



**JUDICIAL REVIEW, PROPORTIONALITY AND CRIMINAL  
PUNISHMENTS; A COMPARATIVE ANALYSIS OF THE UNITED STATES,  
GERMANY AND GEORGIA**

by Giorgi Sulkhanishvili

LL.M. SHORT THESIS  
COURSE: Elements of Comparative Constitutional Law  
PROFESSOR: Mathias Möschel  
Central European University  
1051 Budapest, Nador utca 9.  
Hungary

## **ABSTRACT**

The thesis focuses on proportionality in constitutional law and on its role in the judicial review of criminal punishments. In particular, the framework of the thesis will encompass the constitutional disputes between the person and the state, between the superior norms, basic human rights, enshrined in the constitutions and inferior norms that restrict fundamental rights of individuals via substantive criminal law.

The central of the thesis is a review the constitutional adjudication and proportionality in perspective of criminal punishments in United States, Germany and Georgia, their subsequent comparison and analysis of the strengths and the weaknesses of each approach.

The relevance of the topic is high since all three jurisdictions provide significantly different layers of protection of an individual's right to be protected against disproportional punishments. Thus, it appears quite interesting to discover and/or distinguish how the targeted states operate within the idea of a just state and proportionality and which jurisdiction provides better protection for human rights.

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## INTRODUCTION

Proportionality is a substantial feature of modern constitutionalism worldwide recognized by national and international judicial bodies.<sup>1</sup> It can be understood as a paradigm, which embodies life experience and scrupulous reasoning<sup>2</sup> or a legal product of rational thinking<sup>3</sup>, as Joseph Raz put it neatly.

In constitutional law, proportionality is understood as an analytical structure<sup>4</sup> that is exercised by the judiciary to deal with the disputes between constitutional interests.<sup>5</sup> However, more broadly, proportionality can be described as a principle, a “precept of justice”<sup>6</sup> as well. Vicky Jackson describes proportionality, as a principle carrying the idea that larger harms imposed by the State should be justified by more weighty reasons.<sup>7</sup> Proportionality principle applies to criminal punishments as well.<sup>8</sup> More serious crimes should be punished more strictly than less serious ones.<sup>9</sup>

Some argue that the determination of criminal policy, including defining a criminal sanctions for particular crimes falls within the competency of legislature and thus

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<sup>1</sup> See Aharon Barak, *Proportionality, Constitutional Rights and their Limitations*, Cambridge University Press, 146, (2012); See also David M. Beatty, *The Ultimate Rule of Law*, 159-188, (2004); See also David S. Law, *Generic Constitutional Law*, 89 MIN L. REV. 647-652 and 713-714, (2005).

<sup>2</sup> See E. M. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles*, Cambridge University Press, 337, (2005).

<sup>3</sup> See Joseph Raz, *Practical Reasons and Norms*, Second edition, Oxford University Press, 95, (1999).

<sup>4</sup> See Mathias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT’L 574, 579, (2004).

<sup>5</sup> See Alec Stone Sweet and Jud Mathews, “Proportionality, Balancing and Global Constitutionalism, *COLOMBIA JOURNAL OF TRANSNATIONAL LAW* 47:72, 74, (2009).

<sup>6</sup> *Weems v. United States*, 217 U.S. 349, 367 (1910).

<sup>7</sup> See Vicky C. Jackson, *Constitutional Law in an Age of Proportionality*, *THE YALE LAW JOURNAL*, 124:3094, 3098, (2015).

<sup>8</sup> See Vicky C. Jackson, *Constitutional Law in an Age of Proportionality*, *THE YALE LAW JOURNAL*, 124:3094, 3098, (2015).

<sup>9</sup> See Robert Alexy, *A Theory of Constitutional Rights*, 102-103, (2010).

judicial intrusions in that area are not encouraged.<sup>10</sup> The following thesis demonstrates quite the opposite. The judicial review and proportionality exercised by the Constitutional Courts on substantive criminal law are necessary elements of just state and rule of law.

It should be assumed as a general requirement of a just state and rule of law that individuals are to be punished proportionally to the graveness of their criminal conduct. The need of scrupulous and exceptional check of governmental actions is predominantly required when an individual's physical liberty and fate is in absolute obedience of a state. In such vulnerable conditions it is utterly important to prevent the legislature from demonstrational negligence of proportional measures when defining criminal sentences in order to deter it to treat a individual as a mere object of punishment.<sup>11</sup>

In fact, the idea that punishment should be proportionate to the seriousness of the person's criminal conduct seems to be the requirement of fairness and justice.<sup>12</sup> Justice and proportionality are ideas that were mutually intertwined from ancient times. "An eye for an eye, a tooth for the tooth" flows from various old religious teachings, dating from the code of Hammurabi<sup>13</sup>, representing the notion, which in jurisprudence is called *Lex Talionis*.<sup>14</sup> The significance of proportionality has been promoted at the time of the ancient Greek as well. Here it was attributed to the corrective justice and distributive justice that directly contributed to the construction

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<sup>10</sup> Consider the practice of the U.S. Supreme Court and particularly the opinions about the judicial review of non-capital sentences, see e.g. *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980).

<sup>11</sup> For a notion of an "object" consider e.g. the Aviation Security Case by the Federal constitutional Court of Germany - BVerfG, 1 BvR 357/05 (Feb. 15, 2006). See further Life Imprisonment Case, where the court determined the individual as a "spiritual moral being", who's dignity depend on her/his status as an independent personality – 45 BVerfGE (1977).

<sup>12</sup> See Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, University of Chicago Law Press, 85, (1992).

<sup>13</sup> See J. Dyneley Prince, *The Code of Hammurabi*, *The American Journal of Theology* Vol. 8, No. 3, The University of Chicago Press, 601–609, (1904).

<sup>14</sup> The Law of Talion – representing retaliation prescribed by the law, where the punishment should correspond to the crime committed.

of the notion we mean today in proportionality.<sup>15</sup> For Aristotle “the just is proportion and unjust is what violates the proportion”. Accordingly when one person robs another, Aristotle considers that the compensation or punishment should be proportional.<sup>16</sup>

Proportionality has not lost its actuality in the period of the Enlightenment, as it was directly linked to the idea of limited government and social contract.<sup>17</sup>

However, proportionality as an effective and practical tool and well-defined approach in the hands of judiciary appears to be product nineteenth-century Prussian administrative courts.<sup>18</sup> Later, Prussian “administrative proportionality” was constitutionalized in post Second World War Germany and became immanent scale of constitutional adjudication in the power of Federal Constitutional Court of Germany and then migrated to many other foreign jurisdictions.<sup>19</sup>

As for today, proportionality can be fairly considered as a “generic part of constitutional control” throughout the world.<sup>20</sup>

It should be highlighted that proportionality’s expressions and practice in different jurisdictions may not be homogenous or are ever changing. However, this is quite fair<sup>21</sup>, as states’ practice and the expression of legal principles, including proportionality, are mostly conditioned by the timeframe of drafting the constitutions,

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<sup>15</sup> See Izhak England, *Corrective and Distributive Justice: From Aristotle to Modern Times*, Oxford University Press, (2009). N.B. the Justice described by Socrates was a matter of to each what is fitting. Justice described by Plato was the matter of proportional equality; see Plato, *The Laws*, translation of Trevor Saunders, Penguin Classics, (2004).

<sup>16</sup> See Aristotle, *Nicomachean Ethics*, Bk 5, 1131b (15) in J. Barnes (ed.), *The Complete Works of Aristotle. The Revised Oxford Translation*, Vol. 2, (1995).

<sup>17</sup> See Aharon Barak, *Proportionality, Constitutional rights and their Limitations*, Cambridge University Press, 176, (2012).

<sup>18</sup> See Kenneth F. Ledford, *Formalizing the Rule of Law in Prussia: The Supreme Administrative Law Court (1876-1914)*, *Central European History* 37, 203-205, (2004).

<sup>19</sup> See Dieter Grimm, *Proportionality in Canadian and German Constitutional Law Jurisprudence*, 57 *Toronto Law Journal*, 393-395, (2007); See also V. Jackson, *Constitutional Engagement in a Transnational Era*, Oxford University Press, 60, (2013).

<sup>20</sup> See David S. Law, *Generic Constitutional Law*, 89 *MIN L. REV.* 647-652 and 713-714, (2005).

<sup>21</sup> This is exceptionally evident when we compare the common law and continental law systems, older constitutions and newer ones.

legal thinking, subsequent legal evolutions and constitutional adjudication methodology established by concrete states.<sup>22</sup>

For instance, when Jacco Bomhoff<sup>23</sup> compares the law and legal thinking in the US and Europe, he at the outset emphasizes the “formal” and “legalist” approach strictly followed by the courts of nineteenth-century Germany and on the opposite “pragmatic”, “policy-oriented” and “open-ended” legal methodology exercised in US jurisdiction.<sup>24</sup> The history, legal thinking and ideology of legal philosophers time by time have indeed conditioned the policies followed by the courts.

German nineteenth-century Pandectists and their followers built the rigid, gapless legal system, which provided a firm basis for the legal formalism and legalist methodology.<sup>25</sup> Although, after the postwar period and the rise of constitutional rights adjudication, leading courts in Europe, including Germany, have adopted a style of legal policy, which surprisingly appeared to be radically pragmatic and open-ended.<sup>26</sup> Structured proportionality approach and its main and last element “proportionality as such”<sup>27</sup> or as Rupprecht Krauss coined it – “proportionality in the narrow sense” is a good example. This step of analysis requires the examination whether at the end of the day the benefit of encroachment into constitutional right outweighs the negative impact made on the latter.<sup>28</sup> By adopting such step it made German proportionality doctrine and the role of the judges more rigorous to governmental actions and more

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<sup>22</sup> See Vicky C. Jackson, Constitutional Law in an Age of Proportionality, *THE YALE LAW JOURNAL*, 124:3094, 3121-3130, (2015).

<sup>23</sup> Associate Professor of Law at London School of Economics and Political Science.

<sup>24</sup> See Jacco Bomhoff, *Balancing Constitutional Rights, The Origins and Meanings of Postwar Legal Discourse*, Cambridge University Press, 3, (2013).

<sup>25</sup> See Mitchel de S. -O. -l'E. Lasser, *Judicial Deliberations, A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford University Press, from 151, (2004).

<sup>26</sup> See Jacco Bomhoff, *Balancing Constitutional Rights, The Origins and Meanings of Postwar Legal Discourse*, Cambridge University Press, 3-4, (2013).

<sup>27</sup> This element has various names in constitutional doctrine. For example, Robert Alexy calls it proportionality in narrow sense or proportionality “*stricto sensu*”. See Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, *Ratio Juris*, vol. 16, 135, (2003).

<sup>28</sup> See Aharon Barak, *Proportional Effect: The Israeli Experience*, *University of Toronto Law Journal*, 374, (2007).

open-ended to the evaluation at the same time<sup>29</sup>, than in the U.S., where strict scrutiny test ends after the “least restrictive means” test.<sup>30</sup> Of course U.S. jurisdictions are familiar with balancing, which sometimes is seen as the “counterpart” of proportionality as such, but Vicky Jackson fairly rejects this theory by noting that American balancing tends to focus primarily on quantification of net social good.<sup>31</sup> Accordingly, as far as proportionality is considered as a product of rational legal thinking<sup>32</sup>, the expressions of proportionality even in the same jurisdictions but in different times can be found distinctive when considering the legal history and subsequent legal revolutions in a timescale of targeted jurisdictions. Moreover, proportionality’s sources may be distinctive in the modern constitutions and the highest judicial bodies determine its destination and the role, as we will see in the present thesis. However, one thing we may say with confidence – proportionality in a broad sense, as was noted previously, has been the component of a just state, global cultural heritage and a matter of public law since ancient times and existed of course before the emergence of structured proportionality.<sup>33</sup>

The reason of such rather broad pretext is linked to the reason why I have chosen US and Germany as targets for analysis. In particular, nevertheless, it is generally considered that the United States’ approach differs from the European proportionality one.<sup>34</sup> We can insist, just for now, from Eighth Amendment perspective that US

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<sup>29</sup> See Jacco Bomhoff, *Balancing Constitutional Rights, The Origins and Meanings of Postwar Legal Discourse*, Cambridge University Press, 4, (2013).

<sup>30</sup> See Vicky C. Jackson, *Constitutional Law in an Age of Proportionality*, THE YALE LAW JOURNAL, 124:3094, 3116, (2015).

<sup>31</sup> See Vicky C. Jackson, *Constitutional Law in an Age of Proportionality*, THE YALE LAW JOURNAL, 124:3094, 3099-3100, (2015).

