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HOW DOES THE ARMENIAN CONSTITUTIONAL COURT'S USE OF PROPORTIONALITY IN FREEDOM OF EXPRESSION CASES COMPARE TO THE ECtHR'S PROPORTIONALITY TEST IN SIMILAR CONTEXTS?

Annotation

This paper compares the application of the proportionality test by the Constitutional Court of the Republic of Armenia and the European Court of Human Rights (ECtHR) in freedom of expression cases. The comparison identifies patterns of approaches taken by both courts to balance conflicting values such as democracy, public morals, and human dignity, while constraining freedom of expression limitations. The paper concludes that while freedom of expression has been considered a guiding principle by the European Court, the Armenian Constitutional Court often gives greater weight to moral and cultural values, such as protecting dignity and preserving public morality. In order to place this difference within a broader context, the paper undertakes a comparison of relevant judicial practices within select foreign states. The paper conducts a comparative analysis of relevant judicial practice from selected foreign jurisdictions to illuminate the implications of Armenia's distinctive judicial approach to its larger human rights regime. The comparison underlines a need for a more systematic and transparent approach to applying proportionality arguments within constitutional interpretation domestically and thus meeting international human rights obligations.

Keywords: proportionality, freedom of expression, Constitutional Court, ECtHR, democracy, dignity, human rights.

1. Introduction

The principle of proportionality plays a crucial role in determining the balance between fundamental rights and public interests, particularly in freedom of expression.

This article analyzes how the law is applied by the Armenian Constitutional Court and the ECtHR in cases involving freedom of expression. It seeks to explain how those courts understand the concept of proportionality and, more importantly, how those notions affect human rights and democracy.

The methodology includes a comparative analysis of the jurisprudence of the Armenian Constitutional Court and the ECtHR. Key selected cases demonstrate the similarities and differences in applying the proportionality test. Also, the research incorporates the analysis of foreign countries' judicial activism, like Germany and South Africa, to situate Armenia's perspective in a broader international context. By adopting this methodological framework, it is possible to examine the effects of proportionality on the protection and limitation of the sphere of freedom of expression in Armenia and its conformity to European standards.

2. Theoretical Foundations of Proportionality

As is well known, the proportionality test is used to determine whether interferences with fundamental rights are constitutionally permissible. Originating in German administrative law, the proportionality test is fast becoming the standard method of constitutional rights adjudication across the world. Apart from Germany and with the glaring exception of the United States, it has been adopted by national courts across Europe, Canada, South Africa, Israel, New Zealand, and the European Court of Human Rights.¹

The doctrine of proportionality is at the heart of the Court's investigation into the reasonableness of the restriction. Although the Court offers a margin of appreciation to the Member State and its institutions, the Court's primary role is to ensure that the rights laid down in the Convention are not interfered with unnecessarily.² The principle of proportionality requires a reasonable relationship between a particular objective and the means used to achieve that objective.³

The different versions of the proportionality test appear to reflect various review standards in other contexts. The strict approach is appropriate where fundamental

¹ **Kyritsis, Dimitrios.** "Whatever Works: Proportionality as a Constitutional Doctrine." *Oxford Journal of Legal Studies* 34, no. 2 (2014): 395–415. <http://www.jstor.org/stable/24562824>

² **Birsan, Corneliu.** *Convenția Europeană a Drepturilor Omului*, vol. 1. Bucharest: All Beck, 2005.

³ **Clayton, R., and H. Tomlinson.** *The Law of Human Rights*. Oxford: Oxford University Press, 2000.

rights are at stake (such as freedom of expression or intimate aspects of private life) and consists of a four questions test:

- Is there a pressing social need for some restriction of the Convention?
- If so, does the particular restriction correspond to this need?
- If so, is it a proportionate response to that need?
- In any case, are the reasons presented by the authorities relevant and sufficient?¹

ECtHR emphasizes: "It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired."

