Proportionality vs. legalism

Milena Korycka-Zirk

University of Nicolaus Copernicus in Toruń, Poland
milenakorycka@gmail.com
ORCID:0000-0001-6441-1747

DOI | 10.14195/2184-9781_4_4

ABSTRACT

The rule of law is fundamentally anchored in the legality of state actions, ensures that state bodies operate within the legal frames. The interplay between legality and proportionality is crucial, as the legality test assesses whether actions are lawful, while the proportionality test evaluates the balance of interests involved. Together, these principles create an actual scope of individual autonomy against the potential overreach of state power, emphasizing the importance of justice based on individual rights rather than majority interests. The principles of legalism and proportionality are coherent in the task to limit state power and protect individual rights. While legalism provides a formal structure for governance, proportionality ensures that any limitations on rights are justified and balanced against the need to protect individual autonomy. The relationship between these principles is essential for maintaining a just legal order, where the protection of individual rights is prioritized, and the potential for political influence in judicial decisions is minimized. This coherence is vital for fostering a legal culture that respects individual freedoms while ensuring that state actions remain within lawful bounds.

KEYWORDS

Principle of proportionality; Legalism, Theory of principles; Liberalism; Individual rights

1. Philosophy of state action in the light of legalism and proportionality

The rule of law anchors its existence in the assumed legality of the actions of state bodies. This is understood as acting on the basis and within the limits of the law, which meets the Weberian standard of legal action. In other words, state organs are subject to the law in the same way as the individual. Thus, the main emphasis of legal action is on being bound by the law, and more specifically, on fidelity to the legal text in terms of acting on the basis of the norm of competence, as well as the existence of a legal basis for individual decisions. In the field of application of the law,

i.e., the very making of individual decisions on the basis of general norms included in the legal text, the possible confluence of two fundamental tests of the correctness of the action of state bodies - the test of legality and the test of proportionality - is revealed. The first determines the assessment of the legality of the action of an organ or court, the second assesses the proportionality of the means of action. The first in assessing the formal aspect of the rule of law is intersubjectively verifiable, the second inevitably accentuates the material element-weighing interests, hence it becomes the basis for building a certain vision of justice (i.e., based on the primacy of the interest of the individual rather than the majority).

The premise of legalism in the action of state bodies is the belief that the law (primarily the legal text) is able to determine the decision of the body. This determination must concern the formal aspect - the competence basis for the decision and the material aspect - that is, the basis for the decision is so clearly drafted that the basis for the decision is the legal text and not the authority. From a practical point of view, the substantive basis of the decision can raise problems of interpretation, the linguistic indeterminacy of legal texts excludes the subsumptive nature of the application of the law. However, judicial or clerical practice shapes the canons of interpretation that standardize the process of interpreting linguistically vague provisions, and thus the vagueness does not raise controversy from the point of view of the potential arbitrariness of the decision.

The principle of proportionality, on the other hand, determines the procedure for resolving conflicting interests-individual and public. Its application thus builds the core narrative of legal culture, answers the question of fairness and the necessity of encroaching on the autonomous sphere of the individual determined by constitutional guarantees.

Essentially, therefore, the two principles and the resulting tests that form the basis of the culture of democratic states are possibly complementary in several spheres. Both create a common standard limiting the actions of public authority, both touch the sphere of individual autonomy and protect it, the behavior of both principles is subject to control especially by the Constitution. All these factors together draw a picture of the justice of a legal order based on the balance of the public and the private.

The analysis of the two tests leads one to reflect on the necessary relationship of the two for the preservation of individual autonomy and the dangers of merely basing the assessment of the actions of a state body on the requirements of legality.

2. Principle of proportionality

Liberal constitutionalism is based on the assumption of the constitutional norm as a defense shield for the individual against values gaining majority support in legislative discourse. It means the relevance in constitutional discourse (i.e., the procedure for reviewing the constitutionality of an act of the legislature) of any value protecting individual autonomy as long as this is not precluded by the principle of harm (Mill, 1998, 4)[1].

