„BABEȘ-BOLYAI" UNIVERSITY

CLUJ-NAPOCA

FACULTY OF LAW

THE PRINCIPLE OF PROPORTIONALITY IN ADMINISTRATIVE LAW

- PHD THESIS SUMMARY -

Doctoral Student:

Anghel Marian Pop

PhD Supervisor:

Prof. Univ. Dr. Ovidiu Podaru

Cluj-Napoca

2024

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KEYWORDS

Public law; justice; human rights; sovereign; rule of law; equity; justification; general principle of law; authority; Anglo-Saxon, continental; discretionary power; abuse of power; error; misuse of power; judicial deference; fundamental rights; limiting clauses; effectiveness; alternative measures; less restrictive measures; burden of proof; incommensurability; syllogism.

SUMMARY

Proportionality has been established in the legal field as an essential principle of public power relations, closely linked to the judicial review of the discretionary power exercised by public authorities. This review gained momentum only in the second half of the 20th century, when democracy became a predominant political system in most states, and the protection of fundamental human rights became a global concern.

Thus, the principle of proportionality became an important tool for controlling the discretionary power of public authorities, contributing to the goal of protecting citizens' rights against arbitrary administrative measures and ensuring that intrusions into the exercise of individual rights are appropriate, necessary, and balanced in relation to the legitimate aim pursued.

In this favourable political and legal context, where the courts have been given a crucial role in overseeing the activities of public authorities, this study aimed to present in detail the application of the principle of proportionality in the sphere of administrative law. By addressing the theme of proportionality in administrative law, we sought to analyse the extent to which courts can oversee the discretionary power of the administration. We questioned whether this analysis is strictly limited to the legality of administrative acts or whether it allows for a broader approach, enabling judges to also intervene in evaluating the opportunity of administrative acts.

The motivation for this research stemmed from the observation that in Romania, there is no solid and well-defined doctrine regarding the principle of proportionality compared to other countries with a more extensive and richer legal tradition, which has led to difficulties in interpreting and applying this principle in the specific context of Romanian administrative law. This issue became even more relevant with the inclusion of the principle of proportionality among the general principles applicable to public administration in the Administrative Code. Although this codification created the potential for a clearer regulatory framework, we considered that detailed explanations were necessary regarding the concrete application of this principle.

Therefore, our research contributed to the development and consolidation of Romanian legal doctrine concerning the use of the principle of proportionality in administrative law.

Secondly, promoting a uniform judicial practice in our country is essential for increasing public trust in the judicial system and strengthening the rule of law. We found that legal

professionals have generally been reluctant to invoke and apply the principle of proportionality in practice, possibly because it has been inadequately treated in Romanian administrative law doctrine. The lack of extensive debate on the application of the principle of proportionality has led to divergent interpretations by judges and the issuance of different rulings in similar situations, which could undermine the authority of the law.

Thus, our research aimed to provide guidance for judges and other legal practitioners on the application of the principle of proportionality, thereby contributing to raising awareness of the courts' role as "guardians of human rights" and to the cohesion of the judicial system in our country.

At the same time, by searching for relevant examples from the practice of the supreme court and other courts in our country, or from the jurisprudence of the Constitutional Court of Romania, as well as from the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union, we emphasized that the principle of proportionality is not just an abstract concept but has significant practical relevance and can be a valuable tool in ensuring respect for individual rights and strengthening the rule of law.

The doctoral thesis began with the presentation of the theoretical foundations of the principle of proportionality. These highlighted the genesis of the concept of proportionality and its evolution through the major epochs of history until its consolidation as a fundamental principle of contemporary legal thought.

In antiquity, proportionality was considered a pillar of justice, especially reflected in Aristotelian philosophy of justice. Unlike the Pythagoreans, who characterized justice through reciprocal treatment and numerical equality, or Plato, whose thinking was marked by the desire to achieve "geometric equality" in the city based on the qualities and virtues of citizens, Aristotle proposed a kind of synthesis of these in the form of proportional equality. This aimed at ensuring that the distribution of community goods or functions and honors in the polis was carried out according to the merit of each person (distributive justice) and aimed to maintain balance in voluntary and involuntary exchanges between citizens by correcting situations that led to the impoverishment of one patrimony in favor of another (corrective justice). Aristotle, more than any other Greek philosopher, advocated for proportionality through his method of seeking the "just measure" in all things.

