Social rights in the age of proportionality: Global economic crisis and constitutional litigation

Xenophon Contiades* and Alkmene Fotiadou**

Insisting on defining a minimum core content as a prerequisite for the justiciability of social rights is an updated aspiration, which risks the very enforceability of these rights amidst global economic crisis, at the very hour when they are needed the most. Proportionality not only creates the context for litigation, enhancing the justiciability of social rights, but also renders their content concrete by promoting a dialogue between the judge and the lawmaker which enhances their content and upgrades them to a shared narrative with civil and political rights, that of the proportionality idiolect. This paper aims to explore the application of proportionality from the aspect of social rights and also to explore social rights in the light of proportionality review, demonstrating the way in which proportionality allows the construction of the content of social rights on the basis of balancing conflicting interests, primarily by setting a series of ground rules for the lawmaker.

1. Introduction

Two parallel ongoing debates have been taking place persistently in the field of constitutional law. The first debate concerns the enforceability of fundamental social rights (hereinafter social rights),[1] while the second is about the prevalence of

* Dr.iur, Professor of Public Law, Dean, School of Social Sciences, University of Peloponnese; Managing Director, Centre for European Constitutional Law (Athens, Greece). Email: xcontiades@hotmail.com

** Dr.iur, Research Associate, Centre for European Constitutional Law (Athens, Greece). Email: alkmenef@gmail.com

[1] The answer to the question "what social rights are" is not obvious. According to a traditional approach, social rights require from the state to act positively (*status positivus*), imposing on the state duties to provide goods or services such as work, housing, health care, education, welfare, and social security. Nevertheless, the debate on the constitutionalization of social rights and their judicial enforceability reveals differences in the ways in which they can be understood. For example, Mark Tushnet chooses the term "social welfare rights" over the term "social and economic rights," distinguishing between confining the rights to those associated with the provision of social goods to the especially needy, and refering to rights

proportionality as a method of reviewing violations of rights. The justiciability of social rights has been intensely debated for long, nevertheless it still remains unresolved, despite the fact that a side effect of the recent economic crisis is that austerity measures are increasingly being challenged constitutionally before courts. Proportionality has developed globally into the fundamental method for reviewing rights' infringements, triggering a debate concerning its merits and disadvantages. Is proportionality the ultimate expression of the 'new constitutionalism,' allowing an objective evaluation of rights limitations, or is it a concealed balancing method that multiplies threats to rights?

The application of proportionality in the area of social rights is a less discussed issue, yet of vital importance to both debates. Does proportionality allow the delineation of a legally enforceable content for social rights? Does its application presuppose the existence of a minimum core content of social rights or does it offer a totally different approach to the question of their justiciability? At the same time the use of proportionality for the evaluation of social rights infringements reveals its assets as well as its shortcomings, adding new aspects to its framework, and brings forth all crucial issues concerning balancing, the commensurability of rights and judicial self-restraint. In other words, the examination of the specific issue of applying proportionality in the field of social rights may answer questions concerning both the utility and dangers of proportionality as well as the evasive legal content of social rights.

The principle of proportionality has been elaborated by legal theory and applied by international and national courts in connection to the exercise, limitations, and infringements of civil rights. On the contrary, the theoretical conflicts regarding the justiciability of social rights, as well as the particularities of these rights, had not endorsed the systematic application of proportionality as a method of judicial review in the field of social rights. Both international and national courts had been hesitant to apply proportionality in social rights jurisprudence. Nevertheless, in recent years, as welfare state guarantees give way due to the economic crisis, cases requiring the judicial review of the constitutionality of measures infringing social rights increasingly find their way to the courts, triggering thus the use of proportionality to test the limitations of social rights.

An interesting dual effect is thus produced. New aspects of the principle of proportionality emerge as it is applied in cases involving social rights, while social rights in turn evolve, acquiring a more concrete legal content to meet the requirements of justiciability. This dual effect on social rights on one hand and on the principle of proportionality on the other may be analyzed through an attempt to answer the following questions:

- Do social rights have an inviolable minimum core that may not be limited by the legislator and may not be subjected to any balancing with competing rights and interests?
- Can such a minimum core even exist in the age of balancing? In other words, is proportionality applied to review legislative limitations that may not reach the heart of social rights, or is it used as a structured balancing method that may

allow the prevalence of a legitimate aim over the social right in question through a multi-factor approach?

- Does the application of the proportionality test in the absence of an inviolable minimum core of rights create a context which may facilitate the justiciability of social rights, that do not seem to have a tangible minimum core, as their content is flexible being in perpetual interaction with economic, social and political parameters?

In the light of this analysis, the aim of this article is to seek answers to the above questions and suggests that proportionality activated in the area of social rights protection operates as a mediating tool (a) allowing the rational balancing of the conflicting considerations inherent in the application of social rights, (b) enabling the judge to explore alternative measures sets the grounds for a dialogue between the legislator and the judge, (c) thus substantiating the content of social rights, and (d) upgrading them to a shared narrative with civil and political rights, that of the proportionality idiolect.

The article's structure is as follows: the second section explores the way in which the debate concerning the content of social rights may be re-approached in the light of the use of proportionality. The third section examines the way in which the use of proportionality in the area of social rights influences and adds new dimensions to the application of the principle itself. The fourth section traces how the global economic crisis forces constitutional theory and jurisprudence to explore new tools in order to protect social rights. The fifth section offers insight on landmark decisions of constitutional courts that seem to redefine concepts of social rights applying proportionality and detects this new aspect of proportionality in recent case- law. The sixth section concludes with some final considerations.

2. Re-approaching the legal content of social rights under the influence of proportionality

Despite the vast literature concerning the content, the particularities, and the various problems connected to the justiciability of social rights,[2] the potential created by the

held by everyone in the population. *See* Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 Tex. L. Rev. 1895 (2004). For further analysis of various philosophical and legal approaches to the task of defining these rights, *see also* Cécile Fabre, Social Rights Under the Constitution (2000); Terence Daintith, *The Constitutional Protection of Economic Rights*, 2 Int'l J. Const. L. (I·CON) 56, 61–62 (2004); and Sandra Fredman, Human Rights Transformed: Positive Rights and Positive Duties (2008). Robert Alexy describes fundamental social rights as entitlements in the narrow sense, and distinguishes between expressly enacted entitlements, such as can be found in a series of regional constitutions, and interpretatively derived entitlements. *See* Robert Alexy, A Theory of Constitutional Rights 334–335 (Julian Rivers trans., 2d. ed. 2002). This article uses the term social rights in its "*status positivus*" sense as expressly and interpretatively enacted entitlements.

[2] *See, e.g.*, Social Rights Jurisprudence: Emerging Trends in International and Comparative Law (Malcolm Langford ed., 2009).

application of proportionality in connection to social rights has not yet been systematically explored. How can this be explained considering that proportionality has become an integral part of fundamental rights theory? Is it because proportionality is not applicable to social rights due to the particularity of their content or is it because the two concepts appear to be prima facie incompatible, proportionality been seen primarily as a method of judicial review and social rights seen primarily as non-justiciable?

As opposed to civil rights, where the key issue is setting limits to their limitation, the crucial problem concerning social rights is how to delineate their legal content. The debate concerning the variety of the legal forms under which social rights may appear is ongoing and continues to be the main focus of most theoretical approaches of social rights.[3]

During the first era of their constitutionalization, social rights were treated as non-binding principles setting goals to the government.[4] The Constitution of Weimar (1919) contained a large list of social rights, which nevertheless lacked any binding legal content.[5] As a result, the use of proportionality was not in question. The flexible content of social rights, perpetually negotiated by social actors, led to the formation of variable legal forms that would render them binding.[6] The softest form in which social rights appear in constitutional theory were constitutional orders. Constitutional orders create an obligation for the legislator to fulfill the content of the constitutional provision, without conferring, however, a justiciable claim upon the citizen. Nevertheless, it is accepted that the constitutionality of laws realizing constitutional orders is subject to judicial review.[7] The task in such cases is to reveal the constitutional obligations of the legislator and not to review the statutory limitations of rights. Therefore, prima facie proportionality does not come into play. Another approach of the legal function of social rights considers them institutional guarantees.[8] Here also,

[3] *See, e.g.*, Soziale Grundrechte in Europa nach Lissabon [Social Rights in Europe after Lisbon] (Julia Iliopoulos-Strangas ed., 2010).

[4] *See, e.g.*, Peter Badura, *Das Prinzip der sozialen Grundrechte und seine Verwirklichung im Recht der Bundesrepublik Deutschland* [The principle of social rights and its realization in the Federal Democracy of Germany Law], 14 Der Staat 17, 19–21 (1975); Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 Int'l J. Const. L. (I·CON) 13 (2003).

[5] *See* Klaus Lange, *Soziale Grundrechte in der deutschen Verfassungsentwicklung und in den derzeitigen Länderverfassungen* [Social Rights in the German Constitutional Evolution and the state Constitutions], *in* Soziale Grundrechte [Social Rights] 49 (Ernst-Wolfgang Böckenförde, Jürgen Jekewitz, & Thilo Ramm eds., 1981).

