Ekaterine Kardava*

Proportionality Principle as a Response Instrument to Challenges of Modern Labour Law

Proportionality Principle is the fundamental principle of public and private laws and the basic regulatory instrument of modern relations measuring the use of power. Integration of the principle into the labour law in the form of systematized test (three-stage test) - is the subject of recent debates. The issue is actual caused by contradiction between the traditional approaches of the labour law and modern labour market challenges. The proportionality principle and the application of its structured test to labour relations' debates is considered as one of the responsive mechanism to the challenging process. It is addressed in labour cases not only for the analyzing of employers but employees (mostly trade unions) actions, as well for final assessment and decision-making.

The practice still is developing. It echoes the modern process within of which there are discussion on possibilities of modification of labour law doctrinal objectives. It implies changes of selective nature of the labour low towards the universal.

The study on the practice of application of proportionality and its development within the national labour law of Georgia is the subject of utmost interest with regard to the fulfillment of the Association Agreement and transposition of European standards into the national legislations. Georgia should conduct the legal approximation activities in labour law field, which requires the complex and systemized vision: not only setting of compliance with EU directives, but cognition of the principles, which are the bases for interpretation of the AA norms and their use in practice.

Key words*: proportionality principle, Oakes Proportionality test, three-stage proportionality test, just cause, privacy cases, picketing, discrimination, AA.*

I. introduction

In 2014 - 18 years after the signing of the first agreement between Georgia and the European Union - the Partnership and Cooperation Agreement (PCA)[1], Georgia and the EU signed a second agreement: the EU-Georgia Association Agreement (AA), which replaced the PCA) and established an association between the parties.[2] As a consequence of about twenty years of integration processes Georgia was acknowledged as a country with the European aspiration and European choice.[3] To gain the rightful

* Doctoral Student at Ivane Javakhishvili Tbilisi State University Faculty of Law, Visiting Lecturer at Ivane Javakhishvili Tbilisi State University, Caucasus University, Caucasus International University and Sulkhan-Saba Orbeliani Teaching University.

1 **"**Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Georgia, of the other part**",** 22.04.96, entered into force 01.07.99, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31999D0515>.

2 First Paragraph of the first article, Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part", 27.06.14, <https://eeas.europa.eu/sites/eeas/files/association_agreement.pdf>.

3 Ibid, preamble,2nd indention.

place within the family of the European values it is necessary to achieve political, economic and social goals of the AA. This can be attained through legal approximation - integration of the European standards into national legislation of Georgia and their strengthening in the practice. Hence, Georgia is facing the commitment to implement abundant and voluminous legislative actions, and in the field of labour law, amongst them.

The labour law doctrine is still strictly advancing the fundamental principle of labour law, by virtue of which principle it delimited itself from civil law and developed into a separate branch: labour legislation is to guarantee the weaker party and protect the basic rights of the employee with regard to working conditions and salary.[4] This goal is hotly opposed by some scholars and the specialists and practitioners of various fields. Some believe, that labour relations should be considered and settled within the frame of civil law. However, the researches, legal data, juridical records which have come down to us in the form of legal opinions care the product of social and economic environmental influence in the process of selection through ideas and concepts,[5] without the consideration of which the importance of labour law as a separate branch oriented on the protection of weak party and social standards, cannot be duly understood. Respectively, the matter related to labour relations are still settled within the framework of labour law with due consideration of general principles and approaches of private law. Despite doctrinal strength, the straggle between the concepts, the dynamics of interrelation between labour and capital, mutual links between social and economic aspects and the development indices of a state, provide for the changing nature of labour law. Hence, some processes are permanently ongoing within labour law, requiring the discussion and scrutiny in the context of modern realities.

When interpreting labour legislation it is important to unite and highlight the goals of labour law. These goals can be classified on a continuum between selective and universal.[6] Selective goals imply the

---

4 Labour Law: Its Role, Trends and Potential, Labour Education 2006/2-3, No. 143-144, V, <http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@actrav/documents/publication/wcms_111442.pdf>.

5 *Deakin S.,* The Contract of Employment, A Study in Legal Evolution, University of Cambridge, ESRC Center form Business Research, Working Paper № 203, 2001, 4-5, <http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp203.pdf>.

6 Universalism generally means that benefits are given to all. Selectivity, on the other hand, is a model that prefers the targeting of benefits to specific groups (or people) that really need them. Most democratic countries have both universal and selective programs. But the combination varies. It is common to classify welfare states into three models: liberal, conservative and social-democratic. The liberal model, exemplified by the US, relies mostly on the market. For the most part people are expected to achieve income and security through the market, so intervention by the State is minimal. The conservative model, exemplified by Continental European countries, relies to a large extent on the family. People are expected (more than in other models) to rely on their family members for support, so again intervention by the State is relatively limited. In contrast, the social-democratic model, exemplified by Scandinavian countries, relies much less on both market and family. The State assumes a central role in creating broad societal reciprocal insurance – most risks are transformed from private to public through massive redistribution programs. Obviously the social-democratic model is based on higher taxes alongside a higher level of public services, *Davidov G.,* The Goals of Regulating Work: Between Universalism and Selectivity, Labour Law Research

