

OPINION

by Assoc. Prof. Dr. Konstantin Vassilev Pehlivanov, on a basic employment contract at „Paisii Hilendarski” University of Plovdiv, Faculty of Law, Department of Public Law, Associate Professor in the Field of Higher Education 3. Social, Economic and Legal Studies, professional field 3.6 Law, scientific specialty Administrative Law and Administrative Procedure

on the dissertation of Maria Borisova Dimitrova, submitted for awarding the degree of Doctor in Field of Higher Education 3. Social, Economic and Legal Sciences, professional field 3.6 Law, doctoral programme Constitutional Law, entitled "The Principle of Proportionality in the Protection of Fundamental Rights", supervised by Prof. Dr. Martin Belov

I submit this opinion as a member of the scientific jury appointed by Order No. RD-38-674/21.12.2023 of the Rector of the Sofia University “Sv. Kliment Ohridski” and after decision made at the first meeting of the scientific jury (Protocol No. 1/19.01.2024), pursuant to which I was assigned to prepare an opinion.

I have checked the candidate's compliance with the minimum national requirements for obtaining the educational and scientific degree of Doctor and my conclusion is that she has exceeded them - she has submitted a dissertation and has published in unrefereed but indexed journals three articles and one chapter of a collective monograph in co-authorship. Accordingly, the procedure is admissible and the submitted dissertation can be examined on its merits by the scientific jury. A correctly formatted abstract and the obligatory declaration of authorship have been submitted.

Having read the submitted dissertation entitled "The Principle of Proportionality in the Protection of Fundamental Rights" I have reached the following conclusions:

The dissertation consists of 248 pages, including a title page, table of contents, abbreviations used, 229 pages of analytical text, and a description of the bibliography and sources used. The bibliography used consists of 155 titles. There are 22 articles and books in Bulgarian and 133 in English, French and German. A large number of decisions of the European Court of Human Rights, the Bulgarian Constitutional Court, the Federal Constitutional Court of Germany, the Supreme Court of Great Britain, the French Constitutional Council, the Supreme Court of Canada, the Supreme Court of Israel, and the Supreme Court of the United States have been studied. The dissertation is structured with an introduction, four chapters and a conclusion with the following main features:

The introduction sets out the need for a scholarly study of the principle of proportionality in constitutional law. The topic has been studied in the Administrative Law and Administrative Procedure, but a comprehensive study in Constitutional Law is unknown to me and the existence of such a dissertation should be welcomed.

Chapter One, "The Principle of Proportionality in Contemporary Constitutionalism," examines the changes that occur in understandings of statehood in the transition from Westphalian to post-Westphalian constitutionalism. The main features of contemporary constitutionalism that emerge under the influence of a number of factors are outlined. The

author derives the beginnings of the formation of the principle, and I can agree with her, from the fact that the second half of the twentieth century and especially the beginning of the twenty-first century are characterized primarily by the development of the doctrine of human rights, and the growth of the role of the courts. Thus, the idea is accepted that restrictions on citizens' fundamental rights, even when imposed by the most representative organ of the state, Parliament, must always be subject to review by an independent institution, most often a constitutional court. Next, the European Court of Human Rights and the Court of Justice of the European Union have adopted the principle and a complex process of mutual influence has taken place - these courts have mainly recycled the principle from French and German law, but have in turn translated it into national legal systems. I fully endorse the conclusions on the importance of this principle for the philosophy of the exercise of public power in the modern liberal democratic state, insofar as its exercise extends judicial discretion beyond the formal legality of the act, which in turn extends the requirements for the qualification of the courts; more research is also needed in this respect. It is quite accurate to observe that, as a result of the application of the principle of proportionality, 'power decisions are examined on the basis of their effect on fundamental rights through the language of proportionality, and this leads to the legalisation of politics and the politicisation of the judiciary' and that 'the assessment of what are proportionate limitations on these rights allows the court to be a participant in political processes and defines the new role of the national court in interinstitutional and supranational dynamics'.