[6] *See* Jörg Lücke, *Soziale Grundrechte als Staatszielbestimmungen und Gesetzge bungsaufträge* [Social Rights as Constitutional State Objectives and Constitutional Orders], 107 Aör 15, 19–23 (1982); Manfred Nowak, *Die Justiziabilität wirtschaftlicher, sozialer und kultureller Rechte* [The Justiciability of Economic, Social and Cultural Rights], *in* Die Durchsetzung wirtschaftlicher und sozialer Grundrechte [The Enforcement of Economic and Social Rights] 387 (Franz Matscher ed., 1991).

[7] *See, e.g.*, Karl-Peter Sommermann, Staatsziele und Staatszielbestimmungen [State Goals and Constitutional State Objectives] (1997); Christian Courtis, *Standards to make ECS rights justiciable: a summary exploration*, 2 Erasmus L. Rev. 379–384 (2009).

[8] Ulrich Scheuner, *Die institutionellen Garantien des Grundgesetzes* [The Institutional Guarantees of the Fundamental Law], *in* Staatstheorie und Staatsrecht. Gesammelte Schriften [State Theory and State Law. Collected Essays] 97 (1978).

proportionality does not seem applicable since the main task is to trace the integral parts of the institution. A doctrine bearing similarities to institutional guarantees theory is the "social aquis" or "*effet cliquet*" according to which once enacted, social protection mechanisms acquire constitutional protection.

It must be noted that even constitutional entrenchment has not always been viewed as a direct order requiring state action, the primary burden being conferred upon society. For example, the Italian Constitution provides in article 2 that "the Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled," while, similarly, according to article 25(4) of the Greek Constitution "the State has the right to claim of all citizens to fulfil the duty of social and national solidarity." In respect of realizing social rights the principle of solidarity may be viewed as central. Does this work? The "key aspect" of understanding solidarism is "the possibility of 'neutralising' social conflict through the satisfaction of convergent interests."[9] The solidarism approach thus presents two major problems. First, it presupposes societal cohesion, which seems, however, to be the very first victim of economic crisis, as threats to pension plans, health insurance, and labor standards, and most of all unemployment, endanger the bonds of social solidarity.[10] Second, it relaxes the constitutional duties of the state (especially when these are "things governments have to do even if they don't want to")[11] while, even in the softest version of social rights protection as constitutional obligations, the legislator still remains the guardian of these rights.

According to the above analysis, the legislator appears to be the protector of social rights, being responsible for their activation and realization, whereas in terms of the civil rights narrative, the legislator is perceived as a source of limitations threatening rights. Even in cases where social rights are considered justiciable, the interpreter's quest is to specify their content in order to force the legislator to take social welfare measures, while civil rights jurisprudence focuses on blocking the legislator's interference. In that sense the main concern in social rights adjudication is respect for the separation-of-powers doctrine, whereas the foremost concern in civil rights case law is imposing limitations on the legislator through the application of proportionality.[12]

The above remarks are related to a wider transformation of fundamental rights, expressed primarily with the distinction between subjective rights and objective norms, that is with the recognition of the existence of a subjective and an objective

[9] *See* the definition of solidarism and the analysis of its vital role in connection to social rights in Italy in Giorgio Bongiovanni, *Social Rights in Italy*, *available at* http://www.tsd.unifi.it/cittadin/papers/bongiova.htm (accessed on March 3, 2011).

[10] As W. Forbath puts it, approaching social rights in the US context: "We have seen a crusade against corporate and governmental responsibility sweeping like a grim reaper through pension plans, insurance, and labour standards; cutting the bonds of social solidarity. . . ." *See* William E. Forbath, *Social and Economic Rights in the American Grain: Reclaiming Constitutional Political Economy*, *in* The Constitution in 2020 55, 63 (Jack M. Balkin & Reva B. Siegel eds., 2009).

[11] See that "definition" of constitutional duties in Mark Tushnet, *State Action in 2020*, *in* The Constitution in 2020, *supra* note 10, at 69,72.

[12] Alexy, supra note 1, at 338–340; Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 Int'l J. Const. L. (I·CON) 663 (2008).

dimension.[13] Civil rights usually create justiciable claims, while social rights in most cases ground objective obligations as binding on the government, although these obligations do not correspond to subjective rights. Thus the principle of proportionality, which was developed as a method of review applicable on justiciable claims, appears to lack any remarkable utility in connection to objective obligations. It is of particular interest that the European Union Charter of Fundamental Rights reflects the distinction between civil and social rights, treating the latter as non justiciable principles, which may be implemented through legislative or executive acts but do not give rise to direct claims for positive action.[14] Thus they become judicially cognizable only when courts rule on the legality of such acts and must therefore interpret and review them.[15]

It is also noteworthy that in the exceptional cases where social rights are considered, either by theory or by case law, as subjective rights giving rise to justiciable claims, the principle of proportionality is invoked and approached in the traditional way, i.e. in the way it is applied to review statutory limitations on civil rights. In such cases, social rights are treated as having a minimum core,[16] an inviolable content, and proportionality is applied to limit the limitations imposed on this subjective right.[17]

The application of proportionality in accordance with the above traditional line of reasoning, which leads to an identical, indistinguishable use of the test in social rights cases as well as in civil rights cases, results in an unchanging approach that is poorly suited for meeting the demands set by the particularities of social rights, which are subject to continuous negotiations since their realization carries financial cost. More precisely, proportionality is treated as a method used to review and limit legislative constraints applicable only after the content of the right has been determined. The utility of proportionality for delineating the content of the right is thus ignored.

Two aspects of proportionality thus appear:

- A defensive aspect: proportionality as a tool for defending rights against limitations. This aspect has been traditionally applied in the field of civil rights.
- A creative aspect: proportionality as a tool for forming the content of the right. This is of particular importance for determining the content of social rights, a task which requires a balancing of various interests—a balancing that can be done only through the use of proportionality.

[13] Robert Alexy, *Grundrechte als subjektive Rechte und objektive Normen* [Fundamental Rights as Subjective Rights and Objective Norms], 29 Der Staat 49 (1990).

[14] Art. 52(5) of the Charter of Fundamental Rights of the European Union.

[15] Xenophon Contiades, *Social Rights in the Draft Constitutional Treaty*, *in* A Constitution for the European Union: First Comments on the 2003-Draft of the European Convention 59 (Ingolf Pernice & Miguel Poiares Maduro eds., 2004).

[16] The minimum core has been an object of intense criticism for various reasons, *see, e.g.*, Karin Lehmann, *In Defense of the Constitutional Court: Litigating Economic and Social Rights and the Myth of the Minimum Core*, 22 Am. U. Int'l L. Rev. 163 (2006); Brigit Toebes, *The Right to Health*, *in* Economic, Social and Cultural Rights: A Textbook 169, 176 (Asbjørn Eide, Catarina Krause & Allen Rosas eds., 2d. ed. 2001).

[17] *See* George Katrougalos & Daphne Akoumianaki, *L'application du principe de proportionnalité dans le champ des droits sociaux* [The Application of the Principle of Proportionality in the Field of Social Rights], *available at* http://www.juridicas.unam.mx/wccl/ponencias/9/155.pdf (accessed on Dec. 3, 2010).

This dual function of proportionality becomes even more obvious during the judicial review of the constitutionality of laws. When the judge reviews the constitutionality of a legal provision and finds there has been a violation of a civil right, he invalidates the impugned provision (defensive function). On the contrary, when reviewing legislation to ensure respect for social rights, the judge is not inevitably constrained to invalidate the impugned provision, but shall unavoidably yet indirectly make suggestions to the legislator as to the measures he must adopt in order to materialize his obligations. Therefore, in its creative dimension, the principle of proportionality dictates the steps of a structured balancing test, in order to enclose in the fluid, flexible content of social rights the demanding balancing acts regarding the social, economic, and fiscal policy. Such balancing acts become more crucial in the era of economic crisis and destabilization of the welfare state, as the lawmaker and the judge are required to decide who shall bear the burden of the cuts and the restructuring of redistribution mechanisms. These developments shall trigger the activation of the protective umbrella of social rights rather than weaken their enforceability by confirming the lack of justiciability.

3. Proportionality balancing in the field of social rights

Before analyzing further the way in which the principle of proportionality may be used to determine the content of social rights, it is useful to trace and delineate the transformations of proportionality that render this creative function possible. The metamorphosis of proportionality is already taking place in the field of civil rights.[18] The traditional application of proportionality aims to reveal whether a statutory limitation imposed on a fundamental right is justifiable. In accordance with that approach, the principle of proportionality was developed as a tool indispensable for reviewing the constitutionality of laws limiting fundamental rights.[19] This function of proportionality was further enhanced and elaborated by the jurisprudence of the European Court of Human Rights,[20] which dictates that proportionality must be respected and applied by all member states of the European Convention of Human Rights.[21]

The detailed analysis of appropriateness, necessity, and *stricto sensu* proportionality and their application in a unified manner throughout the years to the review of

[18] Adrienne Stone, *The Limits of Constitutional Text and Structure*, 23 Melbourne U. L. Rev. 668 (1999); Stephen Gardbaum, *A democratic Defense of Constitutional Balancing*, *available at* http://ssrn.com/abstract=1345348.

