

## Searching for the Fair Balance? The Application of the Principle of Proportionality in Slovak Freedom of Speech Cases

### Introduction: Proportionality at the Core of Rights Discourse

No individual human right is absolute. Notwithstanding the differences between various ‘categories’ or ‘generations’ of rights, even the ones closest to the ‘absolutist’ position can, under certain rigorous circumstances, in accordance with the rules set by domestic and international guarantees, be limited in cases when they are in conflict with each other. The limitations in individual cases are decided upon by courts, who thus face the challenge posed by ‘constitutional dilemmas’ (Zucca 2007). If both rights are legally guaranteed and justified, how should they find the ‘equality’ between them and at the same time resolve the issue at stake? One possible answer to this question is proportionality, which provides a tool for judges to ‘balance’ the two conflicting individual rights in a ‘just’ way.

With origins in German administrative law and the continental understanding of *Rechtssaar* (Cohen–Elyia and Porat 2010), during more than 120 years proportionality has developed into the ‘global grammar of constitutionality’ (Klatt and Meister 2012: 3), offering a ‘shared analytical tool to enhance the effective protection of human rights’ (Arai–Takahashi 2013: 446). It is viewed as ‘the archetypal universal doctrine of human rights adjudication’ with its main strengths resting in its ‘universal applicability’ and ‘straightforward structure’ (Cohen–Elyia and Porat 2013). It is precisely this universal aspiration which on the one hand makes it a very influential doctrine, providing the incentives for domestic judges to ‘race to the top’ in human rights protection, while on the other its adoption comes with distinct consequences in terms of losing distinct national elements and integrity of legal culture (ibid.: 150–152). Though ‘rival’ doctrines of resolving conflicts of fundamental rights exist, with balancing, applied predominantly

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in the US (Cohen–Elyia and Porat 2010: 266–270) being probably the best known, neither of these alternatives receives so much attention as proportionality. In addition, leading proportionality scholars offer a wide range of arguments which oppose alternatives and are in favor of proportionality (Barak 2012, also see below). Thus, observing these tendencies, it is no surprise that one of the most recent contributions on proportionality begins: ‘To speak of human rights is to speak about proportionality’ (Huscroft, Miller and Webber 2014: 1).

Despite these positive accounts, the doctrine of proportionality is far from being undisputed. For instance, a forceful critique by Tsakyrakis (2009, 2010) points towards the ‘obscuring of moral argumentation’ by application of the principle or the ‘arbitrariness’ which is supposed to lie behind the components of the respective proportionality test. Replying to Tsakyrakis, Khosla (2010), an advocate of proportionality, stresses the crucial importance of proper application of all stages of the proportionality test and points to several failures of judicial institutions in this respect. This example of a contemporary debate indicates that dealing with proportionality in a rather theoretical manner is not the same as when a judge is about to utilize the proportionality test in a concrete case of conflicting rights with practical and direct implications for the parties involved in the case, as well as for the views of the principle itself. As a result, the relationship between proportionality theory and practice tends to be a mutually constitutive one – judges apply the doctrine in concrete cases and the way they do so has an impact on how the doctrine itself is judged by the public.

In this paper, I depart from this assumption of the relevance of judicial application of proportionality when I analyze the day-to-day implementation of the principle on the lowest possible judicial level – the level of domestic courts, including those of first instance, which as the first ones encounter difficult cases of conflicting rights. The analysis is limited to one country (Slovakia), and one particular situation of conflicting rights (freedom of speech<sup>2</sup> and personal rights), which is approached by study of the references to the principle of proportionality in judicial decisions of domestic courts of all levels (determined by content analysis), and presented with the help of simple statistics and qualitative evaluation of the justifications of judgments. There are two principal

<sup>2</sup> The entrenchment of freedom of speech in the Slovak Constitution does not significantly differ from the European one. The Article 26 of the Slovak Constitution, which deals with it, stipulates that  
 ‘(1) Freedom of speech and the right to information are guaranteed.  
 (2) Everyone has the right to express his views in word, writing, print, picture, or other means as well as the right to freely seek out, receive, and spread ideas and information without regard for state borders. [...]  
 (3) Censorship is banned.  
 (4) The freedom of speech and the right to seek out and disseminate information may be restricted by law, if such a measure is necessary in a democratic society to protect the rights and freedoms of others, state security, public order, or public health and morals. [...]