Such a role in liberal constitutionalism is played by the principle of proportionality, in supranational law terminology is used the term limitation clauses (with the fact that the conflict of substantive norms primarily concerns declaratively defined human rights and freedoms), in American constitutionalism, on the other hand, the concepts of tests are operated (strict scrutiny, intermediate scrutiny, rational basis scrutiny). The case law establish the value of right and in consequence the type of test witch should be applied (Spece & Yokum, 2015, 285). Regardless of the nomenclature, the essence of resolving conflicts of values captured in the form of substantive norms is shifted to procedural assumptions. The principle of proportionality, by its very nature being a peculiar procedure inherent in the assumptions of legal discourse, consistently for these theories is constructed in such a way as to ensure the ethically peculiar correctness of discourse, within the framework of which the constitutionally relevant values coming into conflict in concreto - that is, within the framework of the juxtaposition of a specific regulation of a legislative act with the constitution - will be juxtaposed and subjected to a weighing procedure in a manner appropriate to the requirements of discourse. In other words, the test of preserving the proportion of restriction of one value in favor of another, must meet the ethical requirements of discourse - based on the requirement of coherence with the essence of liberal constitutionalism. Such requirements are the interpretive presumption of preference for the right and freedom of the individual when confronted with the value protecting the public interest, relevance for the discourse of values protecting the individual not gaining support in the statutory discourse as the one that exemplifies in principle

[1] Mill puts it, the basis for limiting individual autonomy can only be "is to prevent harm to others" (Mill, 1998, 14).

the will of the majority (this is a consequence of parliamentarism as a representation of the will of the majority of voters), the public interest should be a representation not of the abstractly assumed will understood aggregatively, and should represent that individual interest that receives the support of public authority. Thus, the principle of proportionality is a consequence of recognizing the relevance of each individual interest by including it in the constitutional discourse, and in its requirements it creates assumptions for balancing values coherent with the assumptions of liberal constitutionalism.

The principle of proportionality, a formula in the nature of a limiting clause, the literal wording of which manifests the assumed constitutional order of preferences, under which the principle is the protection of rights and freedoms and the exception is their limitation, is a consequence of the philosophical and legal assumptions of liberal constitutionalism. Thus, it means exposing the constitutional principle materially declaring the protection of the right or freedom of the individual, as a model for sub-constitutional legislation. It is a declaration of liberal democracy that is, setting the majority manifesting its will in subconstitutional acts the limits of this will. At the same time, the relevance of protecting the constitutional autonomy of each individual potentially opens up the problem of conflict - the collision of these principles. Constitutional principles or the principle of proportionality in its constitutional formulation (reinforced by their genesis, i.e., the political philosophy of individualism inherent in liberalism) create an order of preference - the priority of protection of rights and freedoms in conflict with the interest exhibited in the subconstitutional regulation, and at the same time sets the procedure for its limitation (the correctness of the constitutional discourse). Pro libertate preference for constitutional protection and the formulation of the conditions for the correctness of the limitation procedure must be mutually coherent and not negate the essence of liberal constitutionalism - that is, the constitutional norm treated as a barrier to the unlimited will of the majority of society or those in power. Determining the weight of the constitutional principle in the procedure of balancing values (application of the principle of proportionality) is an in concreto assessment of constitutional jurisprudence and the application of limitation clauses by international judicial bodies established to protect rights and freedoms. This means tahat the essence of the right or freedom is naturally possibly influenced by this jurisdiction. Moreover, coherent