[19] *See* Francis G. Jacobs, *Recent Developments in the Principle of Proportionality in European Community Law*, *in* The Principle of Proportionality in the Laws of Europe (Evelyn Ellis ed., 1999); Iddo Porat & Moshe Cohen-Eliya, *American Balancing and German Proportionality: The Historical Origins*, 8 Int'l J. Const. L. (I·CON) 263 (2010).

[20] On the use of proportionality by the European Court of Human Rights, *see* Jeremy McBride, *Proportionality and the European Convention of Human Rights*, *in* The Principle of Proportionality in the Laws of Europe, *supra* note 19, at 23; Marc-André Eissen, *The Principle of Proportionality in the Case-Law of The European Court of Human Rights*, *in* The European System for the Protection of Human Rights 125, 126–131 (Ronald St. J. Macdonald, Franz Matscher, & Herbert Petzhold eds., 1993).

[21] *See* Jonas Christoffersen, Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights 31 (2009).

violations of rights in different legal orders has rendered proportionality an inherent part of fundamental rights. Proportionality emerges as the leading way to approach competing rights, a tool used globally to evaluate judicially legislative choices—respect for proportionality thus becoming the foremost consideration that must be taken into account by the lawmaker when drafting policies that influence fundamental rights. The obligation of the legislator to respect proportionality has therefore acquired a concrete content.[22] A line of reasoning is dictated to the lawmaker by creating awareness of the tests his decisions must satisfy when they touch upon entrenched rights.

Consequently, proportionality is conceived as expanding the authority of the judiciary. The judge performs a balancing act when reviewing choices made by the lawmaker, which allows him, or even requires him, not only to analyze the facts of the case but also to evaluate the rights and principles at stake, taking into consideration the underlying moral and political standards.[23] Yet, proportionality constrains the judge, binding him to follow specific elaborate steps, dictating the route he has to follow when reviewing legislative limitations on fundamental rights. Binding as it may be upon the judge, proportionality still entails that balancing be necessarily performed during the search for other, potentially available measures and in order to evaluate the limitation in the light of its aim.[24] Does this mean that in the "age of balancing"[25] the core content of rights is but a nostalgic memory[26] and that proportionality has shifted away from its traditional function, which presupposed that fundamental rights have an inviolable core content?

The transformation of the doctrine is more obvious and becomes more crucial when proportionality is applied to review limitations imposed on social rights. Balancing is an inherent feature of social rights due to their above-mentioned particularities. Their content is ever dependent upon the competition of interests and the resources available. This means that where social rights are concerned, the discretion available to the legislator to make political choices is even wider. As a result, the task of reviewing judicially such choices is far more difficult, dependent dangerously on political considerations and balancing. As a tool designed to perform that challenging task,

[22] *See* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 Colum. J. Transnat'l L. 68 (2008).

[23] For an analysis of the way the judge applies balancing and proportionality and a comparative approach of American balancing, strict scrutiny and the use of proportionality by the ECHR, *see* Alkmene Fotiadou, Stathmizontas tin Eleftheria tou Logou [Balancing Freedom of Speech] 117 (2006). On the same subject *see also* Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 Int'l J. Const. L. (I·CON) 468 (2009); Madhav Khosla, *Proportionality: An Assault on Human Rights?: A Reply*, 8 Int'l J. Const. L. (I·CON) 298 (2010).

[24] *See* the analysis of proportionality as a balancing test *in* Simon Evans & Adrienne Stone, *Balancing and Proportionality: A Distinctive Ethic?*, *available at* http://www.enelsyn.gr/papers/w15/Paper%20by%20Prof%20Simon%20Evans%20and%20Prof%20Adrienne%20Stone.pdf (accessed on Oct. 1, 2010).

[25] *See* Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943 (1987). For the development of balancing *see also* Iddo Porat, *The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law*, 27 Cardozo L. Rev. 1393 (2006).

[26] For this phenomenon in the context of the "deformalisation" of law connected to the use of balancing and proportionality *see* Olivier de Schutter, Fonction de juger et droits fondamentaux [The Function of Judging and Fundamental Rights] 1 (1999).

proportionality thus acquires new qualities. It must be noted that the difficulty of the task is also caused by the following particular feature of social rights: from the aspect of the right-holder the violation always seems to reach the core content of the right, while from the aspect of governmental policy the same issue may lie in the margin of the rights' protective scope.

A first reaction of theory and jurisprudence to the intensification of judicial review of the constitutionality of laws triggered by the rigorous proportionality scrutiny[27] is resorting to self-restraint theories. Self-restraint binds the judge to remain within a specific scope while deciding on the constitutionality of a provision, to keep him from substituting his own opinion for the opinion of the legislator who has the authority to make the political decisions.[28] Failure to remain within this scope constitutes a violation of the separation of powers, which blurs the roles of the judiciary and the legislature. Another way to escape the danger of judicial review trespassing on areas strictly confined to political decision making, such as the field of social policy, was to treat social rights as rights with limited justiciability. As analyzed above this tendency was abandoned and social rights are recognized as legally enforceable.

The enforcement of social rights in a way that would not involve overreaching political decision-making by the judiciary could alternatively be achieved by narrowing proportionality review, i.e., by not examining all the steps. Confining review to the examination of appropriateness would contribute to avoiding the evaluation of the aim of the limitation. Proportionality, however, by definition involves an evaluation of the aim of the limitation, a juxtaposition of the measure taken, and the goal it seeks to achieve. What proportionality has to offer is a legal method to perform this task, all political, economic or ethical considerations yielding to a highly disciplined legal approach. Appropriateness is an indispensable step of proportionality; nevertheless, it is a prerequisite easy to satisfy. Confining review to appropriateness would exclude from judicial review the greatest number of statutory violations of rights. It does not work for civil rights and it cannot work for social rights either without amounting to non-enforceability.

The crucial problem is how to restrain judicial decision-making, when subject to review are political decisions that have a strong impact on fundamental rights. Neither the self-restraint approach, nor denying the justiciability of social rights, or confining proportionality review to the examination of appropriateness are adequate or even appropriate for ensuring that the judge not take any political decisions. Proportionality may serve as a restraint imposed both on the lawmaker and the judge. The lawmaker has an obligation to respect proportionality when drafting legislation imposing statutory limitations on rights, being aware that his measures must withstand proportionality review. The judge may only approach the decisions of the lawmaker through a structured, disciplined use of proportionality, which restrains him to follow convincingly a particular line of reasoning.

[27] On the intensity of proportionality review *see* Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 Cambridge L. J. 174 (2006).

[28] On judicial self-restraint in social rights adjudication *see* Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-form Versus Weak-form Judicial Review Revisited*, 5 int'l J. Const. L. (I·CON) 391 (2007).

This also works vice versa: the judge imposes an obligation to the lawmaker to give reasons. In other words "in enforcing ends-means tests, courts push lawmakers and administrators into a judicial mode, requiring them to reason as the judge will, that is, to consider the proportionality of their own activities."[29] This sets the grounds for an interaction between lawmaker and judge, imposing constrains on both, which may ultimately serve the purpose ensuring respect of rights. A channel of communication between judge and lawmaker is created, a conversation accessible to all, since a decision that upholds or reverses a statutory provision may draw great attention, if it is about a matter of pubic concern. Regarding "the relationship between the court and the competent legislative body as a dialogue"[30] that may trigger a public debate, in which constitutionally entrenched rights play "a more prominent role than they would if there had been no judicial decision,"[31] stresses the role of jurisprudence in placing fundamental rights in the centre of the debate concerning public policy, which is a victory in itself if the contested rights are social rights. Reminding the legislator of his constitutional commitments and pointing out the existence of less restrictive measures for achieving his objectives, forces him to engage in a means-ends analysis demanding an underlying justification for choices that affect rights.

Furthermore, the fact-specific character of proportionality balancing does not preclude different future legislative approaches pointing out unconstitutionalities, yet allowing the legislator to discover alternative ways to reach his aims. The delineation of the content of social rights through a dialogue where proportionality operates as the mediating device,[32] upgrades the debate to a constitutional level setting the ground rules for the pursuit of goals and the weighing competing interests.

Proportionality undergoes transformations in order to fulfill the above requirements. The greatest asset of proportionality, which is very obvious where social rights are at stake, is that it is not applicable only when rights are subjected to limitations, but it is also useful when rights and interests compete and must be balanced against each other. The gradual development of proportionality consists exactly in its operation and elaboration as a balancing technique, which takes its traditional function as a limitation of statutory limitations a step further. These two aspects of proportionality are not conflicting but complementary.

