The Proportionality Principle in the Jurisprudence of the Russian Constitutional Court

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Abstract

This paper addresses the boundaries on restrictions of human rights imposed by the proportionality principle, examines the elements of the structure of this principle, and attempts to present the meaning of its elements consistently in terms of the potential for the protection of fundamental rights that are subject to restrictions. The main criticisms of some proportionality tests are considered, as well as ways to minimize the risks associated with the use of proportionality. These theoretical considerations are placed in the context of the jurisprudence of the Russian Constitutional Court, to demonstrate that the Court, instead of consistently applying proportionality tests, often draws generalized conclusions regarding the proportionality (or disproportionality) of restrictions and therefore tends to heighten some of the risks of applying the principle. One can observe some positive changes in the application of the principle, and in further requests for this. Conclusions are formulated concerning the improvement of the Court's activities in terms of a more consistent and structured implementation of the principle of proportionality.

Keywords

restriction of rights – principle of proportionality – transparency of constitutional review – Russian Constitutional Court
1 Introduction

Both national and supranational courts make wide use of the principle of proportionality (or balancing\(^1\)) to determine whether fundamental rights have been lawfully restricted or violated. At the same time, this principle faces significant criticism at the theoretical level. There is some doubt about the correctness\(^2\) and predictability\(^3\) of resolving legal conflicts concerning restrictions on human rights by using this principle. These issues emphasize the difficulties of human rights protection in a modern society and the possibilities for constitutional courts in this sphere.

This article is structured as follows. First of all, it examines the elements of the structure of the principle of proportionality, and attempts to present their meaning consistently in terms of the potential for the protection of fundamental rights that are subject to restriction. Second, the main criticisms of some elements of the principle of proportionality are considered. Here, it is concluded that the advantage of proportionality is that it provides a transparent structure for assessing limitations on rights. Third, these theoretical considerations are placed in the context of the jurisprudence of the Russian Constitutional Court. The article concludes that the Court’s failure to provide a consistent and transparent explanation of its use of proportionality ultimately undermines its application of this principle altogether. On this basis, conclusions are formulated concerning the way in which the Court’s activities can be improved in terms of a more consistent and structured implementation of the principle of proportionality.

2 The Principle of Proportionality: Risks versus Necessity

A number of modern constitutions include catalogs of human rights, providing for the protection of dignity, autonomy, and the free development of

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personality. At the same time, the possibility of restricting these rights in subsequent legislation is possible: since constitutional-level acts have to express the idea of freedom and dignity for everybody, and not just for a single person or a small group, they should necessarily provide the means for a legal reaction to potential conflicts, both between the rights of particular individuals and between individual rights and the common good. This idea is expressed either by pointing to the possibility of a restriction in the context of particular rights, or by a general statement of the permissibility of restricting rights, or by a combination of the two. There are some cases where there is no direct reference in the constitution to the possibility of restricting rights.\(^4\) This may be related to the particular aims of the document and the conditions in which it was adopted, but it does not affect the idea of the admissibility of restricting rights, which can be developed as part of a “living constitution.”

The problem that requires discussion and a solution is related not to the possibility of restrictions in and of itself, but to the limits on restrictions that protect against a total dilution of rights. First of all, there is the widespread idea that restrictions must be established by law or on the basis of law. The requirement that a law must be the basis of a restriction reflects the idea that citizens, either by themselves or through their representatives, should be the ones to restrict rights: an individual is still free even if she has to obey laws that have been approved in a democratic way.\(^5\) However, as a rule it is not enough only to have formal requirements for imposing restrictions, since this does not provide sufficient protection against the will of the majority. Substantive prescriptions to protect rights are therefore required. Constitutional or convention texts do not always provide detailed instructions for setting such substantive limits.\(^6\)

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\(^4\) For example, the Australian Constitution of 1901 does not formally include a special chapter on human rights or any mention of their limitation, but this has not prevented the recognition of these rights or the requirements for restrictions. The High Court has introduced structured proportionality in its examination of the restriction of implied rights (for instance, the implied right to freedom in political speech). See Adrienne Stone, “The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication,” 23(3) *Melbourne University Law Review* (1999), 668–708; Adrienne Stone, “Free Speech Balanced on a Knife’s Edge: Monis v. The Queen,” *High Court Blog* (Apr. 26, 2013), http://blogs.unimelb.edu.au/opinionsonhigh/2013/04/26/stone-monis/.

\(^5\) See Michel Troper, “Obedience and Obligation in the Rechtsstaat,” in Adam Przeworski and José María Maravall (eds.), *Democracy and the Rule of Law* (Cambridge University Press, New York, 2003), 94–108, at 95. This basic construction may be refined. For example, in *ECHR* practice, the term “law” is understood more widely and includes not only primary legislative acts but also the other legal norms of a particular state.

\(^6\) A characteristic exception is the Constitution of South Africa, in which Article 36 states, “The rights in the Bill of Rights may be limited only in terms of law of general application...
Correspondingly, there is a need in both doctrine and practice to develop and justify certain “instruments”, the implementation of which should help to resolve conflict situations in relation to the restriction of rights.

One of these instruments is the principle of proportionality. In its general form, the proportionality principle, most clearly elaborated in Germany but also adopted by other civil law and even common law countries,7 includes four elements for evaluating the legitimacy of a restriction that has been introduced: 1) identifying a legitimate aim that motivates the limitation; 2) determining the suitability of the limitation as a means of achieving the aim, at least to some degree; 3) evaluating the necessity of the limitation, that is, of the absence of a less restrictive means to achieve the same end; and, finally, 4) evaluating proportionality in its strict meaning, which means striking a balance between the restricted right and the aim of the restriction.8

This form, with certain variations, is widely used by constitutional courts when they apply the principle of proportionality to resolve conflicts resulting from the necessity to choose and carry out certain policy measures that interfere with basic human rights.9 It has also received theoretical justification. In fact, Robert Alexy related the application of this principle to the special nature of human rights. In his opinion, the norms defining these rights are not rules but, first and foremost, principles, meaning that rights are not “trump cards” with definitive priority, but interests that are to be implemented as fully as possible, given other principles.10 In other words, rights represent principles to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: a.) the nature of the right; b.) the importance of the purpose of the limitation; c.) the nature and extent of the limitation; d.) the relation between the limitation and its purpose; and e.) less restrictive means to achieve the purpose." However, it is evident that this norm was not created under the conditions of “tabula rasa”; it is more likely that the experience of applying the proportionality principle, which was developed in other jurisdictions, was adopted here.

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defended *prima facie*, and the final degree of their protection becomes clear only when they are balanced against other principles.

The proposed construction, which links the nature of rights with tests of the principle of proportionality, is not so theoretically simple or unequivocal in application as may seem at first glance. It has come under serious criticism, including in the following aspects: 1) it downgrades the value of human rights,\(^{11}\) by providing individuals with opportunities that have “survived” as a result of balancing (instead of real protection), leading to an associated tendency towards the constant “victory” of the majority interests;\(^{12}\) 2) it masks, by using the word “weighing”, attempts to compare things that are in reality incomparable (like interests and values), or alternatively: 2a) there is general uncertainty about what exactly is taken into account when balancing and on what scale this is measured; and as a result, 3) it introduces subjectivity, not to say arbitrariness, in court decisions that substitute the choice made by political (politically responsible) branches of government by the court’s own assessment of what is useful, necessary and acceptable, under the guise of weighing various values;\(^{13}\) and 4) it incorporates a desire to weigh values without determining their priorities, and without any reasoning on the topic of morality,\(^{14}\) or, alternatively, 4a) it allows moral considerations to be taken into account when making decisions, leading to an uncertainty in the resolution of a legal problem that is incompatible with the principle of the rule of law.\(^{15}\)

This is not a complete list of the questions that could be addressed to supporters of the principle of proportionality; however, it is already evident that this principle faces the following types of objection:

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\(^{12}\) See Tsakyrakis, *op.cit.* note 2, 471.