Therefore, the Aristotelian philosophical vision of justice deeply influenced how the principle of proportionality is understood today as a method of balancing opposing interests and

rights, contributing to the elimination of excessive burdens imposed to the detriment of a person's rights.

The migration of Aristotelian ideas about proportionality into Roman law was natural, as they coagulated into the notion of "aequum," which designated the release of the praetor from the constraints of old civil law – "ius civile," which was particularly formalistic and unadapted to new social and economic realities – and the possibility for the praetor to carefully examine the interests involved in the litigation in order to reconcile them. Alongside the term "aequum" in Roman law, a concurrent concept influenced by Greek natural law and promoted by Cicero under the name "aequitas" appeared. According to Cicero, natural law imposed a high form of justice, which he described as the correct ratio that prescribed a specific distribution of goods and honors among citizens based on the principle that the superior individual deserves more, and the inferior individual deserves less.

We further observed that in the medieval period, the appeal to proportionality was not as pronounced as in antiquity. However, with the stipulation in the Magna Carta Libertatum of 1215 of the principle that punishment must be proportional to the severity of the offense committed, the first legal institutionalization of the concept of proportionality occurred.

Additionally, during the medieval period, Thomas Aquinas, one of the most influential theologians and philosophers of the Middle Ages, emphasized the importance of proportionality in the right of self-defense of states. He argued that the use of force by a sovereign state must be necessary and limited to the injustice caused, while avoiding excessive violence. In practice, Thomas Aquinas developed the first multi-stage application of the concept of proportionality, which later influenced the methodology of current proportionality tests.

Subsequently, during the Enlightenment, with the desire of individuals to break free from the authority of the church and the state, philosophical and political movements advocating for the respect of individual rights against abuses of authority emphasized that proportionality should not only apply in reciprocal relations between states but also to individuals in their relations with state power. In this sense, the idea was advanced that there is an increasing need for the state to justify the use of its discretionary power in relation to the existence of a public interest, especially when it harms individual rights, thus marking the beginning of the modern concept of proportionality, which has become an important obstacle against arbitrariness and abuse of state power. These ideas were integrated into the concept of the liberal state, whose foundation lies in protecting individual

liberty and providing a framework for the exercise of civic freedoms and rights.

The presentation of these theoretical foundations allowed us to identify and define the key concepts associated with the doctrine of proportionality and thus understand the analytical paradigms used in the judicial review of proportionality, which was actually the central theme of this study. Therefore, highlighting the initial origins of the idea of proportionality contributed to clarifying and delimiting the field of study and establishing a solid basis for researching the principle of proportionality in its current form, namely that of a judicial syllogism used to detect the abuse of power by public authorities.

Our study continued in a new chapter by observing the evolutionary process of the principle of proportionality, marking the emergence in Prussian law of the first doctrinal and legislative forms that established this principle. In parallel, the concept of the "rule of law" (Rechtsstaat) developed, under whose influence the establishment of judicial control over the actions of the Prussian police authorities was consolidated. The jurisprudential debut of the principle of proportionality was highlighted by the "Kreuzberg" decision of 1882 by the Prussian Supreme Administrative Court, which gave rise to a rich jurisprudence of Prussian-German administrative courts, culminating in its official recognition by the German Constitutional Court as an inherent principle in cases of restriction of citizens' fundamental rights.

Thus, through the use of the historical method, we highlighted the terminological and conceptual evolution of the principle of proportionality over time, from the first mentions of the notion of "proportionality" in antiquity to the recognition of the application of this principle in the German legal and constitutional framework and its transformation into a veritable general principle of law.

This latter characteristic was determined by its universality, reflected in the presence of the principle of proportionality in various national and international legal systems, as well as by its versatility, demonstrated by its ability to be applied in a wide range of different situations. At the same time, despite the existence of varied structures of the proportionality test, we showed that the application of the principle of proportionality is broadly uniform, making it meet this criterion of general principles of law.

