

THE PRINCIPLE OF PROPORTIONALITY AS THE LEGAL BASIS FOR THE LIMITATION OF HUMAN RIGHTS

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The principle of proportionality is the most important criterion for assessing the legitimacy and lawfulness of the limitation of human rights. Despite the lack of a contractual framework, through the practice of international monitoring bodies, especially the European Court of Human Rights, the principle of proportionality has become one of the key principles of the international legal protection of human rights.

The principle of proportionality sets the limits for state intervention in the exercise by individuals of their fundamental rights and freedoms guaranteed by international treaties, determining the relationship between the state and civil society. The principle of proportionality is an important means of control realized by the Strasbourg Court in a concrete and thorough manner with the aim of ensuring an equitable balance between the legitimate aim of the limitation and the guaranteed rights of the individual. It is necessary to consider the principle of proportionality of the limitations of the rights and freedoms of citizens on the basis of a comprehensive analysis of such concepts as necessity, legality, goals, limits, scope, methods and duration of limitation.

Keywords: *proportionality, limitation, human rights, European Court of Human Rights, limits of intervention, civil society, fair balance, legality.*

The principle of proportionality is an inherent element of the theory and practice of human rights [7, 23-35]. Though it should be noted that this major principle is reflected only in one international agreement on human rights - the Charter of Fundamental Rights of the European Union of December 7, 2000. Part 1 of Art. 52 of this regional document establishes that a limitation on the exercise of rights and freedoms can be provided by law only if the principle of proportionality is observed, which means the following: any limitation should not go beyond the goals that are put before it [5, 80].

Despite the lack of a contractual framework, through the practice of international monitoring bodies, especially the European Court of Human Rights, the principle of proportionality has become one of the key principles of the international legal protection of human rights. The European Court has repeatedly noted that characteristic of the entire human rights system under the European Convention on Human Rights is "the search for a fair balance between public interests and individual rights". Achieving such a balance necessarily requires proportionality. International human rights bodies recognized that there must necessarily be a proportionality between the goal pursued by the state in interfering with the realization of an individual's right and the mentioned right.

The principle of proportionality is the most important criterion for assessing the legitimacy and lawfulness of the limitation of human rights: the degree of any limitation must be strictly proportional to the need to protect the more important interest protected by this limitation. In this regard, researched principle should be observed not

only in the laws establishing limitations, but also by the executive and judicial authorities in their application.

It follows from the principle of proportionality that between the goals pursued by the state and the means that it chooses for this, as well as the results of their application, there should be a close relationship. In order to protect the interests of society, no means should be chosen that, as a result of the use of which, the participants of legal relations would be imposed an excessive burden or limitations would be imposed, except for those that are really necessary.

Thus, the principle of proportionality sets the limits for state intervention in the exercise by individuals of their fundamental rights and freedoms guaranteed by international treaties, determining the relationship between the state and civil society.

In a large number of its decisions, the European Court of Human Rights emphasized that it must determine whether a fair balance was maintained between the requirements of public interests and the requirements of the fundamental rights of the individual.

The European Court does not define what public interest or public interest is, considering that the national authorities, because of direct knowledge of the living conditions of society and its needs, have advantages over the international court in assessing what public interests are; therefore, it is they who should initially assess whether there is a problem of public concern and whether appropriate measures should be taken. In one of its decisions, the European Court noted the following: "Considering it normal that the legislator has a great margin of appreciation for economic and social policy, the Court respects the legislator's judgment on what is in the public interest, except when such a judgment is not based on reasonable considerations"[4].

The principle of proportionality applied by the European Court of Human Rights means the following:

- 1) the legitimate aim must be sufficiently significant to justify the limitation of the individual's basic right;
- 2) measures designed to satisfy a legitimate aim must be reasonably related to the goal - they must not be arbitrary, unfair, or based on unreasonable considerations;
- 3) the means used to infringe the right or freedom must be necessary to achieve the legitimate aim - the more serious the negative consequences of the measure taken, the more important the goal must be if the measure must be justified in a democratic society.

In the context of the European Convention on Human Rights, the principle of proportionality was first applied in the Belgian Linguistic Case. In its decision, the European Court ruled that Art. 14 of the Convention, which does not allow discrimination in respect of the use of rights guaranteed by the Convention, prohibits not every distinction in the exercise of these rights, and that the principle of equal treatment is violated only when this distinction does not have an objective and reasonable justification. The court, in particular, said: "Different treatment in the exercise of the right enshrined in the Convention should not only pursue a legitimate aim: art. 14 is also violated if it is clearly established that there is no reasonable proportionality ratio between the means used and the goals that the state was striving to achieve"[1].