intention to help a specific subject of labour relations – employees and the universal goal advance the interests of the society at large and employers as well. The past years are marked with increasing interest in articulating goals from selective to universal. The identification and elucidation of challenges associated with this trend is the very basis of labour law related disputes in the recent history. All this is associated with the goals of labour law - what are and what should be? The topicality of the issue was stressed by some labour law scholars, who demanded the rethinking of the basic principles of labour law. Unlike them, the others believe that it is not the goals and principles that require revision, but rather the results from a mismatch between the goals of the labour law and actual application of labour laws. The debates are necessary as this process investigates legislative gaps, evaluates the proposed reforms and examines the constitutionally of labour law, when they are being challenged.[7]

Based on the foregoing the labour law of Georgia is being formed and developed in the light of interception of three major segments: 1. Political and legal, within the framework of which the process of European integration should be successful, and the legal framework of Georgia should be approximated with the European standards in this process; 2. Doctrinal, within the framework of which the national labour law should maintain fundamental principles stemming from traditional goals and general scientific achievements in a manner, as for the foregoing not to contradict the global political, legal and practical trends. 3. Trade and economical, within the framework of which the labour law should efficiently respond to the duty of the state to advance economically, promote employment and improve the welfare of the employees. Based on the foregoing, Georgia, being the country of new democracy and transitional economy and, at the same time, the subject associated with the European Union, is facing many challenges in the field of labour law conditioned by many international and domestic factors, requiring analysis.

With due consideration of all the above said, when speaking about the aspects of well-balanced protection of the parties to labour relations and "modernization" of the goals of labour law, the possibility and scope of application of ***proportionality principle*** becomes one of the pressing issues.[8] Proportionality is the basic principle of law and is designed to limit the abuse of power. It has become a fundamental and binding legal principle in the jurisprudence of many countries.[9] Apart from being applied in every fields of law (international law, criminal law, administrative law), it is an ethical

Network, 2012, 5, <http://www.labourlawresearch.net/sites/default/files/papers/Regulating%20Work%20--%20Between%20Universality%20and%20Selectivity%20final.pdf>.

7 *Davidov G.*, The Goals of Regulating Work: Between Universalism and Selectivity, introduction, Labour Law Research Network, 1-2, 2012, <http://www.labourlawresearch.net/sites/default/files/papers/Regulating%20Work%20--%20Between%20Universality%20and%20Selectivity%20final.pdf>.

8 *Davidov G., Alon-Shenker P.*, Applying the Principle of Proportionality in Employment and Labour Law Contexts, McGill Law Journal / Revue de droit de McGill, Vol. 59, № 2, 2013, 375-379, <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.html>; <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.pdf>.

9 Ibid, 375.

principle as well. [10] Throughout the years, the principle of proportionality became a central and binding public law principle of the member-states of the European Union.[11] However, gradually, it became applicable in private law as well for the prevention of the excessive and unjustified use of power by contracting parties.

The legal science faced the question: is it possible to apply the standard of proportionality principle in relation with the use of power by employers and can such a standard be integrated in labour law as a responsibility?[12] Is it possible to apply the standard of proportionality principle in relation with the use of power by trade unions as well?[13] With regard to which aspects of labour law will the implementation of the proportionality principle be relevant and useful at this stage of the Georgia's European integration?

Introduction of the proportionality principle and its structured tests into domestic labour law of Georgia and their practical integration into the settlement of labour disputes may efficiently resolve the labour law related problems caused by radically bipolarised ideologies to, what, as a general rule, has an impact on the pace and quality of the implementation of European standards into domestic legislation.

The research aims at providing the overview of recent scholarly disputes and opinions within labour law, and specifically - of proportionality principle.

The objectives of the research are: to study the scholarly and practical visions of proportionality principle within labour law; to advance the possibility of integration of proportionality principle into labour law of Georgia; to establish and develop the practice of reference to proportionality principle in the decisions of the employers and the employees, within the framework of employment relations, as well as court decisions; to study the practical tests of proportionality principle and develop the potential of their application.

The subject of the research is the proportionality principle as a mechanism to respond to modern challenges in the field of employment relations.

---

10 *Davidov G.,* the Principle of Proportionality in Labor Law and its Impact on Precarious Workers, 10/11/2012, 63, <http://law.huji.ac.il/upload/Davidov34-1FINAL.pdf>.

11 *Davidov G., Alon-Shenker P.*, Applying the Principle of Proportionality in Employment and Labour Law Contexts, McGill Law Journal / Revue de droit de McGill, Vol. 59, № 2, 2013, 377, <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.html>; <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.pdf>.

12 *Davidov G.,* the Principle of Proportionality in Labor Law and its Impact on Precarious Workers, 10/11/2012, 64, <http://law.huji.ac.il/upload/Davidov34-1FINAL.pdf >.

13 *Davidov G., Alon-Shenker P.*, Applying the Principle of Proportionality in Employment and Labour Law Contexts, McGill Law Journal /Revue de droit de McGill, Vol. 59, № 2, 2013, 419, <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.html>; <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.pdf>.