interpretation of the right's or freedom's essence, should be extra protection against state's antiliberal usurpations based on concept of national identity. Nevertheless application of individual right or freedom necessively concerns the open concept of the legal principle. Not only the essence might be in question specially in political discourse-that one can be restricted by the concept of coherent interpretation, more problematic is the nonconclusive manner of application of these norms which means weighting of conflicting principle. The problem of continuity or discontinuity with respect to the earlier jurisprudence of the so-called core or essence of the right and freedom - that is, the interpretive determination of such right in the light of supranational background of assistance of such rights, must be faced also with manner of weighting and the vague of principle in broader culture (not national). These factors constitute a political metaground for proportional discourse. The legal discourse captured by reference of politicization in constitutional discourse, mask the actual rejection of the interpretive presumption pro libertate in constitutional jurisprudence. This is very dangerous process so the theory of principles and the clarity of application of the principle of proportionality guarantee the lack of politicization.

The essence of the application in jurisprudence of the principle of proportionality is underpinned by the theory of principles of law. These concepts are based, firstly, on the assumption that constitutional rights and freedoms are norms that take the form of legal principles, and this is generally a type of norm differently applied then legal rules. Within legal theory, the only controversy is whether the difference between a legal principle as a norm and another type of norm -legal rules is a logical difference. Legal rules in these concepts are usually based on Herbert Hart concept of rules (Hart, 1961). The theory of principles is richly developed on the ground of legal theory (Alexy, 2002; Dworkin, 1967-68; Toubez-Muniz, 1997). The principle of proportionality in consequence boils down to the material-legal aspect (of course, the formal aspect examined in the application of the principle of proportionality is also important, that is, the requirement to preserve the appropriate type of subconstitutional act, but nonliberal interpretation, more restrictive limitation take place in nonproportional material aspects of the principle of proportionality). The most important question is how to justify the constitutional correctness of the application of the proportionality test, that is, the collision of principles-norms defined in a very general way even while specifying jurisprudentially and theoretically what the test is

actually supposed to mean. Within the civil law culture, the prevailing concept in this regard is that of Robert Alexy, developed on the basis of the jurisprudence of the German Federal Constitutional Court, which firstly does not differentiate the application of the principle of proportionality due to the type of constitutional right subject to restriction and secondly, the effect of a positive proportionality test, i.e. of recognizing a restriction as constitutional contains an assumed element of recognition resulting from the application of a sub-assembly of the proportionality test referred to as the proportionality test sensu stricto being solely an assessment of the so-called legal possibilities of restricting a right resulting from assessments that escape causal reasoning (instrumental rationality) (Alexy, 2000, 300). In American constitutional jurisprudence tree different types of scrutiny, differently applied are the consequence of the kind of right which is limited. This mean that judiciary creates the vague of principle due to the previous institutional background, that the principle got. The discretion is more restricted and the process of the assessment of proportionality is more clear.

However, returning to the analysis of the sub-principles that make up the principle of proportionality, which is crucial for the civil law system, and moving on to their characteristics, it should also be noted a very important cultural feature affecting the application of the principle of proportionality, that is, the commitment to interpretive textualism even when the interpreted text is the constitution and its effect but the cause and therefore a kind of reduction of constitutional interpretation involving the elimination in the process of applying the law of philosophical and legal considerations inherent as a pre-understanding of the text of the constitution. In other words, the tendency to interpret only the linguistic text of the Constitution is a result of, but also entails in the application of the principle of proportionality the elimination (evident in the justifications of the rulings of constitutional courts) of extra-textual considerations that are relevant to the understanding and interpretation of individual subsets of the principle of proportionality (especially in the assessment of the so-called. legal requirements for the limitation of a constitutional right) and underlying this principle that is, first of all, the conditions that liberal constitutionalism brings (that is, in particular, the requirement of pro libertate interpretation, and the unconstitutionality of aggregative reasoning - ie. assuming that it is possible to evaluate the necessity of limiting a constitutional right through utilitarian reasoning, in other words,

that in the evaluation of proportionality the majority reasoning typical of parliamentary discourse can be used as an argument - i.e., the situation of protecting the right of a larger number of people even if this right were to be less drastically affected by protecting an individual constitutional right, can be used as the prevailing argument for constitutional adjudication in the application of the principle of proportionality).