When applied in the field of social rights, proportionality operates as a limit to limitations, but it is of even greater importance that it serves the balancing of conflicting interests delineating the content of the rights at stake. Proportionality as balancing entails discovering, analyzing, and evaluating competing rights and interests leading to an *ad hoc* assessment of the impact the measure undergoing scrutiny will have on

[29] Alec Stone Sweet, The Judicial Construction of Europe 11 (2004).

[30] Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures*, 35 Osgoode Hall L.J. 75, 79 (1997).

[31] *Id.* at 79. *See also*, on the model of dialogue, Christopher Manfredi & James Kelly, *Six Degrees of Dialogue: A Response to Hogg and Bushell*, 37 Osgoode Hall L. J. 513 (1999).

[32] Proportionality as a mediating principle is approached in Richard Mullender, *Theorizing the Third Way: Qualified Consequentialism, the Proportionality Principle, and the New Social Democracy*, 27 J. L. & Soc'y 493 (2000).

them. Other alternatives are explored during the search of the availability of other measures to examine the necessity of the impugned measure, that is (to use the Canadian term) to ensure that the impairment, even if unavoidable, is minimal.[33] Ultimately a choice is made in each particular case, the balancing act is conducted resulting in a winning right or interest and an overridden one. Once performed, this balancing exerts an influence on the rights at stake that lingers on. Rights are thus structured through their endless interaction with other rights and interests, incorporating each confrontation and its outcome. Their content is rendered open-ended and may be depicted as a mosaic where tiles are perpetually added. Proportionality becomes thus an intrinsic part of rights, serving the continuous delineation of their content.

The difficult question that follows is whether proportionality review leads to stronger or weaker rights due to its balancing features. Where social rights are concerned the application of proportionality draws them nearer to civil rights by exposing them to the endangerment of judicial balancing acts. Nevertheless, what may be seen as a deformalization of the normativity of civil rights is enhancing the enforceability of social rights. The challenge of dealing with issues that may not be seen as strictly or primarily legal is not new to courts. A wide ranging scope of political, philosophical, and moral issues are translated into legal issues as a result of the constitutional entrenchment of civil rights. Proportionality facilitates this "translation," while it may also facilitate the task of judges dealing with the kind of political and budgetary considerations that underlie the implementation of social rights. Subjecting social rights in a rationale shared with civil and political rights through the use of proportionality, that is subjecting them to the narrative of proportionality[34] which is becoming a constitutional Esperanto,[35] solidifies the content of social rights more than a unending struggle to settle for a minimum core.

Proportionality thus does not result in the proceduralization of social rights, but is substance-generating concretizing their content. In cases where the right at stake may give way, which is the price to pay when exposing rights to *ad hoc* balancing acts, as principled and rational as they may be, this does not strip the right of its strength. It is the same way when, for example, free speech prevails over privacy (or vice versa) in a specific case: the normativity of the defeated right does not fade away.

Dependent upon the economic contingencies and the inevitable fluctuations of economic growth, the content of social rights is by definition open-ended and ever-changing, subject to continuous balancing acts. If the scope of civil rights in the age of balancing may be conceived as a mosaic rather than protective circles, social rights are inevitably formed like a mosaic pattern with interchangeable components due to their inescapable dependency upon external factors such as social conflict, economic

[33] *See* Grégoire Webber, *Proportionality, Balancing, and the Cult of Constitutional Rights*, 23 Can. J. L. & Jurisprudence 179 (2010).

[34] For the "language and culture of tiers" connected with proportionality *see* Frank I. Michelman, *Foxy freedom?*, 90 B.U. L. Rev. 949, 962 (2010).

[35] For the rise of proportionality as the prevalent method of comparative constitutional adjudication, see Ran Hirschl, *The Rise of Comparative Constitutional Law: Thoughts on Substance and Method*, 2 Indian J. Const. L. 11, 12 (2008).

growth, political and ideological trends. Proportionality as an inherent part of social rights solidifies their content, giving life to their constitutional status. While the content of rights is endlessly re-definable, proportionality may construe this content by setting the limits to statutory interventions, dictating how the balancing tests are conducted, taking also into account the changing economic and social facts.

This particular aspect of proportionality as balancing, exercised to review the constitutionality of statutory measures that infringe social rights, is affirmed by the case law of constitutional courts dealing with social rights cases that do not ground unconstitutionality on the violation of a minimum core of social rights, but on violations of proportionality. From the judge's standpoint, proportionality presents a familiar tool.[36] When dealing with social rights, tracing the core content involves a theoretical analysis that may trigger a self-restraining reaction, whereas seeking a reasonable relation between the measure and its aim the judge feels more at home with the task he has to perform.

4. The second youth for social rights in the era of economic crisis

The global financial crisis has caused social spending cuts, cuts to wages, pensions, and public benefits, leading to severe political reactions and confrontations, as priorities have to be set. Where social rights are entrenched within the Constitution, i.e., primarily in continental Europe, this resulted in litigation translating the political confrontations into legal controversies that take place before constitutional courts. Perhaps for the first time in history, the judicial system in Europe confronts such a strong challenge to apply social rights, that taking place within the context of a debt crisis unprecedented since the great depression of 1929. This poses difficult questions for legal theory and practice, testing the strength of the constitution in times of crisis.

The crucial question is whether social rights can function as a shield against the deregulation and deconstruction of welfare state. A similar debate took place in Latin American countries as well as in post communist countries in Europe, in the mid-1990s, leading to significant constitutional court decisions, as the same constitutional issues were litigated in different legal orders.

In this context social rights enjoy a second youth in two aspects. On one hand, social rights are faced with new threats and pending limitations; on the other hand, constitutional theory and jurisprudence are forced to explore new tools in order to protect them under extra-ordinary circumstances. The key issue is defining the content of social rights in order to come up with a way to shield them from limitations imposed due to the economic crisis. Proportionality emerges as the basic tool to do that.

[36] David M. Beatty, The Ultimate Rule of Law 147 (2004). According to Beatty applying proportionality to a "discrete set of facts" is what judges do best—what makes it "irresistible" is that "it works." *See*, however, Richard Posner's criticism of Beatty's optimism *in* Richard Posner, *Constitutional Law from a Pragmatic Perspective*, 55 U. Toronto L. J. 299 (2005).

The way in which proportionality is applied is closely related to crucial choices as to the content of social rights. Under the traditional approach, where proportionality operates as a limitation of limitations, the existence of a predetermined, fixed, core content is a prerequisite for legal protection. Where proportionality operates as a balancing test which has a mediating facet, enforceability is not hindered by the flexibility of the content of social rights. The application of proportionality as limitation to limitations includes the examination of appropriateness, necessity, and *stricto sensu* proportionality in the light of an inviolable core content. The non-violation of this minimum core content seems to offer an escape from engaging into elaborate evaluations and means–ends analysis. The infringed right is examined in reference to itself, thus ascertaining and maintaining the core content as the key issue. Policing the limit of limitations goes hand in hand with accepting the incommensurability of a strictly non-derogable deontological minimum core. The level of justification demanded for any derogations is therefore almost impossible to reach, defying any restrictions imposed due to economic and budgetary considerations.[37]

In the context of crisis this may scare off the judge, causing social rights to fall back into non-justiciability. Nevertheless, accepting that "rights do not lose their strength if they include social and economic considerations in their very definition,"[38] has the potential to trigger their reinforcement and further development due to their very ability to accommodate reality and conflicting policies. The burden is thus shifted to proportionality, as a method that can protect the substance of rights not by excluding them from conflict, building a wall around them, but by ensuring that this conflict is conducted in accordance to the constitution.

How is then proportionality helpful to rights claimants from the aspect of enhancing judicial enforceability? Regarding proportionality as a balancing method[39] brings forth the question of whether to attribute to the doctrine the assets but also the shortcomings of ad hoc balancing, or to consider it the holy grail of constitutional litigation,[40] as it is a balancing technique safeguarded from the danger of arbitrariness, being subject to a strictly legal discipline. In other words, is proportionality a flexible test enabling the judge to make a decision narrowly tailored to the specific demands of a case, conferring however upon him enough discretion to allow arbitrariness? Or does proportionality offer a framework for resolving conflicts between rights and interests, that ensures objectivity being a strictly legal formulation? The choice seems difficult, yet it reflects a misguided attempt to either find a panacea or to reject all balancing as arbitrary.

No method of review can preclude a certain degree of infusion of the personality of the judge into his judgements. Yet the way judges perceive their task makes a difference; it matters that judges write opinions as though they believe they are

[37] For an analysis of the different approaches justifying restrictions *see* Katharine Young, *The Minimum Core of Economic and Social Rights*, 33 Yale J. Intl. Law 113 (2008).

[38] *Id.* at 168.

[39] For an analysis of balancing as a structured method *see* Alexy, *supra* note 1, at 101–114.