II. Scope of Application of Proportionality Principle in Labour Law

2.1. The Essence of Proportionality Principle and the Basis for Integration into Private Law Relations

Before answering the questions, posed above, it is important and necessary to review the practice of application of proportionality principle in labour law. Without understanding the essence of proportionality principle the explanation of the goals of the Association Agreement will not be efficient and effective where the labour law is analysed in the light of trade-economic, social and environmental policies (AA, Title IV and VI). Fulfilment of the AA requires not only the compatibility of Georgian labour law with the European Union Directives, comparative law activities, identification of discrepancies and transposition of the European standards into national legislation, but also the discussion of those principles, on the basis of what the AA rules should be interpreted, impact of their practical implementation preliminary should be evaluated, tasks of contemporary labour law should be fulfilled, labour disputes should be efficiently settled, interests of the employers and the employees should be balanced and, at the same time, labour law should be developed.

In the era of neo-liberal capitalism the employers often exert as much control over the life of an individual as the governmental/public authorities do. I.e. it became feasible to develop the idea that proportionally principle can be extended to in private sphere- in the relations of private persons to impose limitations on employers' actions, like public authorities.[14] Not long ago some scholars started to investigate this potential within the framework of labour law, through the advocacy of proportionality principle in some contexts of labour relations and employment. Their opinion was based on the following three basic motives:

1. Higher standard of behaviour is required in employment relations as opposed to other private contractual relations;

2. The application of proportionality principle stresses its legal and analytical merits;

3. The application of proportionality principle fits within contemporary legal doctrine and advances legal coherence.[15]

After all the labour law already imposes limitations on the abuse of power by the employers. Hence it is natural to discuss the necessity of application of proportionality principle. First and foremost it should be said, that the proportionality principle is not a preventive mechanism and does not create additional limitations. The employers are legally entitled to dismiss employees subject to various statutory limitations. The trade unions are also legally entitled to organize picketing. In such cases the judges are left with broad room for discretion when applying and evaluating laws. Just then the proportionality principle stages in as an instrument to measure, evaluate and balance the power.[16] It should as well be mentioned that the private law is quite familiar with proportionality principle, however

[14] Ibid, 379.
[15] Ibid, 380.
[16] Ibid, 408-409.

the manner and method of its application in labour field is very specific as it places a disputed or discussed matter under specially structured test of proportionality principle, what simplifies the analysis and decision-making. The mention should as well be made of the other aspect as well - why proportionality and not some other standard? The employment relations are dynamic, demanding changes over time. The legal framework and agreements between the parties and official rules are changing. For ex: a statute or a specific regulation provides when, in what cases and how to dismiss an employee. However, in the case of a dispute, the courts of law have some degree of discretion to assess the legality of dismissal. The judges apply various standards for evaluation. The employer's actions are often measured in the light of ***reasonableness standard***. E.g. Canadian courts have recognized implied contractual duties to treat employees with civility, decency, respect, and dignity and in good faith and abide by the reasonableness standard. The court discusses and sets certain rules about the reasonableness standard. However, these standards and rules are subject to amendments as it should be defined on a case-by-case basis whether what will be reasonable. Unlike the foregoing the proportionality principle is based on concrete three-stage proportionality test. The application of the test is not associated with some specific situation, but rather offers a principled way to analyse the problem.[17]

The EU applies the proportionality principle in various fields, amongst them, in the legal framework regulating discrimination. In 2000 the EU adopted Directive N2000/78[18] establishing a general framework for equal treatment in employment and occupation.[19] This Directive, is referred to in Annex XXX of the AA (Employment, Social Polity and Equal Opportunities) as one of the commitments to be fulfilled by Georgia and the AA provides for a period of 3 years, starting from 2014, for the integration thereof into domestic legislation and further implementation. The Directive prohibits any direct and indirect discrimination, however there are case, when indirect discrimination can be justified, if it serves a legitimate aim and the means of achievement this aim are objectively necessary and proportionate.[20] Based on the Directive the European Court of Justice (ECJ) started to intensively apply the principle in employment relations. *Mutatis mutandis*, it even extended the proportionality principle to the activities of trade unions. E.g. In *Laval* Case the right to strike, which is one of the fundamental rights, became subject of restriction. In constitutional and administrative law proportionality imposes limitations on the exercise of public authority not to allow for the breach of the rights of citizens/private persons. In the case concerned proportionality imposes limitations on the application of the freedom of a private person by a private person. In *Laval* Case a Latvian company, having won a contract from Swedish Government, posted Latvian workers to Sweden to work on the site. These workers earned much less than comparable Swedish workers. The Swedish trade union asked *Laval* to sign its collective

---

17 Ibid, 410.

18 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000, 0016 – 0022, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1474273510720&uri=CELEX:02000L0078-20001202>.

19 *Davidov G., Alon-Shenker P.*, Applying the Principle of Proportionality in Employment and Labour Law Contexts, McGill Law Journal /Revue de droit de McGill, Vol. 59, № 2, 2013, 413, <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.html>; <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.pdf>.