The principle of proportionality in its constitutional application consists of three tests (sub-principles) that the constitutional court evaluates when assessing whether a sub-constitutional regulation is constitutional: the principle of effectiveness (a requirement that is so-called. factual, which means that its evaluation implies the need to apply the causal arguments typical of empirical evaluations; that is, in the evaluation of this test are evaluates whether the subconstitutional regulation is able to achieve the goal it assumes), the principle of necessity (factual-legal requirement, which means that the court examines whether the subconstitutional regulation limiting the constitutional right is necessary, in the sense of whether it is possible to achieve the same effect otherwise less encroaching on the constitutional right; here the reduction of the constitution only to the text without the background of liberal constitutionalism allows the use of utilitarian arguments, i.e., the concession to the group by virtue of its greater representation may prevail the more important constitutional interest but not gaining greater social representation), and the principle of proportion sensu stricto (the so-called. legal requirement which in essence is supposed to mean evaluating and weighing only constitutionally relevant values that have the support of the law).

The principle of proportionality understood in this way can create a trap for itself, i.e. for its individualistic assumptions. First of all, jurisprudence does not create sharpened criteria for the possible limitation of a constitutional right due to the type of right. In other words, a right that is particularly sensitive to the preservation of individual autonomy, e.g. freedom of speech, by working out special strictures in the application of the sub-rules of the principle of proportionality could result in the practical impossibility of their restriction by a sub-constitutional act. Constitutional jurisprudence limiting such a fundamental right would not only in concreto have to justify the correctness of the application of the principle of proportionality, which is not difficult in the situation of reducing the interpretation of the Constitution to the text and leaving discretion in the

application of the principle of proportionality sensu stricto, but such a ruling would have to undermine the jurisprudentially developed procedural requirements of strict proportion evaluation in a situation where a right recognized in jurisprudence as essential is involved. Strengthening the effect of protection should also be achieved by redefining the concept of presumption of constitutionality of subconstitutional acts. In accordance, moreover, with the textual wording of the restrictive clauses - principle the protection of a right should be treated as a principle rather than its limitation, and to conclude that, at least in relation to rights and freedoms that are sensitive to individual autonomy, the argumentation should be reversed and the procedure for applying the ratio assessment should be based on the presumption of unconstitutionality of a restriction of a right or freedom that is essential to individual autonomy. In addition, assessing the legal weight of conflicting principles in a strongly textual legal culture allows to justify as constitutional the effects of applying the principle of proportionality inconsistent with legal constitutionalism. These are the fundamental pitfalls that allow the introduction of the argumentation of the antithesis of liberal constitutionalism into institutions formed as an achievement of individualist thought, i.e. the essential protection of individual autonomy and the need to create a counterweight to parliamentary discourse within the framework of constitutional jurisprudence.

3. Legalism

The concept of legalism was introduced into the scientific discourse in Western culture by John Locke (Locke, 1988, 323-331)[2], proposing the subordination of the state to law, while in conceptualized form it was proposed by Max Weber. He distinguished so-called legal rule from the other two forms of government: traditional rule and charismatic rule. What is characteristic of the legal form of rule is its reliance on formally introduced rules and principles and their legitimacy by virtue of the authority attributed to such law. The system of legal authority is complemented by a

[2] Locke assumed in the second treatise that government should be based on a law that binds everyone including the governed. The rulers are bound by the social contract and the ruled can use the law of resistance in case of violation of the rules of government (Locke, 1988, 400-419).

bureaucratic apparatus operating in a hierarchical structure and what Adolf Merkl and Hans Kelsen (Kelsen, 1967, 221-229; Paulson, 1998, 154) later called the hierarchy within the sources of law and the relation of authority within the dynamic structure of norms. Weberian bureaucratism is an apolitical official, impartial, issuing decisions in the manner prescribed by procedural norms.

