



## ПРОБЛЕМИ ТА СУДЖЕННЯ

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### DETERMINING THE PRINCIPLE OF PROPORTIONALITY IN CRIMINAL PROCEEDINGS

There is no single approach in Ukraine as of today to understanding of nature and requirements of the principle of proportionality and its place in the modern legal system. The principle of proportionality is a new provision for legal literature, but certain attention was paid to it in the works of such scientists as S.L. Derevyankin, M.I. Kozyubra, S.P. Pogrebnyak, V.M. Tertishnik, V. Uvarov, S. Shevchuk and others. The foreign scientists gave even more attention to this principle. However, as of today, in connection with the integration of Ukraine into the European community, as well as the development of the state in the framework of the expansion of human rights, the solution of defining this principle as a separate general legal one is a matter of urgent necessity.

**The purpose of the article:** to determine the principle of proportionality as an independent principle of criminal proceedings, to define it as a general legal principle in the system of principles, to disclose the content, and also to consider certain aspects of its manifestation in criminal procedural activity.

**Presentation of the basic material.** The principle of proportionality is a necessary component of the rule of law

principle and comes from it, as it was already noted in 1965 by the Constitutional Court of the Federal Republic of Germany. The Constitutional Court of Germany and the European Court of Human Rights applied the principle of proportionality in many cases concerning the restriction of certain rights, linking it with the lawfulness of such restrictions. It seems that the court forms its assessment of the legality of certain restrictions with due respect to this principle [1, p. 479].

Developed in the German public law and continued its evolution in European law, the principle of proportionality provides for a consistent solution to such questions: 1) whether the interference of state bodies in the realization of individual rights (freedoms) took place; 2) whether such interference was provided by domestic law; 3) Whether the purpose of the intervention is legitimate; 4) Whether the desired goal was achieved using this method of intervention, in other words, were the means used to achieve the goal were appropriate; 5) Whether the means used were necessary to achieve the legitimate goal; 6) Whether the means used were appropriate (proportional in the narrow





sense), in other words proportionally (proportionally) with the indictment of the individual in pursuit of the goal and achieve the benefits for the whole society.

It should be noted that the principle of proportionality is reflected in the constitutional acts such as the Federal Constitution of the Swiss Confederation (Article 36); The Constitution of the Republic of Croatia (Articles 16, 17); Constitution of the Republic of Poland (Article 31); The Constitution of the Republic of Portugal; Constitution of the Republic of Moldova; Constitution of the Russian Federation (Part 3 of Article 55).

The ambiguous viewpoint so far had being firmly established in the practice of the European Court of Human Rights (ECtHR) and is actively used by the latter to determine the admissibility of restrictions on the rights and freedoms envisaged by the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms. It should have being emphasized that the concept of proportionality is already expressed in the first decisions of the ECtHR, including in the ruling of July 1, 1961, in the "Lawless vs Ireland case". Among the decisions aimed at forming the concept of proportionality in the practice of the ECtHR, its resolution of July 23, 1968 on the case about the languages in Belgium, in which the ECtHR noted that the principle of equality had being violated, if the difference has no objective and reasonable justification. The existence of such justification has to be assessed in relation to the purpose and results of the event under consideration, taking into account the principles. The difference in application when exercising any right established by the Convention should not only pursue a legitimate aim – Article 14 is also violated when it is clearly established that there is no reasonable ratio of proportionality between the means used and the sought goal [2, p. 111].

The application of the principle of proportionality could be found in cases

concerning the right to freedom of expression guaranteed by Article 10 of the Convention ("Tammer v. Estonia", "Barfod v. Denmark" and others).

It should be noted that in cases where there are restrictions on certain rights and freedoms, the European Court of Human Rights always draws attention to the following aspects: namely, the existence of legal grounds for limiting rights and freedoms (rights and freedoms may be limited only in the manner prescribed by law); the existence of a legitimate aim for the application of restrictions; proportionality of measures taken by the state to restrict rights and freedoms in view of the legitimate aim that the state has been trying to achieve.

In the case of "Serhiy Volosyuk v. Ukraine", the Court found violations of Article 8 of the Convention in connection with the applicant's being brought to disciplinary responsibility for the transfer of a letter from the pre-trial detention center outside the control of the administration. As the ECtHR noted, "this letter did not endanger the risk of impeding the law-making of the applicant or any potential risk <...> In addition, the applicant was detained for a relatively minor offense, while he was sentenced to strict disciplinary punishment for this. In these circumstances, the Court considers that in the present case, even taking into account the usual and substantiated requirements of the detention, the officials concerned went beyond the discretion they had being granted and that the interference was not proportionate" [3, paras. 91–92].