justifications for such an approach. The first concerns the role the proportionality doctrine plays in the European legal order which at the level of human rights is represented by the European Court of Human Rights (ECtHR). Though freedom of speech is not the only right where proportionality is applied by the Court, it is by this one where the principle plays a special role. Indeed, freedom of speech belongs to rights with ‘more broadly framed limitation clauses’ (McBride 1999: 24) according to the Article 10, Section 2<sup>3</sup> of the European Convention on Human Rights (below: Convention), therefore proportionality is particularly important in order not to allow the right to be limited always when there is a law prescribing the restriction and a legitimate purpose, without consideration of the necessity of the restriction (ibid.). Moreover, because of the complexity of the principle in this regard, the ECHR is often criticized for failures in individual cases to apply it properly (Klatt and Meister 2012, Arai–Takahashi 2013: 455). Bearing these contexts on mind, an examination of proportionality within the scope of freedom of speech gains relevance.

Secondly, freedom of speech is a contested right in contemporary Slovakia, with several controversial cases of its limitations in favor of personal rights arising in the recent past (Malová and Steuer 2014). The ECHR also recently delivered several judgments on violations of freedom of speech by decisions of Slovak courts (*Ringier Axel Springer vs. Slovakia, No. 2 and No. 3, Soltész v. Slovakia*), which exacerbate the inconsistency of Slovak domestic decision making on matters of freedom of speech. One could suppose that a proper application of proportionality would prevent such developments, so the question arises whether these problems have been a result of neglecting proportionality, its inconsistent application, or the controversies on the Slovak domestic level could be traced to the alleged shortcomings of the principle put forward by its critics.

Building upon the introductory assessment of proportionality above, in the following sections I, firstly, examine the principle of proportionality in context of freedom of speech in greater detail, focusing particularly on Slovak legal environment. Secondly, I briefly explain the research design of the empirical analysis of 162 judgments of Slovak courts, the results of which are provided in Section 4. Finally, I summarize the main challenges for the application of the principle by Slovak courts, which may serve as useful notions to other, particularly post–communist judiciaries as well.

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<sup>3</sup> ‘The exercise of [freedom of speech], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

## 1. The relevance of proportionality for freedom of speech in Slovakia

After the Slovak Constitutional Court via the verdict II. ÚS 152/08–52 introduced the application of the test of proportionality when deciding between freedom of speech and protection of personality based predominantly on the answers to the questions WHO, ABOUT WHOM, WHAT, WHERE, WHEN and HOW ‘said’, the worldwide discussion about this principle, its advantages and disadvantages, elements, origins or methods of application became more important for the Slovak legislation and case law than ever before. However, only a minority of Slovak scholars (e.g. Drgonec 2013: 329–350) deal with it in context of freedom of speech<sup>4</sup>. Because of its growing relevance via its acceptance by the Constitutional Court<sup>5</sup>, it is an important justification to be examined in the sample of judicial decisions.

Someone could argue that the principle of proportionality is another vague and unclear legal principle that attracts attention only to legal scholars and has no place in other disciplines and practice either<sup>6</sup>. This argument is unjustified as the principle of proportionality is a reaction and proposal of a solution to the broad philosophical issues of justice and the relationship between citizens and the state. In the structure of this solution, it reflects the understanding of democracy in a concrete society, in which it is applied. As Professor Schlink notes, it ‘had a fantastic career: from a philosophical to a legal principle, from a principle of administrative law to a principle of constitutional law or even to law as such’ (Schlink 2013: 736). Some scholars even named it as ‘the ultimate rule of law’ (ibid.).

Basically, proportionality is an accepted way of solution of the conflict between two constitutional rights by Slovak scholars as well, which in ideal situation does not require the retreat of one right in favour of other, but the identification of the ‘just equality between two values’ (Drgonec 1999: 72). This position is subject to the so-called internal criticism of the principle (see the classification in Barak 2013: 749–750) which states that ‘the sites of the balance are incommensurable’ and balancing ‘conveys a false

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<sup>4</sup> A little better results shows the Czech literature, where a monograph from Ondřejek (2012) and works of the former vice president of the Czech Constitutional Court, P. Holländer (2003: 21–23; 2012: 214–239), deal with the principle in theory and application in the Czech Republic.

