

Tor-Inge Harbo

Abstract

The aim of the thesis is to explore the function of proportionality analysis (PA) as a tool of judicial adjudication in European law. In this effort the author analyses in the first part of the thesis the way in which European supranational courts, notably the ECJ, the EFTA Court and the Human Rights Court, apply PA. The analysis reveals that PA is a flexible instrument of judicial review.

In the second part of the thesis the application of PA by UK and Norwegian courts is discussed. The respective countries' courts have not traditionally applied PA but various reasonableness tests. The purpose of the investigation is thus to shed comparative light on PA by contrasting it with comparable assessment schemes. To the extent PA is taken on by the two national courts the investigation may display the persuasive nature of PA.

The legal dogmatic approaches taken in part one and two of the thesis does only partly help determine the function of PA. A broader approach is needed to this end. In part three of the thesis the author firstly discuss what it means that PA consists of both rationality and reasonableness tests and thereafter whether PA is of a substantial or a procedural nature. Concluding that PA is of a procedural nature – securing a legal safeguard for individuals – it is nevertheless clear that PA implies the strengthening of the judiciary.

This leads to an elaboration on the virtues and vices of "judicial governance". In this connection it is suggested that the establishment of PA as a (general) principle of law (together with the tri-partial structure) is a way in which courts may attempt to legitimise the extensive judicial power, which lies intrinsic in PA. The author then embarks upon a discussion of the nature and function of principles of law including the rule of law qualities of PA.