<sup>32</sup> See Joseph Raz, *Practical Reasons and Norms*, second edition, Oxford University Press, 95, (1999).

<sup>33</sup> See Thomas Poole, *Proportionality in Perspective*, LSE Law, Society and Economy Working Papers, 15, (2010); See also Izhak Englard, *Corrective and Distributive Justice: From Aristotle to Modern Times*, Oxford University Press, (2009); See also Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, University of Chicago Law Press, 85, (1992).

<sup>34</sup> See Moshe Cohen – Eliya and Iddo Porat, *The hidden foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law*, San Diego Law Review., 367, (2009).



constitutionalism has a longest tradition, contemporary source and relevant application of proportionality under the Cruel and Unusual Punishment Clause.<sup>35</sup> However, the application of the Eighth Amendment clause and the proportionality from the beginning of twentieth-century has been inconsistent and the views about proportionality source changed with the change of times and even today its expression is not so pragmatic and open ended as in Germany.<sup>36</sup> U.S. jurisdiction is quite unique in the application of proportionality test under the Cruel and Unusual Punishment Clause in comparison to the traditional German proportionality approach, which follows its classical four component evaluation standard for the check of state's action. Moreover, the American approach of judicial review of criminal punishment is rather limited when it comes to the evaluation of non-capital sentences.<sup>37</sup>

Justice Rehnquist, for example, argues that judicial review of duration of different prison sentences by individual judges leads to a subjectivism and substitution of a job of the legislatures.<sup>38</sup> The opponents of such activism, generally, note that the judicial review criminal sentences are inappropriate for the judiciary, as the matter is more political and the legislatures enjoy a wide margin of appreciation in determining the criminal policy.<sup>39</sup> While in contrary, the proponents emphasize on the notion of “precept of justice” leaving the door widely open to the constitutional body entitled with the function of guarantor of justice – the courts, and their effective check of state action under the scrutiny of proportional punishments.<sup>40</sup>

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<sup>35</sup> See Vicky C. Jackson, Constitutional Law in an Age of Proportionality, *THE YALE LAW JOURNAL*, 124:3094, 3098, (2015).

<sup>36</sup> See Jacco Bomhoff, *Balancing Constitutional Rights, The Origins and Meanings of Postwar Legal Discourse*, Cambridge University Press, 4, (2013).

<sup>37</sup> See Vicky C. Jackson, Constitutional Law in an Age of Proportionality, *THE YALE LAW JOURNAL*, 124:3094, 3185, (2015).

<sup>38</sup> See *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980).

<sup>39</sup> See *Harmelin v. Michigan*, 501 U.S. 957 (1991).

<sup>40</sup> See *Weems v. United States*, 217 U.S. 379-80 (1910).

Accordingly, it appears quite interesting to discover and/or distinguish how the targeted states operate within the idea of a just state and proportionality and which jurisdiction provides better protection for human right. As a matter of the fact, the only measurement or scale for the purposes of the present thesis will be proportional punishments.

As to Georgia, the case law on the proportionality of criminal punishments in the light of precedents of Constitutional Court of Georgia was quite strict and scanty, until 2015. The topic has gained contemporary attention after a recent judgment concerning constitutionality of criminal penalty for the possessing a small amount of marijuana. The court struck down the sanction as a disproportional one, holding that imprisonment for possession of small amount of marijuana is a disproportional sanction for such conduct. The judgment opened the gate for other constitutional complaints concerning the disproportional punishments, including the claims that amounts to decriminalization of marijuana. In that context, it is interesting to observe how come that conservative court made its own way to the ankle of constitutional adjudication of criminal punishments? What are the courts standards of assessment of proportionality of criminal sanctions? And finally, whether the approach of the court is effective? The analysis of targeted jurisdictions will help tremendously to respond these and all other questions arising through the overview of constitutional control of criminal punishments.

Proportionality's content and role is quite variable and easily distinguishable in the different areas of law and thus, its meaning can be understood differently, for instance, in the realm of criminal law on the one hand and constitutional law on the other.<sup>41</sup> The thesis will be will be focused only on proportionality in constitutional law

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<sup>41</sup> See supra note 1.

and its role in the judicial review of criminal punishments. In particular, the framework of the thesis will encompass the constitutional disputes between the person and the state, between the superior norms, basic human rights, enshrined in the constitutions and inferior norms proclaimed in the national legislation of targeted jurisdictions, which strive to restrict fundamental rights of individuals. The central of the thesis is a review the constitutional adjudication and proportionality in perspective of criminal punishments in three countries, their critique, subsequent comparison and analysis of the strengths and the weaknesses of each approach.

Accordingly, the first chapter of the thesis will observe the sources of proportionality with the main focus on proportional punishments in the constitutionalism of three countries. Proportionality *in action* is overviewed in the second chapter i.e. the judicial review of disproportional punishments in the targeted jurisdictions. Additionally the second chapter will encompass the critique of relevant case law and mainly proportionality standards developed by respective courts. The third chapter will generally analyze the advantages and disadvantages of particular methodology of the review and standards chosen by the courts concerning the main issue.

## **Chapter 1. CONSTITUTIONAL SOURCES OF PROPORTIONALITY IN CRIMINAL PUNISHMENTS; ANALYSIS OF THREE COUNTRIES - UNITED STATES, GERMANY, GEORGIA**

The present chapter observes sources of proportionality and a right to be protected against excessive punishments in the constitutionalism of targeted States. It encompasses a historical overview of above-mentioned topics, their meaning and the role in a democratic society and contemporary place in the constitutions of respective States.

### 1.1. Cruel and Unusual Punishment Clause in the Constitutionalism of the United States

Proportionality finds its way in constitutional adjudication throughout the world - both at national and international level, but of course with its own characteristics.<sup>42</sup> Thus, proportionality can be considered as a substantial feature of modern constitutionalism.<sup>43</sup> Yet, it is argued whether the jurisdiction of the United States is familiar with proportionality at all or with the European approach.<sup>44</sup>

At the outset, several thoughts should be highlighted why the European proportionality has not fully emerged in U.S. constitutional jurisprudence. The first argument is connected to the age of the U.S. Constitution. In particular, long before the rise of proportionality analysis, which is a feature of modern constitutional law, particularly post WWII period, the U.S. Supreme Court case law was already mature and had already had tremendous practice in the constitutional adjudication, which became a factor of American exceptionalism to the European “novelty”.<sup>45</sup> Secondly, unlike European states’ constitutions, the U.S. Constitution does not have a general limitation clause, which usually provides a coherent rule to rights limitations.<sup>46</sup> Thirdly, the absence of the proportionality principle can be explained by the nature of the doctrine itself. The proportionality *stricto sensu*, which is a substantive element of proportionality doctrine, is considered an open-handed methodology of constitutional

<sup>42</sup> See David M. Beatty, *The Ultimate Rule of Law*, 159-188, (2004).

<sup>43</sup> See e.g., David S. Law, *Generic Constitutional Law*, 89 MIN L. REV. 647-652 and 713-714, (2005).

<sup>44</sup> See Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1307 (2005).

<sup>45</sup> See Vicky C. Jackson, *Constitutional Law in an Age of Proportionality*, THE YALE LAW JOURNAL, 124:3094, 3122, (2015).

<sup>46</sup> See Dieter Grimm, *Proportionality in Canadian and German Constitutional Law Jurisprudence*, 57 Toronto Law Journal 384-386, (2007); See further Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, Columbia Journal of European Law, Vol. 14, No.2, 227-237, (2008).

adjudication, because in that process the role of the judges is very active.<sup>47</sup> In fact, the American skepticism about the role of the judges built a solid wall against judicial activism. This skepticism can be explained by the very controversial case law established in the U.S. jurisprudence, coincidentally at those times when proportionality doctrine was emerging in Europe. In particular, *Lochner*<sup>48</sup> and later *Dennis*<sup>49</sup> are two of the most controversial decisions in the U.S. Supreme Court's jurisprudence, which actually revived American skepticism of the role of the judges and the fear of judicial activism.<sup>50</sup> *The Carolene products case* partly put the end for "Lochnerian fears" and judicial activism.<sup>51</sup> The court defined a hierarchy in the process of examination of human rights intrusions by the state, by restricting the usage of heightened scrutiny to the very limited number of cases and establishing famous *footnote four standard*.<sup>52</sup> Additionally, it should be noted that even the strict scrutiny, which is considered as the highest level of scrutiny in the US jurisdiction, does not comprise the proportionality *stricto sensu* and the test ends after the "least restrictive means".<sup>53</sup>

Accordingly, it is generally considered that the above-mentioned theories conditioned the absence of the proportionality doctrine in the U.S. constitutionalism. While these theories are true, there are still the significant source and relevant practice and further perspective of usage of proportionality under the Cruel and Unusual Punishment Clause.

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<sup>47</sup> The nature of proportionality *stricto sensu* will be in details described in a second subchapter.

<sup>48</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>49</sup> *Dennis v. United States*, 341 U.S. 494 (1951).

<sup>50</sup> For an excellent comparison on the balancing doctrine in American and European jurisdictions see Jacco Bomhoff, *Balancing Constitutional Rights, The Origins and Meanings of Postwar Legal Discourse*, Cambridge University Press, (2013).

<sup>51</sup> Gerald Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972).

<sup>52</sup> *United States v. Carolene Prods.Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>53</sup> See Vicky C. Jackson, *Constitutional Law in an Age of Proportionality*, THE YALE LAW JOURNAL, 124:3094, 3116, (2015).

Before addressing the issue, there is a need to clarify some conceptual points. As was mentioned previously, proportionality's expressions may vary in different jurisdictions, but the substance around which the modern democratic state operates remains the same in all democracies.<sup>54</sup> Generally, once speaking about proportionality we can consider the latter as the ideal of a just state, a substantial aspiration, a theoretic dogma on the one hand and proportionality as a tool, a well-defined structural standard designed by the courts to check whether the state has properly protected the constitutional rights of the individuals on the other.<sup>55</sup> The main difference between these notions largely appears in three aspects.

Firstly, proportionality as a goal or aspiration of the state is an abstract notion. It lacks precision. Particularly, what is the meaning of proportionality or what is the criterion for deciding what is proportional are absent. Secondly, proportionality as the goal of the state is an older notion and existed long before the creation structured proportionality itself. Thirdly, the general proportionality has dual meaning. On the one hand it is a necessary component of the just state and on the other hand it has been historically considered as an aspiration of the individual as well.<sup>56</sup>

In contrast, proportionality as a structured approach in constitutional law, as a substantial tool of constitutional adjudication is a product of the twentieth century. Particularly, the constitutional courts have adopted proportionality checks mainly after the postwar period. The structured approach is very precise and sets clear guidance to inferior courts and it is directed actually on the governmental actions.

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<sup>54</sup> See Aharon Barak, *Proportionality, Constitutional rights and their Limitations*, Cambridge University Press, 146, (2012).

<sup>55</sup> See Vicky C. Jackson, *Constitutional Law in an Age of Proportionality*, THE YALE LAW JOURNAL, 124:3094, 3098, (2015).

<sup>56</sup> Consider Plato's and Socrates' opinions about the goal of human existence and the aspiration of person - see Plato, *The Laws*, translation of Trevor Saunders, Penguin Classics, (2004).

Nevertheless, of clear differences, both ideas overlap in certain points – they are part of the democratic state and serve one goal – **Justice**.

The preamble of the U.S. Constitution stipulates: “We the People of the United States, in Order to form a more perfect Union, **establish Justice**, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”<sup>57</sup>

Nevertheless, the preamble of the Constitution does not *per se* carry any binding force for the state to follow its very broad and vague terms - its relevance several times has been reflected in the Court’s judgments and in legal literature.<sup>58</sup> It is remarked that the term “**Justice**” used in the preamble of the Constitution does not merely state intent, but rather the substantial idea or ideal for the state.<sup>59</sup> Thus, if the idea around which the US should operate is **Justice**, the proportionality historically, as we have seen, has been meant as the tool of its effective execution.<sup>60</sup>

This argument is strengthened with the teachings of the US Constitution Founding Fathers as well. The echoes of proportionality are heard from the Federalist Papers, where the idea of optimal constitution was correlated with the balanced government, which by its all means has to avoid the arbitrary exercise of its powers against its people, e.g., “the means to be employed must be proportioned to the extent of the mischief.”<sup>61</sup>

Accordingly, the general proportionality as a goal and idea of the US can be easily detected through the analysis of constitutional text. As to a relatively complicated

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<sup>57</sup> See Preamble of U.S. Constitution.