[40] For the rapid diffusion of proportionality *see* Iddo Porat, *Some critical thoughts on proportionality*, *in* Reasonableness and Law 243 (Giovanni Sartor, Giorgio Bongiovanni, & Chiara Valentini eds., 2009).

examining the steps of proportionality to arrive to a rational accommodation of conflicting rights and interests. If judges believe that what they are doing is applying a strictly legal method in order to decide on the constitutionality of the impugned measure rather than exercise discretion,[41] this has an immense impact on the quality of their adjudication. Furthermore, the demand to satisfy specific criteria that have acquired a universal acceptance, due to their continuous elaboration in different constitutional and legal orders worldwide, adds a requirement to the formulation of judicial decisions that is bound to have an impact on their substantial outcomes as well.

When the judicial task involves the evaluation of public policies that infringe upon social rights, the way the judge understands his job may make the difference between eagerness and reluctance to conduct judicial review. Proportionality signals the availability of a way to approach conflicting interests as legal questions, that facilitates the judge to fulfill his constitutional mandate to safeguard the exercise of rights from statutory violations. The specificity and flexibility of proportionality allow the judge to feel that he remains within the scope of his mandate[42] while invalidating unconstitutional provisions, as he does not hinder the legislator from setting and pursuing his objectives.

The study of case law leads to the conclusion that while courts worldwide have since the 1990s increasingly accepted the normativity and justiciability of social rights, they are nevertheless quite reluctant to recognize the existence of a minimum core. When courts seem willing to accept that such an essential content exists, they tend to shrink protection to minimum subsistence. Thus, judicial protection of the core content does not necessarily broaden the protective area of social rights and ends up in confining them to minimum subsistence requirements; whereas using proportionality courts are more apt to expand protection. The crucial issue for courts is to remain within the boundaries of their mandate and not trespass upon the role of the legislative. Proportionality allows the judge to evaluate distributive policies, providing a test that while constraining "distributive patterns"[43] he does not trespass upon government authority to set the goals it shall pursue. Courts tend to reverse statutes due to unconstitutionality not because they are willing to accept the existence of a minimum core that everyone is entitled to enjoy and engage in describing it, but when they are shown that the lawmakers have not made fair choices in the way they have decided to interfere with social rights.[44]

[41] Mike Dorf, *Is the Right Answers Thesis Superfluous?*, *available at* http://www.dorfonlaw.org/2010/08/is-right-answers-thesis-superfluous.html (accessed on Oct. 10, 2010). Dorf approaching the right thesis debate suggests that "Dworkin is correct that judges write opinions as though they believe that they are discovering answers in legal materials rather than simply filling gaps and resolving ambiguities." This is also true for proportionality: what judges believe they are doing is of vital importance.

[42] Stephen Breyer offers an analysis of how the narrowness of the holding resulting from balancing serves a constitutional purpose by not hindering public debate. *See* Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution (2006).

[43] Beatty, *supra* note 36, at 147. For a critical approach of Beatty's analysis of the potential of proportionality *see* Vicki C. Jackson, *Being Proportional About Proportionality*, 21 Const. Commentary 803 (2004).

[44] Beatty, *supra* note 36, at 144.

What landmark decisions about social rights seem to share and what makes them comparable despite various differences in their legal and social context, is that they focus on the way governments came to the decisions under review.[45] The legislator's decision (or need) to take measures which are necessary, imposes a series of considerations that must be taken into account. The legislator must look for less restrictive ways to pursue his objectives, in the sense that he must consider the impact of his decisions on those who bear the burden of the limitations imposed on social rights. Hasty decisions, or decisions that seem to be based on arbitrary considerations, fail to convince courts as to their constitutionality.

A crucial issue emerging from the analysis of the case law is whether proportionality review functions always as a "weak" review technique and how does this affect rights. It could be argued that the use of proportionality balancing may result in depriving social rights of any substantial meaning, practically opening the way for any kind of regulation and any level of interference with the right. Proportionality may be seen as "weak" since it does not offer absolute rule-like protection and does not preclude the retreat of the right under the condition that its limitation is proportional. Most importantly, it does not force solutions on the legislative and the executive, but it creates the context of a public dialogue.[46]

Nevertheless, proportionality's strength lies in allowing the judge to give priority to social rights and force the legislator into entering a dialogue. This is enhanced by the narrowness of the holding: by deciding on a specific infringement of the right due to failure of the legislator to abide by proportionality, the judge provides protection to the right, strengthening it without however excluding the subject from future political debate. This debate is conducted in terms of a constitutional dialogue.[47] Proportionality based on the constitutional entrenchment of rights operates structuring their content and creating an interaction between lawmaker and judge. In that sense, the crucial question whether the constitution matters after all, considering the fluidity of the context of social rights and the intrinsic flexibility of proportionality, may be answered positively: the constitution matters greatly. While the minimum core approach may appear securing rights, it results in tying them down to minimum protection. The proportionality approach, on the other hand, poses as riskier but affords rights their constitutional content.

5. The interaction between proportionality and social rights in constitutional case law: Some examples

The economic crisis prompts judges as well as lawyers and scholars to turn to landmark cases that have endeavored to protect social rights in search for applicable legal

[45] On the way judges from different constitutional and political orders interact, *see* David Feldman, *The Internationalization of Public Law and its Impact on the United Kingdom*, *in* The Changing Constitution 108 (Jeffrey Jowell & Dawn Oliver eds., 2007).

[46] In that sense it is a "weak" review technique with a strengthening impact of rights. *See* Mark Tushnet, Weak Courts, Strong Rights: Judicial Review And Social Welfare Rights In Comparative Constitutional Law (2008); and Dixon, *supra* note 28.

[47] *See* the analysis of the difference between constitutional politics and ordinary politics *in* Michel Rosenfeld, Just Interpretations: Law Between Ethics and Politics 251 (1998).

formulations. As threats against social rights are multiplied, so do attempts to enforce them through litigation. Efforts to urge judicial intervention under the extreme circumstances of the economic crisis may prove beneficial for the elaboration of legal weapons to protect social rights, while at the same time they put their strength to the most strainful test. This poses the question of the extent to which borrowing arguments and concepts from different legal orders may be of help, especially in the field of social rights that are dependent upon socio-economic considerations and may therefore be more country-specific than civil rights.[48] Furthermore, the most famous social rights decisions worldwide have been issued by completely different courts: constitutional or supreme courts that operate within different systems of judicial review of the constitutionality of laws, with different structures, different function within the separation of powers system, different role within the society at large, and demonstrating different levels of judicial activism or self-restraint. Is the by-product of economic crisis a comparative jurisprudence bricolage,[49] that is, referring to case law from completely different courts just because "they are there," available and ready to use, in a sometimes desperate attempt to stop governments from curtailing social rights? Or does the fact that rights holders from different countries look out for examples from other legal orders seeking to protect their rights render the comparative study inevitable?

The widespread use of proportionality and its impact on social rights jurisprudence allows a comparative approach and facilitates the analysis of the differentiations between distinct conceptions of social rights. Nevertheless, it is remarkable that a series of landmark cases are invoked to support the justiciability of social rights, without, however, focusing on the method of review employed by the judge and the corresponding obligations dictated to the lawmaker concerning any interference with social rights.

The selective analysis that follows shall approach cases concentrating on the method of review and its impact on the right at stake. Starting from Eastern Europe, passing through South Africa, India, to Canada, and with a reference to the US and South America, the journey ends with examples from Western Europe in search for the impact of the method of review on social rights within pressing economic challenges. Although proportionality seems to have taken the lead as a method of review in constitutional adjudication, nevertheless its appearance in social rights case law is still random and has not yet been allowed to demonstrate its full potential. The following case studies explore the basic features of employing proportionality in assessing judicially social rights issues. It must be noted that despite their differences, proportionality, balancing and reasonableness are practically interrelated as methods of

[48] On the use of comparative constitutional law *see* The Migration of Constitutional Ideas (Sujit Choudhry ed., 2007); Ran Hirschl, *The Continued Renaissance of Comparative Constitutional Law*, 45 Tulsa L. Rev. 771 (2010).

[49] *See* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225, 1287 (1999) (based on a distinction made by C. Levi-Strauss, engineering and bricolage). The engineer chooses specific tool to achieve a goal, whereas the bricoleur uses whatever happens "to be at hand . . . to deal with a particular problem." On comparative constitutional law *see also* Defining the Field of Comparative Constitutional Law (Vicki C. Jackson & Mark Tushnet eds., 2002).

judicial review[50] being open-ended and context-specific. Reasonableness and proportionality impose guidelines for the justification of burdening rights formatting their content, and create the context for a dialogue between the judge and the legislator.[51] Thus, exploring the impact of the method of review in social rights jurisprudence ranges from approaching varying applications of proportionality to applications of reasonableness.[52]

A good example of the tendency to apply rigorous scrutiny on hastily adopted statutory measures is the recent decision of the Constitutional Court of the Republic of Latvia,[53] where the Court had to examine if there had been an infringement of the rights of pension recipients to social security. The Court pointed out that even in times of rapid economic recession the state is not entitled to derogate from a definite body of social rights and applied proportionality under the belief, that what leads to violations of the doctrine is "delay, unpredictability and inconsistency in the exercise of state power" because, when dealing with matters of common interest, public authorities have a duty to consider the matter "in due and coordinated manner for a reasonably long period of time." Accordingly, the Court based its decision on the consideration that the lawmaker had not "carried out objective and well-weighed analysis neither regarding the consequences of the adoption of the impugned provisions, nor regarding other, less restrictive means for the attainment of the legitimate end."[54] The legislator's task is to find a compromise between competing legislative-political ends and especially between legislative and constitutional principles. In order to perform this task the legislator must give "careful and detailed consideration" to the potential economic effect and social consequences of alternative solutions, which cannot be done in a few days.