Some rights and freedoms (non-absolute, qualified human rights), such as the freedom of expression (Art. 10), may be restricted in accordance with the law when necessary in a democratic society in the interests of national security, public safety, or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.²

3. Proportionality in Freedom of Expression Cases

3.1. ECtHR's Proportionality Test in Freedom of Expression Cases

According to Article 10.2 ECHR, limitations on freedom of expression can be envisaged: in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The constitutional basis of the limitations mentioned above means that freedom of expression can be balanced against other constitutionally protected interests. There are no operational differences between systems that consider freedom of expression a supreme fundamental right protected in the constitution and systems that do not make similar proclamations.

In the context of European democracies and respect for the human rights mentioned in the preamble to the Convention, freedom of expression is vital because it plays a role in protecting other Convention rights and constructing common constitutional traditions. Freedom of expression may also come into conflict with other interests and be restricted.

¹ *James and Others v. The United Kingdom*, Judgment of 21 February 1986, European Court of Human Rights.

² "The Principle of Proportionality in the Jurisprudence of the European Court of Human Rights", **Kristina Trykhlil**, PhD, Assistant Professor, Yaroslav Mudryi National Law University, 2023. <https://hrcak.srce.hr/ojs/index.php/eclic/article/download/11899/5875/>

However, one point remains: the ECtHR has repeatedly stated that freedom of expression 'constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment' (*Lingens v Austria*, 8 July 1986; *Şener v Turkey*, 18 July 2000; *Thoma v Luxembourg*, 29 March 2001; *Marônek v Slovakia*, 19 April 2001; *Dichand and Others v Austria*, 26 February 2002); but also that, 'the press plays a preeminent role in a State governed by the rule of law' (*Castells v Spain*, 23 April 1992; *Prager and Oberschlick v Austria*, 26 April 1995).¹

To better illustrate the approach of the European Court of Human Rights (ECHR), let's examine the following cases as examples.

1. *Handyside v. the United Kingdom (1976)*:

*The Court has emphasized that restrictions must be able to satisfy a pressing social need. 'Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 [of the European Convention on Human Rights], it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.'*²

2. *Sunday Times v. the United Kingdom (No. 1) (1979)*:

*The United Kingdom called for the protection of the judiciary article under the provisions of Article 10(2). The injunction aimed to restrain The Sunday Times from publishing an article that was said to have the potential to prejudice the Thalidomide settlements law suits which were still in courts. Whereas Articles 6 and 34 protect the judicial authority, the ECtHR termed the interference as a legitimate purpose but 'manifestly excessive.' The court was not persuaded that there was an article that was prepared to be published which had the potential to threaten the judicial proceeding. It further explained that interference on the part of the states should be substantiated by facts and not abstract dangers.'*³

Both cases solidify the proportionality test in ECtHR jurisprudence, requiring states to demonstrate that any restriction on freedom of expression serves a

¹ "Freedom of Expression as a Common Constitutional Tradition in Europe" Report of the European Law Institute, 2023, p. 14. <https://ssrn.com/abstract=4089372>

² *Handyside v. United Kingdom*, 5493/72, European Court of Human Rights, December 7, 1976.

³ *Sunday Times v. United Kingdom (No. 1)*, 6538/74, European Court of Human Rights, April 26, 1979.

legitimate aim, is necessary in a democratic society, and is the least intrusive means of achieving that aim.

To fully grasp the ECtHR's approach to balancing Article 10's protection of freedom of expression against competing state interests, an analysis of 30 randomly selected cases was conducted, which revealed a pattern where state interests prevailed in 53% of instances compared to 47% favouring freedom of expression, demonstrating the Court's nuanced application of the proportionality test within the margin of appreciation.¹

3.2. Armenian Constitutional Court's Approach to Proportionality in Freedom of Expression cases

The application of proportionality by the Armenian Constitutional Court is evidence of developing peculiarities that are distinctively molded by European legal culture and the jurisprudence of the European Court of Human Rights. This different approach is evaluated at this point in terms of the free speech cases and the Armenian Court's applications of proportionality: its structural, contextual, and European standard assessments, where appropriate.