<sup>58</sup> See *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000), (Scalia, J., dissenting). Justice Scalia directly addresses the term - “Justice” embodied in the preamble as a purpose of the Constitution itself.

<sup>59</sup> See John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121 (1993).

<sup>60</sup> See Thomas Poole, *Proportionality in perspective*, New Zealand Law Review, 8 and 11-13, (2010).

<sup>61</sup> See the Federalist N 28 (Alexander Hamilton).

part, the question whether the US Constitution is familiar with classical proportionality in criminal punishments, or as the Federal Constitutional Court of Germany refers to it, - “the essence of fundamental rights” at all, we should turn to the Bill of Rights and relevant events, which occurred in common law.

For this purpose, we can fairly argue that particular spheres of the U.S. constitutionalism are enshrined by proportionality, including the provision of the Eighth Amendment in the Constitution of the United States and legal precedents developed by the Supreme Court.<sup>62</sup>

At the outset, it should be noted that compared to the German Constitution, the US Bill of Rights contains reference to both – proportionality and the right to be protected from disproportional punishments. Particularly, the Eighth Amendment holds that a person is protected against excessive bail or fines or cruel and unusual punishments.<sup>63</sup> Although, the common understanding and the practice of the Eighth Amendment has not been quite homogeneous since the past century, today there is no doubt that there is a constitutional right of the person to be defended against disproportional punishments.<sup>64</sup>

The idea that the punishment must be suitable to the crime dates back to the old English Common Law and its reflections can be found in such significant constitutional documents as the Magna Carta Libertatum<sup>65</sup> and the English Bill of Rights.<sup>66</sup> Chapter 20 of the Magna Carta stipulated that freemen “shall not be amerced

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<sup>62</sup> See *Weems v. United States*, 217 U.S. 379-80 (1910), *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958), *Solem v. Helm*, 463 U.S. 284-286. (1983), *Harmelin v. Michigan*, 501 U.S. 957 (1991).

<sup>63</sup> See U.S. CONST. amend. VIII. According to the Black’s Law Dictionary the term excessive is described as follows: “Tending to or marked by excess, which is the quality or state of exceeding the proper or reasonable limit or measure”. See [thelawdictionary.org](http://thelawdictionary.org/excessive/), <http://thelawdictionary.org/excessive/> (20 March, 2016).

<sup>64</sup> See, e.g. *Graham v Florida*, 560 U.S. 48,59 (2010). (The court emphasizes that the notion of proportionality is keystone of Eight Amendment).

<sup>65</sup> Constitution.org, <http://www.constitution.org/eng/magnacar.pdf> (1 March, 2016)

<sup>66</sup> Avalon Project – documents in law, history and diplomacy, [http://avalon.law.yale.edu/17th\\_century/england.asp](http://avalon.law.yale.edu/17th_century/england.asp) (1 March, 2016).



for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity.”<sup>67</sup> Chapters 21 and 22 determined that earls, barons, and members of the clergy should be amerced only “in accordance with the nature of the offence.”<sup>68</sup>

The English Declaration of Rights - the English Bill of Rights, adopted in the period of the Glorious Revolution contained a provision almost the same to the modern Eighth Amendment of the US Constitution: “[E]xcessive Bail ought not to be required nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.”<sup>69</sup> The historical sources empirically indicate that the Magna Carta and the English Bill of Rights have greatly influenced American Englishmen including the Framers of the US Constitution in the process of drafting the latter.<sup>70</sup> George Mason copied the text from the English Bill of Rights in order to include it in Virginia’s 1776 Declaration of Rights, which later became the linguistic source for the Eighth Amendment.<sup>71</sup> What is the most significant, the Cruel and Unusual Clause in English Bill of Rights was not a mere provision on paper, but it has had a tremendous practical meaning as well.

For instance, *Titus Oats Case* (Hereinafter – Oats Case) is considered as the first precedent when the criminal penalty was struck down, as it was seen disproportional for the crime committed under the Cruel and Unusual Punishment Clause of the English Bill of Rights.<sup>72</sup> However, there is no common agreement about the outcome

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<sup>67</sup> See supra note 13.

<sup>68</sup> See, e.g., Sir David Lindsay Keir, *The Constitutional History of Modern Britain Since 1485*, at 267-68 (9th ed. 1969); Thomas Pitt Taswell-Langmead, *English Constitutional History: From the Teutonic Conquest to the Present Time*, 507 (Philip A. Ashworth ed., 6th ed. 1905).

<sup>69</sup> See Avalon Project – documents in law, history and diplomacy, [http://avalon.law.yale.edu/17th\\_century/england.asp](http://avalon.law.yale.edu/17th_century/england.asp) (1 March, 2016).

<sup>70</sup> See Dick Howard, *The Road From Runnymede: Magna Carta and Constitution - Alism in America*, 454 (1968).

<sup>71</sup> See Amy L. Riederer, *Working 9 to 5: Embracing the Eighth Amendment through an Integrated Model of Prison Labor*, 43 VAL. U. L. REV. 1425, 1429 (2009) (“the language of the Eighth Amendment was substantially copied from the language of the English Act of Parliament in 1688”).

<sup>72</sup> See James Fitzjames Stephen, *A History of the Criminal Law of England*, MacMillan & Sons, 383-404 (1883).

of the *Titus Oats* case, whether it was struck down on the ground of its unknown nature in English common law or out of its disproportional nature.<sup>73</sup> This question is crucial for the content of the Eighth Amendment and its application even today, because the opponents of the existence of the proportionality requirement in the Eighth Amendment Clause interpret the *Oats Case* narrowly, to the extent of abolishing the punishment only out of its unknown nature to common law – not disproportional.<sup>74</sup> Thus, it would be useful to overview the *Oats Case* in order to establish whether the Cruel and Unusual Punishment Clause in the US Constitution originally sustained proportionality.

Titus Oates was a minister of the Church of England and claimed to know about a “popish plot” of the assassination of the King.<sup>75</sup> According to him, two Jesuit priests were intending to kill the King that would have been followed by the invasion of catholic armies, which would put the King’s brother, James, on the throne. His statement resulted in the execution of 15 people before the discovery that it was all fabrication made up by the priest himself. Finally, Titus Oates was tried by the court and convicted of perjury. At the material time for such a crime the death penalty was abolished and it was the discretion of the court to impose any type of punishment, which the court would consider to be suitable. Accordingly, the Court sentenced him to several punishments. The sanctions were: life imprisonment, whippings, pillorying four times a year for life, a fine of 2000 marks, and defrockment.

After the Glorious Revolution and the implementation of the English Bill of Rights, Titus Oats challenged the sentence in the parliament claiming that his punishment was

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<sup>73</sup> See Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 Cal. L. Rev. 839 (1969).

<sup>74</sup> *Harmelin v. Michigan*, 501 U.S. 957 (1991).

<sup>75</sup> See James Fitzjames Stephen, *A History of the Criminal Law of England*, London and MacMillan, 383-404, (1883).

disproportional for the crime he had committed. Both houses consented that the penalty was illegal.<sup>76</sup>

I will refer to some citations from the decision. It was emphasized concerning the punishment that “For that the said judgments are barbarous, inhuman, and unchristian; and there is no precedent to warrant the punishments of whipping and committing to prison for life, for the crime of perjury; which yet were but part of the punishments inflicted upon him”.<sup>77</sup> In other words, the parliament addressing the Oats punishment with terms – barbarous, inhuman and unchristian, as well as “cruel and illegal”<sup>78</sup>, declared the sentence of the court outlawed.

As mentioned above, there is a controversy in the modern American constitutionalism about the outcome of the *Oats Case*. Originalists like Justice Scalia considered that the criminal punishment of the perjurer was abolished because of its unusual nature in English common law, thus he categorically rejected the argument that there is any resource of proportionality in the Eighth Amendment, which is considered as the counterpart of English Cruel and Unusual Punishment Clause. Justice Scalia in his majority opinion referred to the *Titus Oats* case, urging that the Cruel and Unusual Punishment Clause in the English Bill of Rights was meant to prevent judges from inflicting penalties unauthorized by the common law or by statute.<sup>79</sup>

In contrast, it was argued in legal academia that the *Titus Oats Case* was struck down not only for the unknown nature of the punishment, but as a disproportional one to the crime committed.<sup>80</sup> In particular, the measures imposed on the applicant, as a sanction

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<sup>76</sup> See Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 Cal. L. Rev., 858, (1969).

<sup>77</sup> See William Cobbett, *Cobbett’s Complete Collection of State Trials* col. 1325, edited by Thomas Bayly Howell, (1811).

<sup>78</sup> See Anchitell Gray, *Debates in the House of Commons from the Year 1667 to the Year 1694*, 290, (1763).

<sup>79</sup> *Harmelin v. Michigan*, 501 U.S. 957 (1991).

<sup>80</sup> See John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishment Clause*, Virginia Law Review, 16, (2011).

were quite familiar in English common law at the material time, which led the proponents of proportionality to believe that punishment was struck down on the ground of its severity on the person imposed.<sup>81</sup> Additionally, the proponents refer to the exact citations of the parliament where the latter addresses the punishment as inhuman and cruel, which indicates that the punishment was struck down on the ground of its severity as well.<sup>82</sup>

The *Titus Oates* case can be understood that it was originally designed to inhibit the punishments that were disproportional to the crimes too. Indeed, the language of the court and the historical evidences shows that the parliament was struck not only by application of unauthorized punishment by court, but with the disproportional correlation between the perjury and penalties inflicted on Oats. Thus, the English Bill of Rights not only textually corresponds to its American counterpart, but its application was originally meant to encompass the evaluation of disproportional punishments. Accordingly, if the English Bill of Rights was the source of the American Constitution, and particularly, of the Eighth Amendment, the original interpretation of Cruel and Unusual Punishment Clause should naturally extend to the judicial review of disproportional criminal punishments.

What distances the English version of Cruel and Unusual Punishment Clause from its American counterpart is quite evident. The English version was directed against judiciary only, which seems natural in a country of parliamentary supremacy and attested by the fact that the English Parliament decided Oats case. Of course, the same cannot be said about the United States. The American Revolution was substantially motivated by its disagreement with the King and the injustice of the constitutional

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<sup>81</sup> See Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 Cal. L. Rev., 859 (1969).

<sup>82</sup> See John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishment Clause*, Virginia Law Review, 16-17, (2011).

system. Thus, the incorporated notion of Cruel and Unusual Punishment Clause targeted both the courts and the legislator.<sup>83</sup>

Accordingly, from very old times of US constitutionalism proportionality is considered as one of the keystones of constitutional democracy, the guarantor of society from unjustified activities of the state<sup>84</sup> and ultimate goal for government.<sup>85</sup> Moreover, what is the most significant, proportionality was used *in action*, particularly as a general right of the person to be protected against the disproportional intrusions by the state and the essence of the Eighth Amendment, which definitely brings it closer to the understanding of European classical proportionality notion. Later, in order to provide more effective protection of person's constitutional right to be defended from the implication of disproportional punishments, the US Supreme Court has developed the standard, which *inter alia* represent the legal tool of examination of severity of prison sentences to the crime committed and which more and more converges to the European proportionality analysis. The evolution and modern approaches of judicial review of criminal punishments by the US Supreme Court, as well as the controversies concerning it will be discussed in the second chapter.

## **1.2. Unwritten principle and penumbral right in the Basic Law of Germany**

The 1949 Constitution or as the Germans call it – “Grundgesetz” (Basic Law) of the Federal Republic of Germany - tremendously influenced not only the existing German

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<sup>83</sup> See John F. Stinneford, *The Original Meaning of 'Unusual': The Eighth Amendment as a Bar to Cruel Innovation*, University of Florida - Levin College of Law, 1790-92, (2008).

<sup>84</sup> See Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, in DUE PROCESS: NOMOS XVIII 3, 4, 38 (J. Roland Pennock & John W. Chapman eds., 1977).

<sup>85</sup> See Vicky C. Jackson, *Constitutional Law in an Age of Proportionality*, THE YALE LAW JOURNAL, 124:3094, 3106, (2015).

political and legal framework, but also global constitutionalism itself and the main contributor of the processes through which flowed the renewed German constitutionalism, including modern proportionality analysis, has been the Federal Constitutional Court of Germany (Hereinafter: FCCG).<sup>86</sup>

Surprisingly for our topic, the German Constitution contains neither explicit reference to proportionality, nor the right of a person to be protected from cruel, inhuman or excessive punishment as the U.S. Constitution does. These two constitutional values – unwritten principle of proportionality and penumbral right to be protected against cruel and disproportional punishments was evolved from Basic Law by FCCG and effectively applied in practice. I will try to cast some light on the constitutional sources of these two values in order to better acknowledge German constitutional control of disproportional punishments.