We then analyzed the patterns of the proportionality test and the questions that must be formulated at each stage so that judges can determine whether restrictions on individual rights and freedoms are justified or excessive. Thus, we showed that in some legal systems, the

proportionality test is used with four sub-tests – legitimacy, adequacy, necessity, and balance – while in others, the test with three sub-tests – adequacy, necessity, and balance – is used.

Regarding the jurisprudence of the Romanian Constitutional Court and the High Court of Cassation and Justice, we argued that the pattern to be used during the exercise of proportionality control by national courts is the one with four sub-tests – legitimacy, adequacy, necessity, and balance. Judges must verify whether the measure limiting the exercise of an individual right pursues a legitimate objective, whether it is capable of contributing to the achievement of this objective, whether it represents the least intrusive option concerning citizens' rights, and whether it imposes an excessive burden on the individual in relation to the benefits brought to the public interest.

We also highlighted that the main function for which the principle of proportionality is recognized in public law is that of a judicial control instrument of the discretionary power of public administration. Courts have the duty to defend and promote individual rights and freedoms, and in fulfilling this responsibility, the proportionality test is the analytical and methodological framework that defines the relationship between citizens' rights and the public interests that may justify limiting them in a democracy.

In addition, we emphasized the doctrinal debates regarding the advantages and disadvantages of using this principle in disputes involving conflicts between two opposing interests. Thus, we observed that the consistent application of the principle of proportionality can promote values such as predictability, transparency, fairness, and the obligation to justify both in the activity of public administration bodies and in the work of courts. On the other hand, despite some partially justified criticisms regarding its inconsistency and manipulation by courts to pronounce a certain solution, we argued that the principle of proportionality provides sufficient guarantees to ensure both the protection of individual rights and the necessary flexibility for public authorities to promote the public interest rationally.

Finally, we argued that the principle of proportionality can be defined through two dimensions, namely an administrative one and a judicial one. The first dimension focuses on the preventive vocation of the principle of proportionality, which obliges the administrative body to adjust its discretionary power before issuing an administrative act by passing it through a proportionality filter. The second dimension consists of the proportionality control carried out by the courts, which checks whether the chosen measure pursues a legitimate objective, whether it is

capable of achieving the proposed goal, whether it is the least restrictive, and whether it does not impose an excessive burden on the individual.

The last chapter of the first part of the thesis was dedicated to presenting the dynamics of the principle of proportionality, especially how the methodology developed in the 19th-20th centuries by Prussian-German administrative courts was adapted and processed by the Court of Justice of the European Union and the European Court of Human Rights in their jurisprudence, as well as by other international organizations.

Thus, we showed that the "necessity in a democratic society" test of the European Court of Human Rights is more of a one-dimensional balancing test, which uses the term "proportionality" only to indicate that it has found a fair balance between competing interests but does not constitute a true proportionality test. In contrast, in its jurisprudence, the CJEU applies the principle of proportionality using a test based on three sub-tests: adequacy, necessity, and balance, but most often the Court does not reach the application of the third sub-test. At the same time, we highlighted that in evaluating the acts of European institutions, the Luxembourg Court adopted a more lenient approach focused on the adequacy sub-test, while in interpreting Union law concerning national legislation, the Court adopted a stricter approach focused on the necessity sub-test.

We also showed that although the principle of proportionality was successfully adopted in certain common law systems such as Canada and Israel, where relevant jurisprudence developed in comparative law, courts in the United Kingdom and the United States have not paid significant attention to this test, preferring traditional methods of judicial control such as the Wednesbury reasonableness standard, which involves a less strict analysis of public administration decisions and sanctions only those administrative decisions that prove to be manifestly irrational or absurd. On the other hand, in countries with continental legal systems, the principle of proportionality has not been applied in its well-known form today as a proportionality test but has taken various legal forms. For example, in France, it manifested itself through the control of "manifest error of assessment" or through the "cost-benefit balance" theory. However, under the influence of the European Convention on Human Rights and the jurisprudence of the Strasbourg Court, both British and French jurisdictions have begun to apply the proportionality test in cases of violation of fundamental human rights.

Finally, we concluded that the principle of proportionality has been integrated and adapted in various legal systems, each modifying it according to its own needs and legal traditions, and

recourse to the comparative method allowed us to highlight the characteristics and difficulties of implementing the principle of proportionality, as well as some judicious solutions from the jurisprudence of foreign courts.

