

**PROPORTIONALITY OR RATIONALITY IN SOCIO-ECONOMIC RIGHTS
ADJUDICATION? CASE STUDY OF THE CZECH CONSTITUTIONAL COURT'S
JUDGMENT IN *COMPULSORY VACCINATION* CASE**

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Abstract: Proportionality represents the basic methodological approach towards constitutional rights adjudication. The million-dollar question raised in current doctrinal work is the question of its limits. One such limit concerns the applicability of the doctrine to socio-economic rights. Since the doctrine and case law of constitutional courts do not provide clear answers in this regard, the main goal of this paper is to assess whether proportionality is a suitable method to review interferences with socio-economic rights. First, the paper discusses the theoretical aspects of this issue, primarily the paradigmatic structure of constitutional review. Second, the paper continues with a case study of the Czech Constitutional Court. In order to review interferences of these rights, the Constitutional Court applies the rationality test. The abstract definition of the test implies only means-ends analysis. Notwithstanding this, it represents an open-ended standard akin to proportionality. The paper concludes by assessing whether there are differences between these two standards of review of reasonableness.

A. INTRODUCTION

In recent years, the doctrine of proportionality and socio-economic rights¹ has become one of the most discussed topics in the field of comparative constitutional law. This paper brings these two, *prima facie* incompatible, phenomena together.

According to classic liberal understanding, constitutional rights ‘are designed in the first instance to secure a sphere of liberty for the individual from interferences by public power.’² These rights, which often manifest as civil and political rights, are defensive in nature and protect an individual from interference by the state. As such, they are rights to negative actions (omission) on the part of the state (*status negativus*).³ Socio-economic rights are usually placed contrary to liberal rights, which traditionally imply positive obligations, ie

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¹ In a broader context the socio-economic rights fall within the scope of positive rights. Positive rights are divided into 1) rights to protection; 2) rights to organization and procedure; and 3) socioeconomic rights (entitlements in a narrow sense). See Robert Alexy, *A Theory of Constitutional Rights* (OUP 2004) 294-96.

² *ibid*, 288.

³ *ibid*.

they impose an obligation upon the state to take positive action (*status positivus*). Pursuant to liberal rights, the state must provide citizens with certain goods or services (such as work, accommodation, housing, health care, education or social security).⁴

Contemporary doctrine has overcome this division by stating that all constitutional rights encompass both negative and positive obligations.⁵ Thus, socio-economic rights entail not only positive obligations but also generate negative ones.⁶ The distinction between generations of constitutional rights is therefore blurred.

Distinguishing civil and political rights from socio-economic rights cannot serve as a criterion for different methodological techniques. It seems that the justiciability of socio-economic rights is no longer an issue for high courts and scholarship. Rather, the more interesting question is how to adjudicate these rights, which concerns the methodology of constitutional review.⁷ That is, whether it is possible to apply the same method to socio-economic rights adjudication as well as civil and political rights adjudication. Or is it necessary – in view of their particularities – to approach them differently? Simply put, is proportionality applicable to socio-economic rights cases as well?

In recent years, the number of national jurisdictions that have made use of the proportionality doctrine in constitutional matters has increased dramatically.⁸ So much so that some commentators bitterly state that the constitutional rights doctrine, on a whole, is reduced to proportionality alone.⁹ The proportionality analysis has evolved into a universal methodological approach that is used to review interferences with constitutional rights. The

⁴ *ibid.* Xenophon Contiades and Alkmene Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation' (2010) 10(3) *International Journal of Constitutional Law* 660. David Bilchitz, 'Socio-economic Rights, Economic Crisis, and Legal Doctrine' (2014) 12(3) *International Journal of Constitutional Law* 714-15.

⁵ *ibid.* Ingrid Leijten, 'The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection' (2015) 16(1) *German Law Journal* 25–26. Jan Kratochvíl, 'Test racionality: skutečně vhodný test pro sociální práva' [2015] 154(12) *Právník* 1055.

⁶ For an analysis of negative obligations flowing from socio-economic rights, see Bilchitz (n 4) 714-15.

⁷ Kratochvíl (n 5) 1052. The Constitutional Court of South Africa came to a similar conclusion in its seminal judgment in *Grootboom*: 'Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state "to respect, protect, promote and fulfil the rights in the Bill of Rights" and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis.' See *Government of the Republic of South Africa and Others v. Grootboom and Others*, CCT 11/00 of 4 October 2000, §20.

⁸ For a thorough analysis of the geographical spread of proportionality, see Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012) 175–210; and Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008-09) 47(1) *Columbia Journal of Transnational Law* 192–209.

⁹ Grégoire Webber states that, in this context, 'the entire constitutional rights-project could be simplified by replacing the catalogue of rights with a single proposition: The legislature shall comply with the principle of proportionality.' Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (CUP 2009) 4.

