

Łukasz Folak, MA

Jagiellonian University in Cracow

Faculty of Law and Administration

Chair of Administrative Law

SUMMARY OF THE DOCTORAL DISSERTATION

“The principle of proportionality in administrative law”

written under the supervision of Professor Jan Zimmermann

The subject of the doctoral dissertation titled “The principle of proportionality in administrative law” is characterization of the mentioned general rule of administrative law and administrative proceedings, as well as indication of its significance in the broadest branch of public law. The fundamental questions regarding the issues analyzed are as follows: What is the content of the principle of proportionality (also referred to as the principle of adequacy) in administrative law? Where to look for the normative basis of the principle of proportionality in the Polish administrative order? To what extent in the principle of proportionality perceived and considered by: public authorities (administrative bodies), administrative courts, the Constitutional Tribunal, and European tribunals? How is the principle of proportionality reflected in the procedures of establishing, applying and enforcing administrative law, as well as during control of the stages of implementation of the rules of the described area of law? How does the principle of proportionality protect the rights and freedoms of individuals? Can the principle of proportionality be an important instrument in improving administrative law?

Chapter I of the dissertation provides the theoretical approach to the principles of law, as well as the features defining the norm as a principle of law, including legitimacy of the principles of law, meaning and properties of principles, axiology of law principles, supremacy of principles, ambiguities related to the principles of law, popularity of principles, division of legal principles, and functions of these principles. This part of the thesis also includes a description of previous research on legal principles by Polish researchers and foreign theorists of law. Chapter I also concerns comparison of legal principles and legal rules, as well as presenting the study of the issues addressing constitutional principles of law.

Chapter II covers problems related to general principles of administrative law and administrative proceedings. In this part of the dissertation, the basics of distinguishing the aforementioned principles were pointed out and the views of representatives of Polish science as well as judicature regarding general principles were compared. The last of the subsections of Chapter II contains the author's own original concept of general principles of administrative law and administrative proceedings (based on the following features of these principles: directive nature, legal basis, superiority, omnipotence, special axiological substantiation, optimizational nature).

In Chapter III, the principle of proportionality in administrative law was characterized. Indispensability of maintaining a proportional relationship between the purpose and the measure is the quintessence of the principle in question as well as the basic aim of its establishment in administrative law. The analyzed principle has many normative sources in administrative law (e.g. Article 2 and Article 31 § 3 of the Constitution of the Republic of Poland and Article 7 in fine and Article 8 § 1 of the Code of Administrative Procedure). The principle of adequacy is recognized as binding by all state authorities. This principle requires proper use by public authorities of the legislation powers and decision-making competences granted thereto. The principle of proportionality was based on the philosophical, axiological, praxeological, teleological, structural (constitutional) and cultural foundations. The discussed normative instrument is characterized by universalism, neutrality, undefinedness, and is also used in concrete terms. The principle of proportionality comprises three requirements (orders): the suitability of a measure for a specific purpose, necessity, and proportionality in a narrow sense (*sensu stricto*). Suitability postulates that a legal measure or intervention would allow achieving the assumed purpose. Necessity indicates that the measure (interference) cannot go beyond what is necessary to achieve a legitimate effect. The requirement of proportionality *sensu stricto* implies maintaining a proper proportion (adequacy) between the degree of a specific restriction (measure) and the validity and degree of implementation of a certain value justifying action. The principle of proportionality is also a key principle of European Union law (which in the multicentric system is part of the national order of administrative law).

Chapter IV of the doctoral dissertation covers the relations of the principle of proportionality with other principles of administrative law and administrative proceedings. In this context, two types of links have been distinguished. First, the role of the principle in question in resolving conflicts between the remaining legal principles, as well as in the process

of weighing and optimizing the principles was outlined. Second, the links and complementary relations between the principle of adequacy and other legal principles of administrative law and administrative proceedings (the principle of a democratic state of law, the principle of equality, the principle of justice, the principle of the rule of law and the principle of legality, the principle of sustainable development, the principle of trust, the principle of inclusion of public and private interest, the principle of subsidiarity, and the principle of self-governing nature of local government units) were presented.

