

REVIEW

by Prof. Dr. Boyka Ivaylova Cherneva,
external member of the scientific jury (Order Reg No. RD-38-674/21.12.2023)

Regarding: a public defence before a scientific jury for the award of a PhD in the field of higher education 3. Social, economic and legal sciences 3.6 Law (Constitutional Law) to Maria Borissova Dimitrova

Details of the procedure

Maria Borissova Dimitrova has submitted for consideration by a scientific jury a dissertation on "*The principle of proportionality in the protection of fundamental rights*". Scientific supervisor of the PhD student is Prof. Dr. Martin Belov. The materials necessary for the public defence have been provided. The requirements of the Law on the Development of Academic Staff in the Republic of Bulgaria and the Regulations for the Implementation of the Law on the Development of Academic Staff in the Republic of Bulgaria have been complied with. Maria Borissova Dimitrova has studied in the part-time form of doctoral studies at the Department of Constitutional Law of the Faculty of Law of Sofia University. She is a graduate of the Faculty of Law of St. Kliment Ohridski University. She was granted the right to defence. The dissertation has been directed for public defence before a scientific jury (Order No. RD-38-674/21.12.2023).

Details of the dissertation thesis - general characteristics

The dissertation "*The Principle of Proportionality in the Protection of Fundamental Rights*" is 244 pages long and comprises an introduction, four chapters, a conclusion and a bibliography in Cyrillic and Latin. The introduction of the dissertation defines the subject of the research - the principle of proportionality as a set of rules used in the judicial review of the limitations of fundamental rights. Two main objectives of the research are underlined. The first objective of the dissertation is to examine the evolution and integration of the principle of proportionality in judicial review as an element of the protection of fundamental rights. Its achievement is a prerequisite for the definition of the second objective, which is one of the main theses of the author, namely: the application of the principle of proportionality in the context of the national particularities is an effective way of protecting fundamental rights, as well as a reaction to the so-called activism of the

supranational courts. This, according to the author, would "*delineate the limits of interference in the assessment of fundamental rights*" (p. 7).

The introduction clearly outlines the research methodology. Firstly, it is explicitly highlighted that the principle of proportionality is defined from the position of contemporary constitutional theory, taking into account the emergence of the principle of proportionality within the development of administrative justice. The development of human rights theory and its impact on the subject matter of the work is noted. The focus is on the jurisdictions and the role of supranational European courts. It means that the question of the interaction between legal systems at the constitutional level and the supranational level is raised in order to seek an effective application of the principle of proportionality. The frameworks of statehood remain the 'distant' context of the problem. This allows the author to focus on judicial review, methodologically staying sufficiently 'distant' from the political aspects without neglecting them, which is achieved through the use of evolutionary legal interpretation. The legal method of research is combined with the comparative law approach, which enriches the legal literature on the topic of the thesis.

An advantage of the study is the examination of the principle of proportionality for the protection of fundamental rights in the context of general legal matters and its various manifestations. A distinguished feature of the study is its comprehensiveness and completeness. There is consistency and coherence between its different parts. The exposition is balanced. The scholarly text enforces good style and respect for the accuracy and correctness of the legal terminology. The author demonstrates a thorough knowledge of the subject in a theoretical and practical sense and an objective stance to the problems. The question about the effectiveness of the proportionality principle is placed within theoretical analysis.

Chapter One of the dissertation is devoted to a characterisation of the principle of proportionality in contemporary constitutionalism. It examines the various manifestations of the principle of proportionality: a principle that sets limits to public power; a condition for fair government; a set of rules for judicial review of the restrictions of fundamental rights. In this part, the dissertation contains a coherent and good overview of the philosophical notion of freedom as a criterion for the organisation of the state and a prerequisite for the application of the principle of proportionality. The dissertation points out the tendencies in the development of national judicial bodies in terms of their role in protecting fundamental rights, as well as the conflicts that have

arisen between legal systems concerning such fundamental issues as "identity and universality, legitimacy and democracy, the national and the global" (p. 13). As a result, two main functions of the principle of proportionality are highlighted. This part of the dissertation also covers an overview of the evolution of constitutionalism from the position of the topic under discussion, combined with a comparative legal approach.

Chapter One also examines the main features of contemporary constitutionalism: transnationalism; transfer of sovereignty; judicial review and judicial dialogue. The principle of proportionality is analysed as a core principle of modern constitutionalism, and its content and development as an idea is identified. The analysis is based on the understanding of an indissoluble link between proportionality and justice. It proceeds to detail the content of proportionality as a principle - necessity, lawfulness, legitimacy, etc. The work has an European context but the work also takes into account another regional context - features of the US model in the protection of rights. The work covers a critical review of Robert Alexie's Theory of Constitutional Rights, which has contributed to the definition of the principle of proportionality. This part of the work also has the advantage of highlighting the challenges to the concepts of contemporary constitutionalism. It also examines the criticism towards the principle of proportionality as a structured approach in judicial review. The author points out that the application of the principle is in relation to "the most fundamental rights" (p. 59). The author expresses an opinion for the legal-political and representative role of the courts.

Chapter Two aims at examining the main features of the principle of proportionality as a set of rules used in judicial review of restrictions on fundamental rights, i.e. the principle of proportionality in the practice of the courts. It comments on the requirement of reasonableness of a restriction on a right. It is noted here that the reasonableness requirement 'is *normally applied to restrictions of socio-economic and cultural rights*' (p. 63), but as a set of rules it applies to judicial review of restrictions on personal, civil and political rights. It clarifies the stages of judicial review and the creation of an authoritative model of justified limitation of rights, thereby assisting the work of rule-making bodies. The theories of Robert Alexie and Aaron Barak are presented and compared in detail. The section that discusses the different types of rights is particularly useful given the author's view of the applicability of the proportionality principle to mainly the most fundamental rights. The issue of the balance between the public and the individual interest is again

addressed. The classification of rights as absolute and relative is also discussed. The applicability of the principle of proportionality to non-absolute rights is commented upon. The analysis continues with a consideration of positive and negative rights again to justify the applicability of the principle.