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million-dollar question raised in current doctrinal work is the universality of proportionality.¹⁰ One perceived limitation of proportionality concerns its applicability to socio-economic rights. Despite the recent attention given to the doctrine of proportionality, surprisingly little has been paid to its applicability to socio-economic rights, and existing work is uncertain and vague. Nevertheless, proponents of proportionality generally agree that it applies to all relative constitutional rights including socio-economic rights.¹¹

Proportionality and socio-economic rights constitute central features of the contemporary theory of constitutional rights. They form part of a more complex model of constitutional rights. For example, Kai Möller construes both of these phenomena as constitutive elements of what he terms the '*global model of constitutional rights*'.¹² The global model confronts traditional dogmas of constitutional rights theory and, in contrast, establishes four fundamental elements describing contemporary theory and practice of constitutional rights. The main elements of this model are: 1) rights inflation;¹³ 2) positive obligations and socio-economic rights; 3) horizontal effect of constitutional rights; and 4) proportionality and balancing.¹⁴

¹⁰ Some authors see possible limits of proportionality in socio-economic rights (Stephen Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' in Jackson and Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017) 1-35 <<https://ssrn.com/abstract=2726794>> accessed 14 January 2018; Ladislav Vyhnánek, 'Proporcionálně či jinak? Problém ústavního přezkumu zásahů do sociálních práv' (2014) 22(3) *Časopis pro právní vědu a praxi* 203-221), while others in human dignity (Jochen Von Bernstorf, 'Proportionality Without Balancing: Why Judicial Ad Hoc Balancing is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-Determination' in Lazarus et al (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 73-74). But according to authors such as Matthias Kumm and Robert Alexy, proportionality is applicable to human dignity as well (Matthias Kumm and Alec Walen, 'Human Dignity and Proportionality: Deontic Pluralism in Balancing' in Huscroft et al (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2015) 67-89; Robert Alexy, 'Lidská důstojnost a princip proporcionality' (2015) 154(11) *Právník* 867-878).

¹¹ Alexy (n 1) 288; Barak (n 8) 422-434; Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012) 179; Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2012) 85-108; Matthias Klatt, 'Positive Obligations under the European Convention on Human Rights' (2011) 71(4) *Heidelberg Journal of International Law* 691-718.

¹² Möller (n 11) 2.

¹³ Despite the negative connotation of the term 'inflation', Möller approaches it neutrally. The essence of the right's inflation is that constitutional rights do not only protect the most vital interests of individual, but also involve relatively trivial ones. Consider famous 'constitutional' rights 'to sleep well' (*Hatton v United Kingdom* (2003) 37 ECHR 28), 'to feed pigeons in the park' (BVerfGE 54, 143) and 'to ride [a] horse in the woods' (BVerfGE 80, 137) recognized by the European Court of Human Rights and German Federal Constitutional Court. See also Möller (n 11) 2; and Matthias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4(2) *Law & Ethics of Human Rights* 150-52.

¹⁴ Möller (n 11) 2. See also Robert Alexy, 'On Constitutional Rights to Protection' (2009) 3(1) *Legisprudence: International Journal for the Study of Legislation* 1-2; Matthias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 (1) *German Law Journal* 341-370.

This paper challenges the consistency of this model of constitutional rights. To be more specific, it challenges the applicability of the proportionality analysis to socio-economic rights. As Stephen Gardbaum suggests in his recent work, despite the first view, there is no such harmony between the elements constituting the global model.¹⁵ Gardbaum confronts the global model alleging that even the courts that are most committed to proportionality, namely the European Court of Human Rights, the German Federal Constitutional Court and the Constitutional Court of South Africa, do not apply the method in cases concerning socio-economic rights or positive obligations. Analysing their jurisprudence, Gardbaum arrives at the conclusion that their practice deviates from the contemporary paradigm of constitutional rights. The paradigm distinguishes the infringement (scope of the right) and its justification (extent of protection). The approach of these courts never reaches the justification stage; they solely analyse the interference. Gardbaum concludes that socio-economic rights establish the limit of proportionality.¹⁶

This paper will follow Gardbaum's approach in analysing the jurisprudence of the Czech Constitutional Court (the 'Constitutional Court') on socio-economic rights. The Czech Charter of Fundamental Rights and Freedoms (the 'Charter') includes an extensive catalogue of socio-economic rights. In order to review the interferences with these rights, the Constitutional Court has established the rationality test. The rationality test, contrary to the reasonableness review adopted by the South African Constitutional Court,¹⁷ involves an abstract interpretation of the scope and content of the socio-economic right in hand. For this reason, it corresponds to the abovementioned paradigm, which distinguishes the infringement with the right from its justification. However Czech commentators do not agree on the characteristics of the rationality test. Some authors state that it involves deferential variation of proportionality,¹⁸ while others interpret it only as a means-ends analysis.¹⁹ This paper aims to address this issue.

¹⁵ Gardbaum (n 10) 1-2.

¹⁶ *ibid*, 3, 35.

¹⁷ See *Grootboom* (n 7). For a critical view of the practice of South African Constitutional Court avoiding the substantive interpretation of socio-economic rights, see David Bilchitz, 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' [2002] 119(3) *South African Law Journal* 484-501; David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19(1) *South African Journal on Human Rights* 1-26, 484; Kevin Iles, 'Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses' (2004) 20(3) *South African Journal on Human Rights* 454; Marius Pieterse, 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited' (2007) 29(3) *Human Rights Quarterly* 810.

