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# THE PROPORTIONALITY ANALYSIS IN THE GEORGIAN CONSTITUTIONAL JURISPRUDENCE AND THE PROSPECTS OF RATIONALITY REVIEW

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## INTRODUCTION

The Georgian Parliament has recently adopted changes into legislation, which aims to institutionalise a regulatory impact assessment (RIA) as an element of the legislative process. It is part of the regulatory reform agenda intended to facilitate the implementation of evidence-based policymaking in Georgia and is expected to come into force in 2020. Under the proposed system, in certain circumstances, the draft law must be accompanied by an impact assessment, which would contain factual information in order to measure effects of the proposed law on individuals and the wider community, whereas the legislature should take this assessment into consideration when legislating on the matter.

It thus becomes a procedural requirement for the legislature to take necessary evidence into account and pass on the laws that are informed by reality. Evidence-based lawmaking is believed to increase the substantive quality of legislation. It is thereby of considerable interest how the constitutional court should conduct the review in such cases and to what extent it should assess the procedural requirements of legislation.

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This paper aims to analyse the judicial review of rational lawmaking by focusing on the development of its concept in the European context. It further intends to investigate the criteria of judicial assessment and decision-making methodology applied *vis-à-vis* procedural requirements of lawmaking in order to test the idea whether the Georgian constitutional case-law is ready to move towards rationality review of legislation.

Initially, the paper briefly discusses the concept of rationality in legislation only to explain the argumentative similarity of legislative justification with judicial assessment methodology. The next part of the piece focuses on the proportionality test as the guiding decision-making strategy for constitutional courts and as a key methodological tool to check conduct rationality review. Lastly, the paper switches to analyse the development of the proportionality test in the practice of the Constitutional Court of Georgia (CCG) in an effort to demonstrate its firm institutionalisation in constitutional case-law, which opens prospects for rationality review of legislation in Georgia.

## 1. JUDICIAL REVIEW OF RATIONAL LAWMAKING

It is argued that constitutional control mainly comprises substantive or procedural review (Meßerschmidt 2015: 350), which serves as a basis for the judiciary to check the quality of lawmaking. The latter thereby implies both the procedure applied in the legislature for the adoption of a legal act, as well as its consistency, coherence and effects in practice. The procedural review is viewed to solve the counter-majoritarian dilemma of judicial review (Ely 1980), yet there are no clearly identifiable criteria in European judicial case-law, which would make the procedural check stand as a separate adjudicative category. Instead, courts – especially, the German Constitutional Court (FCC) – tend to conduct ‘semiprocedural review’ (Bar-Siman-Tov 2011), whereby judges review the legislative procedure as part of its substantive check of legislation and if only the content of a disputed law violates fundamental rights or other constitutional values, then does the court look into the legislative process to see whether certain procedural requirements are met (Meßerschmidt 2015: 352).

In German constitutional tradition, procedural review is closely linked to the legislator’s obligation of rational decision-making, which, *inter alia*, includes duty to deliberate (Hoffmann 1990: 97) and to apply an optimal method of legislation (Schwerdtfeger 1977: 173). However, any judicial action intended to review parliamentary business is inherently problematic,

because it may be perceived as abridging legislative supremacy. In this context, two competing views of legitimacy need to be weighed: the input-oriented approach, meaning that law will be constitutional if it is passed by the sovereign democratic body; and the output-oriented approach, which combines three criteria and argues that a law is constitutional because it (a) does not violate fundamental rights, (b) serves sound objectives, and (c) benefits outweigh the implementation costs (Meßerschmidt 2015: 352). It is fair to say that these two views of legitimacy go at the heart of constitutional democracy and it is for the constitutional court to respect and reconcile the foregoing values where appropriate.

Modern thinking on legislation embodies the ideas of legal realism and a law is no longer seen as a mere product of representative political authority, but is a key tool of good governance oriented towards efficiency (Aeken 2005: 67). It is accepted that law may have social and economic consequences and that a lawmaker should be guided by factual data/assessment in order to judge whether to adopt, maintain, change or invalidate a given regulation (Raz 2009: 104). This is what rationality basically implies the idea that regulatory decisions need to be justified by facts via measuring their prospective effects on individuals and a wider society.