It is noteworthy that after the decision, the European Court consistently considered the principle of proportionality as an important criterion for determining whether the authorities interfered with the exercise of rights "necessary in a democratic society" or not.

The international legal literature correctly emphasized that the Principle of proportionality is an important means of control exercised by the Strasbourg Court in a concrete and thorough manner in order to ensure a fair balance between the legitimate aim of limitation and guaranteed individual rights[6].

This principle was subsequently repeatedly applied in the practice of the European Court of Human Rights, as well as the Committee on Human Rights.

So, in the case of *Mustakim v. Belgium*, the European Court found that the expulsion from Belgium of the applicant, who was a citizen of Morocco, was a disproportionate measure in relation to the legitimate aim pursued. The respondent Government indicated that the purpose of the expulsion was to prevent unrest, since the applicant was accused of committing a large number of crimes (147 in total), and also that he continued to commit crimes even under the supervision of a juvenile court. In a word, according to the Belgian government, Mustakim was dangerous for society, and his further presence on the territory of the country was unacceptable.

In its assessment of the fact that the measure of deportation was disproportionate in relation to the legitimate aim pursued, the Court took into account the following facts: a) the applicant was accused of crimes committed during the period when he was a minor, and only 26 and they all covered a relatively short period of time - about 11 months; b) a relatively long time elapsed between the last crime for which the complainant was convicted and the issuance of a deportation order; c) at the time of issuing the deportation order, all of the applicant's close relatives - parents, brothers and sisters - had been living in Belgium for a long time; d) at the time of arrival in Belgium Mustakim was less than two years. From that moment on, he lived there with his family for about twenty years, having received education in Belgium in French. Therefore, the measure taken against him, seriously violated his family life. Accordingly, there was a violation of the applicant's right to respect for his family life[8, 52].

The principle of proportionality was also applied to interventions in the exercise of the right to property, guaranteed by Art. 1 of Protocol No. 1 to the European Convention of Human Rights, although this article does not contain the requirement of an objective need for such interventions. So, in the case of *Sporrong-Lonnroth v. Sweden*, the European Court stated: "The court must determine whether a fair balance has been observed between the requirements of the public interest and the necessary conditions for the individual's fundamental rights. The pursuit of such a balance is inherent in the entire Convention system"[9, 24-28].

In deciding whether a fair balance was observed, the Court took into account the factor that compensation was not provided for the intervention. The court thus considered that the right to compensation for interference with property rights is an inherent feature of the right to property, since it can be a necessary component in a fair balance between public and private interests.

In the case of *Fredin v. Sweden*, the applicant complained of a violation of property rights in connection with the revocation of a permit for the extraction of gravel in the territory of the land plot owned by him. The European Court pointed out that the interference should correspond to a fair balance between the general interest of the society and the requirements of protecting the fundamental rights of the individual. The search for such a balance is reflected in the structure of art. 1 in general, as well as in its part 2; there must be a reasonable balance between the means used and the aim pursued. By monitoring compliance with this requirement, the European Court recognizes the state's wide limits of discretion both in finding means to enforce the

relevant laws, and in deciding whether their consequences are justified in the general interest [2, 6].

In the case of *Fatullayev v. Azerbaijan*, the European Court noted that the internal discretion framework for interventions in press freedom is limited by the interest of a democratic society in ensuring and maintaining a free press. In the same way, this interest will have a lot of weight in determining the proportionality of the limitation of the legitimate aim pursued.

In the case of *Mahmudov and Agazade v. Azerbaijan*, both applicants were sentenced to five months in prison. This sanction, in the opinion of the European Court, was very harsh, especially since the national legislation provided for milder penalties. The court noted that although the imposition of punishment is in principle a matter for national courts, the sentencing of imprisonment for a crime related to the press will still be compatible with the journalists' right to freedom of expression, guaranteed by Art. 10 of the European Convention on Human Rights, only in exceptional cases, in particular, in cases where other fundamental rights were seriously infringed, such as in the case of incitement to racial hatred and incitement to violence.