The Court found that there had been a violation of the constitution because haste and insufficient involvement of experts did not allow the legislator to "duly consider alternative solutions and work out a lenient transition."[55] In other words, failure to consider with sufficient care the alternatives to the provisions under review and envisage a more moderate solution led to a finding of unconstitutionality. The obligation to look for other measures and, most importantly, to convince that such measures were seriously considered, becomes an inherent part of the right imposing specific duties on the legislator. The content of the right may be open ended and subject to

[50] The connection between proportionality, reasonableness and balancing as methods of judicial review is fully explored *in* Reasonableness and Law, *supra* note 40.

[51] For the dialogue created through judicial review *see* Mark Tushnet, *Dialogic Judicial Review*, 61 Ark. L. Rev. 205 (2008).

[52] Proportionality and reasonableness appear as part of the same phenomenon, consisting legal standards of judicial assessment with which judges are already familiar. *See* International Commission of Jurists, Courts and The Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability 21, 64 (2008), *available at* http://www.humanrights.ch/home/upload/pdf/080819_justiziabilitt_esc.pdf (accessed on Apr. 1, 2011).

[53] Judgement of the Constitutional Court of the Republic of Latvia, on 21 December 2009, in the case No. 2009-43-01.

[54] *Id.*

[55] *Id.*

changes and negotiations, nevertheless it must be delineated in accordance to the requirements of proportionality. Failure to meet these requirements when drafting policies amounts to violation of the constitution.

Thus, the Court does not attempt to trace the inviolable core content of the right in order to set limits to the legislator, but sets those limits by applying rigorous proportionality review. Respect for the substantial content of rights comes as a result from abiding by a series of obligations which dictate the manner in which choices affecting fundamental rights must be made. It is up to the lawmaker to find ways to resolve budgetary problems and deal with the economic crisis, therefore the court does not enter the field of political decision making, retaining nevertheless the role of the protector of social rights by ensuring through the application of proportionality that the legislator makes the above choices following the path dictated by the constitution. Important elements that have to be taken into consideration in the legislative balancing of competing interests are the citizen's legitimate expectations and confidence in the permanence of the legal order. The court is there to ensure that the legislator did indeed consider seriously all relevant factors in a way that would allow him to fulfill the requirements of proportionality. The court opens up a dialogue with the lawmaker spelling out the prerequisites of an intervention with rights that would meet the constitutionality requirements. Any future legislative approach comes in response to the judicial evaluation and at least attempt to show that due attention was paid to the evaluation of plausible alternatives. This dialogue, although not directed to the theoretical delineation of the right at stake, nevertheless it strengthens its substantial content by setting strict ground rules for shaping this content at a particular moment.

The above pattern resembles the rationale followed by the *Bokros* cases in Hungary, where reforms that had been introduced "practically overnight" (so that the country would abide by the demands of its creditors including the International Monetary Fund[56]) failed to fulfill the proportionality requirements and were therefore struck down by the Constitutional Court.[57] As Justice Solyom stated, the decisions were not against reforms but "the ways, timing and schedule were subject to constitutional control."[58] The legislator had the obligation to abide by proportionality and perform a "many sided analysis of life situations that would be expected in the application of the laws"[59] in order to convincingly demonstrate that he took into consideration the expected impact of the legislation. The Court did not get involved in reviewing the objectives, but interfered to review the way in which these objectives were pursued. Striking down the legislation due to lack of proportionality triggered a dialogue on how reforms should be made and what would be the role of social rights in Hungary.

[56] Beatty, supra note 36, at 143.

[57] For an analysis of these cases in the Solyom Court *see also* Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts, in* Postcommunist States of Central and Eastern Europe 181 (2005).

[58] Lajos Bokros & Jean-Jacques Dethier, Public Finance Reform during the Transition: The Experience of Hungary 460 (1998).

[59] *Id.*

While referring to a minimum subsistence level has very little to offer in terms of a rigorous constitutionality review, as far as the substantive content of rights is concerned, proportionality is very useful for establishing the content of rights. This is due to the fact that proportionality is employed to make sure that the lawmaker demonstrates respect for the content of social rights by showing that, before passing legislation, he seriously engaged in searching for less impairing alternatives. Courts can thus conduct judicial review eschewing accusations of judicial activism, which may result from attempts to establish a minimum core to social rights regardless of the resources available.

The South African Constitutional Court case law offers a characteristic example of this kind of approach. According to the Court, although "evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand the minimum core be provided to them."[60] Minimum core is thus "treated as possibly being relevant to reasonableness and not as a self-standing right."[61] This is a realistic stance: while impossible to give everyone access even to the minimum core-content of a service immediately, it is possible and can be expected of the state to act reasonably in order to realize the constitutionally entrenched socioeconomic rights. The availability of HIV medication to pregnant women for the prevention of mother-to-child transmission was thus founded on proportionality.[62]

The famous *Grootboom* case[63] provides a clear account of reasonableness. It states clearly that a court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. Yet reasonableness applies both to the conception of the measures as well as their implementation. Reasonableness is to be considered in accordance to the social, economic, and historical context, and in the light of the constitutional protection of rights as a whole. *Grootboom* gave hope to all proponents of positive rights by approaching the problem of homelessness, that is, addressing a right archetypical of the very notion of social rights. Its appeal is such that it had a supra-national impact on constitutional theory.[64] It made commentators easily overcome

[60] *See* South African Minister of Health v. Treatment Action Campaign, 20 02 (5) SA 721(CC) (S.Afr.).

[61] *Id.*

[62] *See also* Stylianos-Ioannis Koutnatzis, *Social Rights as a Constitutional Compromise: Lessons from the Comparative Experience*, 44 Colum. J. Transnat'l L. 74 (2005), *available at* http://www.columbia.edu/cu/jtl/Vol_44_1_files/Koutnatzis.pdf, according to which the Constitutional Court in TAC denied the existence of a a constitutionally protected minimum core and employed reasonableness to "deconstruct government arguments" on an *ad hoc* basis, while at the same time emphasized the importance of judicial self-restraint.

[63] Government of the Republic of South Africa v. Grootboom and Others 2001 (1) SA 46 (CC) (S. Afr.).

[64] For the South African experience *see*, indicatively, Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, *in* Designing Democracy: What Constitutions Do 231 (2001); Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 Colum. Hum. Rts. L. Rev. 321 (2007); Dennis M. Davis, *Socioeconomic rights: Do they deliver the goods?*, 6 Int'l J. Const. L. (I·CON) 687 (2008).

any comparability hesitations. *Grootboom* occupies central position (along with the case law that followed) in most literature on social rights, not because its central holding is easily transplantable, or because the South African constitutional culture bears similarities with other legal cultures facilitating constitutional borrowing, but because of the accessibility of its rational. Grootboom reasonabless makes sense. It engages in a means–ends analysis taking into consideration the problem of resources by linking the obligation to attain the goal expeditiously and effectively with the availability of resources, which is thus considered an important factor in determining what is reasonable. Nevertheless, it allows the legislator wide discretion, explaining that the consideration of reasonableness does not entail enquiring whether other more desirable measures could have been adopted, or whether public money could have been better spent. This appears to be equivalent to the first tier of proportionality. The actual application of necessity does not, however, consist in the examination of the existence of more desirable measures, but of measures less restrictive of the right. In that sense, reasonableness should not necessarily preclude the consideration of other measures. This consideration suggests ideas to the legislator for possible ways to perform the balancing inherent in drafting social rights policies.

The Indian Court's social rights adjudication[65] also offers examples to that direction. The famous *Olga Tellis* decision, which attempted to approach judicially the issue of homelessness, uses reasonableness to reconcile competing interests. These interests were those of the pavement dwellers on the one hand and of the pedestrians on the other (in the words of Olga Tellis,[66] the rights of the slum dwellers against those of the propertied classes). The Court had to decide whether those living on public pavements could be evicted. To do so, it formulated a right to livelihood protected under the right to live. This right could be limited if the government's action was reasonable. The main focus of the decision is not the content of the right, but establishing the unreasonableness of the government's decision. Reasonableness presupposed the opportunity of being heard before eviction and that slums in existence for over twenty years could not be removed unless alternative sites of accommodation were provided. The same rationale was followed one decade later in the *Ahmedabad* case.[67] Reasonableness is attached to procedure.[68] This version of reasonableness, although not as rigorous as the South African version or as proportionality balancing, allows nevertheless a rational balancing of competing rights without adhering to an evasive minimum content, and as it dictates requirements to the legislator, it allows the substance of rights to evolve while it initiates the judge–legislator dialogue.

