

UNDECIDABILITIES AND LAW

The Coimbra Journal for Legal Studies

CALL FOR PAPERS / SUBMISSIONS

VOLUME IV (2024)

LEGALITY AND PROPORTIONALITY IN THE PERFORMANCE OF LAW

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The fourth volume of *Undecidabilities and Law* is dedicated to the relationship between legality and proportionality in the context of practical performance (or realization) of law. To explain this issue, attention should be paid primarily to two very crucial issues, both for academic considerations in the field of the conflicting demands of political philosophy and legal philosophy, but also important for practical-normative dogmatic approaches as well as for the process of interpreting the law in practice by law-enforcing authorities.

The first issue we want to focus on is the relationship between *the rule of law and proportionality*. Not coincidentally, these two evaluative concepts (establishing the legal order of democratic states) have been joined by a conjunction rather than being opposed to each other as necessarily colliding. In other words, speaking of "legality and proportionality" rather than "legality versus proportionality" is a declaration supported by very elaborate theoretical and philosophical legal analyses. Therefore, an approximation of the concept of legality and the necessary conditions for the functioning of the law, allowing it to be considered as a rule of law while simultaneously linking this concept with the principle of proportionality, aims firstly to redefine (modernize, adapt to the actual "essence" of constitutional and supranational case law) the classical concept of legality, and secondly to draw attention to the fact that resolving conflicts between constitutional principles or supranational legal orders is a crucial procedure that determines the political-legal basis on which contemporary legal systems operate. At the same time, a proper understanding of the theory of legal principles and recognition in the assessment of proportionality (in limiting one principle at the expense of another) must adopt frameworks that do not deviate from the canons of legality. Conversely, the combination of the concepts of legality and proportionality within the

framework of possible considerations leads to a conclusion about the archaic assumptions of a strict legalism (regarding the functioning of the state based on a legalistic conception of the sources of law) without taking into account the most important material basis for determining the principles of lawful state action: this material basis concerns the claim to establish the proper proportion between the public interest and the protection of individuality (or protection of the subject-individual), especially in confrontation with the socially (or collectively) dominant legal narrative reflected in legislative acts. The principle of proportionality, as the basis for controlling legislative acts in terms of maintaining proper standards of the relationship between public interest and individual interest, cannot be excluded from the analysis of a lawful state, for the purpose of maintaining democratic standards. Thus, the action of the state based on and within the law certainly means that the “essence” of this boundary must be determined by the optimizing character of the principles protecting individual or personal autonomy. This boundary (to be protected in constitutional and international jurisprudence concerning the protection of individual rights and freedoms) is a barrier against the most oppressive omnipotence of public authority over the individual, which can be manifested in legislative acts that do not respect the proper principles of proportionality in limiting individual autonomy.

The second part of the title of this special issue refers to the relationship between legality and proportionality *in the "performance" of the law*. Therefore, it concerns the broadly understood aspects of law enforcement, such as creating laws with respect to the necessary connection between these two values, interpreting or applying the law more broadly, and thus taking into account the fact that self-restraint by the law is an essential element of the concept of legality that conceptualizes the obligation to maintain proportionality in pursuing the public interest. The concept of performance of law cannot be isolated from the reality of multilevel legal orders and from the necessary links connecting national and supranational legal orders and their mutual penetration and internalization of the same axiological foundations. Those foundations demand actually optimally defined relations between the individual and public authority, as well as the use of an ever more developed doctrine of the application and understanding of the principle of proportionality (appropriateness, necessity, strict proportionality), shaped not only within national structures but also supranational ones, to which constitutional jurisprudence must remain responsive.

In conclusion, here are some examples of issues that are of interest to this volume. Of course, this is not an exhaustive list:

- the concept of legality and the legalist conception
- *rule of law* versus *Rechtsstaat*
- proportionality as a “principle of limited government” and the multi-centric and multi-levelled nature of European experience
- constitutional law in an Age of balancing
- the “technique of balancing” in Constitutional Courts and European Courts of Justice
- theories (or conceptions) of juridical principles

- the principle of proportionality concerning the collision of principles
- Robert Alexy's counterpoint between the subsumption formula and the weight or balancing formula
- Max Weber's concept of legality as political authority
- proportionality and Human Rights ("the absolute and relative dimension of constitutional rights")
- Is balancing an unavoidable method of adjudication?
- proportionality and judicial review (and its "variable intensity")
- proportionality and balancing in contract law (the "constitutional dimension of contract law"?)
- proportionality and the principle of sustainable development (is there a "principle of ecological proportionality"?)
- formal aspects of legality (Is it enough to constitute the *Rechtsstaat*?)
- judicial discretion in the "application" of legal principles
- legality as a frame of application of the principle of proportionality
- proportionality as a value that "should constitute material aspects of legality"
- the principle of necessity from the perspective of political philosophy
- optimisation of individual autonomy in the context of omnipotence of public interest
- the principle of proportionality and the techniques of balancing in labour law contexts.

This Fourth issue will be coordinated by **Marek Zirk-Sadowski**, Full Professor at the University of Łódź, former President of the Supreme Administrative Court of the Republic of Poland and former Vice-President of the IVR (Internationale Vereinigung für Rechts- und Sozialphilosophie).

The articles on the proposed subject must be submitted until **January 10th 2024**, directly to the platform <https://impactum-journals.uc.pt/undecidabilitiesandlaw>.

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