20 Ibid, 413.

agreement with a view to improvement of the conditions of these workers. *Laval* refused to sign the collective agreement. The Swedish trade union called a strike to blockage the business territory of *Laval*. When *Laval* failed to fulfil the contract it filed a suit with the court of law. The Swedish court referred the matter to ECJ for interpretation. The latter applied the proportionality principle, what resulted in final assessment of the action and limitation of the freedom of the trade union. Of course, owing to their consequences, this and similar cases, were roundly condemned based on the argument, that economic interests were preferred to social ones. Various comments were made with regard to this case, within the framework of which comments various standards of application of proportionality test were offered. According to *Brian Bercusson* proportionality should not be applied in the context of strikes as this is the process of collective bargaining and it is difficult to apply proportionality with regard to the requirements of trade unions, which change or originated during the negotiations. Also, the application of proportionality may have a negative impact on the impartiality of the state in the economic sector. Despite the difference in opinions, the controversy of the outcomes of these cases does mean that the application of proportionality should be eliminated altogether. What is more, the matter was analysed in the following light: the justification for using this standard as a limitation of strikes becomes stronger when employers also have to conform to the same standard the obligation of the employer, that its action should be compatible with the same standard.[21]

In the UK the more structured principle of proportionality has replaced the *reasonableness* standard in various employment contexts. Especially the principle of proportionality is well-established in discrimination law. Dynamics of such developments influenced on the jurisprudence of ECJ applying EU Directives concerning equal treatment. Gradually these directives led to the amendment of the existing measures and adoption of new measures prohibiting employment discrimination on various grounds. Furthermore, these Directives also required the application of a proportionality as a part of defence in indirect cases of discrimination. In this contexts the most cases dealt with the employers, who discriminated against their employees. It should be said, that English courts often apply a test integrating proportionality and reasonability. This is the test, that requires an objective balance between the discriminatory effects of the measure and the reasonable needs of the discriminator, but avoids subjecting employers to the stricter ECJ standard, which demands that indirect discrimination be necessary to meet a real need of the business.[22]

As already mentioned the proportionality principle is most often and widely used with regard to law regulating various aspects of discrimination. The aspects of discrimination are particularly relevant for private law relations, like employment relations. E.g. In France, there is a general rule grounded in the Labour Code that prohibits any infringement of workers' rights that is not in line with the principle of proportionality.[23] Ever since in one of its judgements (*Seminal R. v. Oakes*) the Supreme court of Canada interpreted section 1 of the Canadian Charter of Fundamental Rights using the three-stage proportionality test, proportionality has become an important pillar of Canadian law.[24] In Israel, labour courts have been

21 Ibid, 413-414.
22 Ibid, 415.
23 Ibid, 416.
24 Ibid, 375.

using proportionality tests for many years.[25] Professor *Bernd Waas* stated at Barcelona Conference of 2013 on Labour Law, that German Federal Court has been applying the principle of proportionality for decades in labour disputes, especially in dismissal-related matters.[26]

It is reasonable to believe, that in the nearest future this trend will be further expanded and will be applicable by greater number of countries. The expansion of the proportionality principle to other areas of law and especially to contract law could be explained through the changing role of the law in establishing an Economic public order that, traditionally, has been realised via the imperative law, aiming at combating inequalities in the name of social justice.[27] Employment relations are typical example of the theory called relational contract,[28] by *Macneil,* where the parties cannot predict all possible circumstances in advance and due to this reason it is necessary to apply an external criteria, regulating non-predictable circumstances. Insofar as employment relationship is characterised by a different distribution of contractual powers, one of the most important functions of the labour law is precisely to re-balance this unequal power distribution. This labour law function can be implemented through a variety of instruments: first of all using imperative norms that the parties of the contract of employment can't derogate, with a range of different sanctions.[29] Proportionality should be applied as a technique to fill the regulatory gap in the context of employment. It should be applied in private law identically to administrative and public law - should not go beyond the legitimate aims recognised by general principles of law.[30]

2.2. Some Judicial Practice of Application of Proportionality Principle

There are some aspects in Labour law where the principle of proportionality is applied both explicitly and implicitly. The foregoing is proved by some judicial practice which revealed the aspects of labour law, with regard to which the application of the proportionality proved to be effective.[31]

---

25 Ibid, 416.

26 *Waas B.,* The Principle of Proportionality in German Labour Law, Goethe Universität, LLRN Barcelona Conference, June 2013.

27 *Piera L.,* The Reasonableness and Proportionality Principle in Labour, Labour Law Research Network, Inaugural Conference, Pompeu Fabra University, Barcelona, June 13-15, 2013, 3, <https://portal.upf.edu/documents/3298481/3410076/2013-LLRNConf_Loi.pdf/a1992ca6-3376-4e87-a40f-bc3a8250d189>.

28 *Macneil I.R.,* Relational Contract, Wisconsin Law Review, 1985, 483-526, <http://www.cisr.ru/files/publ/lib_pravo/Macneil%201985%20Relational%20contract.pdf>.