The authority of power is based on the so-called rational basis, i.e. on the belief that the legitimacy of normative rules and the right to exercise power of those who have assumed and exercise power on the basis of these rules is justified by the authority of legality (Weber, 1999a, 116-119)[3]. This means that the authority of power is a reflection of the authority of legal rules. Compliance with the law is the result of - as Weber puts it - impersonal order (impersonal order), there is no authority of man, and there is the authority of office (that is, not the authority of the person internalizing the traditional exercise of power or the person whose authority derives from special trust or devotion) (Weber, 1999a, 69). A legal norm derives its legitimacy either from acceptance or the fact of introduction by an authority. The desirability or rational value of the norm, in turn, is the primary factor in its legal adaptation. The authority of the norm is also associated with the bureaucratic apparatus, which means that, according to Weber, the rational authority of law consists of: an organized bureaucracy bound by legal norms, the norm of competence as the basis for the action of the official as an administrative body, a hierarchical structure of organ dependence, the substantive preparation of the official, the objectivity of official decisions (Weber, 1999a, 116-119). Bureaucratic authority led by the first official is technical, apolitical in nature hence constitutes the continuity of the state structure regardless of political changes (Weber, 2005, 152-164). An entity with authority based on legal domination (legal domination) is also subject to rules shaping legal regulations. The ruling entity, as a rule, is the highest (superior) of those entitled to the indicated function (Weber, 1999b, 99-101).

Conceived in this way, legalism sets the basis for a formally understood rule of law, i.e. basing the functioning of government on the norm of

[3] In addition to the authority of legality, Max Weber distinguishes between two more forms of authority that legitimize power: authority based on traditional grounds and authority based on charismatic grounds. The former stems from devotion to immortal traditions, while the latter stems from devotion to the peculiar charismatic qualities of those in authority (Weber, 1999b, 99-108).

competence. Characteristically, legalism has no reference to the axiological requirements of the content of the law. Complementing the principle of legalism is a model of the application of law that excludes judicial discretion, except for the concepts intended by the legislator, which are open to interpretation. However, the assumed mechanistic nature of the application of the law suffers from a fundamental conceptual difficulty when the basis of the decision is a norm that takes the form of a legal principle.

The theoretical-legal peculiarity of a legal principle - especially in the area of normative regulation of the protection of individual rights - results from the necessity of the applying entity to carry out a process of weighing, that is, to assess the degree of possible application of the principle (and thus the degree of restriction of its application motivated by the protection of other values of the legal order conflicting in concreto with the principle). The application of this type of norms is not determined only by their disposition, but is the result of the requirements of proportionality in the application of conflicting norms. The otherness of their application concerns both the methods used to interpret the principle and the assessment of its permissible limitation. The peculiarity of the application of the principles is so apparent that, from a legal perspective, it can raise a dilemma as to the possible reconciliation of the classically understood principle of legalism with the textually elusive requirements of the principle of proportionality, which are the basis for assessing the legality of a violation of a principle, for example, a constitutional one. In practice, this means the visibility of the discretion of the body applying the law, identifiable as the assumed margin of discretion both in interpreting the norm and in determining its scope of application. The confrontation of the application of the principle of proportionality determining the scope of application of a legal principle with the classically understood principle of legalism, therefore, requires a redefinition or at least an indication of the dissimilarity in the degree to which the body applying the legal principle is bound by the legal text. The classically understood principle of legalism and, consequently, the basis for the pillar of the doctrine of the rule of law ideally leaves the entity applying the norm to state law in the position of being the mouth of the legal text with a minimum of decision-making slack. Interpretation with an element of normative novelty or the authority's determination of the degree (scope) of application of a norm is certainly not the realization of an abstractly idealized construction of the relationship between the lawmaker

and the law applied. The rule of law as the basis for the functioning of state bodies especially implications in connection with its reinterpretation in the situation of the application of legal principles can be seen against the background of the application of constitutional principles. The application of constitutional principles with a strong paradigm of legalism of the action of the constitutional court means the adoption of doctrines of interpretation of subconstitutional acts for the purposes of the constitutional norm, and, moreover, the application of the principle of proportionality in a way that masks the discretionary nature of constitutional jurisprudence.