<sup>5</sup> With a more strict interpretation it could be argued that the principle should have been applied even before the precedential verdict of the Slovak Constitutional Court, because it is used by the ECHR when deciding such cases. Indeed, in an ideal environment, ‘the implementation of the European Convention on Human Rights into the national legal system leads also to implementation of the principle of proportionality in the national jurisprudence’ (Schlink 2013: 731–732). The fact that in Slovakia its application was concerned only in 2009 is another example of difference between an ideal situation and the reality.

<sup>6</sup> Such positions can be identified also in Slovakia, beginning with the decision 15Co/144/2012 of the Regional Court in Banská Bystrica below in section 4.3.

sense of being scientific'. It is easier to respond to this criticism than to broader issues connected to judicial activism and interpretation which are beyond the scope of this paper. Generally, the response starts with the recognition and acceptance of the existence of a rational balancing which has to be based on the identification either of the degree of seriousness of the limitation (this is the approach of Robert Alexy) or the 'social importance of realizing one principle and avoiding limitation of another principle' (Barak 2013: 750). In context of freedom of speech, I support the application of the principle for two additional reasons. Firstly, it is a dominant approach in Europe stemming from the most precise argumentations of the ECHR and the Federal Constitutional Court of Germany (while the decisions of the former are binding for Slovak courts). Secondly, its structure does not give priority to freedom of speech over protection of personality which grants judicial decisions applying the test legitimacy not only in the eyes of those who speak about the equality of all rights but also rises the potential of a legitimately viewed decision by advocates of freedom of speech's supremacy and those who put personal rights on the first place. Such legitimacy is in times when the levels of trust in Slovak judiciary reach extremely low levels, especially important.

How does the application of the proportionality test look like? Although there are different classifications of its elements<sup>7</sup>, basically, a restriction of freedom of speech is proportional if this restriction follows a legitimate aim (which aims are legitimate, is determined in Article 26 of the Slovak Constitution), it is 'necessary in a democratic society' and, what is more, the means to achieve this end are connected to this end and do not invoke undesirable side effects. As Christie (2012: 44–45) notes, for courts it is very hard to carry out the test in individual cases. The 'reward' for a successfully carried out test may be, at least theoretically, the perception of higher legitimacy or quality of the decision thank to precise justification and explanation of the way how the judge (court) dealt with the case.

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<sup>7</sup> E.g. Schlink (2013: 722–725) identifies five parts of proportionality analysis: (1) categorically prohibited means, (2) legitimacy of the end, (3) fitness or suitability, (4) necessity, (5) balancing. Barak (2013: 742–747) distinguishes between (1) proper purpose, (2) rational connection, (3) necessity and (4) proportionality *strictu sensu* – balancing. When it comes to conflicts of freedom of speech and protection of personality, this difference is not so important, the key is to properly answer (1) whether the restriction is legitimate according to Article 26 Section 4 of the Constitution (and Article 10 Section 2 of the Convention), (2) whether the restriction satisfies the end, i.e. the protection of a personal right, (3) whether the restriction is necessary to satisfy the end, i.e. whether there are no other possible measures which satisfy the end without restriction of freedom of speech and, in case of all the answers are positive, it comes to (4) balancing the interests of the applicant and the defendant. It is argued that the constitutional rights of the litigants should have priority over the assessing of the public interest (Barak 2013: 746). In case of freedom of speech, assessing the public interest would be especially hard, as it is connected to the view of importance of this right by the public (although in my view it is possible (in a Millian way) to presume that freedom of speech is in public interest insofar until it advocates some kind of harm to others). Here the abovementioned aspect of citizens' view of democracy in a certain state gains even greater relevance.

Proportionality is not the only approach possible, starting with the US alternative of categorization of rights into three categories and, in cases of conflicts, to use the simple principle of balancing between these categories (see Barak 2013: 752–754), but in case of the European legal tradition, there is no better alternative. This is another way how the problems which arise with the principle (like the issues of judicial activism, discretion, deference and others) are similar to those of democracy itself; although both are not perfect, there is nothing better available today.