\(^{14}\) See Tsakyrakis, *op.cit.* note 2, 474.

“fundamental” (assessment of the nature of rights, weakening of rights by allowing restrictions);

“institutional” (positions of the court and the legislature, subjective decisions of judges); and

“technical” (scope of coverage of interest, involvement of different considerations).

However, it can be noted that at least some of the criticisms are warnings about the dangers of misusing the balancing mechanism, rather than claims about the method itself. This means that one must pay attention to the fact that, in order to obtain an adequate resolution of constitutional disputes in the field of human rights restrictions, a more thorough elaboration of the idea and meaning of each stage of the principle of proportionality is necessary, so that no stage of the application of this substantive principle becomes a formality.

For example, if we are talking about the aims of restrictions, it is obvious that individual and collective interests should be carefully analyzed. Many policies requiring restrictions on rights are directly or indirectly aimed at protecting the rights of other people, but this reasoning does not abolish the need, in some cases, to ensure the protection of the individual from excessive claims emanating from the majority (this idea is the core of constitutionalism and cannot be abolished without putting constitutionalism at risk). The first stage of the principle of proportionality – the identification of aims – is therefore of great importance. In particular, it is not only the explicitly stated but also the implied or hidden aims of the limitation that are subject to clarification, study and critical evaluation, requiring an informal approach to identifying not only the rhetorical but also the actual circumstances behind the adoption of an act. It is necessary to take into account the fact that aims that are formulated in a non-objectionable way sometimes camouflage aims that cannot be called legitimate. In addition, it is important to remember that even widely-formulated constitutional aims are not “all-encompassing”, and some considerations, such as attempts to introduce a “correct” lifestyle, or the preservation of stereotypes and prejudices that exist in society to the detriment of certain categories

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16 For example, differences in gender-based regulation may be motivated by the special roles of men and women in society or even by considerations of humanity. In fact, the causes of different approaches often do not go beyond the stereotypes that are rooted in society; stereotypes do not look like a legitimate goal of the restriction of rights. See Konstantin Markin v. Russia [ECtHR GC] (22 March 2012). App. No. 30978/06.
of individuals,17 may fall within the “excluded reasons.” Aims excluded by the constitution itself cannot at the same time be legitimate.18

Further, if the legitimacy of the aim of restriction is established, attention should be focused on the suitability and the necessity of the means to achieve it. These questions are related to the assessment of factual (rather than legal) connections between phenomena. There are different opinions on the assessment of these connections – that considerations based on the criteria of rationality and common sense are enough;19 or that empirical inquiries are necessary to assess whether there is a causal relation between the means and the ends;20 or that suitability and necessity tests should be further “calibrated.”21 In any case, these tests do not mean that every means should be considered to be suitable and necessary. The analyzed restriction must really be able to contribute to the achievement of the aim. This contribution may be big or small, and may directly lead to the result or only partially contribute to it, but if no connection between the chosen measure and the achievement of the aim can be traced, the measure does not pass the test.22 The fact that this requirement is not a mere formality is confirmed by the decisions of the courts, which have established a violation of the principle of proportionality at this stage,23 although only a few disputes end in this way.24

The question to be solved is what should be the basis of the reasonable considerations that are taken into account when determining the suitability of the


18 See Grimm, op.cit. note 7, 390.

19 See Webber, op.cit. note 2, at 75.


22 See Schlink, op.cit. note 8, 723.

23 For example, in one case (when the Supreme Court of Canada initiated a structured application of the principle of proportionality) it was recognized that establishing the presumption that a person has the intention to distribute drugs when even small amounts of narcotic substances are found is an unsuitable means of achieving the socially significant goal of fighting drug trafficking. “It would be irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity of narcotics. The presumption ... is overinclusive and could lead to results in certain cases which would defy both rationality and fairness.” See R. v. Oakes [1986] 1 S.C.R. 103.

24 See Grimm, op.cit. note 7, 389. It should be added that the most famous Canadian example (note 23) should now be used cautiously, because the approach of the Supreme Court has changed. See Marcus Moore, “R. v. K.R.J.: Shifting the Balance of the Oakes Test from Minimal Impairment to Proportionality of Effects,” 82 Supreme Court Law Review (2018), 143–177.
means. As Barak notes, the question of a reasonable relationship between the aim and the means leads us to predictions regarding the likely development of the political, economic, social, and spiritual spheres of social life. These developments can be assessed differently by different actors, who are forced to act in conditions of uncertainty about the consequences of the chosen policy. In practice, it is impossible to consider as reasonably suitable only those means whose suitability is absolutely definite (since there are not many of them), but it is also unacceptable to rely only on the opinion of the legislator. It seems that it should be the party who accepted the contested act who should present facts and data in support of its position – logical considerations, statistical information from both domestic and relevant foreign experience, financial justifications, etc. The same applies to proving the necessity of the chosen measure, where “necessity” means that the same aim could not be achieved to the same extent in a less burdensome way. Since this test does not require that the choice be made in favor of a means that is less burdensome than the restricted right but at the same time less effective than the contested method, it obviously implies an assessment of the intended consequences of choosing a particular measure. Modeling different ways of achieving an aim can lead to the abandonment of some restrictive means, which is also confirmed by the jurisprudence.

As for the balancing itself, this is a key step in determining the admissibility of interference with rights. The main task at this stage is to clarify the relationship between the restricted right and the interest (value or benefit) that stands behind the restriction. The higher the value of the good protected in these circumstances by the restricted right, the more important must be the achievement of the aim pursued by the restriction in order for the restriction to be considered legitimate.

With regard to balancing, the phrases “clarifying the weight of” or “weighing” or “comparing” competing principles are often used. However, here it is necessary to take into account two points that relate, respectively, 1) to weight

26 For example, the Constitutional Court of South Africa declared the death penalty unconstitutional, establishing, in particular, that state representatives had not proved the greater effectiveness of capital punishment compared to other available types of punishment that are obviously less intrusive for the convicted person’s rights. See The State v. Makwanyane and Another, 1995 (3) SALR 391 (CC).
27 See the decision of the Israeli Supreme Court in The Legal Center for the Rights of the Arab Minority v. Minister of Interior, HCJ 7052/03.
28 See Alexy, op.cit. note 10, 102.
and 2) to competing values. The first point is that the idea of “weight” is a metaphor. Perhaps it is this metaphor (or, more precisely, the assumption that the proponents of the principle of proportionality may get carried away by it) that gives some researchers a reason to doubt whether it is possible to obtain the correct legal response as a result of this weighing. The criticism is made that the proponents of proportionality claim mathematical accuracy and do not take into account moral considerations.\(^\text{29}\) However, as Möller rightly points out in one of his works specifically examining this kind of criticism of the principle of proportionality, one can distinguish between “interest balancing”, that is, measuring respective rights or interests by placing them on a set of scales and comparing their weight, and “balancing as reasoning”, which means taking into account all relevant considerations.\(^\text{30}\) In the second case, it is comparison as a process of reflection and justification. It is easy to see that, at this stage, it is possible to take into account various arguments, including moral ones. Moreover, for a number of problems, balancing would be completely impossible without moral arguments.\(^\text{31}\) At the same time, this argument does not remove, but perhaps even exacerbates, the problem of a value-oriented approach to proportionality in the narrow sense. A further question is “how balancing can be saved from being a playground for subjectivity”,\(^\text{32}\) and here the second point matters, namely, which values are to be balanced, and to what extent this is to be done.\(^\text{33}\)

First of all, to be more precise, it is not the limited right and the purpose of the restriction that should be compared, but the intended benefits of the restrictive measures and the damage to the right. In addition, some scholars rightly emphasize the importance of defining a weighing or balancing framework. Grimm describes the need for careful attention to what is to be weighed, in the following way: “It is rarely the case that a legal measure affects a fundamental right altogether. Usually, only a certain aspect of a right is affected... The weight of the aspect of the right that has been regulated in relation to the right at large must be determined carefully. The same is true for the good in whose interest the right is restricted. Rarely is one measure apt to give full protection to a certain good. Only certain aspects of this good will be affected

\(^{29}\) See Tsakyrakis, op.cit. note 2, 474.


