

Abstract (in English language)

In the presented dissertation thesis I tried to argue that if we want to apply the principle of proportionality correctly in case of a collision of fundamental rights or in case of a collision between a fundamental right and a countervailing interest, it is not sufficient only to refer to this principle within the argumentation. On the contrary, it is necessary to recognize a structure of this principle and to apply its components. In order to recognize the structure and components of the proportionality principle, it is necessary to understand the role and effects of human rights in legal orders.

I assume that theoretical backgrounds of this principle contribute to the better understanding of the objective tension between the individual's autonomy and general will of the society.

Another important aspect in the correct application of this principle is the institutional balance between the legislature and the judiciary and overcoming of the "counter-majoritarian problem".

In the contemporary, not only Czech, but also foreign practice we may observe lots of examples in which courts do not pay appropriate attention to the proportionality principle. When solving hard cases, sometimes they made only a reference to this principle without further elaboration.

From the above-mentioned reasons I suppose that it is important to build a methodology of the proportionality principle.

In the first chapter of the thesis, the principle is introduced and put into context with other values in law, namely with the values of justice and reasonableness. It is highlighted that we must distinguish among: 1) the value of proportionality, which has various forms in law, 2) the predecessor of today's proportionality principle: the principle of necessity, and 3) the principle of proportionality which appears in various forms throughout legal orders. Proportionality is an inherent value to a "good law" and appears in law in various contexts.

In the following chapter I concentrate more on the theoretical foundations and effects of human rights, in particular with regard to their limitations. Two important but antagonistic theories are compared in the thesis. They explain the origin of human rights and flow from the German doctrine. They are called "quasi-biological" and "political" theories of human rights.

Limitations of human rights within which the principle of proportionality is applied cannot lead to their complete nullification. In the German legal theory the doctrine of essential core of fundamental right serves as a limit to this limitation (so called *Schranken-Schranken*). This theory is not uniformly accepted in jurisprudence, nevertheless in my opinion it leads to the conclusion that the limitation of fundamental right cannot be without constraints.

The third chapter deals with the description and analysis of the current academic writings about the proportionality principle. The examples of works of *R. Dworkin*, *R. Alexy*, *A. Barak*, *D. Beatty*, *P. Holländer*, *J. Habermas* and others show that despite the asserted universality of the proportionality principle, the consensus among academic scholars has not been reached yet regarding the foundation of this principle. The theoretical ambiguity presented in the aforementioned works should not in my opinion lead to the resignation on the theoretical research on this principle. On the contrary, it should contribute to the better understanding of common features and differences in its application. This exactly is the topic of the second part of the thesis.

An important argument against the critics of the use of the proportionality principle from the reason of disruption of the institutional balance between the legislature and judiciary is in my opinion the incorporation of the variable intensity of review in the constitutional law. When drawing the general conclusions I found the following criteria that have effect on the variable intensity of review: a) the nature of fundamental right and countervailing principles in question, b) the nature of the elements of a legal relation following from the fundamental right, c) intensity of interference into the fundamental right and the possibility of an alternative means of protection – namely through independent courts, and finally d) context of a democratic state governed by law, or possibly relevant foreign practice.

The application of universal but differentiated proportionality principle would enable not only the self-restraint of the courts when deciding cases that involve questions of political decision-making of legislator or expert decision-making of public administration. Furthermore, it enables the construction of universal methodology of the review of acts as for their compatibility with fundamental rights that would lead to the more predictable outcomes and solutions of hard cases.

The fifth and sixth chapters scrutinize the structure and components of the proportionality principle, which are accepted by the case-law and doctrine of lots of

countries in the world. Structural considerations about the principle may in my opinion unify the divergent doctrinal conceptions thereof. Despite I am aware that the principle is embedded in the particular legal orders, pre-positive foundations of human rights-norms together with phenomenons of internationalization of law and legal doctrine relating to human rights enable to construe theories that transgress the states' boundaries.

In the sixth chapter an important reference to the different interpretational outcomes in case of the application of "subsumption" and "balancing" is made. In my opinion the method of balancing is only a specific example that does not exclude the use of the method of subsumption. It merely devotes attention to the possibility to qualify one phenomenon under various legal rules which collide between each other. In my view it should be better considered a synthesis of both methods in case of the application of principles of law or human-rights norms. The principle of proportionality thus does not bring a paradigm shift, but only a particularity (in the words of *T. S. Kuhn* "anomaly"), which must be dealt with by jurisprudence.

In the conclusion of the general part of the dissertation thesis two aspects of the proportionality principle is discussed: its universality and the application of this principle as a neutral principle in the constitutional law.

The universality of proportionality principle does in my opinion not mean that any reference to this principle by the doctrine or case-law should lead to the conclusion of its recognition in the respective legal order. It does not mean either that it is the ubiquitous element in the application of human rights. As presented in the special part of this thesis there do not exist two legal orders that would have the same methodologies of the application of the proportionality principle. The test is influenced by the legal culture, tradition but also by the role of the branches of powers of the state in each state and legal system where the principle is applied.

As for the neutrality of proportionality principle, in my view it is the best merit of its application. If we want the courts to decide cases in a principled way, i.e. their decision-making would not be influenced by prejudices in concrete matters, it is necessary to build such a methodology that would require precise argumentation which reveals the legal grounds on which the case was decided.

The special part of the dissertation thesis deals with the application of the proportionality principle in the light of competing theories in various legal systems: in

the Federal Republic of Germany, in the Czech Republic, in the United States of America
and in the Great Britain.