I find chapter two "Main Characteristics of the Principle of Proportionality as a Set of Rules Used in the Judicial Review of Restrictions on Fundamental Rights" the most valuable and contributory chapter in the dissertation. I accept the dissertation's conclusion that the principle of proportionality as a set of rules in judicial review is not all-encompassing and applies mostly to a certain range of rights, such as fundamental personal, civil and political rights, insofar as they are either fundamental and inalienable to the human person or are essential to the establishment of a democratic and legal order. The analysis of the stages through which judicial review passes in the application of the principle is powerful and contributory. Its application to different types of rights is appropriately examined. I can agree with the dissertator's observation that in Bulgarian constitutional doctrine and practice the principle of proportionality is derived from the rule of law, and I would note that the Constitutional Court has so far avoided proclaiming this principle as fundamental and independent, but has been forced to derive it by interpretation from the rule of law principle or to refer to the case law of the ECtHR and the ECJ simply because it cannot find a reliable legal support in the text of the Constitution, unlike the Supreme Administrative Court which can refer to the explicit provision of Art. 6 Administrative Procedure Code. The author, examining the algorithm of application of the principle, uses the achievements of foreign doctrinal sources (an impressive number of foreign literature is used in the dissertation, it prevails over the national one and for this alone the dissertator deserves praise) and comes to the conclusion about the importance of the last element in the judicial review - proportionality in a narrow sense (*strictu sensu*). This element is predictably the most difficult to analyse, insofar as it is where the transcendence of legal, often political considerations, and the discretion of the court (margin of appreciation) is the greatest, accordingly I find this part of the dissertation's study the most contributory. I also support the conclusions that in practice a dialogue is formed between supranational and national courts, and when a restrictive rule of law is struck down as disproportionate, the court enters into an inter-institutional dialogue with parliament, encourages compliance with proportionality rules in the legislative process, and ultimately brings the exercise of public power closer to the ideal of proportional government. I can support the dissertator's reasoning that the application of the principle of proportionality enhances the legitimacy of the decisions taken and the

confidence of citizens in the courts, and allows them to make arguments from the legal tradition and to place rights in the relevant social context, although this would ideally occur in a case where the absence of an institutional crisis is not guaranteed. In practice, we get control of the most democratic and representative body (parliament) by a constitutional jurisdiction that is expert but opaque and little known to the public, virtually unaccountable, with corresponding political effect. Indeed, the author also correctly reflects the contrary views and the doctrinal dispute, accurately noting that "the impression of irrationality stems from the modern weakening of the ideas of normativism, and the entry of meta-legal categories into law and law enforcement in general" (the use of the term "meta-legal categories" is to be applauded, and I would recommend to the author to continue research in this area).

Chapter Three, "The Principle of Proportionality in Germany, Great Britain and France", completes the legal analysis in the national jurisdictions from which the principle, the subject of the thesis research, originates. The historical line of development in these countries is traced. For me personally it was interesting to learn the change in French legal doctrine and constitutional reform after 2008 with the corresponding change in the application of the proportionality principle.

An interesting point I find here, and perhaps this should have been developed more, is the relationship between the principle of proportionality and the principle of subsidiarity, as well as respect for constitutional identity and tradition. Certainly, given the scope of the work, I recognise the right of the author and her supervisor to place emphasis where they feel it necessary, and I do not find this a weakness of the work.

Chapter Four "The Principle of Proportionality in the Practice of the Bulgarian Constitutional Court" is the logical completion of the topic of the dissertation research on the application of the principle in Bulgaria. I appreciate the historical analysis of the views and practice of the Constitutional Court, the two mentioned examples of judicial dialogue (realized and unrealized) with the European Court of Human Rights.

It was interesting for me to read the analysis of some acts whose application in practice I have encountered (Decision No. 3 of 23.03.2021 in case No. 11/2020 and the controversial for me Decision No. 5/1996 in case No. 4/1996 with a kind of continuation Decision No. 7/2009 in case No. 11/2009). For Decision No. 5/1996, I am not really sure that the Constitutional Court proceeded from the principle of proportionality, given the year of the case and the development of legal doctrine in our country, but, as the dissertation has pointed out, in the practice of the Constitutional Court the principle of proportionality is considered to be a manifestation of the principle of the rule of law. Again, I find the part with the reflections on the application of the third element of the principle - proportionality *strictu sensu*, which is also the most difficult to study, - the most useful. On the elements of the principle the author could find some details in Baltadzhieva, R. and Todorov, Iv., Interaction between European and Bulgarian Administrative Law, Ciela, 2008.

I have no major criticisms of the work, I would like to see it published, the research is original and contributory.

Of the attached publications, I highly appreciate the original "Is the National Assembly Civilly Liable for Damages from "Bad" Laws?".

The research has been done in a manner of scrutiny, with a study of a great deal of foreign literature, with a thorough review of the practice of constitutional jurisdictions.

I have found no evidence of plagiarism and use of other people's scientific contributions in a way not regulated by law.

In view of my conclusions, I find that by virtue of the quality of the dissertation entitled "The Principle of Proportionality in the Protection of Fundamental Rights", Maria Borisova Dimitrova deserves to be awarded the degree of Doctor of Education in the Field of Higher Education 3. Social, economic and legal sciences, Professional field 3.6 Law, Doctoral Program "Constitutional Law".

(Assoc. Prof. Dr. Konstantin Pehlivanov)