

Abstract

Presently the role and the jurisdiction of the Administrative Court established under the Constitution of the Kingdom of Thailand B.E.2550 are defined in the Constitution Article 223-227. The Administrative Court adopts the Principle of Proportionality for judging cases concerning the “by-law” (the regulation which restricts and offends the rights and liberties of the people). One of the example cases is the judgment of the Central Administrative Court no. 2253/2545. However, whether or not the Administrative Court applies the Principle of Proportionality to examine the legitimacy of the “by-law” in other cases is still in question.

According to the Constitution B.E.2550 Article 29, the restriction of rights and liberties shall not be imposed on a person except by only to the extent of necessity. This shows that the Principle of Proportionality is obviously regulated in the Constitution. Proportionality is the fundamental principle in public law and the important sub-principle of Legal State. Moreover, this principle is used to protect rights and liberties of people. It can be divided into three sub-principles. Firstly, the Principle of Appropriateness requires the state to choose only measures, to be imposed on citizen, that are achievable. Secondly the Principle of Necessity requires the state to select measures with least impacts on rights and liberties of people, Lastly the Principle of Proportionality “*stricto sensu*” requires balancing between public interest and the impact of the measures on rights and liberties of the people with more weight on the public interest. These three sub-principles were derived from the judgments of the Federal Republic of Germany’s Constitution Court.

In Thailand, the Principle of Proportionality in public law is both fundamental principle and general principle of law. The administration is prohibited to perform an administrative action excessively affecting people’s rights and liberties. It must reasonably act in accordance with the extent of the facts in the case. The principle of proportionality is the key organizations in the justice system utilize as a tool in the entrenchment of the rights and the liberties of people. This study has shown that the Administrative Court regularly applies the Principle to examine the legitimacy of the “by-law”. The Court systematically applies the principle to the adjudication of the cases and has adopted perfectly the theory of the principle.

However, there are some cases that the Administrative Court has not applied the principles. As a result, the adoption of the principle of proportionality as a basis in reviewing the rules, that have the effect on restricting the rights and the liberties on people, is still lack of clarity and certainty. It can be clearly seen that if the court has not applied all three criterion of the principle of proportionality in judging all cases, people’s rights and liberties may be affected by some court decisions.