Chapter V of the dissertation concerns the principle of proportionality in the creation of administrative law (the principle of legislative proportionality). In addition to the introductory considerations in the field of proper legislation and rationality of the legislator, in this part of the dissertation a distinction was made between the principle of external proportionality and the principle of internal proportionality in the creation of administrative law. The former postulates that the legislator should use his legislative powers in a moderate manner and establish administrative and legal regulations only to the extent necessary, without generating the so-called inflation of administrative law regulations. The principle of internal proportionality in the creation of administrative law involves the quality of regulations introduced by the legislator and includes the requirements for the establishment of the appropriate form of the legal act, the proper form of actions of public authorities (administrative bodies), adequate instruments limiting the rights and freedoms of the individual as well as due mechanisms of discretion in administrative law. In addition, an analysis of the constitutional principle of proportionality in limitation of rights and freedoms by the legislator was made. The last part of Chapter V includes a juxtaposition of the principle of proportionality with individual sources of administrative law.

Chapter VI of the doctoral dissertation focuses on the matters involving the principle of proportionality in the process of applying administrative law. The principle of adequacy concerns the following issues related to the concretization of rights and obligations of individuals by public authorities: balancing public and private interest, justifying administrative acts, choosing the form of action, using discretionary powers by a public authorities, and applying administrative sanctions. The discussed principle also occurs within the so-called states of emergency (extraordinary states). In addition, the principle of proportionality remains effective in all stages of the application of administrative law

in the jurisdictional proceedings (especially in the process of fact finding and in interpretation of legal norms).

Chapter VII entitled “The principle of proportionality in the enforcement of administrative law” covers issues related to the proportional use of administrative enforcement measures. The subject principle is expressed by a number of detailed principles related to requirements of the principle of adequacy. Requirement of suitability is pursued by the principle of advisability which involves the application of measures leading directly to the fulfillment of the obligation. The requirement of necessity is imposed by the principle of using the mildest means of execution and by the principle of taking certain considerations of the obliged person into account, as well as the principle of indispensability. The condition of proportionality *sensu stricto* is implemented by three special rules - the principle of threat, the principle of efficient execution, the principle of respect of minimum subsistence.

Chapter VIII of the doctoral dissertation under the title “The principle of proportionality in the light of control of the establishment and application of administrative law” contains an analysis of the discussed principle in relation to the comparison of the expected and the existing state in the field of establishing of legal norms in the broadest area of public law, and includes the results of research on control of concretization of administrative law. With regard to the former, control of compliance with the requirements of legislative proportionality was discussed, and also the principle of proportionality in the sphere of control of constitutionality of administrative law exercised by the Constitutional Tribunal was analyzed. The second part of this chapter regards the principle of proportionality in the context of instance control in administrative proceedings, as well as control in court-administrative proceedings. The latter was examined from two perspectives. The internal approach concerns the consideration of the principle of proportionality in the regulations of the judicial procedure. The external approach includes considerations on the understanding of the principle of proportionality in the judicature of administrative courts, the scope and frequency of reliance on this principle by judicature as well as, carried out by the courts, the judicial review of the manner in which public authorities apply the discussed principle. In cases involving the settlement of conflicting values or principles, Polish administrative courts call the principle of proportionality “the principle of the golden mean”. In the dissertation, the analysis of cases in which the courts noticed the principle of adequacy was made by means of the case study method. The principle of proportionality

is also recognized in the case law of the Court of Justice of the European Union and in the judicature of the European Court of Human Rights. The last chapter of the dissertation also includes considerations regarding the principle of proportionality in the supervision of regional authorities and regarding control of the legality of acts issued by bodies of local government units, as well as content covering the significance of the discussed principle in the activity of control authorities.

Finally, the thesis contains conclusions resulting from considerations carried out. The principle of proportionality, postulating the application of adequate resources to the assumed objectives, is a criterion for balancing the conflicting principles and values in administrative law, and it serves to defend the individuals from excessive interference in its rights and freedoms. The grounds for the principle of proportionality should be sought in the idea of a democratic state of law. The discussed principle is universal - it is used in processes related to the establishment, application, enforcement of administrative law, control of these procedures, and it also concerns the arrangement of system (order) of the public administration. Application of the principle of proportionality in administrative law can be complicated; it is not syllogistic and obvious. However, the principle of adequacy is useful for the judiciary. When fairly and properly considered, the principle of proportionality can justify issued judgements and also provide solutions that both protect public rights and establish the basis enabling legalism to be guaranteed within the administrative law order.

Kraków, 8 marca 2019r.

Tomasz Folek