\(^{32}\) See Schlink, op.cit. note 8, 724.

\(^{33}\) On the commensurability of different principles, interests or values, see Webber, op.cit. note 2, at 97–98.
in a salutary way.”34 This approach to the balancing framework makes it clear that it should not be understood too broadly and that the scope of the judges’ discretion in this process is not unlimited.35 Finally, it is inadmissible to omit the arguments used to reach the final conclusion and simply to assert this conclusion. The proportionality or disproportionality of the restriction must be proved and demonstrated, and not only stated,36 which requires careful attention to be paid to determining which substantive aspect of the right is affected, how badly it is affected by the restriction, whether it is important to keep the right intact, whether the aims of the limitation are really meaningful, etc.

It is easy to see that these requirements do not remove many problems. The severity of the restriction, the degree of importance of achieving the desired result or preserving the right unaffected – these are still categories that imply an evaluation. It is very likely that the evaluation will differ depending on who makes it. But is it possible to make it completely objective? Is it even possible to raise the question of the objectivity of people solving complex legal problems (hard cases), that is, exactly those cases where the rules does not give a definite answer, without asking the question of who created the legal rules and how objectively they did so? Perhaps the only way for judges who have to make an evaluation and involve moral considerations is for them to make these considerations as transparent as they can be.

The principle of proportionality ultimately constitutes a transparent structure37 for assessing the constitutionality of a restriction, connecting together the restriction, the restricted right and the aims of the restriction. As was shown above, this structure can and must be supplemented by various kinds of techniques that allow the solution to the problem to be evaluated and chosen (different ways to interpret constitutional norms, building a balance between public and private interests, taking into account the specific circumstances of the conflict of values and the far-reaching consequences of certain ways of solving it, the involvement of moral considerations, etc.), but the principle of proportionality does not eliminate the very fact that there has to be an evaluation and that a choice has to be made. The principle of proportionality, in fact, does not pretend to remove this, because the irremovable nature of evaluation is a problem caused not by the application of the principle of proportionality, but

34 See Grimm, op.cit. note 7, 396.
35 See Barak, op.cit. note 25, 357.
36 The indication that the proportionality of the restriction or the imbalance is merely asserted more often than it is demonstrated is a serious reproach to the application of the principle of proportionality. See Aleinikoff, op.cit. note 13, at 975.
37 See Möller, op.cit note 30, at 726.
rather 1) by the inevitable competition between various interests in society;\textsuperscript{38} and, 2) by particularities of constitutional norms that, as a rule, fix basic rights in quite general terms so that a certain “freedom of maneuver” remains so that competition between them can be overcome, while unambiguous solutions are missing or rare. In other words, the necessity of evaluating and of choosing which benefits should prevail, and to what degree, in a particular situation is a result of the fact that constitutional benefits assume an indefinite circle of beneficiaries in very different situations.

Within this understanding, it is logically difficult to imagine a structure, apart from the principle of proportionality and balancing, that would account for the nature of the restriction of rights as a result of competition among the interests of the people living in a particular organized society, but at the same time would suggest ways of overcoming competition without taking into account one of the competing interests. The answers to questions of who, between the legislator and the court, should make a choice and on what basis (in line with a collectivist approach, an individualistic approach, or a combination of both), may vary. One may attempt to deal with the problem on a case by case basis or to create a simple rule with a number of exceptions,\textsuperscript{39} but it is hardly possible to depart from this problem (a “fundamental” one, in our classification) in principle.

Thus, the principle of proportionality is a functional and suitable framework for the review of restrictions on rights. It can be observed that this principle raises certain problems, but we can try to solve these problems rather than ignore the principle itself. This is all the more true because the advantages of substituting the principle are not obvious.

However, this conclusion can be drawn only if the proportionality principle is used properly. In applying it, a certain discipline must be observed, which means a consistent and careful investigation of all its tests. If this is not done, the field of subjectivism begins to look too wide and the justification of the

\textsuperscript{38} The term “competition” emphasizes a concurrence of valuables of which certain elements of each may be kept as the result of a choice, which has a key meaning for the idea of proportionality. However, in a number of cases, the use of the term “conflict” is justified, since this latter term implies a stronger confrontation between incompatible positions, so that the choice of one right means totally discarding the other. This theoretical problem represents a particular complication for understanding rights as “trump cards”. See Lorenzo Zucca, “Conflicts of Fundamental Rights as Constitutional Dilemmas,” in Eva Brems (ed.), \textit{Conflicts between Fundamental Rights} (Intersentia, Antwerp, Oxford, Portland, 2008), 19–37.

\textsuperscript{39} See Mark Tushnet, \textit{Advanced Introduction to Comparative Constitutional Law} (Edward Elgar, Cheltenham, Northampton, 2014), 77.
constitutionality or unconstitutionality of the restriction is replaced by a set of slogans; in such a case, the ability of the principle of proportionality to fulfill its purpose is questionable.

3  The Principle of Proportionality in the Jurisprudence of the Russian Constitutional Court

The Constitutional Court of the Russian Federation lies within the range of courts that apply the principle of proportionality, since the Russian Constitution contains all the prerequisites for this. At the same time, the elaboration of this principle in the decisions of the court does not appear to be very detailed. In fact, the Russian Constitutional Court applies the principle in a highly inconsistent manner. Its jurisprudence is very relevant when testing the hypothesis about the realization of the potential risks (which are underlined in the critical remarks discussed above) of applying the principle of proportionality in an inappropriate way. The Court’s jurisprudence should also be analyzed from the point of view of the prospects for its improvement, taking into account all the clarifications of the principle that have been stated above.

The Constitution of the Russian Federation contains a wide range of rights. One can find civil, political, economic, social, and cultural rights in its Chapter 2. As for restrictions, two different types of rules may be distinguished. First, there are certain constitutional rights provisions that at the same time fix a “special perspective” of how they might be restricted by federal law. For example, according to Article 25, “The home shall be inviolable. No one shall have the right to get into a house against the will of those living there, except for the cases established by a federal law or by court decision”; or, in Article 29 (4), “Everyone shall have the right to freely look for, receive, transmit, produce and distribute information by any legal way. The list of data comprising state secrets shall be determined by a federal law.”

Secondly, Article 55(3) of the Constitution contains a general provision, according to which: “The rights and freedoms of man and citizen may be restricted by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defense of the country and security of the State.” At the same time, Article 55(2) provides that: “In the Russian Federation no laws shall be adopted cancelling or derogating human rights and freedoms.”
Article 55 is a key provision in relation to all conflicts that concern the restriction of rights.\textsuperscript{40} We can see in it the requirements for any restriction: a formal requirement (federal law), an indication of the aims of the restriction, and the principle of proportionality or commensurateness (\textit{sorazmernost’} in Russian) (“to such an extent to which it is necessary”).

However, in practice, the application of these requirements raises many questions.

\section{Form of the Restriction and Its Relationship with the Principle of Proportionality}

Questions concern even the form of the act that sets the restriction, although usually understanding whether a restriction is imposed by an appropriate act is the easiest thing.