[65] Madhav Khosla offers a new model for reading social rights jurisprudence based on the Indian example *in* Madhav Khosla, *Making Social Rights Conditional: Lessons from India*, 8 Int'l J. Const. L. (I·CON) 739 (2010). According to his analysis "Olga Tellis" is neither based on minimum core or on reasonableness, as the Court does not inquire whether each person has access to housing or reasonable numbers of persons have access to housing.

[66] *Available at* http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=401006.

[67] Ahmedabad Municipal Corporation v. Nawab Khan, 11 S.C.C. 121 (1997).

[68] According to the Court, "[t]he substance of the law cannot be divorced from the procedure. . . . [H]ow reasonable the law is, depends upon how fair is the procedure prescribed by it."

From a different point of view the Canadian Supreme Court[69] employs a structured, disciplined use of proportionality to engage in rigorous judicial review in the field of social rights, displaying nevertheless remarkable self-restraint. In the famous *Eldridge* case,[70] which concerned the availability of medical interpretation to people with impaired hearing, the Court was faced with the provincial government's argument that such an obligation would "interfere with the government's ability to choose among competing priorities in the healthcare system."[71] The Court concluded that "the government has manifestly failed to demonstrate that it had a reasonable basis for concluding that a total denial of medical interpretation services for the deaf constituted a minimum impairment of their rights" (¶ 87). In the subsequent *NAPE* case[72] the Court approached the impact of the financial crisis on the scope available to the government to take measures, admitting that a significant scope must be available to elected governments, under the condition however that all measures are subject to proportionality. More specifically, measures must be proportional "both to the fiscal crisis and to their impact on the affected *Charter* interests" (¶ 64). According to the Court, budgetary constraints and pressing government priorities always exist—the courts must not close their eyes to financial emergencies, however they have to remain skeptical where infringements on rights are imposed. To do otherwise would devaluate the constitutional protection of rights.[73]

Similar formulations have been employed by the Argentine Supreme Court regarding the reasonableness of limitations imposed on the right to health, and by the Czech Constitutional Court regarding the necessity and proportionality of eligibility requirements for pension benefits.[74]

The impact of accepting social rights as justiciable, yet accompanied with reluctance to engage in a full-fledged proportionality review appears with clarity in the French Conseil Constitutionnel case law upholding the constitutionality of the "new labor contract," and more recently the pension reform bill attempting to cut pension deficit. The French Conseil Constitutionnel decision[75] upheld the constitutionality

[69] Martha Jackman & Bruce Porter, *Justiciability of Social and Economic Rights in Canada*, *in* Socio-Economic Rights Jurisprudence: Emerging Trends in Comparative International Law 209 (Malcolm Langford ed., 2009).

[70] Eldridge v. British Columbia (Attorney General), 3. S.C.R. 624 [1997] (Can.), *available at* http://csc.lexum.umontreal.ca/en/1997/1997scr3-624/1997scr3-624.html.

[71] Jackman & Porter, *supra* note 69, at 13.

[72] Newfoundland (Treasury Board) v. N.A.P.E., 2004 S.C.C. 66, [2004] 3 S.C.R. 381 (Can.), *available at* http://scc.lexum.umontreal.ca/en/2004/2004scc66/2004scc66.html.

[73] According to the Court in NAPE, ". . . courts will continue to look with strong scepticism at attempts to justify infringements of Charter rights on the basis of budgetary constraints. To do otherwise would devalue the Charter because there are always budgetary constraints and there are always other pressing government priorities. Nevertheless, the courts cannot close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis." (¶ 72)

[74] *See* Supreme Court of Argentina, decision of 18 Dec. 2003; Constitutional Court of the Czech Republic, Pl. US42/04. 6 June 2006); *see also* Courtis, *supra* note 7, at 379, *available at* http://www.erasmuslawreview.nl.

[75] Decision no. 2006-535, *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2006/2006-535-dc/decision-n-2006-535-dc-du-30-mars-2006.1007.html.

of the basic provisions of the "law on the equality of chances," providing for a new employment contract for employees aged under twenty-six, which facilitated firing, allowing flexibility to employers for a trial period of two tears. The "new labor contract" aimed to combat unemployment and to give young people access to the labour market, posing nevertheless serious issues of respect of the principle of equality, the protection of dignity, and the right to work. According to the Court, the legislator could decide how to differentiate the application of the principle of equal treatment in order to achieve the general good by facilitating the employment of young people, unless the measures chosen were demonstrably unsuitable to achieve the goal. Since the measures were not obviously unsuitable the Court did not explore whether the goal set by the legislator could have been achieved with other measures.

This method of review falls short even of the first tier of proportionality, which entails suitability and not demonstrable suitability. Thus, judicial self-restraint expressed by employing an extremely weak method of review amounts to denial to protect the right at stake. Use of proportionality in this case would at least construct a tangible content for the right at stake. Affording social rights constitutional status yet passing legislation only through a test of demonstrable unsuitability results in weakening rights, while applying proportionality, would enhance the right in question even if its limitation was found to be proportional. Demanding from the legislator to seriously look for less restrictive means to achieve his goal and satisfy a more stringent test would force the legislator into a dialogue that would lead to strengthening the content rights.

The importance of the review method is also obvious in the decision concerning the constitutionality of legislation aiming to preserve the pension system,[76] raising to sixty-two the age at which a person is entitled to a retirement pension and to sixty-seven the age at which a person is entitled to a full retirement pension. Allowing the legislator to deviate from the principle of equality in order to serve the general interest by choosing the concrete measures of implementation he sees fit under the condition that the "measures are not inappropriate for the purpose which Parliament has sought to achieve" and that the means–end connection is direct, led to upholding the contested legislation. In this case, the refusal to engage in a more rigorous proportionality review also results in weakening social rights despite their constitutional protection.

Approaching social benefits from a different aspect, while examining the constitutionality of legislation regulating social assistance benefits, the Federal Constitutional Court of Germany adopts the minimum subsistence aspect stemming from the constitutional protection of human dignity.[77] Subsistence minimum gets upgraded thus to material conditions indispensable not only for a person's physical existence, but also for "a minimum participation in social, cultural and political life."[78] The legislator is responsible for finding the way to achieve this goal and has the latitude for

[76] Decision no. 2010-617 DC of Nov. 9, 2010, *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en2010_617dc.pdf.

[77] *See* Judgment of Feb. 9, 2010, 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09, *available at* http://www.bundesverfassungsgericht.de/en/bvg10-005en.html.

[78] *Id.*

giving concrete shape to the corresponding constitutional claims. The Court offers an analysis of what the legislator must do: the legislator must (a) take up and describe the objective of ensuring an existence that is in line with human dignity in a manner that does justice to the constitution; (2) choose within the boundaries of his latitude a fundamentally suitable method of calculation for assessing the subsistence minimum; (c) ascertain completely and correctly the necessary facts; and (d) keep within the boundaries of what is justifiable within the chosen method and its structural principles in all stages of calculation, and with plausible figures.

Most importantly, to make this review by the Federal Constitutional Court possible, the legislator is obliged "to plausibly disclose the methods and stages of calculation employed in the legislative procedure."[79] The choices are the legislator's to make, the way in which those choices are made, as well as the way in which they are expressed, are dictated by the Court. The constitutionality of measures is dependent upon their reviewability. Although not using balancing, what this approach shares with the proportionality approach is that it creates a dialogue between judiciary and legislature. The starting point of this conversation is a clear description of the objective by the legislator and openness at all stages of lawmaking. The Court adopts the tendency to impose on the legislator a specific line of reasoning, an exact way to justify his decisions.[80]

The case law examples of Latvia, France, and Germany have recently dominated constitutional discourse in Greece, that faces tough austerity measures, in order to abide by the obligations set out by the EU–IMF bailout mechanism and by the loan agreement signed with the European Union and the International Monetary Fund, known as the Memorandum (law no. 3845/2010). Civil suits seeking the cancellation of the Memorandum, challenging the constitutionality of wage and benefit cuts, were brought before the Council of the State (the Supreme Administrative Court of Greece) by the Athens Bar Association, regional bar associations and the trade unions, including the civil servants' union federation, pensioners' associations, several other bodies, and individuals.