The right to freedom of expression in the Republic of Armenia is a right that is also guaranteed in the Constitution, which, however, indicates that this right may be restricted when there are justifiable grounds. Article 42 of the Constitution does not simply state this freedom but includes its assumption with the law, which ensures freedom of speech but also allows restrictions that are deemed reasonable in a democratic society. These conditions are consistent with the permissible limits in Article 10 (2) of the ECHR.²

To examine the Armenian Constitutional Court's approach to the proportionality test and freedom of expression, we will review several cases.

In its Decision DCC-997 of November 15, 2011, by reference to the case-law of the European Court of Human Rights, the Constitutional Court stated:

“...tolerance and broadmindedness lie at the foundation of democracy, and the right to freedom of expression protects not only speech that is generally regarded as acceptable, but also those expressions which may be considered shocking, offensive, or disturbing by some.”³

In Decision DCC-1396 of December 26, 2017, the Constitutional Court recorded that "(...) freedom of expression is not only a component of human rights and freedoms, but also of fundamental importance in the system of public interests, the guarantee of which is a constitutional and international legal requirement."

¹ For the full list of cases analyzed, see the appendix.

² Constitution of the Republic of Armenia, art. 42, adopted on July 5, 1995, amended on December 6, 2015. <https://www.president.am/en/constitution-2015/>

³ Armenian Constitutional Court, DCC-997, November 15, 2011.

Nevertheless, the freedom of expression of opinion cannot be absolute. It must be harmoniously balanced with the vital interests of society and the state, as well as other fundamental human rights. Therefore, the Constitutional Court notes that the two abovementioned constitutional values: the inviolability of honor and good reputation, and the freedom of expression of opinion, are a balancing measure for the legal purpose provided by the constitution, that is, for the protection of the honor and good reputation of others. The freedom of expression is subject to limitation (Part 3 of Article 42 of the Constitution).¹

The Constitutional Court, in its Decision DCC-1612 of October 5, 2021, noted the need to protect human dignity, honor, and good reputation as a substantive limit for the exercise of the right to free expression of opinion. The Court has also referenced the ECHR's proportionality test: "The European Court of Human Rights and the Constitutional Court have developed the concept in their case law and applied it many times. The three-factor test for the legality of interference requires any intervention to be evaluated against the following criteria: 1) Is the interference provided for by law? 2) Is it for a legitimate goal? 3) Is the chosen measure sufficient and necessary to achieve that legitimate goal pursued in a democratic society? Article 78 of the Constitution stipulates that the means chosen to limit the principles and liberties defined by the Constitution must be suitable and necessary to achieve the legitimate goal."²

In its Decision DCC-1646 of April 29, 2022, it noted that "(...) freedom of expression in a democratic society does not protect a person's dignity from indecent, obscene speech, as well as behavior that is openly indecent towards a person, contrary to the moral norms accepted in society, and other forms aimed at degrading the human dignity of a person."³

In Decision DCC-997, the Constitutional Court underscored that "the rights and freedoms inherent in human dignity, including honor, reputation, and private life as absolute rights, may justify limitations on freedom of expression only within the bounds of legitimacy."

In Decision DCC-1646, the Court referred back to DCC-997, observing: "The Constitutional Court has held that "(...) any restriction on the right to freedom of expression must be prescribed by law, pursue the protection of a legitimate interest, and be necessary in order to secure that interest."

What we can conclude is that, while the Armenian Constitutional Court shares the ECtHR's proportionality approach, it prefers integrating a prominence and

¹ Armenian Constitutional Court, DCC-1396, December 26, 2017.

² Armenian Constitutional Court, DCC-1612, October 5, 2021.