\subsection{Vertical Aspect: Proportionality and Regional Laws}

One basis for disputes is the federal structure of Russia. The Constitution delineates powers between the Federation and its subjects, but the legal technique for the distinction is not ideal. To be accurate, according to Article 71 the jurisdiction of the Russian Federation includes, among other things, the “regulation and protection of the rights and freedoms of man and citizen,” and, at the same time, according to Article 72, the joint jurisdiction of the Russian Federation and its subjects includes the “protection of the rights and freedoms of man and citizen.” When issues come under joint jurisdiction, federal laws are made and laws and other normative acts of the subjects of the Russian Federation are adopted accordingly. The general impression is therefore that subjects can make laws to protect human rights. The problem is that the protection of the rights of some individuals may result in the restriction of the rights of others. One of the questions arising in practice relates to whether the restriction of rights can be established by the law of a subject.

The Constitutional Court has chosen a “narrow” approach in resolving the issue. In some decisions, it has declared the laws of the subject unconstitutional on the grounds that the federal Constitution allows the restriction of rights “only by federal law to such an extent to which it is necessary”\textsuperscript{41} to achieve

\footnotesize{\textsuperscript{40} It should be added that the Constitutional Court can consider cases that involve both abstract and concrete reviews; in the latter type of case, it considers complaints brought by citizens or courts about the alleged violation of human rights by a law applied or able to be applied in a concrete situation.}

\footnotesize{\textsuperscript{41} See Decision of 4 April 1996 No. 9-P (the right to free travel, choice of place of stay or residence); Decision of 28 February 2006 No. 2-P (the right to private property).}
constitutional goals. If we compare this phrase with the provision of section 3 of Article 55, we can see that the quotation is inaccurate; the word “only” in the Constitution is in another place, not before the words “federal law.” The interpretation given by the Constitutional Court is not the only possible one; theoretically, one could say that the law of a subject (adopted within its authority) can also restrict human rights in order to achieve constitutional goals provided that it respects the principle of proportionality. Does the Constitution prohibit such a situation or does it simply not regulate it, limiting itself to an indication of what the federal law may do?

Without answering this question, the Constitutional Court has nevertheless slightly softened its position in some cases, admitting the existence of a restrictive law of a subject adopted on the basis of federal law; the law of the subject still has to be in the framework of Article 55 of the Constitution. For example, in the tax sphere, the Court has repeatedly stressed that only taxes that are imposed by the legislative bodies of the subjects of the Russian Federation in accordance with the general principles of taxation, and fees established by federal law, can be considered lawful in the constituent entities of Russia.42 In a remarkable way, the Court’s position was summarized in a case concerning land regulation (which is an area of joint jurisdiction): “according to Article 55 of the Constitution of the Russian Federation, laws shall not be passed in the Russian Federation that cancel or derogate the rights and freedoms of a person and citizen (part 2), and their constitutionally acceptable restrictions are possible only on the basis of federal law (part 3).”43 A law of the city of Moscow on the maximum area of plots of land transferred to citizens for their use was declared unconstitutional because it violated the framework established by the federal legislator. At the same time, it was stated in this case that such a situation “does not remove the need for review by the Constitutional Court of the Russian Federation” of the laws of subjects adopted in violation of the competence “also in terms of the content of the norms.” In other words, this case demonstrates that unfulfilled (formal) requirements at the first stage of review do not cancel the subsequent (substantive) stages.

However, we have to admit that it is very difficult to identify an unambiguous trend in the application of the proportionality principle in cases related to the acts of subjects. In some cases, Article 55(3) has been used, and in some it has not. To demonstrate this, one can take two cases in which the same problem of imposing additional requirements on the right to be elected in a subject was addressed. In one of the republics, additional terms of residence were

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42 Decisions of 21 March 1997 No. 5-P and of 8 October 1997 No. 13-P.
43 Decision of 13 December 2001 No. 16-P.
established (five years for election as a deputy, and seven years for election as the head of the subject). The Constitutional Court regarded these provisions as unconstitutional, relying only on the division of powers between the federation and its subjects and the principle of equal rights for Russian citizens. In another republic, an additional period of residence in the republic (ten years) and not only a lower age limit (35 years) but also an upper one (65 years) were established for elections to the position of head of the subject. These provisions were considered to be unconstitutional; in addition to the argument about the equality of citizens, an argument about the disproportionality of the restrictions was presented. The way in which this argument was formulated is very important: “restrictions on rights and freedoms can be established by federal law only to the extent necessary to protect the foundations of the constitutional order, morality, health, rights and legitimate interests of others, to ensure the defense of the country and state security (Article 55, section 3), i.e. should be proportionate to the stated objectives. At the same time, the federal legislator is obliged to ensure such proportionality in cases where he gives to the legislative authorities of the subjects of the Russian Federation the power to specify the conditions for the realization of a right to be elected.” This phrase seems to address the requirement for proportionality to the federal legislator only.

In other words, in Russia there is a rather unusual connection between the formal requirement (the restriction by law) and the substantive requirement (proportionality). As a result of the fact that the constitutional norm in Article 55 only refers to federal law, there is some uncertainty and unpredictability when considering the law of a subject that restricts rights. Will the principle of proportionality be used in the consideration of a case about the law of a subject in the same way as it would be used when considering a federal law? Will it be used only after it has been determined that the subject has remained within its competence? Or should the principle of proportionality not be used at all, since the act of the subject is an inappropriate form of a restriction of the right? The Constitutional Court has generally discussed the principle of proportionality only in connection with federal law.

44 Decision of 24 June 1997 No. 9-P.
45 Decision of 27 April 1998 No. 12-P.
46 Evidence can be seen in recent jurisprudence as well. See Decision of 27 March 2018 No. 13-P (the abolition of the payment of “maternity capital” in connection with the birth of a third child in one of the subjects of the Russian Federation; the Court recognized the violation of social rights because of a breach of the citizens’ trust, but without any reference to the principle of proportionality); or Decision of 10 December 2019 No. 39-P (providing housing for relatives of repressed persons; in this case, the Court reaffirmed that a restriction
Perhaps the extension of this principle to the laws of subjects would be more logical for a federal state. It is true that the distribution of competence in the Russian Federation leaves very little room for legislative autonomy for the constituent entities of the Federation. Actually, one of the reasons for the over-centralization of regulation is the intention to protect the principle of the equality of citizens. Many issues not only of the exclusive jurisdiction of the Federation but also of joint jurisdiction are related to human rights. So, if we treat the problem of equal rights formally, then there is no place for diversity of regulation within the Federation. Nevertheless, the explicit and fully-fledged application of the principle of proportionality to the laws of the subject will have a disciplining effect on relations between the Federation and the subjects. On the one hand, it will allow the diversity of regulation to be preserved in the subjects on those issues that are related to joint jurisdiction (which is an important point for a federal state), and, on the other hand, it will not allow subjects of the Federation to encroach excessively on human rights, as the diversity of regulation can be checked and, accordingly, deviations from the principle of equality of citizens can be considered in terms of the proportionality principle.

3.1.2 Horizontal Aspect: Proportionality and Federal Laws
A more obvious problem with the form of restriction is related to the horizontal separation of powers. On many occasions the Court has considered restrictions imposed by the executive authorities, particularly when the legislator has delegated to the government the detail of certain provisions. In these cases, the Court checks that the executive branch has not gone beyond
the limits of the delegated powers. In the opinion of the Court, the constitutional principle of the separation of power into the legislative, executive, and judicial branches (Article 10 of the Constitution) in the sphere of legal regulation implies the delimitation under which the legislative function is entrusted to parliament and the functions of law enforcement are assigned to the government. Since the government of the Russian Federation implements measures to ensure the rights and freedoms of citizens (Article 114) and acts on the basis of and pursuant to federal laws (Article 115), neither it, nor any other executive body, has the right to establish duties and burdens that are not provided for by federal law and that restrict the constitutional rights and freedoms of citizens. The federal legislator, when it gives the government certain powers in the sphere of rule-making, should clearly define the range of the delegated issues. In any case, the legislator cannot delegate questions that are within its exclusive prerogative.