The emergence of proportionality as a potential practical and effective mechanism of check on governmental actions has its origin in the midst of nineteenth-century administrative law of Prussia, politically and culturally prominent territory in Germany.<sup>87</sup> Its promotion is linked to the name of Prussian jurist Carl Goltlieb Svarez, although he never used the term proportionality itself, is considered the main contributor to the development modern proportionality standard.<sup>88</sup> Svarez emphasized that only the achievement of greater interest can justify the state in requiring the individual to sacrifice less important interest. As long as the difference in weights is not evident individuals right must prevail.<sup>89</sup>

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<sup>86</sup> See Alec Stone Sweet and Jud Mathews, “*Proportionality, Balancing and Global Constitutionalism*,” *COLOMBIA JOURNAL OF TRANSNATIONAL LAW* 47:72, 177, (2009).

<sup>87</sup> See Aharon Barak, *Proportionality, Constitutional rights and their Limitations*, Cambridge University Press, 177, (2012).

<sup>88</sup> See D. P. Currie, *The constitution of the Federal republic of Germany*, University of Chicago Press, 307, (1994).

<sup>89</sup> See D. P. Currie, *The constitution of the Federal republic of Germany*, University of Chicago Press, 99, (1994).

Svarez's conception was partly incorporated in the 1794 Prussian General Law, which actually is considered a significant textual basis of further doctrinal and practical development of proportionality analysis.<sup>90</sup> Article 10 (2) of the above mentioned law established police power to provide public order, but at the same time it stipulated that the police powers in achieving a particular goal were limited; only necessary measures should have been taken by the government to achieve the security and public order.<sup>91</sup>

Besides legitimizing proportionality in German public law, the provision cited above, is a textual source of another significant constitutional principle – *Rechtsstaat*. In fact, by adopting the positive provision for police actions, Prussia made clear, that henceforth, governmental actions should be conditioned by the proper textual authorization, which directly corresponds to the needs of modern *Rechtsstaat* in Germany.<sup>92</sup>

Accordingly, the requirement of *Rechtsstaat* and proportionality complemented each other in the sense that, when one sets the textual basis of authorization of state action, i.e. permitted the intrusion in a human right, the second put a limit on action, by demanding the goal and necessity of the means of achieving it.<sup>93</sup>

There was a quite long debate between Prussian legal thinkers on refining the scopes of proportionality to make it more effective on the one hand, and the creation of the special organ that will be the best guardian of people's rights from government on the other.<sup>94</sup> The process resulted in the formation of strong Prussian administrative courts,

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<sup>90</sup> See Moshe Cohen – Eliya and Iddo Porat, *American balancing and German proportionality: The historical origins*, I. CON, Vol. 8, No.2, 266, (2010).

<sup>91</sup> Ibid at 264.

<sup>92</sup> Before the adoption of the provision, state's any action has been considered lawful even when law did not provide it. See Moshe Cohen – Eliya and Iddo Porat, *American balancing and German proportionality: The historical origins*, I. CON, Vol. 8, No.2, 271, (2010).

<sup>93</sup> Ibid at 272.

<sup>94</sup> See Kenneth F. Ledford, *Formalizing the Rule of Law in Prussia: The Supreme Administrative Law Court (1876-1914)*, Central European History 37, 203-205, (2004).

which in fact, had proven the hopes of the reformers, by rigorously and intensively exercising the proportionality as respective guardians of justice.<sup>95</sup>

Although Prussian administrative courts have actively exercised proportionality analysis, they steadily remained in the formalistic mode, as the analysis usually did not comprise the fourth and most important step— proportionality *stricto sensu*.<sup>96</sup> The major focus of the approach was directed on the “rational connection” and “the least restrictive” analysis. Such approach can be considered as more legalist and formal methodology of examination, less oriented on human rights protection. In particular, the court usually was not involved in the balancing of the interests, rather than confined with to the extent of governmental purpose presented.<sup>97</sup>

I will try to explain more concretely two issues; particularly, why the first two elements of proportionality analysis are much more formalistic and less effective means of human rights protection than proportionality *stricto sensu* and why the courts were disregarding balancing it.

Proportionality, classically, is described as a check of the correlation between the goal and the means chosen to achieve it, as both are the substance of the proportionality principle.<sup>98</sup> Thus, the first step of proportionality analysis commences with the examination whether there is a proper goal for the restriction of particular right. The goals may not (and should not) be the same for the intrusions in all rights and they are basically conditioned by the importance of the right at stake.<sup>99</sup> The second step of

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<sup>95</sup> See Mahendra Pal Singh, *German Administrative Law in Common Law Perspective*, by Springer – Verlag, 88-89, (1985).

<sup>96</sup> See Moshe Cohen – Eliya and Iddo Porat, *American balancing and German proportionality: The historical origins*, I. CON, Vol. 8, No.2, 101, (2010).

<sup>97</sup> See Mitchel de S. -O. -l'E. Lasser, *Judicial Deliberations, A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford University Press, from 151, (2004).

<sup>98</sup> See Aharon Barak, *Proportional Effect: The Israeli Experience*, *University of Toronto Law Journal*, 371, (2007).

<sup>99</sup> Consider *Horse Riding in Forest Case* by FCCG, where the court distinguished the inner and outer spheres of personal development based on their significance leaving the outer sphere less protection - 1 BvR 921/85 (6 June 1989); See further, Israeli Supreme Court judgment *Horev v. Minister of*



proportionality is a rational connection test, which generally requires reasonable link between the goal presented and the means chosen to achieve it. The third step is considered highly important, as at this stage, the court checks whether the government could have reached the goal introduced by the alternative and least drastic means? Although, this step, actually stands as important filter for governmental excessive actions, “least restrictive means” test and previous two steps jointly represent very formal and legalist approach of proportionality adjudication, as they demonstratively recognize the immanence and inevitableness of governmental action. Even “least restrictive means” test, *a priori* embraces the state’s goal without considering whether it is important enough to cause the restriction of the basic right of the individual. It merely checks whether there is any lighter means to achieve the goal, and can even be considered, as an effective tool of realization of a state’s goals, nevertheless how severe would be the effect of chosen means on a human right for the sake of achieving object.<sup>100</sup>

In contrast, proportionality in a narrow sense, examines whether the realization of the state’s goal is commensurate with the negative impact on the individual’s right.<sup>101</sup> In fact, the court role in the latter step appears to be more open-ended and pragmatic, which differs to the traditional legalistic approach established in old German jurisprudence, where government’s goal at the end of the day prevailed nonetheless. It simply stipulates the idea that “ends do not justify all means”, which is the limit the democracy cannot disregard.<sup>102</sup>

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Transportation, HCJ 5016/96, [www.hamoked.org](http://www.hamoked.org) [http://www.hamoked.org/files/2014/2980\\_eng.pdf](http://www.hamoked.org/files/2014/2980_eng.pdf) (21 March 2016).

<sup>100</sup> See Aharon Barak, *Proportional Effect: The Israeli Experience*, *University of Toronto Law Journal*, 373, (2007).

<sup>101</sup> See Robert Alexy, *A Theory of Constitutional Rights*, 102-103, (2010).

<sup>102</sup> See Aharon Barak, *Proportional Effect: The Israeli Experience*, *University of Toronto Law Journal*, 380, (2007).

The reason why the Prussian administrative courts were reluctant to accept the principle of balancing was conditioned by the nature of German law, which recognized itself as the complete and logical sets of rules, being effective to solve any issue that arises.<sup>103</sup> Thus, Prussian administrative courts preferred to remain within the traditional German legalist scope. Later, formalistic understanding of proportionality was contested by the radically opposite legal philosophy, also popularized in Germany, called “balancing of interests”, which considered the law as a mechanism for settling the conflicts between colliding interests.<sup>104</sup> Rudolf Von Jehrung and other authoritative legal thinkers have contributed tremendously to the promotion of balancing in German law, particularly in private law, which concluded with the constitutionalisation of proportionality, including “balancing” as an integral and most significant element of examination of state actions.<sup>105</sup> Accordingly, the rise of the modern proportionality approach, which comprised a four-step analysis, i.e. governmental purpose, the rational connection, the less drastic means and balancing is a product of post WWII period Germany.<sup>106</sup>

As highlighted previously, the Basic Law of the Federal Republic of Germany does not comprise any explicit reference to proportionality.<sup>107</sup> However, it is considered together with the Rechtsstaat as a basis and substance of the German Constitution.<sup>108</sup>

The court finds the source of proportionality principle *inter alia* in the textual basis

<sup>103</sup> See Mathias Reiman, *Nineteenth-Century German Legal Science*, Boston Collage Law Review, Vol. 31, 837-842 (1990).

<sup>104</sup> James Harget and Steohen Wallace, *The German Free Law Movement as the Source for American Legal Realism*, Virginia Law Review, Vol. 73, Issue 2, from 399, (1987).

<sup>105</sup> See Mathias Reiman, *Nineteenth-Century German Legal Science*, Boston Collage Law Review, Vol. 31, 837-842 (1990).

<sup>106</sup> See Dieter Grimm, *Proportionality in Canadian and German Constitutional Law Jurisprudence*, 57 Toronto Law Journal, 393-395, (2007).

<sup>107</sup> See D.P. Currie, *The Constitution of Federal Republic of Germany*, University of Chicago Press, 308, (1994).

<sup>108</sup> See Werner Heun, *The constitution of Germany; A Contextual Analysis*, HART PUBLISHING, OXFORD –PORTLAND OREGON, 42-43, (2011). Consider the theories by Otto Mayer and Gunther von Berg, who linked proportionality to the natural rights - See Alec Stone Sweet and Jud Mathews, “Proportionality, Balancing and Global Constitutionalism”, COLOMBIA JOURNAL OF TRANSNATIONAL LAW 47:72, 17, (2009).

establishing the Rechtsstaat in the Constitution, particularly article 20, stating that “it follow from the principle of rule of law, even more from the very essence of fundamental rights...”<sup>109</sup> Accordingly, FCCG evolves proportionality from the principle of Rechtsstaat and from the nature of human right *per se*, stating that right of the individual that her/his freedom can be limited by the relevant authority only to the extent necessary for the protection of greater public interest.<sup>110</sup>

It should be noted that the FCCG in its early judgments avoided explanation why the limitations on basic rights enshrined in the constitution need to be proportional or how it should operate. The principle was taken for granted.<sup>111</sup> The court gave its detailed explanation of the usage of proportionality in famous *Pharmacy Case*, stating that the freedom to choose the occupation, may be restricted only for the sake of compelling public interest, that is, if, after careful deliberation, the legislature determines that the a common interest must be protected, then it may impose the limitations in order to protect that interest, but only to the extent that protection cannot be achieved by a lesser restriction on freedom of choice.<sup>112</sup>

Later the Constitutional Court when dealing with article 2 (2) of the Basic Law (the right to physical integrity) recognized that principle of proportionality has to be applicable to every encroachment in the constitutional right of a person.<sup>113</sup> Thus, every governmental action, which interferes in the basic human rights, passes constitutional muster if it is in accordance to proportionality.<sup>114</sup>

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<sup>109</sup> BVerfGE 95, 48 at 58 (1996).

<sup>110</sup> See Nicholas Emiliou, *The Principle of Proportionality in European Law: A Comparative Study*, Kluwer Law int'l, 66, (1996).

<sup>111</sup> See, Dieter Grimm, *Proportionality in Canadian and German Constitutional Law Jurisprudence*, 57 *Toronto Law Journal* 385, (2007).

<sup>112</sup> BVerfGE 7, 377 (1958). The excerpts in English translation can be found in Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany*, Second Edition, 276, (1997).

<sup>113</sup> BVerfGE 16, 194, (1963).

<sup>114</sup> See Mariam Gur-Arye and Thomas Weigend, *CONSTITUTIONAL REVIEW OF CRIMINAL PROHIBITONS AFFECTING HUMAN DIGNITY AND LIBERTY: GERMAN AND ISRAELI PERSPECTIVES*, *ISRAEL LAW REVIEW*, 67, (2011).