Any measures taken to restrict human rights and fundamental freedoms must be justified by the existence of a legitimate aim. In most cases, the absence of such a goal is very difficult to prove, therefore, this requirement generally excludes the application of restrictions that had not being at all connected with the legitimate aims defined by the Convention, and doubts about the existence of a legitimate aim may arise except in cases of apparent inconsistency. In this regard,



the European Court of Human Rights pays the greatest attention to verifying the proportionality of the measures taken and the objective pursued.

The functional role of the principle of proportionality consists in regulating the boundaries of rights and freedoms, which makes it possible to attribute it to general legal principles, which operate both in the sphere of material and procedural law. Given these roles and other content of the principle of proportionality in the literature and law enforcement it is used as – the dependency principle [4], or more specifically, the principle of proportional (dimensional) restricting rights and freedoms.

It is necessary to agree with the requirements of the principle of proportionality expressed in the literature and practice of the European Court of Human Rights and national courts:

- any restrictions on fundamental rights and freedoms are possible only on the basis of the law provided by the constitution (or international legal instruments) for the purposes and only to the extent that is necessary for the proper functioning of a democratic society;
- such restrictions should apply only in cases where there are no less burdensome measures (means and methods) for preventing violations of the rights and freedoms of others and securing public interests;
- the effects of measures that restrict the exercise of rights and freedoms must not be excessive and strictly conditioned by the objective pursued;
- rights and freedoms cannot be limited by interpretation in the process of law enforcement practice. Interpretation cannot lead to a narrowing not only the scope and content of rights and freedoms, but also the understanding of their essence;
- all doubts that arise in interpreting the norms governing the relations between the state and the citizen must be interpreted in favour of the citizen;
- all permissions need to be interpreted either literally or extensively,

but not in any way restrictive. Restrictions on permissions are an exclusive area of lawmakers, not judicial interpretation [5].

Taking the above into account, it can be concluded that any restriction of rights and freedoms must necessarily be proportionally correlated with the legitimate aim, even if law expressly provides for such restriction. Since the establishment of specific standards for the enforcement of conventional norms is ultimately the prerogative of the European Court of Human Rights (bearing in mind the provisions of Article 32 of the Convention that defines the limits of the jurisdiction of the Court), the principle of proportionality refers to the main factors that should be taken into account when interpreting the Convention.

It is necessary to point out to the fact that the Constitution of Ukraine also reflects the provision of the principle of proportionality, namely: Ukraine is a law-governed state, where the principle of the priority of human rights and the rule of law operates, and their realization is fully possible provided the principle of proportionality were observed. The application of the principle of proportionality could also being seen in the practice of the Constitutional Court of Ukraine [6].

After analysing the provisions of some normative legal acts, it is necessary to point out that the principle of proportionality extends both to public and private law, both material and procedural law, and therefore has a general legal nature. Namely, the Code of Administrative Procedure has a direct indication of compliance with the principle of proportionality (Part 3 of Article 2); from paragraph 3 of clause 1, 2 of Article 65 of the Criminal Code of Ukraine also follows the provisions of this principle, which establishes the obligation of the courts in each criminal case to motivate the appointment of a sentence on its basis. In civil proceedings, the adherence to the principle of proportionality also explicitly



provides for certain rules of material and procedural law (Chapter 82 of the Civil Code). It is imperative that courts observe the principle of proportionality and apply the rules of civil procedural law, for example, in the application of measures to secure a claim provided for in Articles 151, 152 of the Civil Procedural Code of Ukraine. That is, its multifaceted sectoral distribution testifies to the universality of this principle. Consequently, the principle of proportionality is used to determine the limits of possible restrictions of human rights and freedoms, to regulate the powers and balance of various bodies of state power, to prevent the abuse of discretionary powers and to establish the limits of freedom of discretion, in resolving issues of compliance with the crime and punishment, Labor and remuneration and so on.