29 *Piera L.,* The Reasonableness and Proportionality Principle in Labour, Labour Law Research Network, Inaugural Conference, Pompeu Fabra University, Barcelona, June 13-15, 2013, 3, <https://portal.upf.edu/documents/3298481/3410076/2013-LLRNConf_Loi.pdf/a1992ca6-3376-4e87-a40f-bc3a8250d189>.

30 Ibid, 4.

31 *Davidov G., Alon-Shenker P.*, Applying the Principle of Proportionality in Employment and Labour Law Contexts, McGill Law Journal / Revue de droit de McGill, Vol. 59, № 2, 2013, 419, <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.html>; <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.pdf>.

When making decision on *R.v.Oakes Case* the Supreme Court of Canada, like other jurisdictions, applied three-stage proportionality test, which examines the interrelation between the legitimate measures used for reach of a legitimate objective and legitimate objective:

1. The applied measure should be ***rationally connected*** with the objective that is to be attained;

2. The measure should be selected in a manner as it to be less damaging or ***minimally impairing*** the right to free action, but, at the time, attain the objective;

3. In narrow meaning, there should be ***proportionality*** between the damage caused as a result of applied measures and the benefit gained through the attainment of the objective. I.e. Graver is the effect of negative impact of application of a measures, greater should be the objective.[32]

Proportionally test structured according to such three-stage system is the useful and effective instrument for assessment and decision-making. It ensures: a) that decisions are both rational and considerate; b) prevention of the abuse of power by both employers and unions.[33]

2.1.1. Some contexts of explicit application of proportionality test have been identified:

a) Disciplinary procedures and *just cause:*

The most obvious example of an explicit use of proportionality are ***just cause*** cases. In this case the context is being assessed and analysed in the light of proportionality test - whether an employee's misconduct was so serious that it did not give rise to use just cause (e.g. summary dismissal). In case of a dispute an employer is required to show that the sanction imposed upon an employee was proportional to his or her misconduct. The following is being verified within the scope of the principle of proportionality: even if the misconduct is very serious - a theft, misappropriation or serious fraud was committed - would an employer have a *just cause* to summarily dismiss the employee without an advance notice? In just-cause cases the courts mainly apply two-stage proportionality test: 1. whether the evidence establishes the employee's misconduct; and 2. if so, whether the nature and degree of the misconduct warrants dismissal.[34] E.g. the two-stage proportionality test was applied in *McKinley v. B.B. Tel* Case. However there is some similarity to the ***Oakes proportionality test***: one might argue that when employers make a decision to either discipline or dismiss an employee, the decision infringes the employee's right or interest to have job security or at least to receive advance notice. How does the employers balance such decisions? Of course, the employer's objective is to ensure that the workplace is composed of the most competent and cooperative workers. In the course of dispute settlement, employers are required to show that the measure chosen to achieve this objective was proportional. In this very contexts the test developed in *McKinley* Case resembles the first two stages of the *Oakes* proportionality test. Let's discuss it in details: First and foremost the McKinley test requires a proof of

[32] Ibid, 378-379.
[33] Ibid, 379.
[34] Ibid, 382.

incompetence or misconduct of an employee. This is necessary, as disciplining or dismissing of employees without notice should be rationally related to the aforementioned objective of the employer. Such decisions deter or conclusively prevent future misconduct or incompetence from the other employees.[35] I.e. the objective of the employers - for the workplace to be composed of the most competent workers - is attained through a measure like a decision on disciplining or dismissal. If an employee's action is trivial, minor error, dismissal without notice does not seem to advance the objective of the employer. I.e. there will be no rational relationship between the measure and the objective (the first stage of *Oakes proportionality test*).[36] On the other hand the *McKinley* test examines whether a less severe response is possible while still achieving the objective. E.g. summary dismissal is a severe punishment. A less severe response is a warning, which may prove to be an efficient measure to achieve the objective when official misconduct is not very serious. However, when the employee's actions are serious, intentional, or numerous, the employer may argue that there is no less intrusive way to achieve its legitimate business objective. I.e. there may exist the less damaging measure, still guaranteeing the achievement of the objective (the second stage of *Oakes* proportionality test).[37] The *McKinley* test was further developed in subsequent cases and now contains elements of all three stages of the *Oakes* three-stage proportionality test, balancing the benefits gained against harms.

The use of proportionality principle in disciplinary or dismissal case is even more established in collective bargaining settings as collective agreements generally require employers to establish *just cause* prior to the imposition of any form of discipline (written or oral warning, suspension, discharge, etc.). Furthermore, legislation provides arbitrators with the power to substitute their authority for that of the employer and to reduce the penalty imposed by an employer to one that is "just and reasonable" in the circumstances.[38] Employment relations arbitrators mainly consider two questions in *just cause* cases:

1. Does the conduct in question amounts to *just cause* (proof of reason/sound justification) for the imposition of some form of discipline? This part resembles rational connection stage of the *Oakes proportionality test*: dismissing or disciplining only those employees who misbehaved or performed poorly is *rationally connected* to the employer's objective of having the most competent body of employees?