¹⁸ See, eg, Pavel Ondřejek, 'Limitations of Fundamental Rights in the Czech Republic and the Role of the Principle of Proportionality' (2014) 20(3) *European Public Law* 460-62; Kratochvíl (n 5) 1059.

¹⁹ Jan Wintr, 'Komentář článku 41 Listiny' in Eliška Wagnerová (ed), *Listina základních práv a svobod* (Wolters Kluwer 2012) 835; Marek Antoš, 'Judikatura Ústavního soudu k sociálním právům: nikoliv

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First, the paper discusses theoretical aspects of constitutional rights, ie the paradigmatic structure of constitutional review and *prima facie* character of constitutional rights requiring justification of rights' infringements. The justification is provided by means of proportionality analysis, which is presented in the paper in comparative perspective concluding that the general approach of the Constitutional Court towards constitutional rights fits squarely within this paradigm. Second, it examines the jurisprudence of the Constitutional Court concerning socio-economic rights and its methodology of constitutional review in relation to these rights – the rationality test. The abstract definition of the rationality test only implies a means-ends analysis, which is equivalent to rational connection stage or suitability stage within the framework of proportionality. Notwithstanding the abstract definition, the test represents an open-ended standard of constitutional review and is capable of providing some sort of balance. This paper then analyses the application of the rationality test in the Constitutional Court's judgment in the *Compulsory Vaccination Case*.²⁰ Finally, the paper assesses the differences between these two standards of reasonableness review. The rationality test does bear some resemblance to the proportionality analysis, but the logic of these tests differs significantly. The Constitutional Court, who is led by the abstract definition of the test, has effectively reduced constitutional review of socio-economic rights to mere means-ends analysis. It focuses its reasoning on the rationality of the policy in hand, rendering substantive issues, such as the extent of the proposed limitation on individuals' rights, irrelevant. The balancing exercise as a tool for measuring such interferences must therefore be maintained even in the case of socio-economic rights.

**B. CONTEMPORARY PARADIGM OF CONSTITUTIONAL RIGHTS:
INFRINGEMENT VERSUS JUSTIFICATION**

The issue of legal methodology (legal gnoseology) is tightly bound with the concept of the rights and law as such (legal ontology). Simply put, the nature of the constitutional rights predetermines the method of their application. The contemporary theory of constitutional rights distinguishes between infringement and the justification thereof. The first stage of the analysis is dedicated to the substantive interpretation of the constitutional right. The scope is set, the content of the right is defined, and any infringements are evaluated. In the second

nutně nejlepší, nejvhodnější, nejúčinnější či nejmoudřejší? (2014) 23(6) Jurisprudence 9; Vyhnánek (n 10) 219.
²⁰ Judgment No Pl. ÚS 16/14 of 27 January 2015.

stage, the courts seek justification for the infringement for the purposes of its proportionality assessment.²¹

Over the course of time, the first stage has become marginal. As a result of rights' inflation,²² almost every measure imposing a duty upon an individual could affect his constitutional rights.²³ Therefore the substantive argumentation concerning the scope and content of the right has been deprived of its importance. For this reason, courts focus almost exclusively on the justification of the infringement; namely, whether the infringement can be justified when the proportionality test is applied.

The basic structure of the proportionality analysis comprises three components: suitability, necessity, and proportionality in the narrow sense.²⁴ The proportionality analysis sequences these questions into a structured test that a measure must pass to be deemed constitutional. First, the court must ask whether the measure is capable of achieving a legitimate goal (suitability).²⁵ Second, the court examines if the measure is the least intrusive, but equally effective, measure to achieve the desired goal (necessity).²⁶ Third is the balancing requirement (proportionality in the narrow sense). This component requires the existence of a reasonable relationship between the limitation imposed on the right and the importance of satisfying competing constitutional values (ie other constitutional rights or the public interest). In other words, it requires any abrogation of a right to be outweighed by the gain of pursuing a legitimate goal. Whether the relationship between the infringement and the public interest is reasonable changes according to the extent of the infringement. The analysis in this stage follows the general rule that proposed measures with greater infringements on

²¹ In a broader context, proportionality enhances what is known as culture of justification. See Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) *South African Journal on Human Rights* 31–48.

²² See more on the issue of rights' inflation (n 13).

²³ Kai Möller, 'Constructing the Proportionality Test: An Emerging Global Conversation' in Lazarus et al (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 31.

²⁴ In the subsequent paragraph, I loosely proceed from classic work of Robert Alexy, *A Theory of Constitutional Rights* (n 1). Alexy's theory has also served as a main source of inspiration for the Constitutional Court when introducing the method of proportionality in its case law.

