

## REPORT

regarding the dissertation for a degree of doctor of legal sciences  
of Mr. Aleksei Vyacheslavovich Dolzhikov

concerning the topic

“Proportionality as a General Principle of Law in Constitutional Adjudication in Russia  
(with particular reference to the Fundamental Social Rights)”

### I.

Proportionality has enjoyed a prominent place in the international discussion on constitutional law in the last decade. On the one hand, an increasing number of courts all over the world have adopted proportionality as a doctrinal instrument of judicial review in constitutional and administrative law. On the other hand, it has also been subject to a lively discussion in international legal scholarship that has been subject of many monographs and articles in the last ten to fifteen years. The dissertation of Aleksei Vyacheslavovich Dolzhikov is, therefore, extremely timely. It casts light on the use of the proportionality principle in Russia – a state and legal system that is not often represented in the international discourse. Therefore, his dissertation is potentially interesting not only for Russian legal academia, but also for the international comparativist community.

### II.

The dissertation consists of four chapters. The first chapter deals with the definition of concepts and the description of the methodology used in the thesis. The second chapter analyzes the legal nature and the scope of proportionality in constitutional law. The third chapter examines the structure of the proportionality principle, and the fourth chapter looks at the application of proportionality in the context of the protection of fundamental rights.

The manuscript is concluded by a short conclusion that summarizes the main results of the study.

### III.

The first chapter defines concepts and justifies the methodology that the author uses in his thesis. The author starts out with an illuminating description of the use of proportionality references in Russian mythology and folklore, showing that the principle is not alien to Russian culture. Traces of proportionality can also be found in the early legal history, where the concept was influenced by the Orthodox tradition and found particularly with regard to the proportionality of punishment. But, the principle can also be found in later epochs, such as the Russian empire. However, the author argues that proportionality was mostly absent in the socialist era and that this tradition still influences today's legal thought by giving "considerable priority" to the "common good" in the proportionality assessment (p. 54).

The second section describes the methodological approach of the author. The author follows an interdisciplinary approach, and convincingly argues that positivist legal hermeneutics is not sufficient to understand proportionality. Instead, he also makes use of references to philosophy, ethics, psychology, logic, linguistics, economics, sociology, and political science. Certainly, it seems impossible for one legal academic to master all these neighboring disciplines. But, the author only refers to them selectively, and often through mediators who are experts in the law and one of the neighboring disciplines. Finally, the author clarifies that an interdisciplinary approach does not mean that he will turn away from legal doctrine. Instead, he only uses references to other disciplines in order to inform what the author calls "dogmatic methodology" and the "technique of conceptual jurisprudence" (p. 77). In the last section of the first chapter, the author defines and explains some of the concepts in the context of proportionality, such as proportionality, reconciliation, balancing, and commensurability, expressing his preference for the latter term.

### IV.

The second chapter analyzes the legal nature and scope of proportionality in Russian constitutional law. The author first identifies proportionality as a general principle of law, which is necessary because proportionality does not have a clear textual basis in the Russian constitution. Because of this lack of a clear textual basis, the author continues with an analysis of the scope of proportionality in order to determine the limits of its application. He argues that proportionality serves – together with other doctrinal instruments – as "a test for distinguishing permissible and impermissible interferences" with constitutional rights (p. 165). Furthermore, it is also used by the Russian Constitutional Court as an instrument to delimit the spheres of local self-government (p. 172). Finally, the author also looks at the implications of proportionality for the interaction of the constitutional court with other branches, in particular, the legislature, but also the executive and ordinary courts.

### V.

The third chapter is probably the heart of the dissertation and discusses the structure of the proportionality test. The author discusses the individual elements in turn – legitimate aim,

suitability, necessity, and proportionality *stricto sensu*. He argues that the first element, legitimate aim, aims at “smok[ing] out the true intentions” of the legislature (p. 215). He then continues to discuss the difficulty of this element, the lack of a theory delimiting the legitimate aims of state action. He mostly refers to the public goals listed in Art. 55 of the Russian Constitution as well as to specific goals included in chapter 2 of the Constitution. At the same time, he also warns of relying on abstract “public values” in the absence of a societal consensus of what such public values are.

The second section discusses the test of suitability. The author argues correctly that this test has an empirical basis and explores how courts should evaluate the suitability of a measure. He argues that regulatory measures should be evidence-based in order to fulfill the requirements of the suitability test. However, he also opines that judges should be rather deferential to the legislature except if they have a specific expertise in a certain area.