## 2. Research design of the empirical analysis – the case of Slovakia<sup>8</sup>

The empirical research question which builds on the general question on the usage of the principle of proportionality (or the legal test based on it) by Slovak courts asks, what is the relationship (if any) between the reference to proportionality in the justification of the judgment by a Slovak court and the verdict either in favor (i.e. upholding) or against (i.e. restricting) some kind of exercise of freedom of speech, if this speech, according to the claimant, conflicted with his/her personal rights to such extent that it violated them. Both the independent (reference to proportionality) and the dependent (verdict in favor or against freedom of speech) are thus binary, i.e. having either a positive or a negative value<sup>9</sup>. The statistical evaluation of their relationship is presented through the simplest means available, which is a contingency table (Table 1).

Before moving to the discussion about the results, which should answer whether there is a positive relationship between referring to the principle of proportionality and deciding in favor of freedom of speech, it has to be noted that while Slovakia is undoubtedly a relevant case to observe (see above), from an analysis of a single country, no valid generalizations can be drawn (Van Evera 1997: 53–55). Still, apart from shedding light on the Slovak case, the results allow to be compared with the abovementioned starting point of courts having a profound influence on whether the implementation of principle is in accordance with its theoretical assumptions and mechanism.

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<sup>8</sup> The same research design, for different independent variables (among others, philosophical and theoretical justifications of freedom of speech or referencing to legal documents entrenching freedom of speech), has been applied in my other studies (Steuer forthcoming, Steuer under review), where deeper elaboration on methodological issues is available as well.

<sup>9</sup> Whether there was a reference to proportionality in the justification of the verdict, was determined by content analysis (e.g. Babbie 2012: 333–344) of each of the 162 units of observation (i.e. judicial decisions). The decisions themselves were obtained from publicly available sources (here, decisions after 2000 are available) and include all instances of the Slovak court system (district, regional, Supreme, Constitutional)

### 3. The application of the principle by Slovak courts in freedom of speech cases

In this section, I assess the results of the search for mentions and application of the principle of proportionality in the judgments. Table 1 shows statistical data of the occurrence or absence of argumentation by usage of the term ‘proportionality’ in 162 decisions. It is clear that the number of decisions which do not mention the term is twice as high as the number of those which mention it. However, less visible is the relationship between the mention of the principle and the verdict. Although almost two thirds of the decisions with such mentions decided in favour of freedom of speech, in case of their absence the number of decisions ‘for and against’ freedom of speech almost equals.

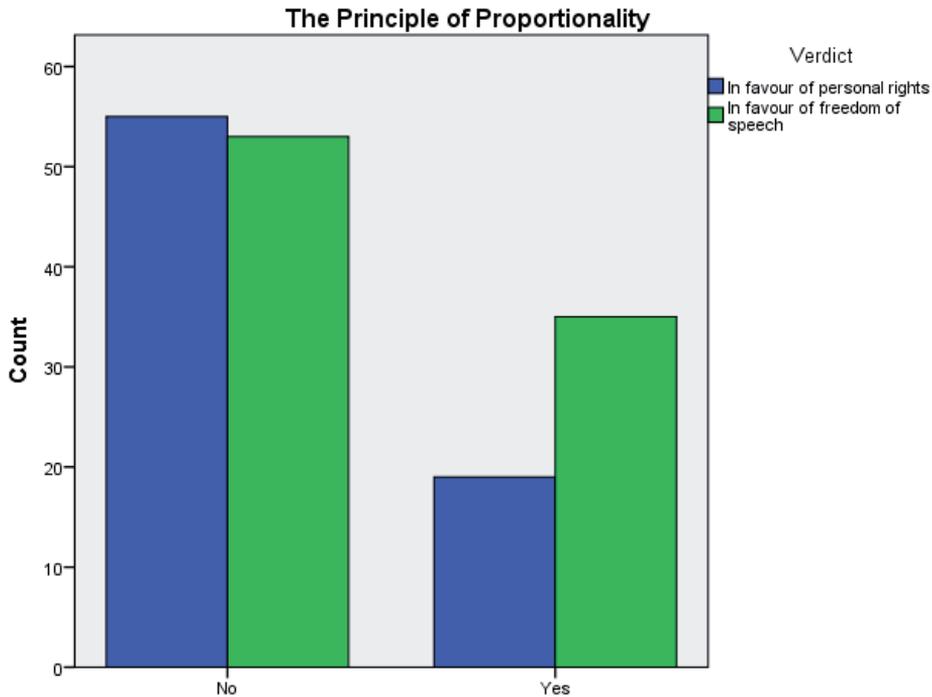
These data reflect the statistical correlation tests (Table 2). It is even not possible to reject the null hypothesis assuming no relationship between the variables with certainty, according to the standard interpretations which require the value of Chi-Square Test 0.05 or less. Even if we would reject the hypothesis, the correlation coefficient is 0.15 which indicates a very weak positive relationship. These results, illustrated by Chart 1, suggest that in the future it would be more proper to differentiate between the simple mentions of the principle in the decisions and those which carried out the complete test. The reason why it had not been done in the present sample is, that the number of decisions which applied the test was so low that it would not allow statistical comparison.