In summary, we can say that in cases of this kind, the Court, if it applies the principle of proportionality, usually links it with federal law (indicating, in particular, that if it does not regulate a problem clearly and leaves the government with the opportunity to restrict rights, the federal legislator violates Article 55(3)). In this case, the scheme that is followed does not lead to any objection, since the restriction must come from the legislature, and not from the executive.

In practice, however, the picture is more complicated than appears above. In making some decisions, the Constitutional Court does analyze, from the point of view of the principle of proportionality, a normative act of the government. This is precisely in the situation in which the federal legislator, without settling the problem on its own, has delegated the authority to regulate to the executive branch. There are decisions in which an act of the government was found to be contrary to the Constitution, including Article 55(3), but the

50 Decision of 2 February 1998 No. 4-P.
51 Decisions of 22 November 2001 No. 15-P and of 28 February 2006 No. 2-P.
52 Decision of 28 February 2006 No. 2-P. For example, the Constitutional Court, firmly attributing the task of taxation to the legislator, has allowed the government of the Russian Federation to establish non-fiscal payments.
53 In some categories of cases that were clearly related to the restriction of rights, the Constitutional Court did not address Article 55 at all. For example, the government’s repeated attempts to impose mandatory payments by bypassing parliament were considered under Article 57 of the Constitution (“Everyone shall be obliged to pay the legally established taxes and dues”). See Decisions of 18 February 1997 No. 3-P; and of 11 November 1997 No. 16-P.
54 See, for example, Decision of 6 April 2004 No. 7-P.
federal law that was the basis for the act of government was not considered.\textsuperscript{55} There is no impression that such different approaches add predictability to the practice of the Court. Can a government act be reviewed in terms of the principle of proportionality without paying attention to federal law, if Article \textsuperscript{55(3)} specifies federal law?

In some decisions, the problem looks even more serious, since it concerns not only the separation of powers but also the meaning of human rights. In one of its first decisions, the Constitutional Court reviewed the presidential decrees and government regulations that laid the foundation for the use of the armed forces in the Chechen Republic without a state of emergency having been imposed.\textsuperscript{56} The challenge emphasized that one of the results of these measures was the unlawful restriction of human rights. The Constitutional Court upheld almost all provisions of the acts under consideration, citing the need to ensure state integrity and the role of the president as supreme commander, and pointed out that the legislative framework was respected by the president and the executive. The Court discussed the problems of proportionality in this case in a very specific way, stating that “the use of force must be commensurate with the objectives and every effort should be made to avoid harm to civilians and their property”, but all the problems that arose with this were addressed to the legislator, and not to the executive. The inconsistency of the legislation, according to the Court, should have been eliminated by the legislator, and the executive should not be blamed. Of course, the question may arise as to how, given the imperfection of the basic legislation, the acts of the executive power based on this legislation could be recognized as constitutional. The answer to this question is that the Court was focused on the objectives of the measures taken, and not on the restrictions on human rights. This was one of the most “divided” decisions of the Court, since eight of the 19 judges presented dissenting opinions,\textsuperscript{57} and some of them indicated that the measures under discussion damaged the principle of the separation of powers, were illegal, were inadequate to achieve the constitutional goals and led to violations of human rights.\textsuperscript{58} However, this case demonstrates the problem of some arbitrariness in whether or not the Court includes in its analysis the problem of the restriction of rights, and, accordingly, the principle of

\textsuperscript{55} See Decision of 20 December 2018 No. 46-P.
\textsuperscript{56} Decision of 31 July 1995 No. 10-P.
\textsuperscript{57} One judge did not participate in the decision, so we can say that there were ten judges who agreed with the result, and nine against it.
\textsuperscript{58} See especially the opinions of Judges Kononov, Ebzeev, and Luchin.
proportionality. There is no way to say that there are many such cases in the Court’s jurisprudence. Nevertheless, their presence inspires some concern.

This is even more true if the fact that some presidential decrees and government regulations restrict rights is taken in conjunction with the fact that, according to Article 125(4) of the Constitution, citizens can only bring laws to the Constitutional Court. Although at present, because of the peculiarities of the political situation, the legislative initiatives of the president and government have practically no particular difficulties in parliament (and, therefore, the formal requirement – the existence of federal law – is easily met, even if we are talking about the initiatives of the executive branch and the head of the state), questions regarding the restriction of rights by decrees and regulations still arise. For government regulations, some clarity has been introduced. They may be subject to verification by the Constitutional Court (following a complaint by an individual) if they were adopted on the basis of federal law. However, with presidential decrees the answer is not so obvious. For example, in 2013, a presidential decree “On the Features of Applying Enhanced Security Measures During the xxii Olympic Winter Games and the xi Paralympic Winter Games in 2014 in Sochi” was adopted. It contained restrictions on a number of constitutional rights – freedom of movement, demonstrations, and entrepreneurial activity (this was especially true for the sale of weapons, ammunition, explosives, etc.). The Constitutional Court refused to consider a citizen’s complaint about this decree, referring not to the fact that citizens can only bring laws to the Constitutional Court, but to the fact that the decree was already no longer in force at the time. This decision leaves open the

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59 Another such alarming case relates to the period 2005–2012, when the direct election of the heads of subjects was replaced by a procedure for their appointment in which the president of the Russian Federation had a decisive say. Citizens complained that, under this procedure, their right to elect and to be elected was unconstitutionally restricted. The Court upheld the provisions of the law, stating that the Constitution of the Russian Federation does not provide for the constitutional right to elect the heads of subjects, or to be elected to this position. For this reason, the Court considered that there was no restricted right, and it did not apply the principle of proportionality at all. See Decision of 21 December 2005 No. 13-P.

60 The abstract review of any normative acts of the highest bodies of state power is possible (Art. 125(2) of the Constitution), but only the president, the houses of parliament, or one fifth of the members of these houses, the government, the Supreme Court, and the bodies of legislative and executive power of the subjects of the Russian Federation can make such a request.

61 Decisions of 27 January 2004 No 1-P; of 10 July 2007 No. 9-P.

62 Ruling of 17 February 2015 No. 266-O.
opportunity of considering whether presidential decrees may restrict rights, but it requires the development of a substantive position of the Court.63

Nevertheless, most of the Court’s judgments have been given on restrictions adopted by the federal legislator. Here, the principle of proportionality can be applied in a more straightforward way. This, however, is not the case for certain specific aspects.

3.2 The Aim of the Restriction

The next element of the requirements for restrictions is the requirement that they have a constitutional aim. The problem is that the aims listed in the Constitution are formulated widely enough to allow almost any restriction to be regarded as corresponding to one of them. Moreover, section 3 of Article 55 is a general provision, apparently applicable to all rights. So, when we look at the aims we do not see any specification; it turns out that any right can be limited to achieve any of these aims.64

This may have influenced the position of the Court regarding the aims of a restriction. It may be possible to distinguish between the approaches that the Court followed at the beginning of its activities and more recent jurisprudence.