The relationship of minimizing recognition as the best realization of the principle of legalism is particularly evident in civil law countries, and especially in this cultural area, the unification of doctrines of interpretation of the subconstitutional and constitutional norm is evident in the legal discourse in order to possibly eliminate the charge of discretion and thus shake the foundations of legalism of judicial action. The most common is the attempt to adapt the doctrines formed in connection with the application of subconstitutional norms to the text of the Constitution, i.e. the dominance of literal interpretation, doctrinaire textualism, i.e. to base interpretation as much as possible on the understanding of the text and - in the best version - on the assumed as possible objective understanding of the text. This, in turn, gives rise to a clear incompatibility of textual doctrines of interpretation with constitutional principles, both because of the way they are linguistically framed, forcing the "filling of the text" with extra-textual understandings of clauses such as privacy, dignity, equality, for example, and the incompatibility with the specifics of the process of assessing the degree of application (limitation) of the principle occurring in the application of the principle of proportionality. The classical model of subsumption, dominant in legal thinking about the application of law, in the context of constitutional principles is impossible to sustain. Thus, legalism on the grounds of the application of the constitution requires taking into account the necessary element of fulfillment of the content of the law (even not always the legal text) by the one applying the law. In other words, the application of the constitutional principle within the limits consistent with the principle of legalism implies the activity of the applicator of the norm both as to its interpretation and the degree of its application. Against this background, legalism is not determined by the relationship of subordination of the body to the text, but by the relationship of equivalence

between the text and the subject applying the principle, which implies, at the very least, the determination of the body applying the constitutional principle of the result of applying the principle. This redefinition of the principle of legalism in the situation of the application of the principle of proportionality (resolving the collision of principles) can also be justified in another way, namely by the very assumption that the authority to apply the norm as such implies the authority to interpret it and determine the degree of its application. This is a Kelsenian justification of interpretive activism in relation to the norm giving rise to recognition Paulson, 1990, 143-151). Kelsen operates with the concept of authority derived from the legal norm creating a basis of competence for the application of the norm, so the exercise of discretion manifested by interpretive freedom is still an authoritative determination of the legal situation of the addressee of the act of applying the law, nevertheless, this justification post factum, is rather an adaptation of the inevitable practice of applying principles to rigid assumptions about the competence of the authority subject to the law. Thus, legal practice is confronted with the situation of justifying the manner of application of constitutional principles with justifications based on the doctrines of interpretation and application of the law adapted to subconstitutional acts captured - in principle - by norms that have the form of rules (that is, norms applied weightlessly and in principle without recognition). The theoretically and legally conditioned practice of resolving conflicts of rules activates the applying subject and confronts him with a strong narrative based on the preference for textualism. The linguistic doctrines of interpretation minimizing the role of the interpreting subject juxtaposed with the intuitive (detached from the theory of legal principles) practice of resolving the collision of constitutional principles, give rise to political-legal doctrines better or worse justifying the coherence of the result of resolving this collision with the essence of the constitution or legal order. The inevitably apparent otherness of the application of a constitutional principle, together with legal preconceptions about the subordination of the applying authority to the text, result in a lack of conceptualized criteria for evaluating the result of the application of a constitutional principle as either acceptable or pathological. In other words, the lack of understanding of the theoretical-legal considerations of what a norm that is a legal principle is (Dworkin's concept) (Dworkin, 1967-68, 23), how it should be applied, to what extent its application is proportional and thus legal gives