According the Basic Law and jurisprudence of FCCG, all rights stipulated in German “Bill of Rights” are relative, except the right to human dignity. Thus, all intrusions into the human rights, except right to human dignity undergo the structured proportionality analysis, which insists on the existence proper purpose and rational connection between the means used by the state to achieve particular goal, the least drastic means and proper balance between the restriction of the right the benefit gained from such restriction.<sup>115</sup>

As mentioned previously, the Basic Law of Germany does not contain the explicit provision about the infliction of cruel and unusual, or excessive punishments, as US Constitution does. However, FCCG emphasized that the right to human dignity *per se* protects the person against cruel and disproportionate punishments.<sup>116</sup>

Human dignity plays an important role in the German constitutional adjudication. Particularly, although human dignity is stipulated in article 1 of the Basic Law, which is granted with absolute immunity from governmental intrusions, the shadows of dignity are traceable in several other human rights of the Constitution. Several specific basic rights, such as the right to privacy, the right of personal development, the right to life and the right to bodily integrity are rights, which possess “human dignity core”. So, even though these rights can be limited, the limitation must not go so far as to infringe the element of human dignity core enshrined in the article 2 of the Basic Law.<sup>117</sup>

For example, in the famous *Life imprisonment Case*, the court concluded that the state strikes at the very heart of human dignity if it treats the prisoner without the regard to

<sup>115</sup> See e.g. BVerfGE, 90, 145, (1994).

<sup>116</sup> See e.g. BVerfGE 45, 187 at 228 (1977).

<sup>117</sup> See e.g. BVerfGE 80, 367, 373-374, (1989).

the development of his personality and strips him of all hope of ever regaining his freedom.<sup>118</sup>

Accordingly, although the basic law does not contain any specific textual source of an individual's right to be protected against cruel or disproportional punishments, as is provided in the Eighth Amendment of the U.S. Constitution, FCCG has evolved it from the human dignity core of the general freedom of a person established in article 2 of the German Basic Law. Subsequently, any intrusion in the liberty of the person, protected by the article 2 of Basic Law, undergoes rigorous test of proportionality.<sup>119</sup>

### **1.3. Article 17 in the Constitution of Georgia and proportionality principle**

In contrast to German Basic Law, the Constitution of Georgia contains the explicit provision on the prohibition of the cruel, inhuman, or degrading punishment. It is noteworthy that this right, mentioned above, is contained in the same article where human dignity is preserved. In particular, Article 17 paragraph 1 of the Georgian Constitution states that human honor and dignity shall be inviolable. Paragraph 2 stipulates that no one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment.<sup>120</sup>

The history of the Constitution and of human rights in Georgia is relatively short compared to the giants of constitutionalism we have overviewed before. However, this does not reduce its significance. Basic human rights were first recognized in the

<sup>118</sup> See e.g. BVerfGE 45, 187 at 245 (1977); See also 86 BVerfGE at 288, (1992).

<sup>119</sup> See Aharon Barak, *Proportionality, Constitutional rights and their Limitations*, Cambridge University Press, 180, (2012);

<sup>120</sup> See Constitution of Georgia. English translation are available at following link: <https://matsne.gov.ge/ka/document/view/30346?impose=translateEn>

1921 Constitution of Georgia.<sup>121</sup> The 1921 Constitution embodied such highly important policies, which undoubtedly distinguished Georgia as a paradigm of democratic and human rights-oriented state among the other countries at material time. In particular, the establishment of parliamentary and local self-governance, universal suffrage based on the recognition of the equality of men and women, the abolition of capital sentence, freedom of speech, jury trials and other significant provisions were expressly reflected in the state's highest law.<sup>122</sup> It should be noted that process of constitutional drafting in Georgia was part of big chain of constitutional building in central and east Europe, which was actually conditioned by the end of WWI and the emergence new independent states.<sup>123</sup>

Unfortunately, the 1921 Constitution lived several days only, as Soviet armies occupied Georgia, which resulted in the loss of independence for 70 years. Of course during the Soviet regime there were constitutions of Georgian Soviet Socialist Republic, which actually were the counterparts of Soviet Republic Constitutions recognizing the legitimate existence of one party communist system that had nothing in common to the principles constitutionalism.<sup>124</sup> The Rights were completely absent. The constitutionalism was lost for 70 years at least.

Georgia gained independence in 1991 and later in 1995 the second and current Georgian Constitution was drafted. It contained a refined chapter of Bill of rights, including the right to be protected against cruel, inhuman and degrading punishments.

<sup>121</sup> კონსტანტინე კუბლაშვილი, ძირითადი უფლებები, მეორე გამომცემი გამომცემლობა ჯიხიაი, გვ. 31, (2008) [Konstantine Kublashvili, The Basic Rights, second edition, 31, (2008)].

<sup>122</sup> See George Papuashvili, *The 1921 Constitution of the Democratic Republic of Georgia: Looking Back after Ninety Years*, Volume 18 (12) European Public Law Journal, 334-346, (2012).

<sup>123</sup> See C.E. Black and E.C. Helmreich, *TWENTIETH CENTURY EUROPE, A HISTORY*, Alfred. A Knopf, New York, 336-388, (1972); See also Martin Kitchen, *Europe between the wars, A political history*, LONGMAN, London and New York, 102-130, (1988), See also Andrew C. Janos, *East Central Europe in the Modern World; THE POLITICS OF THE BORDELANDS FROM PRE TO POSTCOMMUNISM*, STANFORD UNIVERSITY PRESS, 100-115, (2000).

<sup>124</sup> See George Papuashvili, *The 1921 Constitution of the Democratic Republic of Georgia: Looking Back after Ninety Years*, Volume 18 (12) European Public Law Journal, 331-334, (2012).

It is noteworthy that the Constitution of Georgia does not contain explicit reference to proportionality, but the principle was evolved from the constitutional text by the Constitutional Court of Georgia (Hereinafter: CCG).

Particularly, the court emphasized that the basic human rights require the State to provide sufficient breathing space for each individual's personal liberty, which cannot be achieved with the negligence of proportionality and unreasonable intrusions in the basic human rights. For that purpose, the principles established in the Constitution, e.g. the principle of legal and democratic state are the most significant guarantors of such values and define the general framework of the relation between the State and the society. In particular, Article 7 of the Georgian Constitution determines that the State recognizes and protects the fundamental rights and liberties of persons, as eternal and supreme human values and while exercising authority, the people and the state are bound by these rights and freedoms as directly applicable law.<sup>125</sup> Thus, Article 7 of Georgian Constitution was recognized as the source of proportionality and as an effective tool of in the hands of Constitutional Court to check the actions of the State.

The CCG defined proportionality clearly under the influence of German jurisdiction. Particularly, the CCG, in one of its famous cases held that the measurement of the restriction of constitutional rights is the principle of proportionality. The principle by itself represents the bounding tool of a legislator in the process of regulation of the basic human rights and thus, is the element of constitutional control. It is the requirement of proportionality that the encroachment of a basic right by the state should be proper and necessary means of achieving important public goal. At the same time the intensity of the restriction of basic right should be proportional to the

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<sup>125</sup> N1/3/407 judgment of Constitutional Court of Georgia, (26 December, 2007).

objective. It is unacceptable that the achievement of the objective should be conducted at the sake of unacceptable human rights restrictions.<sup>126</sup>

As we have seen, Article 17 of the Georgian Constitution contains the specific provision of the prohibition of cruel, inhuman and degrading punishments, but it was questioned whether the provision contains the right to be protected against disproportional punishments e.g. excessive duration of prison sentences.

In its recent judgment, the CCG clarified that in the modern democratic society the duration of imprisonment, in certain occasions, can be considered as inhuman and degrading punishment. This is the case, for example, with the duration of pretrial detention or even with the punishments proscribed for certain criminal conducts. The Court, however, noted, the longest duration of imprisonment is not *a priori* the condition of its unconstitutionality. It is possible that life imprisonment in certain occasions could be considered constitutional, while imprisonment for rather very short time can reach the threshold of inhuman and degrading punishment. Life imprisonment without parole is considered as inhuman punishment but at the same time the possibility of parole cannot be considered as the condition to exclude the doubts about the particular punishment's unconstitutional, inhuman nature, if the latter is explicitly disproportional to the crime committed.<sup>127</sup>

Thus, according to the Constitutional Court of Georgia, the source of the right to be protected against disproportional punishments is enshrined in Article 17 of the Constitution. And the particular punishment passes muster of constitutionality only if it satisfies the test of proportionality.

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<sup>126</sup> №3/1/512 judgment of Constitutional Court of Georgia, (26 June 2012).

<sup>127</sup> №1/4/592 judgment of Constitutional Court of Georgia, (24 October 2015).



## **Chapter 2. THE APPLICATION OF THE PROPORTIONALITY PRINCIPLE IN CRIMINAL PUNISHMENTS VIA JUDICIAL REVIEW**

This chapter encompasses a review a usage of proportionality principle via judicial review of criminal punishments in three different countries and subsequent critique. The previous chapter observed the sources of proportionality in the constitutions of targeted jurisdictions, distinguished its important role in democratic society with the special focus on proportional punishments and the courts as an effective guarantors of justice. The aim of the present chapter is to illustrate how the constitutional courts treat the general requirement of proportional punishments in action, what issues they face and how they deal with it. Additionally, the weaknesses of a particular approaches will be presented.

### **2.1. Cruel and Unusual Punishment Clause by the Supreme Court of United States**

According to the Eighth Amendment of the U.S. Constitution “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>128</sup> In spite or possibly because of its relatively short legal definition, the provision has been a reason of numerous controversies in the history of the Supreme Court as it was partly overviewed in previous chapter. Terms used in the Eighth Amendment – “excessive” and “cruel and unusual” have been the subject of various interpretations by the respective justices, on whether or not are the courts eligible to the judicial review of proportionality of criminal penalties or how should be determined what is proportional for the purposes of criminal sanctions. Thus, for long time the Court’s primary task has been to detect the source of judicial review of

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<sup>128</sup> See U.S. CONST. amend. VIII.

proportionality of criminal punishments in the Constitution of the US on the one hand and to construe the objective criteria's and standards of examination of proportionality in criminal punishments on the other. The first task has been partly overviewed in the previous chapter and concluded that Eighth Amendment possesses the natural right of the person to be protected against disproportional punishments, which obliges the courts to provide effective layer of the right and the check against the state's actions. However, in the present subchapter proportionality's source will be discussed from different angle. Particularly, the extent of proportionality regarding disproportional punishments in the light of case law developed by the Supreme Court of United States.

Furthermore, the present subchapter illustrates how the court construed an effective layer for the guarantee of person's right to be protected against disproportional punishments. The precedents show that the Supreme Court has gone a long way until it reached some tangible characteristics of the contemporary evaluation standards and common understandings regarding the judicial review of punishments under the mentioned article.

To a present day, the Eighth Amendment has been exercised to rule on various measures invented by the legislators as a means of the punishments for the crimes committed by individuals, including, capital punishments or torture<sup>129</sup> as particular penalties, and lengthy prison sentences.<sup>130</sup>

At the outset it should be highlighted that the application of proportionality flowing from the text of the Eighth Amendment has not the same effect to all criminal punishments under the precedents of the Supreme Court. The Court grants comparably heightened judicial review of proportionality of death penalties,

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<sup>129</sup> See *O'Neil v. State of Vermont*, 144 U.S. 323, 339 (1892), (Field, J., dissenting). The Eighth Amendment itself, of course, contains no reference to "methods" or "modes" of punishment.

<sup>130</sup> See e.g. *Roper v. Simmons*, 543 U.S. 551 (2005).

particularly the goal-control of criminal policy and the assessment of a severity of a punishment to the crime committed, while such approach is not afforded to the non-capital sentences.

Until 1910 the general approach towards the interpretation of the Cruel and Unusual Punishment Clause was quite narrow as the provision was understood as the person's right to be protected against certain types, e.g. "unusual or barbaric", of punishments, with exception of few judgments where it was remarked that "the courts can reasonably interfere only when the punishment is so excessive or so cruel as to meet the disapproval and condemnation of the conscience and reason of men generally".<sup>131</sup> But generally, it was not considered as relevant precedent, because the Supreme Court had not established the particular approach yet.

In the early 20<sup>th</sup> century the Supreme Court made its first attempt to evolve the proportionality from the basin the Eighth Amendment<sup>132</sup>. The case involved the conviction of a United States coast guard officer who was charged for falsifying an official document. The applicant was sentenced to 15 years of imprisonment associated with painful labor, punishment known as "Cadena Temporal", and to pay a considerable amount of fine. The Supreme Court granted writ of certiorari to hear the case. The majority's opinion criticized the punishment inflicted on the plaintiff from two different perspectives, which later caused heterogeneous application of the Eighth Amendment by the United States' courts.

