necessity test is not negligible in ECtHR's case law, as it still applies it on a case-by-case basis as part of the balancing exercise. Adding it to the basic structure would certainly make the whole test more predictable, as it is often easier to "struck down" a law, where the less intrusive alternatives are obvious, as it had been the case in Alekseyev v Russia.

The most complex and controversial element of proportionality analysis remains balancing, which requires due consideration to be given to all the relevant facts. One option for reducing the arbitrariness of the test is for a Court to engage additional sub-tests, such as the margin of appreciation. Unfortunately, the margin is quite a wild card itself, as it does lack predictability and universazability. On the other hand, the option of consistently applying other parts of proportionality may be explored, such as: the legality of the limitation and its necessity. ECtHR perceives necessity as a minefield as it is predictably afraid to violate the subsidiarity considerations. However, one might argue ECtHR may well apply consistently the necessity test without intruding into the area of competences afforded to CoE member-states, by using a legal language that would not suggest the implementation of other, less intrusive means.

[462] Ibid, p.150
[463] Delfi AS v. Estonia, para.120, see note 173 supra

Even the proper purpose test, as explored by SACC in the analyzed case, provides us with an example of how a discriminatory act had been struck down in the first stage of proportionality analysis. And although SACC sees all the elements of proportionality rather as part of a larger balancing exercise[464], in the analyzed case it still did provide such an example. This is not to conclude that the SACC experience is perfect with regard to the methodology of proportionality. In my opinion, the consistent application of proportionality in case of SACC would add predictability and universazability to the judicial decision-making.

As concerns the ECtHR jurisprudence, one has to keep in mind the peculiarities of the Strasbourg Court as a trigger for a change in the outdated policies, especially as concerns LGBT rights, which are normally highly debatable. In order to be perceived as a legitimate actor in this regard, it has to consider all the relevant interests that may be involved in a potential LGBT case, in order to increase the overall objectivity of a judgment that has the potential of "attacking" the governing social attitudes. Proportionality does bring objectivity and transparency that does remove the sentiment of the justice 'not being seen to be done'. Proportionality does provide for an *ab initio* set of criteria or questions, which might wipe off any further allegation of ECtHR's arbitrariness.

At the same time, there are still Supreme Courts of Justice in Eastern Europe that do deliver arbitrary decisions backed by bigoted arguments. Proportionality in this case has the potential of bringing clarity, structure, and some degree of objectivity. At the same time, the application and interpretation of human rights sub-constitutional laws would actually acquire a minimum degree of predictability. Finally, in some cases, the proper application of a four-staged proportionality test might lead to a different, more balanced solution, that would engage the human rights values all the litigating parties, as they are protected under the current state of law.

[464] Leckey, R., op.cit, p.101

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