If the idea of rational lawmaking is accepted and entrenched in a legal system, judicial review of laws needs to adopt assessment criteria and an argumentative methodology, which would correctly judge on the quality of legislation. Although the elements of good lawmaking are a relative novelty, judicial standards of assessment rooted in the protection of fundamental rights are still applicable (Popelier 2012: 257). It is also interesting to observe that tools of better legislation, especially, impact assessments, set requirements that are similar to the proportionality method. Namely, they consist of (a) a problem analysis, (b) determination of objectives and (c) a comparison of alternative options (European Commission 2009: 92). There is a striking resemblance (or convergence) between this methodology and the proportionality analysis applied by courts. Correspondingly, the proportionality serves as a key assessment framework for rational legislation.

## 2. PROPORTIONALITY PRINCIPLE AND RATIONALITY REVIEW

It should be borne in mind that a legislative process is political by nature and thereby subject to lesser judicial scrutiny. In case parliamentary procedures are not strictly observed in a given case, yet the adopted law

is substantively sound and produces good results, it would not seem to be plausible or practicable by a constitutional court to invalidate such legal act. This is an approach developed by FCC, which implies that when the content of law is flawed, procedural requirements are triggered (Meßerschmidt 2015: 365). Substantively, constitutional adjudication increasingly relies on proportionality to assess the quality of a disputed law.

The proportionality test is normally applied through a three-stage analysis. Once the state has demonstrated that its action, restricting the fundamental right(s) in question, had a legitimate objective, the judicial decision-making strategy across the globe would warrant a proportionality scrutiny. The first element of the test checks whether the means that were applied, in fact, promote the legitimate goal (suitability); subsequently, it is assessed whether the state opted for the least restrictive means to advance its regulatory objective (necessity); finally, a careful analysis is carried out to evaluate whether benefits of the state's objective are strictly proportionate to the infringement of the constitutional right(s) (balancing) (Cohen-Eliya, and IddoPorat 2011: 464).

There are important differentiations between each of the foregoing elements, which in practice require meticulous factual and normative consideration. Initially, the proportionality test looks into the legitimate aim of a regulation at hand, namely, the court attempts to identify the state's regulatory objective (Stone Sweet, and Mathews 2008: 75–77). This may sometimes prove to be difficult, since the aim might not always be obvious or there can be manifold aims or implicit ones, whereas the law would not normally provide for a clear interpretative rule to deal with such matters of ambiguity. Nonetheless, in practical terms, this requirement of proportionality is widely regarded as an auxiliary element, which although mandating formal check of legitimate aim(s), hardly operates as a filter for the substantive constitutionality review.

The next element of proportionality checks the suitability of the regulatory means (Alexy 2014: 51–53). In particular, the courts would normally assess the suitability of a given measure in terms of its capability to promote, but not to achieve, the pursued objective. This requirement thereby renders it not difficult to meet, because the threshold of needed effectiveness is considerably low. Moreover, the effectiveness of the measure is intrinsic to its suitability, which would often depend upon a legislative prognosis. It is fair to note that whilst reviewing such prognostic assessments, the courts are likely to accord great deference to the respective lawmaking authority (Alexy 2014: 51–53).

As regards the necessity requirement, a given regulation will be deemed necessary provided there is no alternative measure that would be less onerous

but equally effective. The said element of proportionality is inherently related to the idea of constitutional democracy, which is based on the presumption of individual liberty and implies the idea that any infringement of individual rights by public authority must be least restrictive (minimal impairment rule). Thus, should there be a less burdensome measure available, the state has the obligation to opt for such a measure to achieve its regulatory goal. It should be noted again that evaluation of the effects of the measure at hand and the entailed burden would often require a prognostic assessment by the legislature, to which constitutional courts are expected to grant considerable leeway (Alexy 2014: 53–56).