rise to political-legal narratives justifying the results of the application of the principle of proportionality that are disproportionate. Newly sensitive for the legal order are those cases of principle application, which are the application of constitutional clauses that limit individual rights. These situations of assessing the degree of application of the principle, carried out through the procedure of assessing proportionality, shape the degree of protection of individual autonomy, and are therefore crucial for protecting the essence of legalism. These doctrines: legalism and the requirement of proportionality of restrictions on individual rights are aimed at the same goal - the elimination of usurpation of power. Thus, only the application of the principle of proportionality in a way that minimizes the limitation of the individual right is coherent with the idea of legalism or limited power. Judicial discretion in itself is not a threat to legalism, the threat becomes the application of tests of proportionality in a disproportionate manner, i.e., favoring public power pursuing majority interests in democratic procedures. Thus, the coherence of legalism and proportionality means the transparency of the test of suitability, necessity and most important proportionality sensu stricto, which is the juxtaposition of individual and majority interests. This means that the role fundamental to justifying the outcome of the application of a constitutional norm - its interpretation and the degree of its limitation in favor of other constitutional values - is played by the applied principle of proportionality, which is evident to the addressees of the law. Political doctrines "masking" specialized legal (and, in fact, strictly theoretical-legal) reasoning by virtue of their incomprehensibility, begin to play a leading role in the discourse of constitutional courts. Coherent with the idea of constitutionalism and legalism, the preference for the individual interest is often masked in the superficial reasoning of politically oriented constitutional jurisprudence. Such a way of adjudicating constitutionality poses a threat to the foundations of legal culture, individual autonomy and distorts the essence of the principle of proportionality, which in principle contains a maximizing paradigm for the protection of the individual.

The principle of proportionality sensu stricto and the principle of necessity are both paradigmatic principle to maximilizing process of human rights protection, these ratio tests are used in constitutional jurisprudence and constituting the matrial-legal aspect of the control of the constitutionality of a subconstitutional act in the application of the principle of

proportionality. R. Alexy refers to three sub-principles that make up the principle of proportionality, besides necessity and proportionality sensu stricto, Alexy describes principle of appropriateness as based on actual (not legal) possibilities (Alexy, 2000, 297).

Both of these sub-principles in the analysis of the degree of limitation of the constitutional principle, in assessing the degree of protection of, for example, individual privacy, force the evaluation of the so-called legal possibilities of applying the constitutional principle. The legal possibility of applying the principle is non-factual reasoning, that is, not based on the objective relationship between the means and the purpose of implementing the principle (characteristic, in turn, in assessing the standard of the suitability sub-assumption), so it is largely based on the prima facie subjectivization of reasoning. The necessity of a restriction of a constitutional principle means assessing the necessity of the restriction, i.e. the unavailability of another measure to achieve the statutorily preferred goal. Proportionality sensu stricto is an assessment of the weight of conflicting principles (theoretical-legal term), i.e., the interests of the individual and the majority[4] (political-legal term). The most elusive for the addressee of judgments based on the evaluation of the collision of constitutional principles is the criterion of the weight (validity) of the principle. Prima facie subjectivity of these reasonings, i.e. the assessment of the necessity and strictly proportionality of the limitation of a constitutional principle can be greatly reduced by building a unifying guarantee standard of understanding a right or freedom by creating the criteria necessary to be taken into account in assessing the importance of constitutional principles. The concept of the weight of a constitutional principle is key to understanding whether a restriction on an individual's right is justified by a pre-understanding of constitutional principles. That is, whether we are able to assess whether the jurisprudential technique of standardizing the concept of weight with universalist reasoning, i.e., based on the analogy of the constitutional standard and the standard of international protection of individual rights, or the ad hoc unspecified jurisprudential assessment of weight whose legitimacy is,

[4] By majority interest I mean both a collective interest and an individual interest, but one that gains support in statutory discourse (i.e., a majority preference for a certain individual interest over another, e.g., a preference for the protection of religious feelings over freedom of expression due to the dominance of a certain type of worldview in society).