In a number of early judgments, the Court simply assumed that the legislature seeks to achieve a constitutionally significant aim, without any detailed analysis of the issue.65 Sometimes, the Court dwelt on the problem of aims, but still approached them in a rather “generous” way, sometimes without revealing the relationship between these objectives and section 3 of Article 55 of the Constitution. As an example, let us take the case where the Court reviewed the provision of the Federal Law “On Political Parties”,66 according to which a political party was obliged to have regional branches in no fewer than half of the subjects of the Federation. In other words, the provision was intended to preserve the country’s political space for federal parties. This provision was rightly claimed to constitute a restriction of the right to association in political

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64 In one of his dissenting opinions, Judge Gadzhiev raised the question of whether all six objectives mentioned in Article 55(3) of the Constitution may be taken into account in restricting specific constitutional rights: “Some of these six objectives can be correlated with a particular basic right, while some objectives, if they are kept in mind at the introduction of restrictions, may lead to a derogation of rights”. See dissenting opinion of Judge Gadzhiev in the Decision of 30 October 2003 No. 15-P. However, in the Court’s further practice, this approach was not developed.
65 Decisions of 4 April 1996 No 9-P; and of 11 March 1998 No. 8-P.
66 Decision of 1 February 2005 No. 1-P.
parties. The contested legislation was deemed to address the following constitutionally significant aims of the limitation: the formation of a true multi-party system within the country, the legal institutionalization of parties as an important factor of the development of civil society; and the encouragement of the creation of large nationwide parties. It was also said to ensure the unity of the country in the contemporary historical conditions of transition towards democracy and the rule of law in Russia. The problem here is not even that the Court did not connect these aims to the broader aim of the protection of the basis of constitutional order, but rather that the question of suitability and, most importantly, the necessity for these corresponding restrictions in terms of achieving the stated aims was not discussed.

In addition, in this decision (as well as in some others), the Court did not pay attention to the true purposes of the legislator, or at least to the obvious side effects of its decisions. For example, in this case the issue of reducing the number of registered political parties did not receive adequate coverage, and nor did the consequences of this reduction for political competition at the level of either the state in general or certain subjects of the Russian Federation. Loss in the context of the principle of federalism was also not taken into account.

Of course, there are exceptions to the practice of failing to elaborate on the aims. In particular, the Court has repeatedly pointed out that restrictions of rights may not be justified merely by the objectives of the rational organization of public authorities, thereby recognizing that the restriction is already unlawful at this stage.67 In addition, the question of the relationship between the aims and the means of a restriction sometimes receives more detailed coverage, at least in the separate opinions. For instance, a remarkable dissenting opinion was pronounced in a case68 that upheld a prohibition for representatives of media-release organizations to campaign as part of their professional activities. In his dissenting opinion, Judge Kononov drew attention to the fact that, during the hearings, the need to exclude the media from participating in an election campaign was justified not in relation to providing freedom of choice, but in the context of “a pragmatically trivial problem of combating ... illegal payment of custom publications ... It seems that the problem of taking into attention the paid publications cannot provide any grounds for a restriction of any constitutional right, and the legislator solved it using inappropriate means.”

In more recent decisions, the Court has assessed the purpose of the restriction more closely. For example, the Court considered a provision of the Family

67 See, e.g., Decision of 27 March 1996 No. 8-P.
68 Decision of 30 October 2003 No. 15-P.
Code that imposed on the government the obligation to establish a list of diseases whose sufferers could not adopt a child. The government stated that such diseases were infectious diseases (that were not in the stage of stable remission), without specifying which specific infectious diseases are obstacles to the adoption of a child. The applicant in the case was a woman who had hepatitis and HIV. The child who she was not allowed to adopt had been born by the applicant's sister, and lived with the applicant and her husband. The Court emphasized that the constitutional principle of state support for and protection of the family presupposes the priority of children being brought up by the family, concern for the well-being and development of children, and the inadmissibility of arbitrary interference by anyone in the affairs of the family. At the same time, it clarified that the constitutionally significant aims of restricting these rights may be the protection of morality, health, and the rights and legitimate interests of others; that is, it pointed to these aims from the list in section 3 of Article 55, in this case bearing in mind the need to guarantee the rights and legitimate interests of a child as the most vulnerable and dependent part of a family. The aim of protecting the right to life and to the protection of the health of minors was recognized by the Court as legitimate. According to the final decision of the Court, the norms in question were deemed to be contrary to the Constitution, because in practice they meant that the applicant with hepatitis and HIV received an automatic refusal to adopt a child, without taking into account the peculiarities of the transmission of these diseases and without taking into account the fact that the child already lived with the applicant. In this example, one can clearly see that a careful study of the aims of the human right restriction laid the foundation for the final correct solution.

There are other examples of more careful treatment of the aims of restrictions. An example is the case on prohibiting foreign citizens from being founders of mass media, where the aim of the information security of the state was presented in detail (and the aim was separately compared to the restrictions on various affected rights). Still, the contested norms were declared unconstitutional because of their uncertainty, and not as a result of the strict application of the principle of proportionality.

69 Decision of 20 June 2018 No. 25-P. A goal that is as clear as the protection of the interests of minors (which is unambiguously correlated with the aim of protecting the interests of others, as set out in Article 55) was also found in other recent decisions. See: Decision of 14 November 2018 No. 41-P; and of 18 July 2013 No. 19-P.

70 Decision of 17 January 2019 No. 4-P. What is even more impressive in this decision is the concurring opinion of Judge Aranowski. He rightly stressed that the admissible constitutionally significant aims were not justified in the case (and that the conclusion...
In other words, attention to the aim of a restriction is a necessary but not a sufficient condition for the completely correct application of the proportionality principle.

3.3 The Suitability, Necessity and Proportionality (stricto sensu) of the Restrictions

The most ambiguous situation persists in regard to the proper application of the requirement of proportionality. There is a rather paradoxical situation. The Constitutional Court of the Russian Federation refers to the idea of proportionality in many decisions, but it almost never reveals or employs a detailed structure for this idea in a transparent way.

The Court has often used a particular phrase, stating that the federal legislator, when imposing restrictions, “should ensure a balance between constitutionally protected values, and public and private interests; respect the principles of justice, equality, and proportionality arising from the Constitution; the norms introduced must meet certain criteria of clarity, unambiguity, and consistency with the current legal regulations; at the same time, restrictions on rights and freedoms should by no means infringe the very substance of a right or lead to the loss of its principal content.”71 The Court has indicated that “possible restrictions by a federal law … must meet the requirements of fairness, be appropriate, proportional, commensurate, be of a general and abstract nature, not be retroactive and not affect the substance of constitutional rights, i.e., not limit the scope and application of the relevant constitutional provisions; the very possibility of restrictions and their nature must be determined by the necessity to protect constitutionally significant values.”72 In some decisions, “the Constitutional Court of the Russian Federation concluded that the aims of such restrictions should be not only legally, but also socially justified, and the restrictions themselves should be adequate to these aims and meet the requirements of justice; if it is permissible for a federal law to restrict a particular right in accordance with constitutionally approved aims, it is necessary to use not excessive, but only necessary and strictly stipulated by these aims measures; public interests listed in Article 55(3) of the Constitution of the Russian Federation can justify legal restrictions on rights and freedoms only if they are adequate to the socially necessary result; in the framework of legal regulation, distortion of the very essence of constitutional right or freedom is

71 See, e.g., Decision of 21 March 2014 No. 7-P.
72 See, e.g., Decision of 14 May 2012 No. 11-P; of 19 July 2017 No. 22-P.
unacceptable, and the aims of a rational organization of the activities of government bodies cannot serve as a basis for restricting rights and freedoms.\textsuperscript{73}

The quotes are needed to identify at least two problems. The first problem is related to the methodology of using the principle of proportionality. The above formulas include, in fact, many requirements, but the problem lies in their somewhat chaotic presentation. Some of them should obviously be checked at other stages of the consideration of the restrictions – for example, the issue of the clarity of a federal law should be considered in connection with the demand about the form of a restriction rather than a claim about its proportionality. Meanwhile, the Constitutional Court regularly associates the proportionality of a restriction with the requirement for the certainty of legal norms.\textsuperscript{74} Also, the comma-separated list of the principles of proportionality, fairness and equality does not add to the understanding of the specifics of each of them. The relationship between the requirements of proportionality and the prohibition on the violation of the essence of a right is not quite clear.\textsuperscript{75}

Very often, the position of the Court is that if a restriction does not comply with the principle of proportionality under section 3 of Article 55, this means that there has been a derogation of the right, which is prohibited by section 3 of this article.\textsuperscript{76} This looks logical, but somewhat redundant – the question remains as to why two different norms of the Constitution are interpreted in such a way that they both essentially mean the same thing.

