

# **OPINION**

by

Prof. Dr. Plamen Veselinov Kirov

of dissertation for the award of the educational and scientific degree

# **DOCTOR**

Field of higher education: Social, Economic and Legal Sciences (3.)

Professional field: Law (3.6)

Scientific specialty: Constitutional Law

Author of the thesis:

**MARIA BORISSOVA DIMITROVA,**

part-time PhD student

to the Department of Constitutional Law, Faculty of Law, Sofia University  
"St. Kliment Ohridski"

Title of the thesis:

**THE PRINCIPLE OF PROPORTIONALITY  
IN THE PROTECTION OF FUNDAMENTAL RIGHTS**

Scientific supervisor  
Prof. Dr. Martin Belov

By the Order of the President of the Sofia University "St. Kliment Ohridski" No. RD 38-674 of 21.12.2023 I have been appointed as a member of the Scientific Jury in connection with the defence of Maria Borissova Dimitrova, a PhD student of part-time training in the professional field of Law (3.6), scientific specialty Constitutional Law for the award of the educational and scientific degree "Doctor", and at the first meeting of the Scientific Jury I was assigned to prepare an opinion on the dissertation.

Maria Borissova Dimitrova was enrolled as a part-time PhD student in Constitutional Law at the Department of Constitutional Law Studies of the Faculty of Law of Sofia University "St. Kliment Ohridski" in 2019. After presenting her dissertation, which was discussed at a meeting of the Department and passed a successful internal defence, Maria Dimitrova was discharged with the right to defence by virtue of an Order of the President of Sofia University "St. Kliment Ohridski" in 2023.

Pursuant to the order of the President of the University and the decision of the Scientific Jury and in view of the requirements of the Academic Staff Development Act of the Republic of Bulgaria and the Regulations for its implementation, I present to the attention of the distinguished members of the Scientific Jury the following findings and conclusions, as well as the so-related reasoned assessment.

The set of materials provided by Maria Borissova Dimitrova includes the following documents: a curriculum vitae; an order for the student's enrolment; certificate of successful completion of the doctoral minima; dissertation, abstract; an order for discharge with the right of defence; a list and copies of Maria Borissova Dimitrova's scientific publications related to the topic of the dissertation and a declaration of originality of the work.

The PhD candidate has enclosed three scientific articles related to the topic of the dissertation and meets the scientific metric requirements.

I consider that all the requirements concerning the procedure and the formal composition of the thesis have been met.

The topic "The principle of proportionality in the protection of fundamental rights" has its theoretical, legal-normative and practical aspect. The relevance of the study is determined by the tendency, which is gradually emerging in contemporary constitutionalism, that the current constitution reflects the theoretical debate and, as directly applicable law, to place a legal foundation for the growth of a comprehensive national legal framework that would adopt proportionality as a constitutional principle in assessing the permissibility of restricting fundamental rights. Taken as a topic on its own and addressed through the approach applied by the PhD candidate, the question of proportionality in the traditional democracies and the Republic of Bulgaria has been developed as a comprehensive theoretical study. Until the present moment, this problem has been addressed in various aspects by some Bulgarian authors, but in the dissertation at hand it has been developed as a complete independent study.

Maria Dimitrova demonstrated a high level of knowledge of the issues. The PhD student shows a remarkable awareness in the field of constitutional history and theory, human rights field, as well as the ability to evaluate creatively the abundant literature accumulated in the research over the last decades in countries with democratic constitutional traditions. Proportionality in law is a multi-layered topic, which, theoretically, could be summarised into three aspects: proportionality as a legal principle placing limits on public power and preventing its arbitrary exercise; proportionality as an objective of governance to comply with the democratic standards and satisfy the ideas of justice; proportionality as a set of rules applied in judicial review of the limitations of fundamental rights.

The author of the dissertation outlines two main functions of the principle of proportionality. The first one consists in delineating the limits of public power by means of judicial review of the restrictions imposed on the exercise of fundamental rights, and the second one refers to the determination of the limits of

intervention of supranational courts in matters related to national restrictions of fundamental rights. At the same time, the thesis underlines the task of national courts to give content to the rules of proportionality, which is refracted through the prism of the universal nature of rights, national constitutional identity, legal traditions, history and culture. In this way, the national courts delineate the boundaries of non-intervention by the supranational courts and become a legitimate expression of national sovereignty.

The dissertation has two main objectives. It argues that the principle of proportionality is a fundamental principle of modern constitutionalism and the modern democratic European state, linked to the new role of the national court as a participant in the political process at the national level and as an authoritative interlocutor in the judicial dialogue with supranational courts. Secondly, the dissertation debates the proposition that a well-developed national case-law on the limitations of fundamental rights, in which the principle of proportionality is applied in line with the universal understanding of rights but also with the national context and legal tradition, is an effective way to respond to the activism of supranational courts.

The methodological toolkit of the research is rich - starting with the legal-dogmatic, historical and comparative method and continuing with the systematic and functional method. Case law of national and supranational courts is used to substantiate the presented ideas. Such an approach allows an in-depth research of the topic and a thorough examination of the rich issues related to philosophical aspects and their legal projections.

Structurally, the work has been construed well, which generally excludes repetitions and gaps in the exposition. The thesis is 247 pages long and consists of an introduction, four chapters, a conclusion and a bibliography. The bibliography contains 152 titles in Bulgarian, English, French and German. Footnotes are 456 in total.