²⁵ Courts sometimes apply the 'legitimate goal' test as an additional stage, which renders the test four-pronged. As regards content, it too varies among courts. The German Federal Constitutional Court and the Canadian Supreme Court can serve as good examples here. The German Court may consider this test to be satisfied if the measure pursues any legitimate aim, while its Canadian counterpart requires the measure's objective to be of sufficient importance. See Möller (n 23) 33-55; Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57(2) *University of Toronto Law Journal* 387-89.

²⁶ Again, Germany and Canada may serve as an example. Canadian 'minimum impair' differs substantively from German necessity. For more information, see *ibid*, 390.

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individuals' rights require stricter judicial scrutiny and more compelling justification to be put forward by the public power.²⁷

The jurisprudence of the Czech Constitutional Court fits squarely within this paradigm. In the *Anonymous Witness Case*, the Constitutional Court set out the components of the proportionality test:

The first is the criterion of suitability, ie a reply to the question whether the institute restricting a certain constitutional right allows the achievement of the desirable aim (the protection of another constitutional right [or public interest]) [...] The second criterion for measuring constitutional rights and freedoms is the criterion of necessity residing in the comparison of the legislative means restricting some constitutional right or freedom with other provisions allowing to achieve the same objective, however, without impinging upon constitutional rights and freedoms [...] The third criterion is the comparison of the importance of the two conflicting constitutional values [constitutional rights or public interests]. The comparison of the importance of colliding constitutional rights (after having fulfilled the condition of suitability and necessity) resides in weighing empirical, systemic, contextual, and value oriented arguments. The empirical argument is the factual seriousness of a phenomenon which is connected with the protection of certain constitutional right [...]. The systemic argument means considering the importance and the classification of the respective constitutional right within the system of constitutional rights and freedoms [...]. The contextual argument evaluates adverse effects of the limitation on the constitutional right [...]. The value argument considers the positive aspects of the conflicting constitutional rights as regards the accepted hierarchy of values.²⁸

In its early case law, the Constitutional Court included the test of minimizing rights infringement within the structure of proportionality. This focused on '*considering the utilization of legal institutes minimizing the intervention*' in the constitutional right in hand. This proposition overlaps almost fully with the necessity test. But in subsequent case law, the Constitutional Court explicitly declared it an optimization requirement. As a result, it has

²⁷ Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65(1) Cambridge Law Journal 200. The most famous formulation of this rule is probably that put forth by Robert Alexy: 'The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.' See Alexy (n 1) 102.

²⁸ Judgment No Pl. ÚS 4/94 of 12 October 1994.

been left out of the test, or fused with it.²⁹

In substance, the proportionality analysis applied by the Constitutional Court is gradually getting closer to the paradigmatic structure mentioned above. Most notably, the Court has abandoned the weight formula comprising empirical, systemic, contextual, and value oriented arguments, and replaced it with an ‘Alexy-style’ weight formula:

[The] principle of proportionality (in the narrow sense) [requires that] the detriment to a constitutional right [...] not be disproportionate in relation to the intended aim. That is, in the event of a conflict between a constitutional right or freedom with the public interest, the negative consequences of measures restricting constitutional rights and freedoms may not exceed the positive elements represented by the public interest in these measures.³⁰

As results from a comparative point of view and the case law of the Constitutional Court, proportionality is a specific way to test the reasonableness of the limitation of constitutional rights. The analysis queries the rationality of means-ends relation and how to fairly balance conflicting values, where an interference with a constitutional right must be adequately outweighed by sufficient reasons in favour of the second value. Finally, proportionality is an argumentation structure for courts, which contributes to greater transparency in their decision-making process.

C. THE PRACTICE OF THE CZECH CONSTITUTIONAL COURT

1. Socio-economic rights in Czech Charter of Fundamental Rights and Freedoms

Chapter four of the Charter includes an extensive catalogue of socio-economic rights, such as the right to the free choice of profession and the right to private enterprise (Article 26); the right to social security (Article 26 and Article 30); the right to form trade unions (Article 27); the right to strike (Article 27(4)); the right to fair remuneration for work and satisfactory work conditions (Article 28); the right of women, adolescents, and persons with disabilities for the increased protection in labour relations (Article 29); the right to health protection and health care (Article 31); the right to protection of parenthood, family, children and adolescents (Article 32); equality of children born in or out of wedlock (Article 32(3)); the right to education (Article 33); and the right to a favourable environment (Article 35).

²⁹ See judgments No Pl. ÚS 4/94 of 12 October 1994; Pl. ÚS 41/02 of 28 January 2004; Pl. ÚS 34/04 of 14 July 2005; Pl. ÚS 51/06 of 27 September 2006.

³⁰ Judgment No Pl. ÚS 8/06 of 1 March 2007. For application of this formula in more recent jurisprudence, see eg judgment No Pl. ÚS 2/17 of 18 July 2017, §40.