However, the most serious problem is the absence of a thorough study of the compliance of particular restrictions with each of these requirements. We can imagine that references to the adequacy and necessity of limitations in this context have the same meaning as the requirements of suitability and necessity within the accepted scheme of the principle of proportionality, while references to commensurability and proportionality follow the differences between proportionality in the broad and narrow (\textit{stricto sensu}) senses. However, if the Court simply lists the requirements, then this is clearly not enough for the correct verification of the constitutionality of a restriction.

\textsuperscript{73} See Decision of 29 November 2016 No. 26-P.

\textsuperscript{74} See e.g. Decision of 15 July 1999 No. 11-P.

\textsuperscript{75} There is also a position according to which a right “may be restricted by federal law in order to protect constitutionally significant values out of obligatory observance of the principles of necessity, proportionality, and commensurateness, in order to ensure that the introduced restrictions do not infringe upon the very essence of this constitutional right”. See Ruling of 22 April 2014 No. 976-O. In accordance with this position, to confirm the restriction as proportionate, it is sufficient that it does not infringe on the essence of a right. In fact these criteria have independent meanings.

\textsuperscript{76} See Decisions of 17 February 1998 No. 6-P, and of 15 January 2002 No. 1-P.
Once again, some of the recent decisions pay more attention to specific issues—for example, the question of the presence of other, less intrusive, means of restriction. This can be seen in one of the most recent cases, which is related to the restrictions on venues for demonstrations that were introduced by some subjects of the Federation. In a specific case, there was a ban on the holding of public events on the main square of the subject’s capital, supplemented by a ban on places within a radius of 50 meters from the entrance to any building occupied by the state authorities or local self-government of the subject. The Constitutional Court confirmed that restrictions on constitutional rights can only be established by federal law, and that the secondary legislation of entities should not lead to a reduction in the guarantees contained in federal laws for the implementation of rights. Since the Federal Law “On Meetings, Rallies, Demonstrations, Processions and Pickets” does not provide for restrictions on the holding of demonstrations arising from their proximity to the authorities (with the exception of places adjacent to the presidential residences and the courts), the ban on demonstrations within a 50-meter radius was declared unconstitutional. The general ban on demonstrations within the main square of the city received more attention. In particular, the Court stated: “A general ban can be established only when it is a more appropriate means of preventing a serious violation of the ordinary life of citizens than considering each case of organizing a public event separately, taking into account the possibility of minimizing the corresponding costs.” The contested general ban was found to be inconsistent with the idea of a minimum restriction of rights. According to the Court, the authorities must not solely apply a general ban in order to prevent potential threats to rights and freedoms, the rule of law, law and order and public safety, but must, in each case, evaluate the real level of such threats and, considering the constitutional value of freedom of peaceful assembly, which does not imply the possibility of establishing excessive prohibitions on its implementation, decide on the issue.77 In other words, the decision actually dealt with the establishment of a regime that would involve less invasive means of restriction.

There are some other decisions that discuss whether there are less invasive ways to achieve an aim that justifies the restriction.78

Nevertheless, the lack of a uniform and consistently applied structure of a test leads to the manifestation of precisely those risks that are often referred to by the opponents of the principle of proportionality.

77 Decision of 1 November 2019 No. 33-P.
78 See Decision of 17 January 2019 No. 4-P.
In particular, the Court more often states, rather than demonstrates or proves, the proportionality or disproportionality of a restriction. A common scheme for a decision by the Court is to reproduce all the requirements of Article 55 of the Constitution, then to give a review of the norms under consideration in the system of legal regulation (but without any detailed correlation with the requirements of the principle of proportionality, which could be seen in the text of the document), and to follow this with a final conclusion. In the 1990s, the Court’s decisions were brief (5–8 pages), while in later years they became much longer (30–50 pages), but a clear scheme of a sequential check of the proportionality requirements was not added. In fact, we can see the connection between the structure of the decision and the way in which the argument is made. The decisions of a Russian Court have numbered paragraphs in the reasoning, with different legal positions, but there are no subtitles that could highlight the logic of the analysis of the proportionality principle tests. Of course, logic can exist without subtitles, but so far there has been no detailed analysis that would ensure total transparency in decision making.

In such a situation, there is a high risk that arguments can be used manipulatively. Thus, it was determined, for example, that the blanket ban on the right to be elected for persons convicted of committing serious crimes (even after the cancellation of their criminal record) is disproportional,79 and we can agree with that decision intuitively. We can also read that the refusal to hand over the bodies of terrorists to their relatives for burial is a proportional restriction of rights,80 and we can intuitively object to the decision. However, a legal framework of separate tests for proportionality would be more convincing. The problem of the lack of structure in the application of the principle of proportionality was noted by Judge Gadzhiev in one of his dissenting opinions.81 However, again, this opinion has not yet become the position of the majority of the Court.

The second question concerns the very easy transition to rhetoric about a balance between public and private interests, which is quite usual in cases about the restriction of rights. It is clear that the freedom of the individual exists not in isolation but in society. However, public interests and state interests are not the same thing, and the Court does not make this distinction in all cases. In addition, it was important for the post-socialist state to underline that a human being, and his rights and freedoms, are the supreme value (Article 2 of the Constitution). The use of balances emphasizes that drawing a clear

79 See Decision of 10 October 2013 No. 20-P.
80 See Decision of 28 June 2007 No. 8-P.
81 See Decision of 15 February 2016 No. 3-P (Gadzhiev, J., dissenting).
demarcation line between individual autonomy and public interest is still a problem. “The nostrum of ‘finding a balance’ between private and public interests ... always leads somehow to the preference of public motivations.”82 Of course, one should distinguish between different categories of conflicts, but all the same it is impossible to deny that in some spheres the Constitutional Court, like the Tower of Pisa, prefers to lean in only one direction, and that is to the side of the state. In the most noticeable way this concerns the political sphere,83 but there are ambiguous resolutions on some other issues.84

The key idea is that the simple presumption of the importance of the public interest and its sufficiency for recognizing the constitutionality of restrictions on rights overturns the entire hierarchy of values of the Russian Constitution. The idea of Articles 2 (the highest value of a person and his rights) and 55 (the necessity of restrictions) of the Constitution is replaced by another idea of a kind of “inverse proportionality” – rights can exist only insofar as they do not interfere too much with the public interest. Such inverse proportionality can be protected within the framework of some theories,85 but it obviously