**Table 1. Presence and absence of the principle of proportionality in judicial decisions.**

		Verdict			
		In favour of personal rights	In favour of freedom of speech	Total	
(Principle of) Proportionality	No	Count	<b>55</b>	<b>53</b>	<b>108</b>
		% within Proportionality	50,9%	49,1%	100,0%
	Yes	Count	<b>19</b>	<b>35</b>	<b>54</b>
		% within Proportionality	35,2%	64,8%	100,0%
Total		Count	<b>74</b>	<b>88</b>	<b>162</b>
		% within Proportionality	45,7%	54,3%	100,0%

**Table 2. Correlation coefficients for the principle of proportionality.**

		Value	Chi-Square Tests Approx. Sig.
Nominal by Nominal	Phi	<b>,149</b>	<b>,058</b>
	Cramer's V	,149	,058
N of Valid Cases		162	

**Chart 1. The principle of proportionality and verdicts in favour v. against freedom of speech.****Chart 2**

Although the statistical results did not show significant relationships between the decisions and the verdict, there are examples of decisions which deserve attention. Again, the majority of 54 decisions which mentioned proportionality did not go into great detail or conduct the proportionality test. They mostly viewed it as a theoretical formulation which expresses the idea of equality of rights. For instance, the District Court Bratislava V took into account the ‘requirement’ of proportionality of rights when decided a dispute between a person who was under trial for a criminal act, and a magazine which published an article about him:<sup>10</sup>

<sup>10</sup> Verdict 15C/251/2006 from April 4, 2009. Similar formulations appear in the reasoning of District Court Rimavská Sobota, verdict 6C/91/2011 from May 21, 2012. Deciding on a dispute between the current and ex-mayor of Rimavská Sobota, the court stressed that ‘in a concrete case it is always necessary to examine the degree of the alleged infringement of the basic right to protection of personality, precisely in

‘In the case concerned there is a conflict between the right to information and their dissemination with the right to protection of personality, which are two basic constitutional rights standing on the same level. The task of the court was to examine and consider all circumstances of the case without giving precedence to one right over the other. The court examined the rate – intensity of the alleged infringement of a basic right to protection of personality in context of freedom of speech and right to information, with regard to the requirement of proportionality of protection of these rights, and examined, whether there was a causal relationship between them.’

Sometimes, the legitimacy of the principle is derived from the case law of the ECHR or from the precedential findings of the Constitutional Court. The latter connection is present in the decision about the case of a regional politician, mayor of Považská Bystrica<sup>11</sup>, who sued the Association of entrepreneurs because of publishing an article in which they accused him of misusing his competences:

‘Regarding the so-called test which rests in finding answers to the questions WHO, ABOUT WHOM, WHAT, WHERE, WHEN and HOW said (this test is explained also in the judgment of the Constitutional Court II.US 152/08–52 from December 5, 2009 which assessed the conflict of freedom of speech and protection of personality), it is clear that answers to these questions are of key importance for assessing proportionality between freedom of speech and protection of personality.’