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Within this broad group of rights, the Charter enshrines rights of economic, social, and cultural character. It is a disparate group, and the normative nature of these rights changes from one provision to another. The vast majority of rights are subjective constitutional rights (eg right to social security, or the right to education), however some of the provisions that anchor these rights are more likely to be classified as objective principles of constitutional law (eg rights of women, adolescents, and persons with disabilities for the increased protection in labour relations). Further, in some instances, the positive aspects (obligations) of any such right are predominant (eg right to social security, and right to health protection and health care), while with respect to other rights, it is their negative aspects that prevail (eg right to free choice of profession and right to private enterprise).³¹ Notably, some commentators maintain that the right to equal legal protection of children born in or out of wedlock do not naturally belong in the list of socio-economic rights and must have appeared in this chapter only by mistake of an editor.³² This means that it is only a specification of the general right to equality (Articles 1 and 3(1)), and thus does not belong to this chapter at all.

Article 41(1) of the Charter brings these miscellaneous provisions together. The provision reads: '[t]he rights listed in Article 26, Article 27(4), Articles 28 to 31, Article 32 (1) and (3), Article 33, and Article 35 of this Charter may be claimed only within the confines of the laws implementing these provisions.'³³ What follows from the wording of this provision is that the legal regulation of socio-economic rights in the Charter is, to a degree, paradoxical. It incorporates a voluminous catalogue of rights but leaves their implementation to the mercy of the legislator, pursuant to Article 41(1) of the Charter. Article 41(1) cannot be interpreted separately from the rest of the Charter. This wording is coupled with the Charter's general provision on the limitation of rights anchored in Article 4(4), which reads:

When employing the provisions concerning limitations upon the fundamental rights and freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations shall not be misused for purposes other than those for which they were enacted.³⁴

³¹ Because of their close connection to the right to property, the right to free choice of profession and the right to private enterprise are deemed to be more a traditional liberal freedoms than socio-economic rights. For this reason, the Constitutional Court applies them also by means of (strict) proportionality. See, eg, judgment No II. ÚS 443/16 of 25 October 2016. From a comparative point of view, it is not a coincidence that the German Basic Law enshrines the right to the free choice of profession, although it does not include the catalogue of socio-economic rights. See Article 12(1) of the German Basic Law.

³² See Wintr (n 21) 832.

³³ Article 41(1) of the Charter.

³⁴ Article 4(4) of the Charter.

The interplay between these two provisions determines the very nature of socio-economic rights in the Charter as subjective rights, as well as the method of rights' adjudication. In relation to Article 41(1) of the Charter, the Constitutional Court provides the legislator with a broad degree of discretion to define the content of, and manner of implementing, socio-economic rights. At the same time, Article 4(4) of the Charter places limitations on the legislator in exercising its discretion, which is not (and should not be) unfettered. Thus, neither the relative freedom of the legislature arising from Article 41(1) of the Charter entitles the legislature to negate constitutional guarantees of socio-economic rights. Otherwise, the constitutional protection of these rights would be devoid of any practical sense.³⁵ Therefore, Article 4(4) of the Charter guarantees an autonomous normative content of socio-economic rights and their very nature as subjective constitutional rights.

2. Methodology of socio-economic rights adjudication: rationality test

Based on the substantive character of socio-economic rights and the need for a more deferential position towards the legislator, the Constitutional Court deconstructed its general methodological approach towards (strict) proportionality and developed a new method to review socio-economic rights limitations: the rationality test.³⁶ The rationality test is a constitutional standard that a statute must pass in order to be considered constitutional. The test reflects both the need to respect the relatively broad discretion of the legislature, and the need to avoid its possible excesses. Structurally, it consists of four questions: 1) What is the essential content (or, minimum core) of the socio-economic right? 2) Does the statute affect the minimum core, or its actual implementation? If it does not affect the essential content of the right, then the analysis continues with steps 3-4. 3) Does the statute pursue a legitimate aim? 4) Are the statutory means used to achieve the legitimate aim reasonable (rational), even if not necessarily the best, most suitable, most effective, or wisest (rationality in the narrow sense)?³⁷

If the Constitutional Court concludes that the minimum core of socio-economic rights is affected at step 2 of the rationality test, then it will subject the interference to the (strict) proportionality test. As such, the Court will consider whether the interference is 'based on the

³⁵ See judgments No Pl. ÚS 1/08 of 20 May 2008, §92; Pl. ÚS 2/08 of 3 April 2008, §52; Pl. ÚS 54/10 of 24 April 2012, §§45, 59.

³⁶ This test was inspired by the American *rational-basis review*, which resides only in an assessment as to whether the measure in hand is 'rationally related' to the legitimate governmental interest. Thomas E. Sullivan and Richard S. Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions* (OUP 2009) 61-6.

³⁷ See judgments No Pl. ÚS 1/08 of 20 May 2008, §§102-4; and Pl. ÚS 54/10 of 24 April 2012.

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absolutely exceptional current situation, which would justify such interference'.³⁸ The second step of the rationality test enables the Constitutional Court to adjust the intensity of review according to the sphere of a right affected, ie the minimum core (proportionality test) versus penumbra (rationality test).