83 See the decisions mentioned earlier about political parties, Decision of 8 April 2014 No. 10-P (on the validity of assigning a “label” to the foreign agents of non-commercial organizations, if they receive funding from abroad and carry out political activities), and Ruling of 2 April 2009 No. 484-O-II (about preserving the need to come to an agreement with the state authorities on the time and place of public demonstrations, which blocks the possibility of organizing spontaneous events). For recent decisions on public events, see also Decision 18 June 2019 No. 24-P, etc.
84 E.g. when relying on the idea of “a balance of constitutionally significant values”, the Court upheld norms establishing administrative responsibility for propaganda about non-traditional sexual relationships among minors, even though practice shows that the courts sometimes equate propaganda with ordinary information. See Decision of 23 September 2014 No. 24-P. For more on the arguments of the Court, including some that are quite problematic in terms of constitutional law, see: Olga Kryazhkova, “Novyy raund bor’by za prava seksual’nnykh men’shinstv: kommentariy k Postanovleniyu Konstitutsionnogo Suda Rossii ot 23 sentyabrya 2014 goda N 24-P”, 23 (6) Sravnitel’noe konstitotsionnoe obozrenie (2014), 123–131.
85 For an analysis of the decisions of the Russian Constitutional Court, adopted in line with the rhetoric of the balance of values and “inverse proportionality”, see Sergey Belov, “Tsennosti rossiyskoy Konstitutsii v tekste i v praktike eyo tolkovaniya”, 28 (4) Sravnitel’noe konstitotsionnoe obozrenie (2019), 68–83, at 77–81. The author elaborates on the following Court decisions: of 23 December 1997 No. 21-P (priority of tax collection over wage arrears in case of shortage of funds), of 28 June 2007 No. 8-P (refusal to extradite the bodies of dead terrorists to relatives for burial due to hypothetical public safety risks), of 7 June 2012 No. 14-P (restriction of the right to travel outside Russia for persons holding state secrets), and Ruling of 15 January 2009 No. 187-O-O (restriction on possibility of male military personnel taking parental leave).
contradicts the normative provisions of the Constitution. The rejection of simple presumptions and their negative consequences for rights is possible by returning to the disciplined application of the principle of proportionality, by means of a clearer indication of a specific public interest (what exactly it consists of), precisely why the restriction introduced can contribute to achieving this public interest, why this contribution cannot be achieved by a less invasive means, and why retaining the right without the limitation is less important than this public interest.

Thus, in the issue of the application of the principle of proportionality, the Russian Constitutional Court remains inconsistent. Russia's Constitutional Court is clearly familiar with the theory of proportionality and with the practice of its application in other courts; in its decisions, this approach has neither been explicitly rejected nor been replaced by any alternative. Likewise, the Court has never denied the values of coherence, transparency, and predictability of decisions made according to the proportionality principle. Conversely, the requirement for proportionality is key in disputes related to the restrictions of rights. In this situation, the question arises of why the criteria of the principle of proportionality are perceived sporadically and applied inconsistently (which contributes to the manifestation of the negative, rather than the positive, aspects of the principle of proportionality), and this question remains unanswered. Instead of the consistent and separate consideration of individual tests, the Court often draws generalized conclusions regarding the proportionality (or lack of proportionality) of restrictions, listing all the tests at once and refraining from a detailed comparison of the purpose of the restriction, the means of the restriction and the meaning of the limited right, or even replacing the tests for the principle of proportionality with other ideas, such as the requirement of certainty of regulation.

At the same time, it is possible to trace some change in the use of the principle of proportionality by the Court, which can be regarded as “a door ajar” for a positive perspective, at least in some categories of cases. As the decisions cited above demonstrate, the Court has recently been more attentive to the aims of restrictions on rights and has, at least sometimes, mentioned various tests of the principle of proportionality, although specific restrictive measures have not quite been consistently juxtaposed with these tests. Isolated examples have not yet developed into a generally stable picture, but at least for those

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86 It is quite obvious that a detailed scheme for checking laws would also have a preventive effect: if the legislator knows that the constitutionality of any decision he makes will be checked in a certain way, he can at least to some extent correct himself even at the stage of the adoption of the law.
who appeal to the Court, it remains very sensible to use the principle of proportionality in their complaints, promoting a transparent constitutional check on restrictions on rights.

4 Conclusion

In many legal orders, the principle of proportionality is perceived as a structure for checking the constitutionality of restrictions on rights. Understood in this way, the principle of proportionality involves the correlation of rights, as *prima facie* protected principles, with other principles (rights or other values). However, it does not discount the value of rights that can ensure the protection of individuals. The degree of this protection, and the refusal to consider the right as a “trump card”, seem to be related not to the principle of proportionality as such, but to the legal character of rights in modern society and the tendency to harmonize the interests of different social groups and to find a degree of freedom for everyone that is compatible with the freedom of others. Constitutional rights, subjective in their nature and, at the same time, stipulated in broad terms with a high degree of abstraction, are designed to apply to a variety of situations, and contain the potential for competition with each other and with common interests. However, none of them should be completely eliminated from the legal system as a result of such competition: even if a value is “outweighed” by other values in a particular situation, it nevertheless does not cease to be a value, able to outweigh other interests in different circumstances. In this sense, the fact that the law-making and law enforcement agencies are often forced to compare certain rights with each other, or to compare rights with public interests, does not diminish the status of the rights as supreme values that all public authorities should aim to protect.

The principle of proportionality is not free from criticism. Some of the criticism can be seen as an exaggeration – for example, the anxieties regarding the ability of the court to compare values that, according to some authors, are not comparable. In fact, this is the very essence of the activity of a court when it engages in rights review (comparison of crime and punishment, damage and responsibility, and so on). For this reason, it is hardly worth worrying that the courts are unable to compare the value of the inviolability of a right and the importance of achieving constitutional goals. Some criticisms risk taking the situation into a vicious circle of objections – for example, in response to being too mathematical and not taking moral considerations into account, the advocates of the principle of proportionality argue that moral considerations can be emphasized when applying
the principle. However, if they are immediately criticized for undermining legal certainty, then, of course, they find themselves in a difficult situation between the Scylla of striving for analytical accuracy and the Charybdis of engaging in the analysis of moral considerations, which causes some subjectivity of assessments. Nevertheless, it cannot be denied that some critical considerations have contributed to the development of the principle of proportionality and an understanding of the characteristics of its tests. As a result, we can say that proportionality is justified as a transparent way of assessing rights claims and the competing concerns involved, but requires compliance with the rules for its application.

The jurisprudence of the Constitutional Court of the Russian Federation demonstrates that a significant part of the Court’s decisions are devoted to checking the constitutionality of restricting rights. The Court utilizes certain criteria of the principle of proportionality. Nevertheless, it is possible to say that the Court does not use the main advantages of the principle of proportionality, namely the consistency and transparency of its tests. In a sense, there is a paradoxical situation. The Russian Constitutional Court has never denied the idea of the proportionality of rights restrictions, and has never cited any of the criticism that we can see in the doctrine. At the same time, the Court is not acting as a real defender of the principle of proportionality, since the principle remains essentially undeveloped in its decisions. All the difficulties discussed above associated with the principle of proportionality, as well as the reaction to those difficulties, are not, in fact, taken into account in the decisions of the Court. Since the Court does not follow a completely clear and objective scheme, at least some of its decisions demonstrate the risks of the principle of proportionality, which are emphasized in the doctrine, rather than its advantages.

The somewhat chaotic way of applying the principle of proportionality can be explained. On the one hand, this approach allows the Court to make decisions while avoiding detailed criticism. The fewer the details in the decision, the smaller the opportunity to oppose it, although, of course, the heavily curtailed scheme for applying the principle of proportionality creates reasonable doubt of the Court’s complete abstraction from political considerations. On the other hand, the principle of proportionality still retains its instrumental value, although not in such a valuable form as it could. Besides, this allows the potential of the principle to be saved for the future. One can already see the tendency to pay greater attention to some elements of the verification of restrictions – for instance, a more detailed analysis of the aims of the restrictions or, in some decisions, a consideration of less restrictive means. In the text of the Court’s decisions we can see that applicants often appeal to the
Constitutional Court by referring to Article 55(3). It can be assumed that the correct use of the principle of proportionality by the parties to a conflict will facilitate a detailed analysis of the principle by the Court itself. In addition, the Constitutional Court may consider *amicus curiae* documents. Such documents are another way to draw the Court’s attention to a fully-fledged analysis of the principle of proportionality. If our goal is not to abandon the principle, it would be good to apply it more consistently, and the Russian Constitutional Court remains open to improving its jurisprudence.