Continuing our study in the second part of the doctoral thesis, we moved from the comparative law aspects of the doctrine of proportionality to a detailed examination of the application of this principle within Romanian administrative law.

In the continuation of our study, in the second part of the doctoral thesis, we shifted from the comparative law aspects of the doctrine of the principle of proportionality to a detailed examination of the application of this principle within Romanian administrative law.

In an ideal democratic system, power is distributed in such a way that each branch controls and balances the others through a mechanism known as "checks and balances." However, modern political reality has brought to the forefront certain changes, particularly regarding the prerogatives of the executive branch, which has gained an increasingly important role following the delegation of certain powers by the legislative branch. In this context, essential questions have arisen about how the judiciary interacts with the executive branch, particularly regarding the control and limitation of the discretionary power enjoyed by public administration bodies.

An essential aspect of this control is the application of the principle of proportionality in the process of evaluating administrative acts that violate citizens' rights and freedoms. Given its explicit regulation in the Administrative Code, there has been concern in the doctrine as to whether this entails full control over the opportunity of administrative acts. To provide a fully informed answer, we considered it necessary, in the first chapter of the second part of the thesis, to delve into the main concepts related to the dialectic between legality and opportunity in Romanian doctrine, namely the notions of "discretionary power" and "abuse of power."

In modern public administration, discretionary power allows administrative authorities to make decisions tailored to the specific context of each case, thereby providing the capacity to respond quickly and effectively to various situations. However, without a proper framework of control, the exercise of this power can lead to abuses or arbitrary decisions. This is where the principle of proportionality comes in, ensuring that the measures adopted in exercising discretionary power are appropriate, necessary, and balanced in relation to the legitimate public interest pursued. We argued that discretionary power provides public administration with the possibility of adjusting its decisions, so educating public administration bodies to conduct a

proportionality test before making decisions that impact citizens' rights could eliminate the perception that discretionary power is merely a tool for imposing rules and restrictions, and that it can also be used to protect citizens' rights.

Regarding the notion of "abuse of power," which is defined in Law No. 554/2004 as "the exercise of the right of discretion by public authorities by exceeding the limits of competence provided by law or by violating the rights and freedoms of citizens," we considered that the part concerning the application of the principle of proportionality arises from the violation of citizens' rights and freedoms, which Professor Iorgovan calls "abuse of appropriateness." This phenomenon occurs when an administrative authority exceeds the normal limits of discretionary power, violating the internal legality of an administrative act and thus becoming subject to the control of administrative courts, which can sanction the abusive and disproportionate exercise of this power. The substance of this "abuse of appropriateness" includes both the error committed by the administrative body regarding facts, legal norms, or legal qualification, and the pursuit of a purpose different from that provided by law, known as "misuse of power." It also includes the violation of the balance between general interest and individual interests, by imposing an excessive burden on the person, in violation of the principle of proportionality.

If, in the first chapter of the second part of the thesis, we analyzed in detail the manifestations of error and misuse of power, in the next chapter we moved on to the study of the proportionality control of administrative acts.

Thus, the principle of proportionality in Romanian law was recognized at the constitutional level with the adoption of the Constitution of Romania on November 21, 1991. However, its implementation was challenging, as the application of the proportionality test by the Constitutional Court of Romania was inconsistent, without systematically going through the subtests of legitimacy, adequacy, necessity, and balance. At the same time, in the field of administrative law, administrative courts were reluctant to use it as an instrument of control over discretionary power, except in situations where it was expressly provided for by some special laws.

In contrast, we observed that the principle of proportionality experienced considerable effervescence following its recognition as a general principle applicable to local and central public administration, following the adoption of the Administrative Code by Government Emergency Ordinance No. 57/2019. We argued that, as a result of its codification, the principle of proportionality introduced a supranormal control of appropriateness, allowing judges to intervene

more deeply in the decision-making process of the administration than was previously possible under normal control for abuse of power.