Finally, proportionality involves balancing the goal(s) pursued by the measure *vis-à-vis* the burden they entail (Alexy 2014: 51–53). This element of the test is the most problematic since it would often require a plain value judgement by the courts, which raises the question of legitimacy of judicial intervention in the province of policy-making. For this reason, constitutional judges ought to institutionalise the criteria for proportionality to make the judicial decision-making more discernible and transparent. In this context, the courts identify and weigh from the outset the constitutional status of the interests involved in a given case. For example, if a fundamental right cannot be restricted or only under specific circumstances, or a legitimate objective(s) of the state benefit from explicit constitutional recognition, this would indicate increased importance. Furthermore, the balancing requirement typically involves measuring intensity of the restriction in a given case against other conceivable measures of restrictive nature of the same right(s). This would imply comparisons to similar situations, the process in which many different variables can gain relevance, yet the choice of a pertinent variable(s) rests with the court.

It seems fair to say that proportionality offers judges a useful analytical platform to evaluate competing societal interests, which is likely to involve tensions between several constitutional values (Kumm 2004: 579–581) and, though it is supposed to narrow down the scope of unfettered judicial value judgements, it can hardly predetermine the potential outcome of a judicial process in a clear-cut fashion. Hence, proportionality allows judicial review with varying degrees of scrutiny, and the choice of the appropriate standard depends both on legal and factual criteria of a given case. The former implies the scope of a constitutional right and the intensity of the infringement, and the latter has to do with the difficulty of a legislative prognosis, which varies in each field of legislation (Brünneck 1988: 256–257). Although the intensity of review may differ, proportionality as a constitutional decision-

making strategy can certainly mitigate the problem of arbitrary judicial intervention into legislative policy-making and, thereby, it is widely regarded to be a legitimate instrument for reviewing infringements of fundamental rights (Cohen-Eliya, and Porat 2011: 463).

### 3. PROPORTIONALITY PRINCIPLE IN GEORGIAN CONSTITUTIONAL JURISPRUDENCE: A WAY TOWARDS RATIONALITY REVIEW

As indicated above, this paper aims to focus on proportionality in the context of rationality review by CCG within its human rights adjudicative mandate. In particular, the application of proportionality in relation to certain civil and political rights by CCG will be presented to showcase the embodiment of this principle in Georgian case-law.

The Georgian Constitution does not contain an explicit provision on proportionality and it has been interpreted by the Constitutional Court as a major analytical framework for resolving constitutional disputes and extensively applied in practice. Importantly, CCG has formulated varying proportionality criteria for dealing with civil and political rights.

The case-law on the right to privacy serves as a good example to showcase application of proportionality in Georgian constitutional adjudication. Similarly to European constitutional jurisprudence, initially, CCG attempts to identify a legitimate aim(s), which should, in principle, correspond with the weight of the basic right (CCG 2016, p. 17). Further, a given legitimate objective must be suitable and the limitation of the right minimal (necessity) (CCG 2016, p. 16). The last stage is balancing where CCG looks at whether the limitation of the right is justified. There are different variables that may influence the value judgement of the Constitutional Court, such as, the nature of the limitation (blanket or indefinite time) (CCG 2014, p. 76). Simultaneously, the notion of 'private life' has been given a broad interpretation as to cover all similar areas of life (CCG 2009, p. 17). It should be noted that as part of the proportionality check, should a disputed regulation unduly interferes with the private sphere of an individual, the Court would also assess the qualitative criteria of law, i.e. foreseeability and accessibility. In this context, case-law is consistent in stressing the need for clear and unambiguous procedural rules of restrictive character (CCG 2009, p. 14). Provided the legal provision can be interpreted in practice differently, out of which a single reading unduly restricts the constitutional right, the Court would deem such a regulation unconstitutional (CCG 2012, p. 30).

In relation to the equality clause, CCG assesses differentiated treatment between two or more groups and subsequently checks reasons for such differentiation. The Court follows the traditional assessment criteria, whereby various interests are considered and ultimately balanced in the framework of proportionality. Normally, disparate treatment can be based either on the grounds explicitly provided in the constitution or any other identifiable reasons (CCG 2008, p. 2).