If the principle is mentioned together with other justifications of freedom of speech in the same section, it usually signalizes, that these arguments will be more detailed or that the court carried out the test itself (the latter applies only to decisions carried out after the verdict II.US 152/08–52)<sup>12</sup>. Except the verdicts of the Constitutional Court (all

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connection to freedom of speech and right to information and with regard to the requirement of proportionality of these rights’. The District Court Liptovský Mikuláš argues already not with a requirement but the principle: ‘The whole case cannot be decided without taking into account the two basic rights: to protection of personality and to freedom of speech which requires the application of the principle of proportionality of both these rights’ (Verdict 8C/14/2010 from March 2, 2011). The District Court Senica in decision 3C/110/2010 from December 2, 2010 puts in: ‘The application of these basic rights and freedoms and their legal protection have to be proportional and mutually balanced, so that the excessive protection of one right above the acceptable level did not suppress the protection of the other right. Therefore even the existence of an interference to protection of personality does not necessarily lead to a conclusion about the ineligibility of such action, if this action was a result of application of another fundamental right, and, given the particular circumstances, did not exceed the borders of proportionality’. Exactly the same structure can be identified in the argument of the District Court in Trnava (Verdict 16C/226/2009 from March 28, 2012) which decided the medially known case of Archbishop J. Sokol and articles published about him in newspaper *Week (Týždeň)*. The court dismissed the application of J. Sokol. See these examples in Slovak language in Malová and Steuer 2014.

<sup>11</sup> Verdict 3C/39/2010 from July 8, 2010.

<sup>12</sup> There are examples of older decisions which mention proportionality but not through referencing to the Constitutional Court. The Regional Court in Bratislava decided on May 14, 2009 a case (Nr. 8Co/225/2007), before the Constitutional Court applied the test in conflicts of freedom of speech and personal rights for the first time). The applicant was a representative of the local state administration about whom a critical article was written in a magazine which included some private information. The

of those which were included into the sample carried out the test of proportionality), a complex test of proportionality can be figured out from the decision of the District Court in Veľký Krtíš, with its verdict having been approved by the Appellate Court in Banská Bystrica<sup>13</sup>. The case was concerned with several articles published in the magazine *Plus 7 Days* about a former MP and member of the political party HZDS (i.e. a public figure *par excellence* according to classification presented in e.g. Drgonec 2013: 163–165) who was subject to criminal prosecution. The Court directly expressed the relevance of the theory of proportionality of rights when deciding conflicts among them and conducted the test according to the ‘pattern’ of the Constitutional Court. It provided a brief explanation of the theory at the beginning of its argumentation:

‘The theory of proportionality is a respected theory applied by the assessment of collisions of two fundamental rights. The theory is applied also by the Constitutional Court of the Slovak Republic in its judgments (II. ÚS 326/2009, II. ÚS 152/2008 a IV. ÚS 107/2010). According to this theory, it is required to assess the degree (intensity) of the alleged infringement of the fundamental right to protection of personality in the context of freedom of speech and right to information. The test consists of the following steps: A/ test of a sufficiently legitimate end (suitability test), B/ test of necessity, C/ proportionality *strictu sensu* (in a narrow sense), C1/ practical concordance (preservation of maximum of both rights), C2/ Alexy’s weight formula’.

In the test the court highlighted the difference between private persons and public figures and stressed that ‘a journalist is not a lawyer’ and therefore he/she ‘does not have to provide absolutely conform information in a legal sense’. It also provided a metaphorical explanation of what the judge did:

‘When the court decides on the action, it cannot consider only the possible interference to the right to protection of personality. This right has to be put on weight against the right to freedom of speech and it has to be decided, which right should be given priority. It is necessary to take into account the fact that the alleged violation of the right to protection of personality was made via the exercise of another fundamental right – the right to freedom of speech.’

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Court took the position that ‘Freedom of speech and expressing of one’s opinions does not have a character of a philosophical category, but as an institute of constitutional law at its application by courts to a concrete case it is subject to customary principles and rules of legal interpretation. The right to express opinions guaranteed by the Constitution is limited by the rights of others. If an opinion exceeds the limits which are generally acknowledged in a democratic society, it loses the character of a concrete statement and gets outside the scope of constitutional protection. Freedom of speech and criticism are limited in a democratic society. However, in case of an eligible (legitimate) criticism, the limits are not exceeded and the requirement of their proportionality is maintained.’ It is not hard to observe that this interpretation of proportionality differs significantly from those in newer cases mentioned below, as the conflict is viewed from the perspective of personal rights not as a neutral one, like the proportionality theory would require. However, despite such argumentation, the court upheld the right to freedom of speech in this case.