The rationality test is a holistic and open-ended standard of constitutional review. This characteristic flows from the structure of socio-economic rights as principles.³⁹ Thus, the rationality test can (and should) accommodate some sort of balancing exercise. However, the wording and the abstract definition of the rationality test merely suggests the suitability of a proportionality analysis, including only a means-ends analysis; the rationality test does not denote balancing. A clear answer as to the overlap between the rationality test and a form of proportionality analysis does not directly flow from the abstract definition of the rationality test set out above. Instead, the answer may lie in the practical application of the test.

3. Does rationality involve balancing? Case study of the Compulsory Vaccination Case

In order to answer the main question of this article, which is whether the rationality test is a variation on proportionality, an in-depth analysis of the practice of the Constitutional Court is required. The application of the rationality test entails many discrepancies. Rationality is problematic for a number of reasons. First, it is a somewhat activist test, which allows the Constitutional Court to weigh in even on cases where the core of a right has not been infringed (Article 4(4) of the Charter).⁴⁰ Second, the rationality test is characterized as so inconsistent, both in terms of its application⁴¹ and structure,⁴² that it borders on arbitrariness. On this point, some authors argue that defining the minimum core of a socio-economic right on a case-by-case basis creates inconsistency, along with a lack of clarity on the issue of rationality's intensity.⁴³ This is underlined by the fact that the practice of the Constitutional Court is inconsistent with respect to its own perception of the normative nature of socio-economic rights enshrined in the Charter.⁴⁴ The Constitutional Court can be further criticized for not applying the rationality test as a formal structure of an argument, but rather as an

³⁸ Judgment No Pl. ÚS 1/08 of 20 May 2008, §104.

³⁹ See dissenting opinion of Justice Holländer in judgment No Pl. ÚS 32/95 of 3 April 1996.

⁴⁰ Jan Wintr, 'První tři dny nemoci bez nemocenského' (2008) 17(5) Jurisprudence 37.

⁴¹ See judgments No Pl. ÚS 61/04; Pl. ÚS 2/08; Pl. ÚS 1/08; Pl. ÚS 1/12; Pl. ÚS 43/13; and Pl. ÚS 44/13.

⁴² See judgments No Pl. ÚS 39/01; Pl. ÚS 61/04; Pl. ÚS 1/08; Pl. ÚS 10/13; and Pl. ÚS 44/13.

⁴³ Antoš (n 19) 13-14; Vyhnanek (n 10) 218-19.

⁴⁴ The opinions of the Constitutional Court vary significantly from one case to another. The main positions can be summarized as follows: a) socio-economic rights as subjective constitutional rights; b) protection of socio-economic rights limited only to the minimum core; and c) socio-economic rights as 'institutional guarantees'. See dissenting opinion of Justice Janů to judgment No Pl. ÚS 36/11 of 20 June 2013.

argument *per se*.⁴⁵ Analysis of each of these deficiencies exceeds the scope of the present article, which instead focuses on whether the rationality test can be considered a variation of the proportionality analysis.

In order to answer this question, the Constitutional Court's judgment in the *Compulsory Vaccination Case* will be used as a case study.⁴⁶ In this case, the Constitutional Court rejected a motion seeking the annulment of Article 50 of the Act on Public Health Protection for its alleged violation of the appellant's right to education (Article 33 of the Charter). The impugned provision stated that preschool educational facilities were only allowed to admit children who had received certain vaccinations.⁴⁷ If they had not been vaccinated, parents and guardians were required to certify that their children were immune to infection, or could not undergo vaccination due to permanent contraindication.

Article 33 of the Charter, which enshrines the right to education, reads as follows:

- (1) Everyone has the right to education. School attendance shall be obligatory for the period specified by law.
- (2) Citizens have the right to free elementary and secondary school education, and, depending on particular citizens' ability and the capability of society, also to university-level education.
- (3) Private schools may be established and instruction provided there only under conditions set by law; education may be provided at such schools for tuition.
- (4) The conditions under which citizens have the right to assistance from the state during their studies shall be set by law.⁴⁸

In its reasoning, the Court first stated that the case fell within the scope of the right to education because 'there [was] no reason to eliminate the preschool education as a process leading to the acquisition of specified skills, attitudes, and knowledge, not only as taking care of children or babysitting, from the scope of the right to education under Article 33 of the Charter.'⁴⁹ The Constitutional Court then subjected the impugned legal provision to the

⁴⁵ In some instances, the Constitutional Court applies the test as one of the arguments – and in some cases, the only argument – when inquiring as to the constitutionality of an impugned statute or provision. In such instances, the test does not structure the thinking of the interpreter. See judgments No Pl. ÚS 36/11; Pl. ÚS 1/12; Pl. ÚS 10/13; and Pl. ÚS 43/13.

⁴⁶ Judgment No Pl. ÚS 16/14 of 27 January 2015.

⁴⁷ Compulsory vaccination in the Czech Republic covers 9 infectious diseases. Children are mandatorily vaccinated against diseases such as diphtheria, tetanus, whooping cough, polio, measles, mumps, rubella, diseases caused by *Haemophilus influenzae* type B and hepatitis B. The Constitutional Court has submitted a regulation of compulsory vaccination to its review in judgment No Pl. ÚS 19/14 of 27 January 2015 and found it in compliance with the Charter.