The Court stressed that the nature of the crime is an important aspect for the determination of penalty - "...In all such cases there is something more to give

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<sup>131</sup> See e.g. *State v. Becker*, 51 N.W. 1018, 1022 (S.D.1892).

<sup>132</sup> *Weems v. United States* 217 U.S. 349 (1910).

character and degree to the crimes than the seeking of a felonious gain, and it may properly become an element in the measure of their punishment”<sup>133</sup>.

The court accordingly made a comparative analysis of the particular offence (falsification of the official document for the fraudulent use) and the punishment imposed to other more severe crimes, noting that the punishments for the latter were significantly not as severe as the penalty inflicted in the present case.<sup>134</sup>

The second factor, that prompted the court to strike down the punishment, was the unusual nature of the particular penalty to the common law.<sup>135</sup>

Accordingly, the judgment has become the first try to assess the nature of crime under the proportionality scrutiny, which concluded with a success to a claim. It should be noted that Justice (Edward) White harshly criticized the majority’s opinion. It was argued in the dissent that the majority’s interpretation of the Eighth Amendment raised serious risks of intervention in the affairs not belonging to the judicial power, which constituted the determined intervention of the lawmaking policy of the legislative body.<sup>136</sup> Additionally, Justice White referred to the old English common law practice, including *Oats Case*<sup>137</sup>, arguing that the clause was originally meant as a prohibition of certain unusual types of punishments - not disproportional ones. The Court responded to the dissent by noting that the Clause of the Constitution is progressive and “acquires meaning as public opinion becomes enlightened by the humane justice.”<sup>138</sup>

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<sup>133</sup> Ibid. at 379-80.

<sup>134</sup> Ibid. at 380-81.

<sup>135</sup> Ibid. at 377.

<sup>136</sup> See *Weems v. United States*, 217 U.S. from 383 (1910).

<sup>137</sup> For the overview of Titus oats case see and relevant approaches see to the first chapter.

<sup>138</sup> Ibid. at 378.

The Supreme Court strengthened its dynamic interpretation developed in the *Weems* case in *Trop v. Dulles*,<sup>139</sup> stressing that the clause protected in the Eighth Amendment is not static and “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>140</sup>

A very interesting approach was developed in the late 1970s, when the Supreme Court firstly struck down the law imposing death penalty for non-homicide crimes. In *Coker v. Georgia*,<sup>141</sup> the court’s emphasized that “although rape deserves serious punishment, the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such and as opposed to the murderer, does not unjustifiably take human life.”<sup>142</sup> Additionally, the court established that a punishment is “excessive” and therefore unconstitutional if it passes the one of a following threshold:

1. Punishment makes no measurable contribution to acceptable goals and thus is nothing more than the purposeless and needless imposition or suffering.
2. Punishment is grossly out of proportion to the severity of the crime.<sup>143</sup>

The Coker’s court relying only on the second factor struck down the law, as it explicitly remarked that the punishment might “measurably serve the legitimate ends of punishment.”<sup>144</sup>

Accordingly, the court created two-folded standard of examination of proportionality of death penalty. The first standard, which requires “measurable contribution to acceptable goals” are analogues to the rational basis test, which is the lowest scrutiny of the check of the state action and the latter, under such test will be held

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<sup>139</sup> See *Trop v. Dulles*, 356 U.S. 86, (1958).

<sup>140</sup> *Ibid* at 100-01.

<sup>141</sup> See *Coker v. Georgia*, 433 U.S. 584, 598 (1977).

<sup>142</sup> *Ibid* at, 598-99.

<sup>143</sup> See *Coker v. Georgia*, 433 U.S. 584, 598 (1977).

<sup>144</sup> See *Coker v. Georgia*, 433 U.S. 593 and footnote 4 (1977).

unconstitutional if it is not rationally connected to the legitimate aim of state.<sup>145</sup> Thus, for example, simple notions as retribution and deterrence may in any way be considered as acceptable goals on the one hand and the means, *e.g.* the capital sentence, may always be considered rationally connected to those goals. As to the second standard of evaluation, gross disproportionality check, it focuses on the retributive nature of the punishment taking into consideration the harm and blameworthiness of a person.<sup>146</sup>

Proportionality standards have been applied to the non-capital sentences as well, but very scarcely and ambiguously. Proportionality evaluation test significantly differs from the test exercised to capital sentences.

In *Rummel v. Estelle*<sup>147</sup>, the Supreme Court established a significantly different and lower standard to the non-capital punishments. In the case, the plaintiff was successively charged of fraudulent use of credit cards with minimum property damage (approximately 120 \$) and was sentenced to the life imprisonment under the recidivist code of state. The Court emphasized that there is drastically little scope for proportionality requirement concerning non-capital penalties and the court lacks the capacity to measure the excessiveness of the prison sentences, in contrast to the death penalties, which by its nature is final and determinable.<sup>148</sup> The Supreme Court to some extent reiterated the approach developed in the dissent made by Justice White in *Weems* case.<sup>149</sup> The majority emphasized that when determining the prison terms, the state legislature enjoys wide discretion and is in the better position to conclude the

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<sup>145</sup> See Bruce W. Gilchrist, *Disproportionality in Sentences of Imprisonment*, 79 Columbia Law Review 1119, 1147 (1979). See also for the notion of rational basis *e.g.* *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 101 S. Ct. 453, 66 L. Ed. 2d 368, (1980).

<sup>146</sup> See E. Thomas Sullivan and Richard S. Frase, *PROPORTIONALITY PRINCIPLES IN AMERICAN LAW, Controlling Excessive Government Actions*, OXFORD UNIVERSITY PRESS, 131, (2009).

<sup>147</sup> See *Rummel v. Estelle*, 445 U.S. 263, (1980).

<sup>148</sup> *Ibid.* at 272.

<sup>149</sup> See *supra* note 135.

reasonableness of the sentence.<sup>150</sup> Justice Rehnquist, additionally, remarked that assessment of proportionality of duration of sentences by justices is nothing more than the expression of subjective views on particular case, which is not acceptable and clearly cause the intervention into the affairs of legislature.<sup>151</sup> Thus, the court has drawn a rigorous line between the assessment of proportionality of capital sentences for non-homicide crimes and other penalties for particular offences.

Additionally, the court noted, “[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.”<sup>152</sup> With that reasoning the court rejected the three steps test suggested by the dissenting opinion of Justice Powell.

According to Powell’s test, the disproportionality of the punishment should be assessed by **(1) the weighting the nature of the crime, (2) the penalty inflicted for the same crime in other states and (3) punishments imposed on other crimes in the same jurisdiction.**<sup>153</sup>

The Supreme Court overturned the *Rummel* judgment only a few years later in *Solem v. Helm*.<sup>154</sup> The plaintiff had been sentenced six times for non-homicide felonies. At the material time he was charged for issuing a falsified check, which amounted to 100 US dollars.

The Supreme Court found it unusual to exclude the proportionality requirement to non-homicide crimes, stating that no penalty issued by the state is *per se* constitutional and the judiciary is authorized to check on the proportionality of the punishments non-homicide offences as well.

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<sup>150</sup> See *Rummel v. Estelle*, 445 U.S. 263, 275-276, 283-284 (1980).

<sup>151</sup> *Ibid* at 275.

<sup>152</sup> *Ibid* at 282.

<sup>153</sup> See *Rummel v. Estelle*, 445 U.S. 295 (1980).

<sup>154</sup> *Solem v. Helm*, 463 U.S. 277, (1983).

At the outset it should be mentioned that for the first time the Supreme Court explicitly referred and based its argumentation on the historical interpretation of Eighth Amendment, although, as we have seen, the latter was consistently used against the existence of proportionality requirement of the penalties.

Whereas, in the *Weem's* case, the majority to some extent ignored the historical interpretation of Eighth Amendment, it did not do so in the *Solem* case, where it stressed that the constitutional provision was the analogical to the English Bill of Rights, and English clause of cruel and unusual punishment was familiar to check the proportionality of criminal penalties. According to the court, “[i]t was expressed in Magna Carta, applied by the English courts for centuries, and repeated in the English Bill of Rights in language that was adopted in the Eighth Amendment. When the Framers of the Eighth Amendment adopted this language, they adopted the principle of proportionality that was implicit in it.”<sup>155</sup>

Additionally the Court remarked that “although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection-including the right to be free from excessive punishments.”<sup>156</sup>

To rule on the case, the Supreme Court adopted the three steps analysis suggested in *Rummel's* dissent by Justice Powell in order to assess the proportionality of punishment. In particular:

1. The assessment of gravity of the offence and the harshness of the penalty;
2. The comparison the sentences on other criminals in the same jurisdiction;

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<sup>155</sup> *Solem v. Helm*, 463 U. S. 284-286, (1983).

<sup>156</sup> *Ibid* at 286.



3. The comparison the sentences imposed for the conduct of the same crime in other jurisdictions.<sup>157</sup>

Regarding to the first step, Justice Powell explained how the fears of Rummel's majority about the judicial subjectivism could be eliminated. Particularly, he remarked that the gravity of the offence should be assessed by the harms caused by the person and the latter's blameworthiness, e.g. the type of intent.<sup>158</sup>

Accordingly, the Court, on one hand, stressed that the punishment was disproportional to the nature of the crime and on the other hand, that the penalty was stricter than other crimes in the same state, which were significantly more serious than the present one.<sup>159</sup> On the basis of the reasoning provided above, the Court struck down the punishment imposed on the plaintiff under the Eighth Amendment.

*Solem v Helm* test was criticized and changed in *Harmelin v. Michigan*.<sup>160</sup> Ronald Harmelin was sentenced to life in prison without possibility of parole for possession of over 650 grams of cocaine. In strictly spitted judgment (5-4) the Supreme Court upheld the sentence. Two separate opinions were written in favor of judgment by Justices - Scalia and Kennedy.

Justice Scalia emphasized that the Cruel and Unusual Punishment Clause does not include the proportionality requirement at all. He invoked the original interpretation of the Constitution, stating that the framers of the Constitution were very aware of the proportionality principle during the adoption of the Bill of Rights, because the latter was already stipulated in several state constitutions. Thus, by rejecting to add proportionality requirement in the Eighth Amendment, the framers intention was

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<sup>157</sup> Ibid at 190-193.

<sup>158</sup> Ibid. at 292.

<sup>159</sup> *Solem v. Helm*, 463 U.S. 277, 291-292 (1983).

<sup>160</sup> See *Harmelin v. Michigan*, 501 U.S. 957 (1991).

simply to prohibit certain specific types of punishments, which were barbaric or inhuman *per se*.<sup>161</sup>

Justice Scalia stressed that by assessing the excessiveness of the punishment the court relies on the subjective values, which contradicts the very essence of the spirit of the Eighth Amendment. Justice Scalia further remarked that the traditional notions of federalism entitle States to treat like situations differently in light of local needs, concerns, and social conditions.”<sup>162</sup> Thus, there is wide margin of appreciation granted to a state legislature to define the sanctions of particular crimes and that process should not be impaired by the subjective evaluations by the judges.

Justice Kennedy proposed a different solution. His concurring opinion suggested narrowing the proportionality requirement test established in the *Solem* case. He argued that, the Eighth Amendment does not require a strict proportionality test, and the Court should strike down the punishment only in extreme cases that are grossly disproportionate to the crime.<sup>163</sup> So, he disregarded other two steps of proportionality check developed by majority in the past.

Justice Kennedy emphasized on wide discretion of the legislature noting, “the fixing of prison terms for specific crimes involves a substantial penological judgment that, as a general matter, is properly within the province of the legislature, and reviewing courts should grant substantial deference to legislative determinations”.<sup>164</sup>

Additionally, he criticized the three-step test invoked in *Solem*, noting that the Eighth Amendment does not mandate any specific penological theory. There are different theories of punishment, such as retribution, deterrence, incapacitation and rehabilitation and the state legislature is free to choose any of them as the goal of the

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<sup>161</sup> Ibid at 958.

<sup>162</sup> Ibid at 958-99.

<sup>163</sup> See *Harmelin v. Michigan*, 501 U.S. 959 (1991).