<sup>13</sup> Verdict No. 1C/83/2010 from April 19, 2012, approved by the verdict No. 16Co/247/2012 from February 21, 2013.

The application which requested an excuse and also financial compensation was denied. The Regional Court confirmed the decision by simply agreeing with the arguments of the District Court, it did not provide an own analysis which would be more convincing<sup>14</sup>.

On the other side of the ‘barricade’ there are those decisions which mentioned proportionality but decided in favour of personal rights. From those included into the sample, only three judgments not only mentioned the test in some context but also carried out the test. Two of them were rulings of the Constitutional Court (both cases were handled by the 1<sup>st</sup> Senate). The third one was the decision of District Court Banská Bystrica, later approved by the Appellate Court in the same location<sup>15</sup>. Before looking at the latter case, a short evaluation regarding the other 16 decisions (as seen in Table 4) should be included.

In short, almost all these cases mentioned proportionality only as a marginal argument (usually as a ‘requirement’, not a ‘principle’, ‘test’ or ‘theory’) and only after stressing the limits of freedom of speech. The District Court Bratislava IV issued out a decision on a dispute between a legal person and the media which published some dubious information about the activities of the company<sup>16</sup>. The mention of the ‘requirement of proportionality’ in case of solving the conflict between freedom of speech and the right to good reputation of a legal person came here only after explaining that

‘freedom of speech is not absolute, it is limited according to the Article 10 Section 2 of the Convention and Article 26 Section 4 of the Slovak Constitution, through the right to protection of personality. [...] *Restricting the right to freedom of speech to uphold the right to good reputation of a legal person is not a violation of the Article 10 of the Convention*’ (italics M.S.).

Therefore, the court limited the scope of freedom of speech via the other right standing in the conflict which resulted in a *de facto* weakening of its next argument about the necessity to take proportionality into account.

However, the most ambiguous attitude towards the principle (test) of proportionality in the analyzed sample of decisions can be identified in the abovementioned decision of the Regional Court in Banská Bystrica, which served as appellate court to the decision in which the lower court carried out the test of proportionality (the result was in favour

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<sup>14</sup> What is more, it made a small but obvious mistake when it argued with the principle of *reliable balance* instead of *fair balance* when speaking about resolving conflicts of rights (in Slovak the words *spoľahlivý* and *spravodlivý* sound as quite similar).

<sup>15</sup> Verdict Nr. 14C/131/2010 from February 29, 2012 and verdict of the Regional Court Nr. 15Co/144/2012 from March 27, 2013.

<sup>16</sup> Verdict 12C/121/2007 from June 19, 2012.

of protection of personality). The court, although having approved the progress of the lower court, criticized the proportionality theory itself:

‘Regarding the application of the proportionality test, the appellate court adds that it is applied when two fundamental rights and freedoms conflict. This test deals with some kind of abstract adequacy which should be to some level just and proportional as much as possible. However, each science has its history and even though its thinking often changes, it always stems from its past and the past inspires it. The test of suitability (as part of the proportionality test) is misleading in its elementary form, because the pursued goal will always be a subjective matter, which will be a product of the legal and moral reality of that time. The test of necessity is totally unnecessary, because there are simply no more and better solutions available. The test of balancing is the worst part of the entire test, because balancing is generally based on the belief that rights have approximately the same value and is an important to show only various positives and negatives. Literature and respective case law leads a common man to gain an impression that it is a very delicate test, which is very complex and good. About each of its parts, long discussions are being held with very unclear conclusions. At the same time it should be noted that this test is nowhere normatively enshrined. The application of the test leads to redundant formalism.’