The third section deals with the necessity test. The test implies the analysis of possible alternatives to the challenged regulation. The author refers to its use in ordinary legislation and international law and sees the latter as an inspiration for the employment in constitutional law. The author also discusses the use of the economic analysis of law as a tool to concretize the necessity test. The author sees a certain value in this approach, but cautions to use it universally. Instead, he advocates to limit its use to the context of economic law and policymaking.

The fourth section, finally, examines the core of the proportionality test, proportionality *stricto sensu*. The author first seeks to clarify the terminology. Then he discusses the incommensurability problem according to which the comparison of competing constitutional values is difficult because it is impossible to translate these into a common normative currency. He argues that the resulting indeterminacy leads to a counter-majoritarian difficulty, according to which parliaments and not unaccountable judges should be the main institutions to decide conflicts between competing values. However, the author adds that the situation is different in “illiberal democracies, where parliamentary institutions perform more likely an imitation function, and demagogic populism is spreading instead of real public discussion, the problem of moral neutrality of judicial balancing of constitutional values is more significant.” (p. 333). This is a sharp observation. Yet, I would add that even in liberal democracies courts might have an important role to play to correct decisions of the parliamentary majority because of ‘political market failures’ (see Petersen, *Proportionality and Judicial Activism*, 2017, ch. 1). The difference between illiberal and liberal democracies is, therefore, probably only one in degree. ‘Political market failures’ are not exclusive to illiberal democracies, but more likely to occur in the latter. The author also deals with the critique that balancing leads to uncertainty (pp. 345 et seq.). Overall, the author proposes a test with eight different elements for the judiciary to consider in order to mitigate the incommensurability and uncertainty challenges (p. 351).

## VI.

The fourth part analyzes applications of proportionality in the context of the protection of fundamental social rights. He first extensively discusses the general problem of justiciability of social rights. He acknowledges the abstract content of many social rights, but argues that they “can receive the necessary interpretation in constitutional adjudication.” (p. 388). He then discusses the application of proportionality in two specific fields of reference – fundamental labor rights and the principle of sustainable development. With regard to the

latter, the author observes a constitutionalization of environmental legislation. He argues that the balancing test plays an important role in this context, aiming to establish an equilibrium between environmental concerns and economic development.

## VII.

The final part of the dissertation concludes and highlights some of the general threads running through the thesis. The author argues that proportionality is still in a nascent state in Russian constitutional law. He adds that the position of the Russian Constitutional Court *vis-à-vis* the legislature and the executive is rather weak because it has to fear political backlash. That might explain the priority that is often given to the common good over individual rights that the author observes in the application of the proportionality test by the Russian Constitutional Court. However, the author convincingly advocates an increased intensity of review “in relation to the most important constitutional rights and vulnerable social groups” (p. 456).

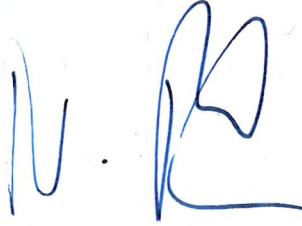
## VIII.

The dissertation covers enormous ground. It deals with a legal concept – proportionality – that is of fundamental importance for constitutional review. However, the author does not restrict himself to a doctrinal analysis of proportionality, but also looks at neighboring disciplines and discusses theoretical topics central to the use of proportionality, such as the legitimacy of judicial review by constitutional courts. Furthermore, the dissertation is not only theoretically well-grounded, but also well-informed about comparative developments. In particular, the author regularly refers to the German experience and shows an impressive command of the German discussion. Through careful analysis, the author uncovers the nature of the proportionality test in Russian constitutional law, arguing that the common good often takes precedence over the protection of fundamental rights, which the author attributes to the rather weak institutional position of the Court. Normatively, he advocates for an increased intensity of review with regard to certain important fundamental rights and vulnerable social groups, which certainly is a convincing proposition.

Overall, I have no doubt that the dissertation fulfills the requirements for the degree of doctor of legal sciences. I believe that the book will be an important work of reference for the future discussion on the topic, which will be impossible to ignore for anyone dealing with the subject. Furthermore, I am also of the opinion that it will be a valuable contribution to the comparative discussion on proportionality.

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(Prof. Dr. Niels Petersen)