<sup>164</sup> Ibid at 959.

sentencing, thus it is inevitable that there might be the divergences in criminalization same crimes in different states.<sup>165</sup>

Last time the proportionality check of non-capital sentences was substantially modified in *Ewing v. California*.<sup>166</sup> The plaintiff was charged with shoplifting of three gold clubs and previously had been convicted numerous times for different felonies, e.g. theft, burglary, robbery etc. The Supreme Court upheld the sentence 25 years to life. Writing on behalf of the majority Justice O'Connor modified proportionality standards developed in *Solem* and *Harmelin*. In particular, the court will follow the *Solem* standard only in exceptional occasions, when the sanction for the crime will appear grossly disproportionate.<sup>167</sup>

Accordingly, the US Supreme Court provides two different standards for proportionality check on capital and non-capital sentences. When examining the proportionality of a capital sentences, the court are eligible to struck down the sanction if founds that punishment makes no measurable contribution to acceptable goals and/or punishment is grossly out of proportion to the severity of the crime.<sup>168</sup> As to the non-capital sentences the court provides more complex test. In particular the Court will assess the proportionality of sanction, which includes the comparison of penalties imposed on different crimes in the same jurisdiction and the comparison of the sentences inflicted on the same crime in different jurisdictions. But the Court will conduct such comparison only if the sanction passes the threshold of gross disproportionality.<sup>169</sup> Thus, when in capital sentences cases a gross disproportionality of a penalty is a sole and sufficient basis to hold the punishment unconstitutional, in

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<sup>165</sup> See *Harmelin v. Michigan*, 501 U.S. 959-560 (1991).

<sup>166</sup> See *Ewing v. California*, 538 U.S. 11 (2003).

<sup>167</sup> See *Ewing v. California*, 538 U.S. 11, 290-291 (2003).

<sup>168</sup> See *Coker v. Georgia*, 433 U.S. 584, 598 (1977).

<sup>169</sup> See E. Thomas Sullivan and Richard S. Frase, *PROPORTIONALITY PRINCIPLES IN AMERICAN LAW, Controlling Excessive Government Actions*, OXFORD UNIVERSITY PRESS, 131, (2009).

non-capital sentences gross disproportionality is just one of the elements of proportionality standard.<sup>170</sup> Accordingly, the Supreme Court grants wide margin of appreciation to a legislatures in defining the criminal policies concerning non-capital sentences. It should be noted, additionally, that since 1980 there is only one precedent when the court struck down the punishment on the basis of the disproportional length of prison sentence.<sup>171</sup>

Nevertheless, the determination of criminal policy is competency of legislative organ, the latter should not be granted with practically unlimited powers in substantive criminal law. In contrary, the exceptional attention and rigorous check on state actions are required, when life and liberty are at stake. The Court should provide an effective layer to minimize the risks of unreasonable state actions. As it was shown, when assessing the proportionality of non-capital sentences, the US Supreme Court heavily relies on the decisions of the legislatures. For instance, in order to check proportionality of particular punishment the court takes into consideration the criminal policy established in other states, in spite of the independent assessment of the goals, necessity or proportionality in a narrow sense. Such approach leaves the Court in the scopes of the legislature, bounds the judiciary by the legislative thought, which *per se* is directed on the restriction of human rights. The proportionality standard that examines the state actions should be an internal and autonomous product of the Court, which should not be subjected or otherwise influenced by the external effects from the legislatures. As far as such external effects influence proportionality, the protection of the basic rights becomes illusory.

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<sup>170</sup> See *Ewing v. California*, 538 U.S. 11, 290-291 (2003).

<sup>171</sup> *Solem v. Helm*, 463 U.S. 277, (1983).

## 2.2. Constitutional control of criminal sanctions in German constitutionalism

As mentioned previously proportionality in German constitutional law is a substantial element of judicial review. Proportionality puts the burden on a state of explaining the reasonableness of its actions. Suitability, necessity and balancing are the sub-principles of proportionality, which check constitutionality of the state action.<sup>172</sup> Moreover, it is also recognized that proportionality check should be applicable to any action of a state that encroaches into a person's basic right.<sup>173</sup>

Accordingly, the substantive criminal law falls within the check-area of proportionality, as it prohibits certain actions and defines sanctions for it. However, it should be noted that the FCCG recognizes the wide margin of appreciation in certain parts of criminal legislation, i.e. (1) where the restrictions are flourished by the dictation of public morals and (2) where there are opposing scientific opinions about the effectiveness of measure.<sup>174</sup> In the *Incest Case*,<sup>175</sup> the court restricts itself in undermining public morals, which are deeply entrenched in the German nation. The court, therefore, leaves the issue to be regulated under the democratic process. In the *Cannabis Case*,<sup>176</sup> when there is no sole scientific answer to the regulated problem, the court deferred to the parliament again.

A classical example, when the Federal Constitutional Court of Germany assessed the proportionality of the length of criminal punishment, is the famous *Cannabis Case*, decided in 1994. At material time the possession of marijuana was a criminal offence

<sup>172</sup> See Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, Ratio Juris, vol. 16, 135, (2003).

<sup>173</sup> Mariam Gur-Arye and Thomas Weigend, *CONSTITUTIONAL REVIEW OF CRIMINAL PROHIBITIONS AFFECTING HUMAN DIGNITY AND LIBERTY: GERMAN AND ISRAELI PERSPECTIVES*, ISRAEL LAW REVIEW, 67, (2011).

<sup>174</sup> See 90 BVerfGE 145 (173) (1994) and 120 BVerfGE 224 (240) (2008).

<sup>175</sup> 120 BVerfGE 224 (2008).

<sup>176</sup> BVerfGE 90, 145 (1994).

and thus, was punishable with a fine or imprisonment up to five years. The Court, at the outset, distinguished the basic rights that were limited by the above-mentioned provision, concluding that the criminal regulation was *inter alia* restricting the general freedom of the person and the right of movement. As far as the rights at stake were identified the court examined whether the restriction was proportional.<sup>177</sup>

The legitimate aim of the provision was the prevention of a health risks created by the consumption of marijuana. However, having examined the various scientific and medical findings about the harms of marijuana, the court had not have a clear picture whether the particular drug was harmful to a person or whether it caused the addiction or the demand for the stronger narcotics. There were different and quite opposing expert opinions about the harms of cannabis.<sup>178</sup> However, the court relied on the wide margin of appreciation of state in identifying the threats of society and accepted the protection of the public health as a legitimate goal and the particular measure as suitable to achieve it.<sup>179</sup>

Next, the Court examined whether there were alternative, less-restrictive ways in achieving the particular goal. It was argued that the legalization of marijuana might reduce the consumption of the drug, but there were no consistent scientific or criminological findings between the experts attesting such approach. Thus, the Court considered that the parliament was in better position to regulate the matter and the criminalization of the conduct was recognized as the necessary means to achieve the public goal.<sup>180</sup>

On the last stage of proportionality the Court emphasized that the seriousness of a crime and the blameworthiness of the person must bear the just relation to the

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<sup>177</sup> Ibid. at 171-172.

<sup>178</sup> Ibid at 180-181

<sup>179</sup> Ibid at 174-182.

<sup>180</sup> BVerfGE 90, 145, 183 (1994).

punishment. The criminal conduct and its legal consequences should be in appropriate to each other.<sup>181</sup> Additionally, the Constitutional Court stressed that it is inherently the competence of legislature to determine the criminal policy in a country and the judiciary cannot substitute its function, but at the end it is still a matter of the Court to check the constitutionality of a particular penalties that encroaches in the constitutional rights of the individuals.<sup>182</sup> The Court concluded that the harm inflicted on society by unrestrained consumption of marijuana was so great that its criminalization was generally proportional measure to achieving the public goal.<sup>183</sup> Nevertheless, the court was concerned about the unlimited content of the regulation, as it did not create the exceptions for the possession of minor quantities of marijuana, intended for personal use. The court emphasized that criminal provision covered a wide range of conducts in which there were significant differences in the nature and the quality of the danger. Thus, in some cases, the dangers for public interest were so slight that the measure imposed on conduct to achieve the purpose was clearly out of proportion. Accordingly, for such conducts the criminal liability and imprisonment up to five years might be considered grossly disproportional.<sup>184</sup> However, the court refrained to declare the law unconstitutional, but instead put the obligation on the prosecution to dismiss petty cases, where the amount of marijuana was intended for personal use and did not cause the danger for third parties.<sup>185</sup> In other words, the Court recognized that the issue was mitigated by the fact that the ordinary courts and persecutors had the obligation to drop such cases and there was no need for holding the law unconstitutional.<sup>186</sup>

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<sup>181</sup> Ibid at 174, 183-194.

<sup>182</sup> Ibid at 173.

<sup>183</sup> Ibid at 183-194.

<sup>184</sup> Ibid at 184-194.

<sup>185</sup> BVerfGE 90, 145, 183 (1994). 189-190.

<sup>186</sup> Ibid at 189-190.

The approach of the Court, generally, can be assumed promising, as it subjected to the proportionality check on the character of the punishment, including the duration of imprisonment, but in fact it is not the optimal solution of the case. There is two major issues that flows from the approach. Firstly, by accepting the wide margin of appreciation of the state in defining criminal policy, the court drastically diminished the relevance of basic human rights in German constitutionalism, which permanently strive for optimization.<sup>187</sup> In particular, the Court gave deference to the choice of legislature to prohibit and punish certain conduct, which as it was highlighted in the judgment, was not clearly assured of its dangerousness.<sup>188</sup> Moreover, there were presented numerous scientific findings that normal consumption of marijuana did not create such alarming risks for a health that parliament was indicating.<sup>189</sup> The aim of restriction was taken for granted and genuine and the main concern of the court was focused only on the means of achieving the object. Professor Barak calls this particular issue regrettable in German and Israeli experience.<sup>190</sup> He argues that legitimate aim should be given an autonomous and substantial role in examining constitutionality, without linking it merely with the measures for achieving it.<sup>191</sup> The idea of professor Barak's conclusion is linked to Robert Alexy's theory of human rights optimization, as both authors highlight on the momentous status of the human rights in modern constitutionalism.<sup>192</sup> Without the clear comprehension of the real existence of the public interest, the court made two grave mistakes. First, it gave the

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<sup>187</sup> Robert Alexy emphasizes that as constitutional rights as principles "are norms requiring that something be realized to the great extent possible, given the legal and factual possibilities". See Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, Ratio Juris, vol. 16, 135, (2003).

<sup>188</sup> See supra note 172.

<sup>189</sup> See BVerfGE 90, 145, 174-181 (1994).

<sup>190</sup> See Aharon Barak, *Proportional Effect: The Israeli Experience*, University of Toronto Law Journal, 371, (2007).

<sup>191</sup> Id. at 371-373.

<sup>192</sup> For the comparison consider - Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, Ratio Juris, vol. 16, (2003) and Aharon Barak, *Proportional Effect: The Israeli Experience*, University of Toronto Law Journal, (2007).



way to the wide stream of illusory governmental interests for a material and future cases. Second, as the legitimate interest of criminalization of the marijuana was practically taken for granted and as a result the Court put the burden of proof of the provision's unconstitutionality on the shoulders of individual that is categorically unacceptable. The Court should not accept the existing status quo for granted. The starting point of the assessment should be the presumption of freedom. Therefore, burden of proof of scientific harm of consumption of cannabis should have been on the state, not on the individual.

The second problem of the approach is the factor of legal certainty. In particular, nevertheless the Court recognized that the statute was too broad it did not declare it unconstitutional, but left it to the executive to deal with it in practice.<sup>193</sup> The principle of legal certainty requires that individual should be able to foreseen the possible legal consequences of the legislation. The judgment causes considerable degree of uncertainty. On the one hand there is a legal norm, that is formally applicable, but on the other hand the state authorities are unable to enforce it. The legal consequences of the judgment could have been more precise, if the Court has declared the norm unconstitutional and void.

In 2008, the Federal Constitutional Court ruled on culpability of sexual intercourse between natural siblings in the famous *Incest Case*.<sup>194</sup> In short, Article 173 of the Criminal Code of Germany prohibits the incest and imposes the criminal liability on the wrongdoer up to two years. The Court upheld the provision relying on the tradition and morality of German society. As mentioned previously, the second occasion when the Court refrains to use strict proportionality check on criminal punishments and gives very broad margin of appreciation to legislature are the cases

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<sup>193</sup> See supra note 178.

<sup>194</sup> BVerfGE 120, 224 (2008).

concerning public morality and traditions.<sup>195</sup> The Court leaves the matter to be decided by the more representative body. The main object of the prohibition, in particular case, was the genetic problems of a child, which might have been born, however the provision encompassed even those sexual relations, where objectively the child would not have born, out of person's the age or other factors.<sup>196</sup> Indeed, the court's judgment was heavily conditioned by the morals and traditions, which was strictly criticized in the dissent of the justice Hessemer.<sup>197</sup>

The Court's approach leaving the legislature without the proper constitutional check on the grounds of public morals and traditions are disturbing. Using traditions and morality as the legal ground to abstain from judicial review of criminal penalties is a very dangerous precedent. It endangers the counter-majoritarian function of the Constitutional Court in the cases when majority relies on the conventional morality to impose penalties and suppress different minorities or vulnerable groups of the society.

