

The Principle of Proportionality: Critique of Theoretical Standpoints and Its Relevance

Abstract:

A decision concerning a fundamental rights conflict needs to respect the principle of proportionality in order to be compatible with a constitutional order. The principle of proportionality obliges the court to adequately assess and weigh the conflicting fundamental rights or other constitutional principles in light of the particular facts. The proportionality of the decision is to be ensured by the so-called proportionality test. It consists of three steps: an assessment of the suitability, necessity and proportionality in a strict sense.

The thesis *The Principle of Proportionality: Critique of Theoretical Standpoints and Its Relevance* describes the proportionality principle and the proportionality test in a specific legal-philosophical and legal-theoretical context. The first chapter introduces discursive theory as an important starting point for the rational application of fundamental right norms and the use of the proportionality test. For this purpose, it identifies the relationships between discourse, norms of justification and the proportionality principle.

The second chapter of the thesis outlines, in relation to the existing approach of Czech legal theory, an alternative view of legal methodology inspired mainly by German legal scholarship. Individual institutes of application of law (legal syllogism, subsumption, interpretation and proportionality test) are presented mainly as tools for justification of a decision, i.e., not as tools for finding a decision. This approach stems from the legal-philosophical foundations of discursive theory and is therefore normatively oriented and focuses exclusively on justification as a both the source and a condition of the correctness of a decision.

The third chapter attempts to combine the outlined normative approach to legal methodology and justification with abductive reasoning.

The final chapter synthesizes the arguments presented and attempts to present them coherently as a concept within which the principle of proportionality can be both more adequately understood and more appropriately applied. The proportionality test is described as a tool of internal justification, which by its very nature necessarily presupposes external justification, i.e. further justification mainly through methods of interpretation, decision-making practice, legal doctrine and moral argumentation.