In the current context of administrative law, the notion of "supranormal control of appropriateness" represents an evolving concept derived from the proportionality test, which authorizes the courts to examine the reasoning behind administrative decisions. Thus, courts can request pertinent explanations, eloquent justifications, or solid evidence from the issuing authorities, but they do not have the right to substitute the public administration's judgment with their own evaluation of the opportunity of issuing administrative acts. In essence, we argued that, in exercising supranormal control of appropriateness, courts play a more active role in evaluating public administration decisions; however, in such an approach, the court does not propose alternatives to administrative decisions but verifies whether the challenged administrative act meets the criteria of proportionality, namely whether it is appropriate, necessary, and balanced in relation to the legitimate objective pursued.

The establishment of a formal theory of the intensity of supranormal control of opportunity exercised by courts based on the principle of proportionality was necessary, so we proposed that it be guided by two factors that influence both the nature of judicial analysis and the limits of court intervention.

The first factor is represented by the doctrine of judicial deference, which involves courts recognizing the superior institutional competence of public administration in areas with a pronounced political or socio-economic emphasis, as well as accepting that administrative bodies possess specialized knowledge and experience in certain matters, which leads to granting increased credibility to these authorities in justifying measures that affect the free exercise of citizens' rights.

The second factor to be considered, which regulates the intensity of supranormal control of appropriateness, is the nature of the rights affected by the contested administrative acts. Fundamental rights and freedoms have a supreme character, recognized by legal norms with constitutional force, so any restriction on them triggers more intense proportionality control and requires more rigorous analysis by the courts. In such cases, we argued that courts should demand detailed and relevant justifications from public authorities to legitimize the imposed restriction. The more severe the limitation of constitutional rights, the more intense the judicial control, and any hesitation on the part of the issuing body to provide an eloquent response will be sanctioned by the annulment of the contested administrative act.

Therefore, the formulation of the theory of variable intensity of supranormal control of opportunity represents the central element of originality of this doctoral thesis. In an era of dynamic and complex administrative law, this theory brings an innovative approach to judicial control, reflecting the diversity and nuances of administrative decisions and proposing its adaptation to the specificities of each case. Thus, on the one hand, judicial deference implies recognizing the expertise and experience of administrative authorities in specific areas and granting a certain degree of trust in their decisions. On the other hand, the nature of the protected rights is a criterion that involves different degrees of justification from public authorities for the imposed restrictions. By integrating these two factors, we believe that the proposed theory manages to maintain a balance between respecting the margin of appreciation of public administration and protecting citizens' rights and freedoms.

The next step in our research was to present how supranormal control of proportionality can be used by judges within each subtest of the principle of proportionality to identify disproportionate violations of citizens' rights.

First, we argued that the requirement for the legitimacy of the public interest objective is essential, as it ensures that the imposed limitations do not undermine the values of democracy and citizens' fundamental rights. In this context, the legitimacy subtest revolves around the idea that the mere existence of a legal provision is not sufficient to justify the restriction of a right. It is necessary for authorities to provide a clear and convincing justification for the imposed limitations, based on well-defined public interest objectives.

Therefore, the evaluation of the legitimacy of the objective set by public authorities is based on two essential elements: the presence of limiting clauses, which can be implicit, general, or specific, and the absence of vices in the proposed public interest objective, whose character must not be generic, insignificant, illegal, or immoral.

Secondly, we showed that the adequacy subtest aims to verify whether the measures adopted by the authorities are logically and effectively oriented towards achieving the proposed objective. In the analysis of the adequacy of administrative decisions, courts must decide whether they evaluate administrative measures based on the circumstances existing at the time of adoption (ex ante) or according to the effects observed after implementation (ex post). We argued that, at the time of adoption, the measure must be capable of contributing to the achievement of the proposed objective, even if, subsequently, its implementation does not produce the expected result.

We also emphasized that evaluating the degree of achievement of the objective is another important aspect in the analysis of the adequacy of administrative measures. In this debate, the central question is whether the adequacy subtest requires that the measure adopted by the administrative authority ensure the complete achievement of the public interest objective or whether partial fulfillment is acceptable. We considered that the partial achievement of the objective, provided it is not marginal, meets the adequacy requirement. We also argued that an insufficient evaluation of effectiveness does not automatically invalidate administrative measures, provided that the evaluation conducted by the administration was based on the information available at the time of the decision and was not manifestly erroneous.