Chapter One examines the changes that occur in the concept of statehood in the transition from Westphalian to post-Westphalian constitutionalism. It outlines the main features of modern constitutionalism, emerging under the influence of a number of factors, such as globalisation, the technological revolution, the transformation of human rights protection into a leading ideology of a world shaped by contradictions, the supranationality and the transfer of sovereignty, the constitutional review and the judicial dialogue. In recent decades, the supranational institutions gradually acquired a dominant role in the creation of legal norms, especially in the area of fundamental rights. At the same time, the supranational regimes, the Council of Europe and the European Union, have established their own courts in order to apply these norms and, through judicial precedents, transform them into applicable law. Against the background of these socio-political changes, the contemporary constitutionalism also faces a number of challenges, such as the citizen participation in the process of political decision-making and the question of how to guarantee the rule of law. The author argues that these modern challenges create serious tensions in the functioning of national and supranational legal regimes. It is asserted that the principle of proportionality has become a fundamental principle of modern constitutionalism. Its origin, determination and development have been uncovered, as well as its role as a centre where the universality of fundamental rights and the concepts of national constitutional identity, legal tradition and culture meet. The role of the national court in reconciling the universal and the national has been outlined, with the primary aim of ensuring the protection of fundamental rights while preserving national sovereignty. The principle delineates the limits of the exercise of public power and provides an additional opportunity for citizens to participate in policymaking. As a result, according to the author, political authorities begin to apply the principle of proportionality in their practice so that their decisions are not quashed by the courts.

Chapter Two examines the doctrinally accepted structure of the principle of proportionality as a set of rules applied in the constitutional review of the limitations rights' limitations. The principle of proportionality, as a sole requirement of reasonableness of the limitation rather than as a set of rules, is in practice applied in the review of restrictions on socioeconomic and cultural rights. In the context of these rights, the nation states have a wide margin of discretion as to how to regulate and define them in the national legal order. The author has examined the main theories in legal doctrine concerning the principle of proportionality. The analysis reaches the correct conclusion that the principle enhances the legitimacy of the decisions taken and the confidence of citizens in the courts by allowing the courts to reassess the decisions of the legislator in an authoritative manner without causing an institutional crisis and violating the separation of powers. Furthermore, the principle allows national courts to apply the national legal framework and to determine the limits of the intervention of the European Court of Human Rights, compelling it to apply the principle of subsidiarity. The application of the principle of proportionality as a set of consistent rules leads to a new model of constitutional rights and a common framework of proportionality rules that constitutional courts in European countries follow.

Chapter Three aims to trace how the case-law on the application of the principle of proportionality has developed in three European countries - Germany, the UK and France - and the influence of the European Court of Human Rights on the development of this case-law. The three countries are examples of the adoption of the principle of proportionality in the judicial review of the limitations on rights, its modification in order to reflect the national legal traditions, and its use in the dialogue with the legislature and the supranational courts.

Chapter Four is dedicated to the application of the principle of proportionality in the case-law of the Bulgarian Constitutional Court. The main problem of the application of the principle in the Bulgarian model of

constitutional review has been outlined - the limited possibilities of the constitutional court to rule on the issue of human rights and their limitations. The limited case-law of the Constitutional Court demonstrates the need for the introduction of an individual constitutional complaint or other effective means of guaranteeing the access of citizens to the constitutional jurisdiction. In this manner, the important and controversial issues about the rights and their limitations could be examined in the context of proportionality within the national human rights system and the Constitutional Court would have the opportunity to argue persuasively for one or another national legal position on these issues. According to the author, the existing constitutional framework deprives the Constitutional Court of effective participation in the human rights protection system in Bulgaria. Therefore, the study argues that expanding the access to constitutional justice and, at the same time, applying the principle of proportionality as a set of rules for reviewing the limitations of rights will allow the Constitutional Court to fully participate in the dialogue between the domestic institutions and, most importantly, will include it, as an equal participant, in the dialogue with the supranational courts.

The dissertation contains conclusions that can be highly assessed. They are particularly valuable in clarifying the nature of the four rules that underpin the principle of proportionality in restricting fundamental rights- legitimate aim, suitability, necessity and proportionality in the narrow sense.

The dissertation and the submitted scientific publications present and discuss abundant in volume and content theoretical concepts and opinions, they contain important proposals *de lege ferenda*, which definitely contribute to the development of Bulgarian legal science.

The abstract of Maria Dimitrova contains all the necessary elements precisely, and the report on the scientific contributions, prepared by the PhD candidate, expresses accurately the achievements of the dissertation. Some inaccuracies are also observed in the dissertation, which do not diminish its

scientific value. The conclusion that the principle of proportionality has become a fundamental principle of modern constitutionalism need be formulated with greater legal precision. After refinement and development of some of the concepts, the dissertation deserves to be presented to the attention of the public as an independent scholarly publication.

In conclusion, I give a positive assessment of the dissertation, considering that it contains scientific results which constitute an original contribution to legal science, and, also, that the PhD candidate has an in-depth theoretical knowledge and ability for independent research.

Dear members of the Scientific Jury,

After assessing the quality of the dissertation, I believe that it has undeniable merits, demonstrates a thorough analysis leading to theoretical conclusions, contains important contributions and proposals *de lege ferenda*. Therefore, I am convinced in proposing to the Scientific Jury to award the degree “Doctor” to Maria Borissova Dimitrova.

03.02.2024 г.

The opinion has been prepared by:

Prof.Dr.Plamen Kirov