Chapter Two discusses the scope of the rights limitations and the judicial review and related concepts - scope of the right, limitation of the right. On this basis, the dissertation examines the constitutional foundations of the principle of proportionality and provides interpretation of central concepts - legitimate aim, attainment of the aim, necessity, etc. The notion of proportionality in a narrow sense is clarified - overcoming the conflict between interests and principles. It is concluded that proportionality should take into account the national and constitutional identity and of course other essential conclusions are drawn.

Chapter Three of the dissertation is devoted to a comparative legal study of the principle of proportionality in Germany, the United Kingdom and France, which is particularly valuable given the European context of the whole work and in particular the author's reflections on the principle of proportionality. The application of the principle in administrative law is taken into account, which is relevant to the legal argument. The review also covers a number of aspects of the development of the principle in the Bulgarian Constitutional Law.

Chapter Four is dedicated to the principle of proportionality in the case-law of the Constitutional Court of the Republic of Bulgaria in the context of the four rules of the principle. It draws a conclusion that the principle is applied consistently by the Constitutional Court and supports the need of an individual constitutional complaint (p. 171). I welcome the consideration of the institutional context that complements the legal context. Thus, the problems of the interaction between the Constitutional Court and the European Court of Human Rights is not 'overshadowed' by the normative analysis, which the legal analysis primarily is. Objective reasons are given why the case law of the Constitutional Court on the application of the proportionality principle is not ample.

The issue of the hierarchy of rights is also considered (p. 180), which is certainly relevant to the overall consideration of the principle of proportionality. An overview of the relevant case law of the Constitutional Court is provided. An argument is made for the efforts of the European Court of Human Rights and the Court of Justice of the European Union to apply the principle of

proportionality and the principle of subsidiarity consistently. Examples of judicial dialogue between the Constitutional Court and the European Court of Human Rights are asserted. Reference is made to Article 56 of the Constitution of the Republic of Bulgaria establishing the right of defence. The work points to imbalance with respect to the possibilities of the Constitutional Court to fully fulfil the role that modern constitutionalism assigns to it in terms of the protection of rights.

Abstracts and publications on the dissertation topic

Maria Dimitova has submitted an Abstract of 25 pages, which clearly, correctly and objectively presents the content of the dissertation. The abstract accurately reflects the scientific contributions of the PhD student.

The PhD student has presented a list of three publications on the topic of the research, which shows that it fulfils the minimum national requirements for the acquisition of the educational and scientific degree "Doctor".

Scientific contributions and practical results

The dissertation contains a number of contributions, contribute aspects and practical results, among which the following contributions should be explicitly noted.

The work enriches the legal literature on the principle of proportionality in the protection of fundamental rights. It is also a contribution to the development of the topic of the protection of fundamental rights in general.

An independent scientific contribution is the examination of the institutional context of the application of the principle under consideration as a necessary scientific environment for constitutional law research. This position has allowed the author to advance the problem of the effectiveness of judicial review of restrictions on fundamental rights. In fact, the dissertation enriches the understanding of evolutionary legal thinking by arguing that in the exercise of judicial review of rights limitations, the court participates in the political process, i.e. assists political actors in delineating the limits of rights' limitations.

The conclusions about the institutional and legal "insufficiency" of the judicial review of the limitations of the rights are reasons for the author to join the support for the introduction of the individual complaint to the Constitutional Court. The conclusion that an active dialogue between

the Constitutional Court and the national courts is necessary in order to delineate the limits of state intervention through a thorough determination of the rights and their justifiable limitations, both on the basis of the nature of fundamental rights as universal rights and on the basis of constitutional identity, legal tradition and culture, is also of a contributory nature.

The detailed explanation of various views on the nature of the principle of proportionality in the protection of fundamental rights, its definition, as well as the examination of its various manifestations is also an independent scientific contribution to the theory of constitutional law and the theory of human rights.

The analysis of the four rules that underpin the principle of proportionality has also contributory aspects.

The comparative law examination and its accompanying theoretical and practical review also constitute serious contributions. Here the collection, review and summarising of the practice of various judicial bodies, including at different levels of establishment (European and national) is the essential part.

Suggestions and critical comments

I recommend that the PhD student continues to work on issues concerning the application of the principle of proportionality to the various generations of human rights (types of fundamental rights). In the thesis, the author identifies personal, civil and political rights as fundamental or most fundamental in comparison to other fundamental rights (socio-economic and cultural rights). The adoption of a hierarchy of fundamental rights raises new issues regarding the judicial review of limitations on rights, many of which are, certainly, addressed in the work.

Conclusion

The abovementioned observations on the procedure and the dissertation, as well as the identified scientific contributions, justify the conclusion that Maria Borissova Dimitrova has the ability for independent theoretical thinking in the field of constitutional law. The dissertation on "*The principle of proportionality in the protection of fundamental rights*" contains significant theoretical and practical results.

In view of the above, I give a POSITIVE EVALUATION and propose to the Scientific Jury to award Maria Borissova Dimitrova the degree of Doctor in the field of higher education 3. Social, Economic and Legal Sciences, professional field 3.6. "Law" (Constitutional Law).

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Author of the opinion:

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