The application of this principle in criminal proceedings helps to ensure the implementation of the objectives of criminal proceedings in general and the tasks of the individual stages of criminal proceedings. Thus, the CPC in Section 2 provides the purpose and grounds for the application of measures to ensure criminal proceedings. The purpose of these measures is to ensure the effectiveness of criminal proceedings, they are of an exceptional nature. However, as the generalization of judicial practice shows, the justification of decisions on the application of preventive measures is formal, consists of standard sentences and does not contain specific data. This is also indicated by the judgment of the European Court of Human Rights against Ukraine, according to which the lawfulness of the applicant's detention was considered by the national courts several times, but each and every time the court decisions repeated the standard list of grounds for the applicant's detention, without any investigation of the probability of these grounds, given the specific the circumstances of the applicant's case [7]. Failure to comply with the principle of proportionality is also observed when extending detention periods. Thus, in the judgment

of the European Court of Human Rights in the case of "Buryag v. Ukraine" of 15 July 2010, the Court noted that the extension of the period of detention may be justified in one or another case only if there are specific indications that this is required by true needs of public interest, which, despite the existence of a presumption of innocence, outweighs the requirement of respect for personal liberty. While continuing the applicant's detention, the prosecutors and the courts provided the same grounds based on which this preventive measure was chosen or did not give reasons in their decisions, but merely referred to the fact that they were elected. In addition, the national authorities have never considered the possibility of choosing another preventive measure, alternative detention, and, relying mainly on the severity of the charges, prolonged the applicant's detention on grounds which could not be considered "adequate and sufficient" [8].

Article 246 of the CCP provides that clandestine investigative actions might be conducted if information about the crime and the person who committed it cannot be obtained in any other way. That is, to achieve the objectives of criminal proceedings clandestine investigative actions might be conducted. Analysing the practice of the ECtHR ("Smirnov vs Russia", "Uzun v. Germany" and others), it can be concluded that the conduct of investigative and secret investigative (investigatory) actions, without sufficient justification, is an intervention that cannot be disproportionate, since there is no legitimate aim for such interference, and the evidence obtained as a result of such actions is considered inadmissible.

We believe that the principle of proportionality is one of the essential requirements that the state must observe when restricting human rights, and a mandatory assessment criterion for the court when determining the legality of such restrictions. The purpose of the principle of proportionality is to balance public and private interests and prevent unlawful restrictions on the rights of individuals.



The foregoing indicates the need to respect the principle of proportionality in some state which has positioned itself as a legal, giving priority to human rights and consolidation of this principle among the major acts such countries as the common principle.

**Conclusion.** The principle of proportionality can be defined as a separate general legal principle of criminal proceedings, according to which the purpose of procedural actions should be socially significant, and the means of its achievement least burdensome in specific conditions, interference in the field of human rights and freedoms, the application of measures for ensuring criminal proceedings, including preventive measures, may be allowed only in cases of extreme necessity, in order to ensure the effective realization of the tasks of criminal proceedings, enshrined in Article 2 of the CPC, and the tasks of individual stages of criminal proceedings.

**Key words:** principle, proportionality, criminal procedure, rule of law.

*Proportionality is a component of the rule of law with the help of which one of the most important functions is maintained – the protection and preservation of human rights and freedoms. At the present stage of building a democratic state and reforming power in Ukraine, the principle of proportionality acquires special significance. Consequently, there is a need for its normative consolidation in the legislation. The article explores the issues of determining proportionality as an independent principle of the criminal process and the need to reflect it in the system of general principles of criminal proceedings. It reveals its content and manifestation in criminal procedural activity.*

*Пропорційність – це складова верховенства права, за допомогою якої дотримується одна з найважливіших функцій – захист і збереження прав*

*та свобод людини. На сучасному етапі побудови демократичної держави та реформування влади в Україні принцип пропорційності набуває особливого значення. Отже, виникає необхідність його нормативного закріплення в законодавстві. У статті досліджено питання щодо визначення пропорційності як самостійного принципу кримінального процесу та необхідності його відображення в системі загальних засад кримінального провадження. Розкривається його зміст і вираження у кримінальній процесуальній діяльності.*

*Пропорциональность – это составляющая верховенства права, с помощью которой поддерживается одна из важнейших функций – защита и соблюдение прав и свобод человека. На современном этапе построения демократического государства и реформирования власти в Украине принцип пропорциональности приобретает особое значение. Следовательно, возникает необходимость его нормативного закрепления в законодательстве. В статье исследованы вопросы определения пропорциональности в качестве самостоятельного принципа уголовного процесса и необходимости его отражения в системе общих принципов уголовного производства. Раскрывается его содержание и выражение в уголовной процессуальной деятельности.*

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