2. Is the method/form of discipline selected by the employer appropriate in the circumstances? Various mitigating factors are discussed as potentially justifying the substitution of a lesser penalty in the place of discharge, including: whether the employee was confused or mistaken or the act was impulsive (non-premeditated); whether the harm to the employer was trivial; whether the employee sincerely acknowledged the misconduct; whether the penalty imposes severe hardship upon the employee given his or her age and personal circumstances; the past record of the employee, the length of service. This part combines both the second and third stages of the *Oakes proportionality test*. It requires the employer

35 Ibid, 382-383.
36 Ibid, 383.
37 Ibid, 383.
38 Ibid, 384-385.

to choose the least intrusive punishment while still achieving its objective. It also balances between the benefits of achieving the employer's objective and the harms imposed upon the employee.[39]

b) Inviolability of privacy at workplaces/privacy cases:

Obvious example of explicit use of proportionality principle is the case of privacy violation at workplaces: employers requires the employees to take alcohol test or uses surveillance cameras or monitors the use of mails and computers. E.g. in Canada this matter is subject to regulation of PIPEDA-ს ,[40] namely, it says that organizations can collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.[41] This stipulation was interpreted by Privacy Commissioner, arbitrators and federal courts within the proportionality test.[42] The Confidentiality Commissioner developed *four-stage test* to determine, whether it is possible to collect personal data for purposes that a reasonable person would consider appropriate in the circumstances. The Commissioner held that, it is essential to consider the appropriateness of the organization's objective for collecting personal information, as well as the circumstances surrounding that objective. Once the objective is identified, in order to determine whether the collection, use, or disclosure was reasonable in the circumstances, the following questions should be tabled:

1. Is the measure demonstrably necessary to meet a specific need?
2. Is it likely to be effective in meeting that need?
3. Is the loss of privacy proportional to the benefit gained?
4. Is there a less privacy-invasive way of achieving the same end?[43]

The same approach was developed by Federal Court and the arbitrators. The above structure of the test is identical to *Oakes proportionality test*. The first inquiry corresponds to the *minimal impairment* stage of the *Oakes test* because it examines whether the measure is necessary to meet the objective - that is, whether there are less intrusive ways of achieving the same objective. The second inquiry is akin to the first stage of the *Oakes proportionality test* because it examines whether the measure chosen for the collection of information is effective in achieving the objective - that is, whether it is *rationally connected* to it. The third inquiry resembles the third stage of the *Oakes proportionality test* because it weighs the proportional benefits of collecting information against the harm to the employee's privacy (In this case the benefit from collecting data against impairing employee's confidentiality by the employer).

---

39 Ibid, 385-386.

40 Personal Information Protection and Electronic Documents Act, <http://laws-lois.justice.gc.ca/PDF/P-8.6.pdf>.

41 Ibid, part 1, division 1, paragraph 5(3).

42 *Davidov G., Alon-Shenker P.*, Applying the Principle of Proportionality in Employment and Labour Law Contexts, McGill Law Journal / Revue de droit de McGill, Vol. 59, № 2, 2013, 386, <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.html>; <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.pdf>.

43 Ibid, 386-387.

The fourth inquiry, which asks whether the employer explored other less privacy-invasive ways of achieving the objective, is also similar to the *minimal impairment* stage of the *Oakes test*.[44]

In *Eastmond v. Canadian Pacific Railway* Case, the video recording surveillance cameras were installed in the work space, what was the least intrusive mean available to employer to accomplish a reasonable objective. In this case the court found that the measure to accomplish the objective was appropriate in these circumstances caused by numerous past incidents, which encouraged the employer to use this measure as a preventive instrument. The cameras were important for deterrence of theft and vandalism as well as for the increased security of individuals and goods. Furthermore, the court found the loss of privacy to be minimal. Also, the collection of information was neither surreptitious. Another argument was that the surveillance was not limited to employees only, but captured every person who walked in the work space. As well, the employer explored other alternatives, such as security guards and fencing, but they were too expensive or unfeasible. Finally, after passing all the stages of the test, the court found the loss of privacy proportional to the benefit gained from the collection of information. [45]

In *Parkland Regional Library* Case an employer installed software to monitor the usage of computers by employees. This action was hidden from employees. When the employee found out about the surveillance, he filed a complaint with the Privacy Commissioner. After reviewing the case the Commissioner held that employer's action was violating the legislation. In the case concerned there was no legitimate reason of the employer that would have considered surveillance of the employee without his knowledge as a legitimate measure to the accomplishment of the objective. Neither was there sufficient evidence to support the employer's suspicions about employee's control. i.e. there was no *rational connection* according to the first stage of the *Oakes proportionality test*. Moreover, the measure chosen by the employer was not necessary for managing the employee. Furthermore there could be other computer-based methods which would assess employees more productivity and specifically. In this case chosen measure was not the least intrusive way of collecting information about the employee. Again, the Commissioner was in fact using the second stage of the *Oakes proportionality test* - *minimal impairment*.[46]