⁴⁸ Article 33 of the Charter.

⁴⁹ Judgment No Pl. ÚS 16/14 of 27 January 2015, §83.

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rationality test applying the abovementioned four-prong structure. On this point, and according to abstract definition of the test, the Court is required to define the minimum core of the socio-economic right. The *Compulsory Vaccination Case* involved the right to education, which is protected under Article 33 of the Charter. However the Constitutional Court did not provide an interpretation of the substantive content of the right. The Court reiterated only that although the legislature has a relatively broad discretion to define the content of the right, it could not breach the minimum core of the right enshrined in Article 33 of the Charter.⁵⁰

On the second step of the rationality test,⁵¹ the Court found that the contested provision did not interfere with the minimum core of the right to education. The Court did not find the provision to represent such an interference that could be discriminatory, or prevent all unvaccinated children from being admitted to a preschool establishment.⁵² Additionally, the Court found that the contested provision pursued a legitimate aim, namely the protection of public health and the rights of others. The Court recalled the opinion of the Committee on Human Rights and Biomedicine of the Government Council for Human Rights of the Czech Republic, according to which:

Vaccination is one of the most effective methods of health prevention in general and it is widely considered, along with the use of antibiotics, as a cause of extreme decrease in morbidity and mortality resulting from infectious diseases and as the greatest benefit and basis of modern medicine. An essential part of the preventive action of vaccination is its wide application and a high vaccination coverage rate, which is about 90% vaccination coverage.⁵³

Moreover, the Constitutional Court referred to its judgment No Pl. ÚS 19/14 of 27 January 2015, where it stated that ‘the purpose of compulsory vaccination is not only in principle the blanket vaccination of persons *ex lege*, but also indirectly the protection of individuals, who have not been vaccinated for various reasons, against infectious disease’. Thus, the contested provision also served as protection of the rights of others.

⁵⁰ *ibid.*, §§87-89.

⁵¹ *ibid.*, §§90-98.

⁵² The Constitutional Court mainly regarded the existence of exceptions from the general duty to undergo vaccination for cases of the immunity to the infection and the permanent contraindication.

⁵³ Judgment No Pl. ÚS 16/14 of 27 January 2015, §99.

Finally, the Court examined whether the contested provision was a rational means to achieve its legitimate aim.⁵⁴ The Court largely based its opinion on the following argument:

Vaccination in general, as a means of immunisation against some infections, has a social benefit requiring the shared responsibility of members of the society, i.e. an act of social solidarity of those who undergo a risk, at present referred to as minimum by the current majority-accepted scientific knowledge, in order to protect the health of the whole society. The vaccination of the sufficient majority of the population prevents the spread of some diseases, providing protection not only to those who have been vaccinated. The higher the proportion of unvaccinated against the vaccinated population, the higher the risk of repeated spreading of infection not only among those who have voluntarily refused vaccination, but also among those who cannot be vaccinated for serious reasons, especially health-related. Finally, also the people who have been vaccinated, but their vaccination has not achieved the desired effect, are threatened by the spread of the disease. In the present case, where the vaccination is a condition for admitting a child to a kindergarten, the persons particularly exposed to the risk of infection are children, who may face in case of disease particularly serious consequences.⁵⁵

The bench concluded that the impugned provision, mandating vaccination as a condition for admission to preschool, was reasonable (rational). According to the Court, this was because it followed a legitimate aim (protection of public health and rights of others), and the measure used rational, and not arbitrary, means to attain this aim. Therefore, the Court found that the measure did not violate the right to education as protected under Article 33 of the Charter.

Despite adopting the concept of minimum core, the Constitutional Court does not utilize the benefits offered. One such advantage is that it enables courts to define the substantive content of an infringed right. In the *Compulsory Vaccination Case*, the Constitutional Court defined the core of the right to education as proscribing discrimination in access to education. There is no mention of the value brought to an individual by the right to education, or what an individual may require in order to access this right.

As to rationality in the narrow sense, the Constitutional Court did not engage in any substantive analysis of the right to education either. It focused solely on the analysis of positive consequences of the state's policy (vaccination) for the protection of public health

⁵⁴ *ibid*, §100.

⁵⁵ *ibid*, §102.

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and rights of others, and failed to take account of the provision's negative consequences on individuals. Instead of analysing the purpose of the right to education, and the extent to which it was affected by the impugned provision, the Constitutional Court only considered the importance of compulsory vaccination.

The Court's reluctance to take account of the adverse effects of the law is a consequence of the abstract definition of the rationality test, and the absence of a substantive interpretation of the right in the Constitutional Court's reasoning. Nowhere in its majority judgment does the Constitutional Court mention the substantive content of the right to education. If it did, it would not have left out arguments brought up in Justice Kateřina Šimáčková's dissenting opinion.