Based on the above, the European Court concluded that the circumstances of this case do not justify imposing a sentence of imprisonment, since such a sanction, by its nature, has a deterrent effect on journalistic freedom. The fact that the applicants did not serve their sentence does not change this conclusion, since the applicants were exempted from serving the sentence due to an amnesty act that was applied to many people convicted of various crimes and which was not adopted with the specific purpose of correcting the situation. It follows that by sentencing the applicants to deprivation of liberty, the national courts violated the principle that the press should be able to fulfill the role of a "guard dog" in a democratic society.

According to the Court, although interfering with the applicants' right to freedom of expression could be justified and necessary, the criminal sanction imposed was disproportionate to the legitimate aim that was pursued by condemning the applicants for insult and libel. Therefore, there has been a violation of Art. 10 European Convention [12].

In the case of *Hakansson and Sturesson v. Sweden*, in which the applicants claimed to be victims of a violation of the right to property, the European Court of Human Rights stated: "Art. 1 of Protocol No. 1 to the Convention requires a reasonable balance of proportionality between the means used and the goal. This condition cannot be considered fulfilled if the person has undergone a special and excessive limitation" [3].

In the case of *Raimondo v. Italy*, the claimant contested the legality of confiscating several land plots, buildings and automobiles prior to the presentation of evidence that this property was acquired illegally. The complainant was suspected of having links with the mafia. The European Court noted that the confiscation pursued a goal that meets common interests and was intended to ensure that the use of this property did not give the applicant or the mafia, in which he was suspected, any benefits at the expense of the public interest. Confiscation, which aims to impede the movement of capital obtained by criminal means, is a necessary and effective means in the fight against the mafia, therefore, this measure appears to be proportionate to the aim pursued [13].

Case *Soltysyak v. Russia*, also considered by the European Court of Human Rights, concerned a Russian soldier who worked with top-secret information. When Soltysyak resigned from work to reach retirement age, his passport was confiscated so

that he could not go abroad. Before the European Court, the Russian government claimed that the reason for the interference with freedom of movement, guaranteed by Art. 2 of Protocol No. 4 to the European Convention on Human Rights, was the need to protect national security and prevent the dissemination of confidential information. The Court considered that the exit ban could hardly be considered an effective means to achieve this goal: "The confidential information held by the applicant could have been transferred to other people in various ways, and the applicant did not have to be abroad or even enter into direct contact with someone ... The status of the applicant as a soldier does not change the conclusion that the limitation imposed did not reach its protective function, which was initially pursued by the authorities [10].

The Human Rights Committee, in its General Comment No. 27, noted that restrictive measures regarding freedom of movement should be in line with the principle of proportionality; they must be adequate to achieve their protective function; they should be the least restrictive tool among those that can achieve the desired result; and they must be proportionate to the protected interest.

In the opinion of the Committee, the principle of proportionality should be observed not only in the legislation providing for limitations, but also by administrative and judicial authorities when applying this legislation. States should ensure that any procedures relating to the exercise or limitation of these rights are carried out as soon as possible and that reasons be given to justify the use of restrictive measures.

The Human Rights Committee further noted that the application of limitations in each case should be explained by clear legal grounds and must meet the criterion of necessity and the requirements of proportionality. These conditions will not be met, for example, if a person is denied to leave the country only on the grounds that he knows "state secrets", or if the person concerned is denied movement in the country without specific permission.

In the case of *Shin v. Republic of Korea*, the Human Rights Committee noted that when a State party refers to legitimate grounds for imposing limitations on freedom of expression, it must clearly and in detail demonstrate the specific nature of the threat, and also that specific measures meet the criteria of necessity and proportionality in particular by establishing a direct and immediate link between the form of expression and the threat [11].

It is necessary to consider the principle of proportionality of the limitations of the rights and freedoms of citizens on the basis of a comprehensive analysis of such concepts as necessity, legality, goals, limits, scope, methods and duration of limitations. Changes in the content of human rights should not concern their essence, and that the limitation of the right is possible to the extent that it does not conflict with the true purpose of the right itself. Otherwise, the purpose for the sake of which certain limitations on the rights and freedoms of citizens would be significantly distorted would be significantly distorted. Restrictive measures are applicable if they do not prohibit the legitimate exercise of fundamental rights and if a particular restrictive measure is least detrimental to basic rights.

In conclusion, we note that the principle of prohibiting the limitation of the essence of law is enshrined in the constitutions of a number of countries (Poland, Turkey, Switzerland, etc.) or developed by constitutional practice (Portugal, Romania, Estonia, etc.), according to which the meaning of the principle of proportionality is to establish additional guarantees against excessive limitations.

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**Date of receipt of the article in the Editorial Office
(10.01.2019)**