The two Council of State legal rapporteurs, assigned to study the case, recommended in November 2010 the rejection of these civil suits on the grounds that the Memorandum is constitutional and in compliance with European and international legislation.[81] Regarding the constitutionality of wage and benefit cuts,

[79] *Id.*

[80] A great challenge would be to imagine how the proportionality tests could be employed in US social rights jurisprudence. The idea of proportionality has already started to make its appearance in the USA. *See* Stephen Breyer, Making Our Democracy Work: A Judge's View (2010). It must be noted, however, that the main context for the elaboration of social rights is that of the state constitutions and the state courts case law. A good example is the case law dealing with de facto segregation in schools trying to remedy de facto inequality. Cases like *Sheff* show the potential of state constitutional protection of social rights. Adjudicating such cases could not only expand the dialogue which occurs between legislator and courts, but also trigger an interaction between state and federal constitutionalism. *See* Sheff v. O'Neill, 678 A.2d 1267, 1276 (Conn. 1996) Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989) and analysis *in* Helen Hershkoff, *State Courts and the "passive virtues" : rethinking the judicial function*, 114 Harv. L. Rev. 1833 (2001).

[81] *See* press release of the Greek Council of State, *available at* http://www.ste.gr/portal/page/portal/StE/PressReleases#a150.

the Coucil of State rapporteurs accepted that they fall under the protection of property in accordance to article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms and proceeded to examine the aim of the limitation. The rapporteurs stated that the goal of the measures is to protect the higher public good, serving the need to cut the country's excessive fiscal deficit and external debt, and abide by the obligations Greece has undertaken within the framework of the Economic and Monetary Union, and proceeded to examine the necessity and proportionality of the measures. They stressed that these measures were a part of a whole series of measures which sought not only to cut expenses but also to augment state revenues to save Greece from defaulting on its depts.

What seems to be of vital importance is that the impugned measures constitute only a part of the broader agenda of promoting fiscal consolidation and structural reforms of the Greek economy. Being part of a wider program of fiscal consolidation, the attempted reform is not focused on measures to cut wages and benefits for employees of the public sector and pensioners. This line of reasoning is important for the application of proportionality. The rappoteurs do not see a violation of necessity, because the legislator seems to have worked out a larger program, which indicates that he did not fail to consider alternative measures. Thus, three elements are of crucial importance. The first one is the weight of the goal sought by the impugned measures which aimed to the fulfillment of the country's commitments, undertaken to activate the mechanism of financial support of the Greek economy, and of the obligations stemming from the Treaty provisions of the Economic and Monetary Union. The second element is that the legislator worked out a program for the economy—thus taking all alternatives into consideration. The third element is that the cost of the reform affects all citizens—that there is no violation of "fair shares" in bearing the cost of the reform. Therefore, if the Court follows the opinions of the rapporteurs, as deemed possible, it shall choose to adopt proportionality as a means of self-restraint, in line with the recent developments in social rights litigation. This would actually allow the Court to avoid deconstructing the protective shield of social rights, declare that the legislature, despite the economic, crisis must respect social rights and must also respect proportionality by carefully considering all available measures, and yet decline to strike down the contested legislation. This would be in line with the Council of the State's adjudication on social rights.[82]

The Court has so far demonstrated a pragmatist approach, choosing to avoid theoretical aspirations to define the content of social rights and focusing on specifying the consequences of their constitutional entrenchment in particular cases. Thus, it has achieved to protect social rights as institutional guarantees in the context of specific cases, without however trespassing on the area of political decision making that belongs to the lawmaker.[83] The Court has exercised rigorous constitutionality review

[82] *See* Xenophon Contiades, Sintagmatikes Egiisis kai Thesmiki Organosi tou Sistimatos Kinonikis Asfalias [Constitutional guarantees and institutional organization of the social security system] (2004).

[83] *Id.* at 149.

in several cases without however demonstrating judicial activism.[84] What the Council of State shall decide on the "memorandum case" will certainly not only influence the future of the reform in Greece, but also the Courts profile. Proportionality seems to be the best chance the Court has to produce a decision in line with its mandate, as well as the constitutional entrenchment of social rights. This is particularly important, as this decision is bound to trigger a heated legal debate whatever the outcome. The legislator, even if the measures are not invalidated, will have to consider the rationale of the Court. In the midst of an unprecedented debt crisis in Greece this decision will certainly expose the Court itself to criticism, producing not only a dialogue but possibly a "backlash,"[85] involving in a passionate discussion the people at large—a discussion which nevertheless shall be conducted in terms of constitutional law and rights protection. This "backlash" may potentially add a feature to the dialogical model—that of popular participation in the dialogue.

According to the above analysis it might be supported that in different legal orders the use of proportionality signals the tendency of courts to adjudicate on social rights issues determining the content of rights through the imposition of series of considerations to the lawmaker. Judicial intervention seems to be getting detached from the search of a minimum core content for rights. Political considerations and choices are left with the legislature, yet the way those choices will be made undergoes rigorous review, which invites (or forces) the legislator to enter an imaginary dialogue.

6. Concluding remarks

The encounter of social rights with proportionality has revealed new possibilities for approaching both the question of the justiciability of social rights as well as the issues regarding the multiple functions of proportionality. Proportionality allows the construction of the content of social rights on the basis of balancing conflicting interests, primarily by setting a series of ground rules for the lawmaker. This formulation, on one hand, leaves room for the examination of all competing considerations, imposing, however, a strict model for the justification of statutory interventions limiting rights. Political choices are left with the lawmaker. Nevertheless, he is obliged to satisfy the criteria set forth by proportionality, by demonstrably showing that he carefully set the aim of measures that infringe on social rights; that he then considered the availability of other measures less impairing to the right; and that he went through this process elaborately and openly, so that his choice is reviewable by the courts. The lawmaker is thus led to an open-ended dialogic relationship with the judge. Respect for proportionality

[84] With the exception of cases that involved the protection of the environment, where the Council of the State has been characterized as an activist court. *See* Kostas Chryssogonos & Xenophon Contiades, *Der Beitrag Griechenlands zur europäischen Rechtskultur: der verfassungsrechtliche Umweltschutz* [The Contribution of Greece in the European legal culture: The constitutional protection of the Environment], 52 Jahrbuch des Öffentilichen Rechts 21 (2003).

[85] On ordinary people discussing constitutional issues as a result of constitutional case law *see* Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373, 390–91 (2007).

by the lawmaker, expressed through the way in which he legislates, guarantees fairness, and provides the grounds for justiciability, rendering thus the importance of the search for the elusive minimum core content of social rights secondary.

Moreover, proportionality displays its full potential as a balancing technique, since it ensures that the balancing acts, which are inherent in the content of social rights, are performed in a highly disciplined matter, leading to the formation of this content. As opposed to criticisms against proportionality related to the rationale of civil rights, the argument about proportionality being a balancing test, that poses threats to fundamental rights which are better protected through categorical rules rather than through the application of the flexible standards connected to proportionality, does not apply to social rights' judicial review. Definitional balancing, absolutes, and categorical rules[86] were never an option for the protection of social rights, where arguments for supporting legal enforceability evolved around safeguarding the existence of a minimum core.

In connection to social rights, proportionality operates creating content. Proportionality does not operate in a vacuum. Its function presupposes the existence of constitutional rights. Relying on constitutional rights is different from relying on politics, as social rights incorporate powerful values, which are activated and strengthened as their content is shaped through balancing. It must be noted that the consideration of the public interest is always present when policies on social rights are drafted, thus to allow the right to be measured against the public interest is as integral part of the protection of the right. Proportionality, by facilitating these considerations, yet imposing them to a strict discipline, not only creates the context for litigating social rights enhancing their justiciability, but also renders their content concrete.

Insisting on defining a minimum core content as a prerequisite for the justiciability of social rights is an updated aspiration, which risks the very enforceability of these rights in the context of a global economic crisis, that is, at times when they are needed the most. Attempts to justify this approach by invoking court decisions from different legal orders which have nothing in common other than the fact that they offer protection to social rights, not only constitute misuses of comparative methodology, but also fail to produce the desired outcome and determine a fixed content for social rights. Nevertheless, a less ambitious approach of international case law may detect a global tendency of courts to accept review of social rights through the application of proportionality, which is a part of the wider emergence of proportionality as a method of reviewing rights limitations. Where social rights jurisprudence took an activist turn, it was interrelated with particularities of specific courts and their case law failed to produce consistent reliable precedent.

Rights in the age of balancing are perpetually measured against other rights and interests; winning and losing is part of the game and they develop though this eternal competition as a mosaic, where new tiles are intermittently added. Attempts to treat

[86] Kathleen M. Sullivan, *The Supreme Court, 1991 Term-Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22 (1992); Kathleen M. Sullivan, *Post-Liberal Judging: The Role of Catergorization and Balancing*, 63 U. Colo. L. Rev. 293 (1992).

proportionality as a threat to rights—because it accepts these conflicts and adopts the role of a strict referee—entail the risk of failing to understand not only the function of proportionality but also the function of rights. Exploring the application of proportionality from the aspect of social rights and also exploring social rights in the light of proportionality review, demonstrates with clarity the flaws in theoretical approaches that reject proportionality as a pseudo-rational method of review, which endangers rights that are thought to be better off when shielded behind the absolute protection of their core content. Discovering and applying all aspects of proportionality opens the way for the true protection of social rights.