Justice Šimáčková strongly dissented against the reasoning provided by the majority of the bench. She agreed with the majority with regards to the categorization of the infringement as falling out of the minimum core, and the application of rationality for its review.⁵⁶ Nevertheless, she criticized the majority for its insufficient review of the law and its rationality.⁵⁷ Justice Šimáčková brought up several strong arguments against the rationality of the impugned provision. First, the rationality of the provision should be examined against each of the nine listed diseases separately. In this respect, she believed that it was not reasonable to require vaccination against tetanus (which is not communicable from one child to another) and hepatitis B (which is transmitted only through sexual intercourse or blood contamination) as a condition of admission to preschool.⁵⁸ Second, the legal regulation of vaccination duty is irrational as it applies to all preschool establishments (both public and private) and providers of child care services. As such, it provides no alternative for unvaccinated children to attend a preschool establishment.⁵⁹ Finally, Justice Šimáčková pointed out that the judgment also ignored warnings from the Ombudsman, which called for the annulment of the contested legislation, alleging that it imposed a duty to vaccinate children attending preschool but did not impose the same duty upon the staff of at the same institutions.⁶⁰

⁵⁶ According to Justice Šimáčková, the core of the right to education enshrined in the Article 33 of the Charter generally covers elementary school education. See dissenting opinion of Justice Šimáčková to judgment No Pl. US 16/14 of 27 January 2015, §§2-5.

⁵⁷ *ibid.*

⁵⁸ *ibid.*, §§6-9.

⁵⁹ *ibid.*, §10.

⁶⁰ *ibid.*, §11.

These arguments are all persuasive, but arguably the most compelling is Justice Šimáčková's argument in relation to the severity of the limitation on the right to education imposed by the impugned legal provision, which excluded unvaccinated children from the entire preschool education system. The Constitutional Court focused solely on the benefits flowing from the obligation to vaccinate, and failed to consider the harm caused by the infringement on an individual's right to an education. Led by the abstract definition of the test, the Constitutional Court limited its review of the law to mere means-ends analysis and failed to assess the harm caused to the infringed right. As such, this application of the rationality test does not indicate that it could be perceived as a variation on proportionality.

D. CONCLUSION: IS THE RATIONALITY TEST A VARIATION ON PROPORTIONALITY?

It follows from the analysis of the abstract definition of the test, and the case study, that the rationality test is a holistic, open-ended standard, which (if applied properly) contributes to the transparency of judicial decisions. It even works in the paradigmatic two-stage structure of review because it first deals with the substantive questions of socio-economic rights, and then the possible justifications for limiting these rights. In this respect, the rationality test resembles that of proportionality, but that is where the similarities end.

The logic that underscores both methods of the reasonableness review under the proportionality test and the rationality test differs significantly. The rationality test, in its abstract definition, only focuses on testing the existence of reasonable means-ends relation; it does not require the court to balance conflicting constitutional values. As the *Compulsory Vaccination* Case demonstrates, the Constitutional Court does not engage in any sort of balancing exercise either. On the contrary, it only weighs the importance of public interest in favour of the reviewed law. Together with the absence of any substantive interpretation of the right to education, this approach taken by the Constitutional Court has led to socio-economic rights 'falling out' of any such consideration. In time, socio-economic rights and their normative content may become completely irrelevant to the Constitutional Court, and lose their position as a benchmark criterion of constitutional review.

Proportionality is a specific method used to assess the reasonableness of measures that limit, or threaten to limit, constitutional rights. In its essence, it requires a balance between the benefits of the adopted measure and its aim on the one hand, and the negative consequences for individuals on the other. This aspect of proportionality is not included in

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the rationality test as applied by the Constitutional Court, neither in its abstract definition nor its application. Rather, the Constitutional Court applies the doctrine of material state of law in its practice. One of the components of this doctrine is the primacy of an individual before the state.⁶¹ It is always necessary to take account of the consequences of a given measure on individuals and their constitutional rights. Whether the methodology of the Constitutional Court may be justified on grounds of this principle is a question of a separate order, but this author is of the view that it may not.

This proposition yields another one; if one limits the constitutional review to the means-ends analysis only, individuals and the extent of interferences with their constitutional rights are excluded. Balancing as a tool for measuring such interferences must therefore be maintained even in the case of socio-economic rights.

Finally, this paper raises an additional issue that denotes future research. It concerns the manner in which the standards of review correspond to the methodology applied by the international institutions that protect fundamental rights. Apart from Article 33 of the Charter, the right to education is also enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 2 of Protocol No 1). However the European Court of Human Rights assesses interferences with the right to education by means of proportionality analysis. Notwithstanding the wide margin of appreciation that the European Court of Human Rights is likely to grant to the state, it cannot be unequivocally inferred from its case law that it would be as lenient as the Czech Constitutional Court in its application of the rationality test.⁶² This question deserves further elaboration beyond the framework of this study.

⁶¹ See, for example, judgment No III. ÚS 449/06 of 3 February 2011.

⁶² Dissenting opinion of Justice Šimáčková to judgment No Pl. ÚS 16/14 of 27 January 2015, §3.