³ Armenian Constitutional Court, DCC-1646, April 29, 2022.

balancing acts of freedom of expression and respect for the dignity of individuals, honor, and morality, frequently allowing the restrictions to prevail instead (DCC-997, 2011; DCC-1612, 2021; DCC-1646, 2022). This character in its application is prone to abuse, since abstract social values are invoked in justifying most of these limitations; they are inconsistent with the position of the ECtHR, which seeks to defend even such speech that is held in severe contempt (Handyside v. UK, 1976). The shift in the Constitutional Court's approach can be attributed to its alignment with the key roles of Armenia's legal framework. While this reflects a commitment to legal principles, it has resulted in a notable impact on the democratic purpose of free expression within the country.

4. Comparative analysis

The ECtHR's proportionality test places emphasis on the requirement that any restrictions imposed must satisfy a pressing social need and must not derogate from the core content of the particular exercise of the right. On the other hand, the Armenian Constitutional Court perceives the concept of proportionality in a different light, as it is embedded in the constitutional principles of Armenia. For instance, in DCC-1646 (2022), the Armenian Constitutional Court noted that the right of freedom of expression does not extend to speech that is considered obscene or offensive to human dignity. **While this reflects Armenian cultural and legal norms, it risks enabling overly broad restrictions on speech, particularly when "morality" and "dignity" are undefined and subject to subjective interpretation.**

In DCC-1396 (2017), the Court issued a reminder that the freedom of expression does not apply universally and the reputation of an individual must be upheld. This is the same case in DCC-1612 (2021), where the need for morality and human dignity was raised in legislation as constitutional imperatives in curtailing free speech. In this instance, the European Court of Human Rights firmly establishes that democratic expression encompasses the right to voice opinions, even those that may be unpopular at the time.

4.1. Comparative Perspectives

In examining Armenia's attitude towards proportionality with respect to other jurisdictions, it is interesting to refer to Germany and South Africa, where limitations of freedom of expression are regarded in a similar way. However, there is only a handful of exceptions allowed where the dignity or public order would be the requirement for the prohibition of speech. While in Germany, the Constitutional Tribunal applies proportionality in a precise way so as not allow arguments of dignity or of preservation of public order to be such a rough

4(121)2025

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justification.¹ Likewise, in the case of South Africa, the Constitutional Court has also emphasized the value of freedom of speech, even if it is destructive to the social order.

Looking at these illustrations, it becomes obvious that the relatively wide and flexible understanding of the principle of proportionality in Armenia is not congruent with the practices in many other democracies, with an emphasis on deeper respect for free speech, though the speech might still be offensive or disturbing to moral or social order.²

4.2. Striking the Right Balance

Troubles can arise with regard to the degree of predictability and consistency of the decisions made by the Armenian Constitutional Court, even in good faith, when it has references to such moral and dignity aspects of a society which are very **general**. This is especially worrying in relation to speech that questions political authority and the hegemonic understanding of culture, because **no matter how strong the invocation of dignity and morality is, it may still be instrumentalized in "strangling" dissent**.

It is imperative for the Court to clarify these ambiguous concepts by necessitating objective, evidence-based demonstrations of concrete harm prior to endorsing any limitations on expression. Specifically, the Court ought to (1) implement a compulsory structured checklist that must be adhered to and replicated in each ruling that imposes restrictions on expression; (2) mandate that the party asserting dignity or morality meets a defined evidentiary threshold and utilizes a standardized Harm Matrix; (3) adopt a strong presumption in favor of political and public-interest speech (requiring heightened evidence to overcome it). The implementation of these initiatives will foster predictability, protect against the misuse of open-ended values, and ensure that Armenian practices align with the democratic objectives inherent in the principle of freedom of expression.

4.3. Interpretive practice-direction (model clause appropriate for adoption by Court or legislature)

In connection to any restriction of freedom of expression: (a) the word "dignity" is to be understood as referring to tangible and demonstrable harm to a person's

¹ **Schlink, Bernhard**. "Proportionality." In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and András Sajó, 729. Oxford: Oxford University Press, 2012. Online publication November 2012.