### **2.3. Judicial review of the proportionality of sanctions by the Constitutional Court of Georgia**

As noted in the previous chapter, Article 17 of the Constitution of Georgia explicitly provides the prohibition of cruel, inhuman and degrading punishment. The CCG has interpreted the scope and respective standards of this constitutional provision recently in its landmark judgment – Citizen of the Georgia – Beka Tsikarishvili v. Parliament of Georgia.<sup>198</sup> The CCG has declared unconstitutional a norm of the Criminal Code that had imposed an imprisonment term of seven to fourteen years for illegal purchase

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<sup>195</sup> Mariam Gur-Arye and Thomas Weigend, *CONSTITUTIONAL REVIEW OF CRIMINAL PROHIBITIONS AFFECTING HUMAN DIGNITY AND LIBERTY: GERMAN AND ISRAELI PERSPECTIVES*, ISRAEL LAW REVIEW, 67, (2011).

<sup>196</sup> BVerfGE 120, 224 (2008).

<sup>197</sup> Ibid at 73-128.

<sup>198</sup> N1/4/592 judgment of Constitutional Court of Georgia, (24 October, 2015).

and storage of dry marijuana. It was the first case when the CCG assessed the proportionality of punishment.

According to the judgment, the Court checks the proportionality of sanctions only in very limited circumstances, when the punishment is grossly disproportionate. The Court acknowledges the high degree of discretion of legislative power in terms of penalty policy. Respectively the case is admissible only in very rare occasions when severity of penalty and the nature of crime are considerably disproportionate. The Court states that in such cases it is necessary to limit the discretion of the legislature in order to protect inviolability of fundamental rights.<sup>199</sup>

If the punishment in question is considerably disproportionate and satisfies the threshold, the Court considers proportionality on merits. The CCG provided the two-fold test for the assessment proportionality of the punishment on merits. The Court takes into account the following circumstances: (1) Whether the severity of punishment and the gravity of the crime are grossly disproportionate; (2) Whether the law gives power to the judge who imposes the punishment, to consider individual circumstances – the harm caused by the crime, degree of blamefulness and etc. The punishment is proportionate if it passes these two elements.<sup>200</sup> It is noteworthy that while considering the “gross disproportionality” element, the Court employs the four-component test of proportionality. Moreover, according to the judgment, the Court should also take into account the general penological theories to consider the legitimate aims of the punishment properly.<sup>201</sup>

It is important to figure out how the Court applied the standards to the particular factual and legal circumstances of the case. Firstly, it is clear that the case satisfied the threshold element, because the fact that the case found admissible indicates that the

<sup>199</sup> N1/4/592 judgment of Constitutional Court of Georgia, (24 October, 2015), Para. 34.

<sup>200</sup> N1/4/592 judgment of Constitutional Court of Georgia, (24 October, 2015), Para. 38.

<sup>201</sup> N1/4/592 judgment of Constitutional Court of Georgia, (24 October, 2015), Para. 41.

Court found the punishment grossly disproportionate. Unfortunately, the Court did not provide any reasoning in the admissibility decision and the precise standards of the sufficiently disproportionality are unknown.

The Court applied the above-mentioned test and assessed proportionality of punishment on merits. Assessing the gross disproportionality the CCG indicates to the possible legitimate aims of the punishment. The Court acknowledges that protection of public health and prevention of drug-related crimes are, in principle, valid legitimate aims. But the Court emphasized that considering the importance of personal liberty it is not acceptable to impose such harsh punishment in order to protect a person by preventing him/her to harm his/her own health. Respectively, the Court disregarded one of the legitimate aims.<sup>202</sup> Afterwards the court checked suitability, necessity and the proportionality in strict sense of the prohibition in regards with the other legitimate aims. The Court pointed out that the particular amount of marijuana (70 grams) does not *per se*, without any further proves, indicate the intention of sale. Therefore, there is no logical connection between prohibition in question and protection of society from drug-dealers.<sup>203</sup> Furthermore, the Court found prohibition excessive in regards of the prevention crimes committed by the people who are under influence of marijuana, other than imprisonment up to fourteen years. The Court stresses that the general prevention of abuse of marijuana is disproportionate. According to the judgment if the person is punished in order to prevent others to abuse marijuana is disproportionate because it considers a person as an instrument to achieve goals of penalty policy and there is no proportionality in strict sense.<sup>204</sup> After considering the “gross disproportionality” component, the Court considered whether the law gives the sufficient directives to the judge who imposes

<sup>202</sup> N1/4/592 judgment of Constitutional Court of Georgia, (24 October, 2015), Para. 82.

<sup>203</sup> N1/4/592 judgment of Constitutional Court of Georgia, (24 October, 2015), Para. 93.

<sup>204</sup> N1/4/592 judgment of Constitutional Court of Georgia, (24 October, 2015), Para. 83.

the punishment to take into account the individual circumstances of the case. The Court states that the law in question imposed the penalty without consideration of the degree of harm of the crime, in particular, without any distinction between the persons who purchased or stored marijuana for personal use or the persons who intended to sale it.<sup>205</sup> Thus, no room for individualization of the punishment was another reason of disproportionality of the sanction.

The judgment should be considered as the historical and groundbreaking as it is the starting point of judicial review of punishments in Georgian Constitutionalism. Although there are several issues that need further clarification and development. First of all, it is not quite clear what is the distinction between the threshold test of “sufficiently disproportionate” and the test of “gross disproportionate” on merits. Moreover, the function of “individualization” of punishment in the test is doubtful. If the punishment is not proportionate, the further step does not seem to be necessary, and if the punishment is proportionate, it must be proportionate in every case, even without considering the individual circumstances. Also, in the judgment the Court found imprisonment as disproportionate, it is unknown what will be the court’s approach in the cases when imprisonment in principle is proportionate, but the given term is grossly disproportionate. It is rather interesting if the Court is brave and activist enough to strike down such punishments.

### **Chapter 3. ASSESMENT OF THREE SYSTEMS**

The previous chapter observed how proportionality of criminal punishments is exercised by the Constitutional/Supreme Courts of three jurisdictions. The present chapter is mainly focused on general comparative analysis of targeted systems.

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<sup>205</sup> N1/4/592 judgment of Constitutional Court of Georgia, (24 October, 2015), Para. 101.

As it was shown, proportionality check is present in all three jurisdictions, when it comes to the judicial review of criminal punishments. However, it was also seen that proportionality's expressions differ in each jurisdiction. In particular, the courts have provided different approaches to check the governmental actions under the proportionality scrutiny.

There are some other similarities in proportionality doctrine of targeted jurisdictions as well. One general feature, which combines all three tests, is the notion of "gross disproportionality".

However, even the role of "gross disproportionality" is different when we observe the case law of targeted countries. It should be highlighted that, even in the same jurisdiction "gross disproportionality" principle is exercised differently.

For instance, as shown in previous chapter, in the US jurisdiction the "gross disproportionality" is used as the sole basis for violation of the Eighth Amendment, when the court examines the constitutionality of a capital sentences.<sup>206</sup> However, when checking the proportionality of non-capital sentences, gross disproportionality test plays only a threshold of admissibility, after which the court invokes the Solem Test.<sup>207</sup>

When observing the German jurisdiction, "gross disproportionality" of punishment is already a sufficient basis of a violation.

Considering that context, we can assume that in US jurisdiction the court rely on legislatures more than in Germany. In particular, when in Germany the finding of gross disproportionality is a basis of norm's unconstitutionality, in US it is a mere threshold, after which the court will make further steps.

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<sup>206</sup> Coker v. Georgia, 433 U.S. 584, (1977).

<sup>207</sup> Solem v. Helm, 463 U.S. 277, (1983).

As to Georgia, “gross disproportionality” notion has a double meaning/role and remains vague as well. On the one hand the notion of “gross disproportionality” is an admissibility criterion and on the other hand it is basis of finding the law unconstitutional. However, on admissibility stage the court calls it “sufficiently disproportionate”, there is no distinction provided in the judgment between “gross disproportionality” and “sufficiently disproportionate”. Accordingly, the CCG uses gross disproportionate standard on the admissibility stage and on the merits as well. Thus, the notion has two functions in constitutional adjudication. The court, however, omitted to explain what the standards of “gross disproportionality” are on admissibility stage, but it provided explicit test on merits to assess and establish the gross disproportionality.<sup>208</sup>

Accordingly, the admissibility criteria in Georgia and US for proportionality check of criminal sanction are basically the same. On the other hand, Georgian and German systems are pretty much alike on merits. Both systems provide classical proportionality doctrine to examine constitutionality of sanctions.

As to US jurisdiction, the Supreme Court established completely different standard on merits, which actually does not recognize the German proportionality analysis. In fact, after passing a threshold of “gross disproportionality”, the Supreme Court will invoke the *Solem Test* to compare the punishments.

It is relevant to mention, that the Solem test is seen to include some elements of German proportionality. For example, when the court compares the sanctions for the same crime in different states, it really looks like the necessity step of classical German proportionality analysis.<sup>209</sup> Nevertheless, it has been never recognized.

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<sup>208</sup> N1/4/592 judgment of Constitutional Court of Georgia, (24 October, 2015).

<sup>209</sup> See E. Thomas Sullivan and Richard S. Frase, *PROPORTIONALITY PRINCIPLES IN AMERICAN LAW, Controlling Excessive Government Actions*, OXFORD UNIVERSITY PRESS, (2009).

As to the question, which proportionality analysis is more effective for the human rights protection we have to bear in mind the nature of the approach and the extent of test's independence.

Considering that context, the US proportionality analysis is relatively weak, as the test to great extent relies on the state legislatures views on the criminal policies. In contrast, German proportionality analysis is relatively autonomous mechanism of examination. The court is not confined within the scopes of legislative thought, especially on *stricto sensu* stage, which actually provides stronger filter or layer for basic right at stake.

As mentioned in previous chapter, the effectiveness of human rights protection through judicial review is greatly distorted and diminished when it substantively influenced by the external powers. The court should construe its internal and autonomous mechanism to check governmental actions, without confining itself in the strict margins of legislative branch. German Proportionality is a good example. Proportionality and its substantive element proportionality *stricto sensu* can be considered as an effective check of governmental actions. It gives the judges the possibility to weight the interest at stake. This process, however, cannot be considered as policymaking. It is more judicial lawmaking, which is constitutionally granted to the courts. We can argue that from two standpoints. Firstly, it is a primary job of constitutional courts to defend the rights of persons stipulated in the constitutions. Thus, each regulation that encroaches into the basic rights of individuals will pass constitutional muster if it is proportional. This has been clearly emphasized in German jurisdiction. Secondly, the constitutional courts do not use proportionality to assess which penalty is best suited for the crime. More concretely, when the courts



invoke proportionality analysis they stay purely in juridical scopes, examining rationality, necessity and proportionality of particular measure.

Accordingly, German proportionality principle remains the optimal tool regarding the assessment of proportionality of punishments. It provides more effective check of governmental actions and at the same time clearly remains the courts in juridical scopes.

## CONCLUSION

The main purpose of the thesis was to illustrate how the courts of targeted States exercise the judicial review of proportionality of criminal punishments. The paper provided a comprehensive view on the sources of person's right to be protected against disproportional punishments in relevant constitutions and how effective are the standards developed by the courts to assess the proportionality of criminal punishments.

The paper, firstly, observed the origins of proportionality in relevant jurisdictions with the main focus on proportional punishments. It shed some light on several factors. In particular, what were the reasons of the rise of proportionality and why. Furthermore, who was originally meant to be granted with proportionality check and how it should be exercised.

Next, the paper overviewed the sources of proportionality, its place and the meaning in respective States' Constitutions. We have seen that the sources of proportionality are not similar in every jurisdiction. When in the US Constitution proportionality and the right to be protected against cruel and disproportional punishments is more or less explicitly embodied in the Eighth Amendment, in German Basic Law proportionality

appears to be an unwritten principle evolved by the Federal Constitutional Court from the text of Constitution.

Moreover, the thesis illustrated how the judicial review proportionality of punishments is put in practice. In particular, what are the standards of evaluating the proportionality of punishments. Additionally, the paper focused on illustration of the weak sides of particular proportionality standards developed in respective States.

Lastly, the paper cast some light on subsequent comparison of the three States jurisdiction. Particularly, what are the similarities and differences between them and which jurisdiction provides more effective layer for human rights protection in broad sense.

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