Based on the above examples **proportionality is a tool to assist in the assessment of facts. It calibrates the intrusion to the interest protected. The operating principle is that the more serious the intrusion, the heavier the burden will be, and vice versa.**[47]

The situation differs according to the existence of trade unions at the workplace. In a unionized environment, relations between the parties are regulated by law as well as the rules, established between them. In this case the employers are required to exercise their managerial rights and discretion reasonably. In privacy cases, this reasonableness standard has evolved into a "balancing of interests" test:

---

44 Ibid, 387.
45 Ibid, 387-388.
46 Ibid, 390-391.
47 Ibid, 391.

weighing the employer's interest in running its business effectively and safely against the privacy interests of employees. In such cases the arbitrators often assess:

- the reasonableness of the employer's action or policy;
- the nature of the employer's interests in advancing this action or policy;
- whether there are less intrusive means available to address these interests;
- the impact of the employer's action or policy on the employees.

Actually, the above structure represents the first and the second stages of the *Oakes* proportionality test, however the elements of the third stage can as well be identified.[48] E.g. with regard to surveillance cameras, if they are placed in workplace washrooms, some argue, that this is a necessary and efficient measure, reasonably needed to prevent thefts. There is no less intrusive way of controlling washrooms. However, some agree that this measure is still unreasonable, due to the severity of privacy infringement, which cannot be offset by the benefits of preventing thefts. The assessment of this very aspect is the part of the reasonableness where balancing issue is being assessed, what is identical to the third stage of the *Oakes proportionality test*. In non-unionized workplaces and the employers are free in their actions, they collect and use information about their employees in the absence of specific legislation or common law rules. In this case the rights of the employees are brutally violated.[49]

As already mentioned, at least two contexts of explicit application of proportionality principle and its test in employment relations are established in practice (*just cause* and privacy). In some cases the different variations of proportionality test are used, but each of them is based on proportionality three-stage test system. Hence, it is reasonable to fully apply *Oakes proportionality test* in the case of explicit referral to it.

2.2.2. Several contexts of implicit use of proportionality test in employment relations are identified:

- restrictive covenants;
- workplace discrimination;
- picketing.

In cases regarding these issues the courts have developed the practice of legal tests that are very similar to the proportionality test yet lack any direct reference to proportionality.[50] These tests are rather well structured, what brings about a question: why using proportionality in an explicit manner will be beneficial in these cases? The answer is as follows:

1. Once the tests used in above contexts are very similar to proportionality, it could prove beneficial to start using all three stages of the test directly and in a systematized manner, the good practice of which would add additional relevant considerations into the analysis.

48 Ibid, 391-392.
49 Ibid, 392-393.
50 Ibid, 394.

2. Even if no change is made to the jurisprudence and the same tests prevail without referring to proportionality, by showing that courts are de-facto using the proportionality tests, that is, it is an efficient mechanism for assessment. Hence, it is better for it to be used directly and not implicitly. [51]

In picketing cases proportionality may be relevant in two different contexts. The first context is constitutional and examines whether picketing should be permitted or restricted by legislation. In this case is it clear, that picketing is a form of expression, and as such is protected by the constitution. The second context focuses on the relationship between the union and the employer and assesses whether the use of picketing is appropriate. In this context the proportionality of union's action with regard of the employer is not clear without establishing and analysis of specific circumstances. Insofar as freedom of expression is not unlimited, it is subject to reasonable limits. Imposing limitations on picketing may therefore be justifiable only to the extent that it is reasonable and markedly necessary for free and democratic society. E.g. picketing outside the homes of management personnel may be tortious and the court may issue an injunction order, whilst picketing according to the places of production may be found admissible. However, even in the latter case it is very difficult to delimit between the form of expression and a tortious action. In such cases the court makes recourse to a balancing act. It argues, that picketing is economically damaging not only for the employers, but the third persons as well. At the same time it is possible for even the most problematic picketing not to become grounds for setting limits. Hence it is necessary to analyse picketing cases according to proportionality test. In *Ledcor* case the workplace was under substantial renovations and, as a result of picketing at the entrance that included delays of vehicles, construction had to be shut down. The court allowed the picketing, but ensured that construction workers were let in. At the same time the court limited the maximum number of picketers to twenty. This result corresponded to the minimal impairment stage of the test. Furthermore, the court concluded that there were less intrusive ways to achieve the objective and since the union had not chosen them, the court had to impose some limitations with regard to picketing.[52]

In above cases the logic and assessment system of *Oakes* (three-stage) *proportionality test* is applied implicitly, without direct reference to proportionality principle. This practice demonstrated the importance of proportionality principle and the necessity of its advancement and explicit use.