² **Stacey, Richard**. "Proportionality Analysis by the South African Constitutional Court." Chapter. In *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice*, edited by Mordechai Kremnitzer, Talya Steiner, and Andrej Lang, 193–284. Cambridge Studies in Constitutional Law. Cambridge: Cambridge University Press, 2020. <https://www.cambridge.org/core/books/proportionality-in-action/proportionality-analysis-by-the-south-african-constitutional-court>

core personal interests, which include physical safety, protection of intimate privacy, significant and provable reputational or economic harm, or coercive dehumanization; (b) "public morality" is to be defined narrowly to protect well-identified public goods such as protection of children, prevention of imminent violence, and maintenance of public health, rather than to quell dissenting thought or legitimate political criticism; (c) any entity that appeals to the terms of dignity or morality must submit evidence that satisfies an evidentiary standard defined below and fill out the Court's Harm Matrix assessment; (d) political expression, criticism of public officials, and matters of legitimate public concern are to be given a presumption of protection, thus requiring that any restriction have supporting clear and convincing evidence of narrowly defined, immediate harm; (e) Constitutional Court shall follow each decision that restricts expression by a brief methodological appendix explaining how the clause and the Harm Matrix have been deployed.

5. The Harm Matrix

The Court shall weigh any claim invoking 'dignity' or 'morality' by giving numeric scores to a list of seven objective criteria. (1) **Severity of impact** (0–4, weight ×4), (2) **Specificity of target** (0–2, ×2), (3) **Causal connection** (0–3, ×3), (4) **Immediacy/likelihood** (0–3, ×3), (5) **Vulnerability of target** (0–2, ×2), (6) **Intent and context** (0–2, ×2), and (7) **Scale and dissemination** (0–2, ×2), yielding a weighted cumulative numeric tally; a restriction is permitted only if weighted tally achieves or exceeds **10** and two of three high-weight variables (Severity, Causal connection, Imminence) reach ≥ 2. The burden of proof is upon the party seeking restriction, and restraints of political or public-interest speech require a higher threshold of evidence (clear and convincing proof of severe and immediate harm). The Court should document numeric scores, give brief justifications and cite supporting evidence for each criterion, show that no less restrictive measure would suffice, and include a brief methodological remark with each restrictive decision."

For every such ruling to affirm a restriction, the Court will annex a 1–2-page methodological note explaining how each of the factors in the Harm Matrix was employed, upon what evidence it relied, and why less restrictive measures did not work.

Conclusion

The comparative assessment identifies that although both the ECtHR and the Armenian Constitutional Court nominally invoke the principle of

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proportionality, their lines of interpretative trajectory vary in substantive application. The ECtHR adopts a democracy-oriented perspective that enforces the restriction of freedom of expression as a basic guarantee to well-defined instances of concrete harm based on evidence. Conversely, the Armenian Constitutional Court invokes extensive ideas of dignity and morality time and again in the absence of definite operation or methodological constraint, thus widening room for discretionary restriction of speech. This adaptable and culture-laden conceptualization of proportionality is liable to yield inconstant case law and undermine the predictive value of constitutional case-making. To safeguard conformity with international human rights norms while preserving national constitutional identity, it is imperative to internalize a structured proportionality framework in terms of requiring demonstrable harm, defining the range of dignity and morality, and giving precedence to political and public-interest speech under a presumption of protection. **The scientific novelty of this proposal lies in introducing a numerologically structured harm assessment chart, the Harm Matrix.** Integration of methodological instruments such as an evidence-based Harm Matrix and a required justificatory appendix in the reasoning of judges would make case-making more transparent, diminish arbitrariness, and bring constitutional review in Armenia in accordance with the democratic ideals inherent in Article 10 ECHR.