Moreover, regarding the burden of proof concerning the effectiveness of the measure in achieving the proposed objective, we considered that it is the responsibility of the issuing body to demonstrate the coherence and relevance of the adopted measures in relation to the proposed objective. When applying supranormal control of appropriateness, the court will grant greater trust to the public authority's justifications regarding the effectiveness of its decisions in areas involving political, technical, or complex aspects. In contrast, when fundamental rights of citizens are involved, and depending on the severity of the interference, the issuing body must present convincing arguments and evidence to demonstrate that the decision was based on premises with a high degree of certainty regarding the effectiveness of the adopted administrative measure.

Thirdly, we indicated that the necessity subtest evaluates whether, among all available options for achieving the public objective, the issuing authority chose the least intrusive one in the exercise of individual rights. In practice, the necessity subtest involves two essential questions. The first concerns the existence of viable alternatives that can achieve the pursued objective with the same efficiency, and the second seeks to discern whether these alternatives impose a less restrictive limitation on individual rights.

To evaluate the necessity of the measures adopted by the administration, we argued that it is essential to establish clear criteria for identifying and evaluating comparable alternatives. In this context, we excluded alternatives that are only "logically possible" or "physically possible" but impractical in reality.

We also showed that determining a low level of abstraction of the pursued objective will narrow the alternative measures that can be proposed in place of the adopted measure, while a general level allows for consideration of diverse alternatives.

Additionally, we argued that alternative measures must significantly contribute to achieving the public interest objective, even if equivalence in effectiveness with the administration's measure is not required. Furthermore, alternatives that involve excessive costs will be considered impractical, even if they are less restrictive.

In the context of evaluating the necessity of administrative measures, we considered that the party claiming that its rights were violated must identify and present to the court less restrictive alternatives, and it is up to the authority to demonstrate the ineffectiveness of these alternatives and, if applicable, that their impact is just as harmful to the rights of the concerned person. If the evaluation of the effectiveness of an alternative measure is difficult due to the lack of empirical data, we argued that the court should grant judicial deference to the authorities, recognizing their specialized training and experience in the respective field. On the other hand, if the claimant invokes the violation of a fundamental right protected by the Constitution, the court must verify whether the public authority relied on analyses and information that attested that the adopted measure was indispensable for achieving the legitimate objective and that other less restrictive measures could not be considered.

Regarding the balance subtest, we argued that it focuses on comparing the negative effects on citizens' rights with the benefits for society, ensuring that there is no excessive imbalance to the detriment of individuals.

The verification of the balance between opposing rights and interests involves integrating them into a system that allows for their comparison and classification, but this process is hindered by the fact that they are often distinct and difficult to quantify. In such cases, we argued that courts should not use a "Procrustean bed" to evaluate these incommensurable values, but rather adopt a flexible and contextual approach, considering the importance of each right and interest in the specific circumstances of the case. Although evaluating the balance between the two opposing interests involves a certain degree of subjectivity on the part of judges, we argued that this is greatly mitigated by the use of the "proportionality syllogism." This process involves a detailed evaluation of both the impact on citizens' rights and the importance of achieving the public interest objective, and emphasizes that a severe interference with citizens' rights and freedoms must be justified by the particular importance of the public interest.

In this context, we considered that the individual has the responsibility to prove the harm suffered due to the limitation of their rights, while the issuing authority must explain the benefits

that the contested administrative act brings to the public interest and demonstrate that it does not impose an excessive burden on the individual. Thus, in areas where the experience and specialization of the issuing body are decisive, we argued that the court must respect its decision to the extent that it provides rational justifications. However, if it concerns the restriction of a fundamental right, we indicated that the court will increase the intensity of supranormal control of opportunity and will administer any type of evidence to ensure that the explanations presented by the public authority are plausible.

Finally, we considered that a careful evaluation of the justifications offered by the issuing body does not represent a review of the opportunity of the contested administrative act. The court focuses on determining whether these justifications are solid and credible enough to demonstrate the balance between the interference with the individual's right and the legitimate objective pursued by the administration. We argued that, through the application of supranormal control of appropriateness, judges fulfill their constitutional role as "guardians of human rights," which is not limited to a formal analysis of the proportionality of the administrative act but involves substantial control of the public authority's explanations to verify whether the measures taken impose an excessive burden on the harmed individual.