It is worth emphasising that the proportionality test is an integral part of constitutionality review in Georgia. Yet, subject to contextual modalities of a given case, manifold variables, both legal and factual, play a role at the balancing stage of judicial evaluation.

### 3.1. Rationale behind the Institutionalisation of Proportionality

CCG has been in existence for a little more than two decades, the period which was marked by the transition from post-Soviet rule to democracy. Certainly, in the process of democratic changes, which have consistently seen solid ruling majorities of a day in power, the functioning of the constitutional judiciary has never been easy. It is perhaps an invariable characteristic of every constitutional court, due to its institutional mandate of constitutional review, to always remain in somewhat tense relations with political institutions of the state. Not surprisingly, by eliminating normative acts issued by inherently political organs of the state, the constitutional court confronts with the will of a decision-making majority, which may well be conceived as having a negative connotation of a political character.

Apart from hurdles associated with the political configuration, CCG had to overcome challenges of institutional incapacity, to amass professional competence and to help strengthen the scholarship in the field of constitutional law, which was barely existent in Georgia before. Indeed, to cope with these salient issues, CCG needed support from the wider public, from people who could directly benefit from constitutional adjudication. In theory, everyone in society can be seen as beneficiaries of constitutional jurisprudence, because it is addressed to every individual and whilst declaring a provision unconstitutional, the effects of a changed legal framework may go well beyond the litigation at hand. Although in practice, CCG needed to sharpen the awareness of its mandate and try to win the trust of the public. One of the ways to do that was to produce consistent case-law, which would be substantiated by rational reasons and give parties and population at large clear understanding of constitutional decision-making. The proportionality analysis is believed to serve this purpose well.

It seems an inherent element of legal reason to invite ambiguity. Apart from the substance of normative acts, which can be uncertain at times, judicial case-law is also far from being fully unambiguous. Against this backdrop, the judiciary is in constant need of legitimacy. The proportionality doctrine acts to complement the wider institutional framework of judicial architecture by establishing a formidable structure of analytical reason within which judicial value judgements are to be justified. More specifically, by splitting a given constitutional issue into a set of clear and standardised questions, proportionality helps to reduce the scope for arbitrariness and facilitates a rational exchange on potentially ambiguous points of law.

This pervading problem of ambiguity is particularly salient when it comes to norms at a high level of abstraction and generality. The constitutional provisions on fundamental rights belong to that category, since they tend to be framed as open-textured principles rather than concise rules. Therefore, a legal system that aims at the strong protection of fundamental rights is, by definition, inclined to confront with the challenges of ambiguity to a greater extent.

In the Georgian context, the problem of ambiguity of constitutional text was prevalent and, to a certain extent, still has not been fully remedied by CCG, which is vividly reflected in the reluctance of common courts to invoke fundamental constitutional rights whilst resolving actual cases. It is generally argued that the question of judicial legitimacy can be confined to rationality and reasoning of the constitutional court (Lachmayer 2013: 1490), which, among others, calls for structured and transparent reasoning (Jackson 2015: 3142). Through entrenching the proportionality test in its decision-making strategy, CCG has made significant progress in that direction. Admittedly, after defining proportionality as a general principle of the constitution despite the absence of an explicit constitutional recognition, as well as adopting it as the main assessment tool of human rights cases in the late 2000s, both the number of constitutional complaints and case referrals from common courts has surged considerably. This, in turn, resulted in the increase of application of constitutional jurisprudence in real cases before ordinary courts and has helped CCG to emerge as an effective remedial mechanism in Georgia.

In short, the institutionalisation of the proportionality principle has provided both a stable doctrinal framework in Georgia, which clearly indicates to litigating parties the manner and sequence of arguments that ought to be made before the court and the path through which the constitutional judges are going to substantiate their reasoning. It also gives clarity to the legislature that it is under the duty to justify a law, especially restrictive

legislation, with rational reasons. The indispensable place of proportionality in the case-law of CCG with varying degrees of scrutiny is likely to serve as the basis for the Constitutional Court in Georgia to judge on the procedural obligation of the lawmaker and examine the reasons that motivated the parliamentary decision.