III. Conclusion

Although the proportionality is the fundamental principle of public and private law and the main tool for the regulation of modern relations through measuring the use of power, the question of its integration into labour law field in a way of systematized tests, is subject of recent debates. The actualization of the question was conditioned by some contradiction between traditional understanding of labour law and modern challenges. Application of proportionality principle and its tests in employment

[51] Ibid, 394-395.
[52] Ibid, 399, 403.

relations is regarded as one of the mechanisms to react to this process. It was applied in labour disputes as a preventive measure against the abuse of power for analysis of the actions of not only the employers, but the employees (mainly unions) as well and for making final decisions. The case law is not so rich so far, however it is developing. The advancement of proportionality principle is the reaction to modern processes, within which the aspects of possibility to modify doctrinal tasks of labour law are discussed, meaning the change of selective nature of labour law by universal and taking good account of employer's interest in proportion to protection of the rights of the employees. Hence, proportionality principle is a kind of efficient balancing legal mean in response to modern challenges to solve both traditional and new tasks of labour law.

As a result of referral to proportionality principle when discussing a specific case, specific questions and assessment criteria were developed, which were then systematized in three-stage test - the so-called *Oakes* proportionality test. The courts and other dispute settlement authorities of course prefer case-by-case approach to the use of proportionality principle, however, over the time, the analysis of various cases has demonstrated, that all the assessment criteria resemble three-stage proportionality test. The latter combines all the different approaches, systematizes them in a more efficient manner, what is relevant (ready-made formula) for any case:

1. There should be rational connection between means/measures and objectives, as the means/measures used for the achievement of objects should really promote the advancement of results.

2. Intrusive measure should be selected, which is necessary for the attainment of the objective. Justification of violation of rights should be conditioned by strong necessity, owing to specific needs and should result in minimal impairment.

3. The damage, caused by the abuse of power and the benefit of this action should be mutually proportional.

As of to date the practice of application of proportionality principle and its structured test is notable only in several contexts of employment relations (*just cause*, privacy cases, discrimination cases, picketing). Furthermore, proportionality principle is not always used explicitly, but rather implicitly, without direct reference thereto. However, it is important, that the necessity, need and benefitiality of the use of proportionality test in decision making process is evident.

Study of the practice of proportionality principle and its advancement within the framework of national labour law of Georgia is of major importance in the light of fulfilment of the Association Agreement and integration of the European standards into Georgian legislation. The country is to accomplish legal approximation in labour field and this required multidimensional vision: not only the establishment of compatibility with the EU Directives and transposition of the European rules into Georgian legislation, but also the understanding of the principles, which constitutes grounds for the interpretation and then use of these rules.

Integration of intensive application of proportionality principle in court decisions and scrutiny of labour dispute in the context of three-stage test will promote not only the establishment of sound practice (new models of analysis), but also the advancement of labour law as well in general.

Bibliography

1. Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part", 27.06.14, <https://eeas.europa.eu/sites/eeas/files/association_agreement.pdf>.
2. **"**Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Georgia, of the other part"**,** 22.04.96, entered into force 01.07.99, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31999D0515>.
3. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*,* Official Journal L 303 , 02/12/2000, 0016 – 0022, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1474273510720&uri=CELEX:02000L0078-20001202 >.
4. Personal Information Protection and Electronic Documents Act, <http://laws-lois.justice.gc.ca/PDF/P-8.6.pdf >.
5. *Davidov G., Alon-Shenker P.*, Applying the Principle of Proportionality in Employment and Labour Law Contexts, McGill Law Journal / Revue de droit de McGill, Vol. 59, № 2, 2013, 375-380, 382-388, 390-395, 399, 403, 408-410, 413-416, 419, <https://www.erudit.org/revue/mlj/2013/ v59/n2/ 1022312 ar.html>; <https://www.erudit.org/revue/mlj/2013/v59/n2/1022312ar.pdf>.
6. *Davidov G.,* the Principle of Proportionality in Labor Law and its Impact on Precarious Workers, 10/11/2012, 63, 64, <http://law.huji.ac.il/upload/Davidov34-1FINAL.pdf >.
7. *Davidov G.*, The Goals of Regulating Work: Between Universalism and Selectivity, introduction, Labour Law Research Network, 2012, 1-2, 5, <http://www.labourlawresearch.net/sites/default/files/papers/Regulating%20Work%20--%20Between%20Universality%20and%20Selectivity%20final.pdf >.
8. *Deakin S.,* The Contract of Employment, A Study in Legal Evolution, University of Cambridge, ESRC Center form Business Research, Working Paper № 203, 2001, 4-5, <http://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp203.pdf>.
9. Labour Law: Its Role, Trends and Potential, Labour Education 2006/2-3, №143-144, V, <http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@actrav/documents/publication/wcms_111442.pdf >.
10. *Macneil I.R.,* Relational Contract, Wisconsin Law Review, 1985, 483-526, <http://www.cisr.ru/files/publ/lib_pravo/Macneil%201985%20Relational%20contract.pdf>.
11. *Piera L.,* The Reasonableness and Proportionality Principle in Labour, Labour Law Research Network, Inaugural Conference, Pompeu Fabra University, Barcelona, June 13-15, 2013, 3-4, <https://portal.upf.edu/documents/3298481/3410076/2013-LLRNConf_Loi.pdf/a1992ca6-3376-4e87-a40f-bc3a8250d189>.
12. *Waas B.,* The Principle of Proportionality in German Labour Law, Goethe Universität, LLRN Barcelona Conference, June 2013.