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Ամփոփագիր

Սույն ուսումնասիրությունը համեմատական վերլուծության է ենթարկում համա-
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րանների կողմից որդեգրված մոտեցումների օրինաչափությունները՝ բախվող
արժեքների՝ ժողովրդավարության, հասարակական բարոյականության և

մարդկային արժանապատվության համակշռման համատեքստում՝ արտահայտվելու ազատության սահմանափակումները գնահատելիս: Ուսումնասիրությունն արձանագրում է, որ եթե ՄԻԵԴ-ը արտահայտվելու ազատությունը դիտարկում է որպես ժողովրդավարական հասարակության հիմնասյուներից մեկը, ապա ՀՀ Սահմանադրական դատարանը հաճախ գերակայությունը տալիս է բարոյական և մշակութային արժեքների պաշտպանությանը, մասնավորապես՝ արժանապատվության և բարոյական նորմերի պահպանմանը: Հոդվածը համեմատական վերլուծության է ենթարկում մի շարք արտասահմանյան պետություններում ձևավորված համապատասխան դատական պրակտիկան՝ համաչափության սկզբունքի կիրառման համատեքստում: Այս վերլուծությունը նպատակ ունի լուսաբանելու այն մեթոդաբանական տարբերությունները, որոնք բնութագրում են Հայաստանի Սահմանադրական դատարանի մոտեցումը՝ համեմատած միջազգային ստանդարտների հետ: Վերլուծությունը միաժամանակ ընդգծում է անհրաժեշտությունը՝ սահմանադրական մեկնաբանության ներքին պրակտիկայում համաչափության փաստարկների կիրառման նկատմամբ որդեգրել ավելի համակարգված և թափանցիկ մոտեցում՝ ուղղված մարդու իրավունքների պաշտպանության միջազգային պարտավորությունների լիարժեք կատարմանը:

Հիմնաբառեր. համաչափություն, արտահայտվելու ազատություն, Սահմանադրական դատարան, ՄԻԵԴ, ժողովրդավարություն, արժանապատվություն, մարդու իրավունքներ:

**КАК КОНСТИТУЦИОННЫМ СУДОМ РЕСПУБЛИКИ АРМЕНИЯ
ПРИМЕНЕНИЕ ПРИНЦИПА ПРОПОРЦИОНАЛЬНОСТИ В ДЕЛАХ О
СВОБОДЕ ВЫРАЖЕНИЯ МНЕНИЯ СООТНОСИТСЯ С
ПРИМЕНЯЕМЫМИ ЕВРОПЕЙСКИМ СУДОМ ПО ПРАВАМ
ЧЕЛОВЕКА В АНАЛОГИЧНЫХ СИТУАЦИЯХ КРИТЕРИЯМИ
ПРОПОРЦИОНАЛЬНОСТИ?**

Аннотация

В статье сравнивается применение критерия пропорциональности Конституционным Судом Республики Армения и Европейским судом по правам человека (ЕСПЧ) в делах, касающихся свободы выражения мнений. Проведённое сравнение позволило выявить модели подходов, используемые обоими судами для балансирования коллидирующих конституционных ценностей — таких как демократия, общественная мораль и человеческое достоинство — при одновременном ограничении свободы выражения мнений. В работе делается вывод, что если ЕСПЧ рассматривает свободу выражения мнений как основополагающий (руководящий) принцип, то

Конституционный Суд Армении нередко отдаёт приоритет моральным и культурным ценностям, в частности защите человеческого достоинства и сохранению общественной морали.

Для рассмотрения указанного различия в более широком контексте в статье проводится сравнительный анализ судебной практики по применению критерия пропорциональности в отдельных зарубежных юрисдикциях. Это позволяет оценить последствия особенностей подхода Конституционного Суда Армении к свободе выражения мнений для общего уровня защиты прав человека в стране. В итоге подчёркивается важность выработки более систематического и прозрачного подхода к соразмерности ограничений при национальном толковании конституционных норм, что способствует надлежащему выполнению международных обязательств Армении в сфере прав человека.

Ключевые слова: соразмерность, свобода выражения, Конституционный Суд, ЕСПЧ, демократия, достоинство, права человека.

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