## CONCLUSION

The paper attempted to demonstrate that the proportionality principle is firmly entrenched in the Georgian constitutional jurisprudence, which could become a valid analytical platform for CCG to conduct rationality review of legislation. By deconstructing inherent elements of proportionality, it becomes clear that it intrinsically invites justification of legislative action and any evidence that supports the law or lack thereof may be subject to judicial scrutiny while assessing the substantive quality of a legal norm.

The institutionalisation of proportionality in Georgia has gone a sufficiently long way to conclude that the Constitutional Court could rely on its case-law and expound the duty of rationality of legislation by conducting the review with varying degree of scrutiny. Provided CCG remains reasonably active in constitutional adjudication and reluctant not to needlessly defer the political choices of the legislature, a strong argumentative framework of proportionality in Georgian constitutional practice mandates the view that the Constitutional Court is likely to move towards the review of the rationality of legislation, especially against the backdrop of emerging regulatory reform. Nevertheless, it is fair to note that only the future constitutional jurisprudence has the potential to shed the light on the prospects of rationality review in Georgia.

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## THE PROPORTIONALITY ANALYSIS IN THE GEORGIAN CONSTITUTIONAL JURISPRUDENCE AND THE PROSPECTS OF RATIONALITY REVIEW

### Abstract

The proposed regulatory reform in Georgia introduces impact assessment tool as part of the legislative process. While the lawmaker is accountable to the public and has a general duty to justify their actions, the political nature of parliamentary procedures makes it difficult to formally scrutinise legislature. This paper looks into the argumentative strategy of constitutional adjudication to showcase that the Georgian Constitutional Court possesses appropriate analytical framework to move towards realisation of rationality review of legislation.

Key words: judicial review, rationality, proportionality, legal reasoning, impact assessment

## ANALIZA PROPORCJONALNOŚCI W GRUZIŃSKIM ORZECZNICTWIE KONSTITUCYJNYM I PERSPEKTYWY PRZEGLĄDU RACJONALNOŚCI PRAWODAWSTWA

### Streszczenie

Proponowana reforma regulacyjna w Gruzji wprowadza narzędzie oceny wpływu do procesu legislacyjnego. Podczas gdy ustawodawca jest odpowiedzialny przed społeczeństwem i ma ogólny obowiązek uzasadniania swoich działań, polityczny charakter procedur parlamentarnych utrudnia formalne kontrolowanie władzy ustawodawczej. Niniejszy artykuł analizuje argumentacyjną strategię orzekania konstytucyjnego, aby wykazać, że gruziński Trybunał Konstytucyjny posiada odpowiednie ramy analityczne, aby przejść do realizacji przeglądu racjonalności prawodawstwa.

Słowa kluczowe: przegląd sądowy, racjonalność, proporcjonalność, uzasadnienie prawne, ocena wpływu

## АНАЛИЗ ПРОПОРЦИОНАЛЬНОСТИ В КОНСТИТУЦИОННОМ СУДОПРОИЗВОДСТВЕ ГРУЗИИ И ПЕРСПЕКТИВЫ РАССМОТРЕНИЯ РАЦИОНАЛЬНОСТИ ЗАКОНОДАТЕЛЬСТВА

### Резюме

Предлагаемая нормативная реформа в Грузии предполагает введение инструмента анализа воздействия в законодательный процесс. В то время как законодательный орган несёт ответственность перед государством и принимает на себя обязательство обосновывания своих действий, политический характер парламентских процедур затрудняет формальный контроль над законодательной властью. В настоящей статье анализу подвергается аргументативная стратегия конституционного судопроизводства с целью выявления того, что грузинский Конституционный суд обладает соответствующими аналитическими рамками, которые позволяют перейти к реализации рассмотрения рациональности законодательства.

Ключевые слова: обзор судебной практики, рациональность, пропорциональность, правовое обоснование, анализ воздействия

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