in fact, only the authority of the court, is more coherent with the thought of constitutionalism. The choice seems obvious, individual autonomy is a common cultural achievement, not limited to a single constitution, and the universalist standard is the only possible choice. Legality is precisely indeterminacy, including in determining the degree of individual autonomy. Undetermining the interpretation of a legal principle in connection with the application of the principle of proportionality makes it possible to expose political tendencies that are dangerous to the standard of individual protection. How, then, to optimally understand the concept of the weight of the principle, so that it does not give rise to the dangers of a revolution in the understanding and degree of restriction of individual rights, and does not depart from the essence of the idea of constitutionalism, that is, the maximization of the protection of individual autonomy in confrontation with the social majority determining its interests through the statutory norm? The fundamental problem with the formation of the concept of the weight of a constitutional principle is linked to the legally strong narrative that it is a strictly subjective criterion and results from the ad hoc judgments of the constitutional court that have a more or less political-legal basis. In other words, it is legally accepted that the result of the application of constitutional principles is undetermined, and gives rise to little or no counterargument based on exposing the departure of the result of the interpretation of a principle beyond the framework of legalism. The remedy for this process may be to externalize in constitutional jurisprudence with maximum detail the process of application of the sub-principles that make up the principle of proportionality and standardize the understanding of the principles that express the individual right. The most important thing, however, is to understand the basic narrative of our legal culture, that is, that the principle is the protection of the individual right, and that its limitation is suspect not only because of the possible overstepping of the limits of proportionality, but also because it undermines the principle of legalism.

4. Summary

In an attempt to point out the mutual coherence of legalism and the requirement of proportionality, it should be noted that both of these principles aim to limit power. The limitation of an individual right to be

legal formally forces the issuance of a limitation act in compliance with the principles of decent legislation, while in the material sense it means the issuance of a legal act that meets the three tests that make up the principle of proportionality. Both of these principles are coherent, and only together do they determine the proper relationship between public authority and the individual. The mere preservation of legalism does not yet guarantee the individual a proper standard of protection, proportionality determines the order of preference based on the priority of protection of the individual right, and the analogy in the construction of the standard of understanding of the constitutional principle between the national order and the international standard allows to maintain depoliticization in the application of subsets of the principle of proportionality in constitutional jurisprudence.

References

Alexy, R. (2002). *A Theory of constitutional rights* (J. Rivers, Trans.). Oxford University Press.

Alexy, R. (2000). On the structure of legal principles. *Ratio Juris*, 13 (3), 294-304.

Dworkin, R. (1967-68). The Model of rules. *The University of Chicago Law Review*, 35(14), 14-46.

Hart, H. (1961). *The concept of law* (1st ed.). Oxford Clarendon Press.

Kelsen, H. (1967). *Pure theory of law*. University of California Press.

Locke, J. (1988). *Two treaties of government* (P. Leslett, Ed). Cambridge University Press.

Mill, J. S. (1998), *On libery and Other Essays*, Oxford University Press.

Paulson, S. L. (1990). Hans Kelsen on legal interpretation. *Legal Studies*, 10, 136-152.

Paulson, S. L. (1998). Four phases in Hans Kelsen's legal theory? Reflections on a periodization. *Oxford Journal of Legal Studies*,18, 153-166.

Spece, R. G., & Yokum, D. (2015). Scrutinizing strict scrutiny. *Vermont Law Review*, 40, 285-351.

Toubes-Munis, J. R. (1997). Legal principles and legal theory. *Ratio Juris*, 10 (3), 267-287.

Weber, M. (2005). *Bureaucracy*. In J. Joseph (Ed.), *Social Theory:A Reader* (152-164). Edinburgh University Press.

Weber, M. (1999a). The Rational State and Its Legal System. In R. Swedberg (Ed.), *Essays in Economic Sociology* (116-119). Princeton University Press.

Weber, M. (1999b). The Three Types of Legitimate Domination. In R. Swedberg (Ed.) *Essays in Economic Sociology* (99-108). Princeton University Press.