By the presented ‘dissenting opinion’ the judge himself used his right to freedom of speech, as this attitude goes contrary to the practice of both the ECHR and the Constitutional Court. In addition, the case that ‘produced’ this opinion was a dispute between an applicant (M. Truban) who is himself a judge, and the newspaper *Sme* which published some information about the free-time hunting activities of the judge (see the articles of T. Czwickovics (2013) for a more detailed description of the context). Moreover, the opinion is a textbook example of the abovementioned internal kind of criticism of the principle which it is usually responded by the fact, that although the balancing (in the ‘proportionality in a narrow sense’-part of the test) sometimes allows discretion, this is not to prove, that it lacks rationality (Barak 2013: 750). Finally, the judge did not offer any alternative how to deal with such difficult cases of conflicting rights. Without any methodology, however unclear and sometimes biased, the decision would rely entire on subjective attitudes and opinions of the judge, including his attitude to the issue of equality/non equality of fundamental rights – which is exactly what, is criticized in the dissenting opinion to the principle of proportionality.

To sum up, the justification through the principle of proportionality and, sometimes, the application of the proportionality test, is still only at the beginning in case law of Slovak general courts. There is a great difference between mentioning the principle (often interpreted only as a requirement in the judgments of Slovak court) and carrying out the test itself. This is not easy because of its complex theoretical background and without proper explanation it could even discourage some judges of the lower courts to

conduct it in a concrete case. As the statistical results showed, the mention of the principle rises the probability that the case is decided in favour of freedom of speech, although this result can be in the Slovak legal environment often reached without any mention of proportionality in the justification.

At first sight, the complexity of the test speaks for a proposal of Ján Drgonec (2013), who supports transferring the decision-making about cases of conflicts of freedom of speech and other fundamental right directly into the jurisdiction of appellate (regional) courts. However, a closer look points against such an initiative, as there are examples of decisions of district courts which are able to convincingly conduct the test (in the sample it was that of District Court in Veľký Krtíš), while on the other hand some higher courts not only do not conduct the test but directly oppose the whole theory (as the judge on Regional Court in Banská Bystrica). As usually, again the factor of individual judges, their professional background and competences including education in legal argumentation, may be of greater importance as the systemic level represented by the court's instance.

## **Conclusion: The consequence of the Janus-faced application of proportionality**

In this paper I have conducted an empirical analysis of the application of the principle of proportionality by Slovak courts in cases concerning conflicts between freedom of speech and the protection of personality. My core theoretical argument rested in the appreciation of proportionality as the best, i.e. 'most sophisticated' (Klatt and Meister 2012: 167) available approach to find the 'fair balance' between rights in conflict<sup>17</sup>.

The empirical results indicate the occurrence of a 'Janus-faced' application of proportionality in the examined Slovak cases. Within judicial decisions which at least mentioned proportionality (these constituted a clear minority within the sample), on the one side there were those which applied it in accordance with the standards set by international judicial bodies<sup>18</sup> and with respect to all of the components of the proportionality

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<sup>17</sup> Yet, proportionality is by far just a formal measure which should be 'solved' similarly as a mathematical equation. In its original understanding, it does not lack the moral dimension, as it is often interpreted by critics, though, as the results of newest research show, the prevalent interpretation in contemporary jurisprudence tends to implicitly support this view, when instead of recognizing the wider ethical underpinning of 'proportionality between means and ends', it fosters a more technical approach of 'proportionality as balancing' (Luterán 2014). This is just to demonstrate that the concept of proportionality as understood in legal sense and evolved gradually since the 19<sup>th</sup> century is only one of 'multiple proportionalities' (Huscroft, Miller and Webber 2014: 3), which together construct a far more complex and nuanced picture than what is possible to deal with in this text.

<sup>18</sup> The key of these bodies for Slovakia is the ECHR. Still, the ECHR is neither immune from the criticism of the application of the principle, especially after the recent trend to grant a wider margin of appreciation

test, while on the other side several decisions either mentioned it with no signs of understanding what it means and how the judge should evaluate the case utilizing it, or, as a few examples showed, argued clearly against its application. Therefore, from this analysis, no clear approach to proportionality can be inferred regarding Slovak courts, though, as the example of the Constitutional Court shows, a prevalence of a positive standpoint towards proportionality can be observed on the highest judicial level. However, without a clear and more or less unified position towards proportionality, its impact on the outcome of judicial decision-making in Slovakia in cases dealing with political speech remains rather low.

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in freedom of speech cases and thus allowing more significant restrictions by domestic institutions (Miller 2009). It may be often true that when criticising proportionality on the European level, the critic is more likely to be dissatisfied with the disputable approach of the ECHR which is falsely attributed to the principle itself (McBride 1999: 35).

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