

РОЗДІЛ V. МІЖНАРОДНЕ ПРАВО

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THE GENESIS AND MODERNIZATION OF THE PRINCIPLE OF PROPORTIONALITY AS ONE OF THE BASIC PRINCIPLES OF THE EUROPEAN UNION LAW

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The paper highlights the relevance of the problem of defining the theoretical basis of the proportionality principle notion in historical context on the territory of modern Europe. The European Union legislative regulation of the principle, the attitude towards it, and its application by scholars and lawyers are analysed. In particular, the importance and role of the proportionality principle as one of the basic principles of European Union law in the context of its legal framework and solving human rights cases in the digital age is grounded, which, due to the pace of its rapid development, requires constant legal changes and additions.

Key words: proportionality principle, European Union law, human rights, basic principles of European Union law.

ГЕНЕЗИС И СОВРЕМЕННОСТЬ ПРИНЦИПА ПРОПОРЦИОНАЛЬНОСТИ КАК ОДНОГО ИЗ ОСНОВОПОЛАГАЮЩИХ ПРИНЦИПОВ ПРАВА ЕВРОПЕЙСКОГО СОЮЗА

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В статье освещается актуальность проблемы определения понятия принципа пропорциональности в историческом контексте на территории современной Европы, его значение для современных реформационных, государственных и правотворческих процессов. Внимание концентрируется на его понимании современными теоретиками права, принципах законодательного закрепления и особенностях правоприменения. При этом акцент сделан на современном доктринальном векторе выяснения истоков этого принципа в условиях определения принципа пропорциональности как базового принципа для всех стран, воспринявших право Европейского Союза как основание для национальной правовой системы. Обосновывается необходимость урегулирования базовых положений права Европейского Союза относительно принципа пропорциональности для современного процессуального законодательства Украины.

Ключевые слова: принцип пропорциональности, европейское право, права человека, базовые принципы права Европейского Союза.

ГЕНЕЗИС ТА СУЧАСНІСТЬ ПРИНЦИПУ ПРОПОРЦІЙНОСТІ ЯК ОДНОГО З ОСНОВОПОЛОЖНИХ ПРИНЦИПІВ ПРАВА ЄВРОПЕЙСЬКОГО СОЮЗУ

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У статті висвітлюється актуальність проблеми визначення поняття принципу пропорційності в історичному контексті на теренах сучасної Європи, його значення для сучасних реформаційних, державотворчих і правотворчих процесів. Увага концентрується на його розумінні сучасними теоретиками права, засадах законодавчого закріплення та особливостях правозастосування. При цьому акцент зроблено на сучасному доктринальному векторі з'ясування ресурсу цього принципу в умовах визначення принципу пропорційності як базового принципу для всіх країн, що

сприйняли право Європейського Союзу як базове підґрунтя для національних правових систем. Обґрунтовується потреба врегулювання базових положень права Європейського Союзу щодо принципу пропорційності для сучасного процесуального законодавства України.

Досліджується сучасний стан і генезис принципу пропорційності як одного з основних принципів законодавства Європейського Союзу та висвітлення його актуальності в сучасному контексті.

Особлива увага зосереджується на принципі пропорційності як одному з основних і найвпливовіших принципів у міжнародному публічному праві загалом, а також у межах законодавства Європейського Союзу.

Визначається роль принципу пропорційності, концентрується увага на його вагомості й значенні, зокрема, будучи одним із загальних принципів у законодавстві Європейського Союзу, він був розроблений Європейським Судом із метою заповнення прогалин у європейському законодавстві, зміцнення узгодженості законодавства Європейського Союзу та інших можливих аспектів.

Окрім теоретичного базису поняття принципу пропорційності, висвітлюється практичний аспект його застосування. У статті проаналізовано підходи до визначення форм, методів і критеріїв, яким має відповідати застосування принципу пропорційності.

Доводиться, що принцип пропорційності допомагає забезпечити гарантії того, що прийняте законодавство не встановлює будь-які необґрунтовані та непропорційні обмеження з урахуванням мети кожного окремого акта або сфери законодавства.

Крім того, особлива увага зосереджується на доцільності визначення нових сфер і можливостей застосування принципу пропорційності в сучасній перспективі. Окремо розглянуто питання захисту та дотримання прав людини в сучасному світі. Доведено, що принцип пропорційності є одним із найважливіших важелів регулювання в аналізованій сфері. У цьому разі принцип виступає як контрольний чинник для знаходження точного балансу між необхідними діями та можливим порушенням прав людини.

Ключові слова: принцип пропорційності, європейське право, права людини, базові принципи права Європейського Союзу.

The general principles of European Union law are the general principles of law which are applied by the European Court of Justice and the national courts of the member states when determining the lawfulness of legislative and administrative measures within the European Union [11].

According to the basic rule, the general principles of the legislation of the European Union are defined and developed by the European Court of Justice. By the criteria of their origin, they can be either accepted in all national legal systems or extracted from specific national legal systems that have inspired the Court, or be specific for the European Union.

One of the key aspects of the difference between general principles of law and direct legislative rules is that, having a broad scope of application, the former ones should be adjusted to the specific cases.

The practical importance of the general principles of the Union law lies in the fact that the European Court of Justice has used them to avoid the refusal of justice, to fill the gaps and to strengthen the coherence of European Union legislation and other possible aspects.

Within European Union law, proportionality is a principle that mainly serves as a framework for decisions to determine whether and/or to what extent rights can be limited by governmental intervention (such as legislation) that is motivated by public interests. The proportionality test applies to measures taken at Union level as well as at the level of the Member States.

In the process of our research, we have analyzed works of such well-known contemporary scholars: A. Dashwood, M. Dougan, B. Barry Rodger, E. Spaventa, D. Wyatt, M. Horspool, M. Humphreys, K. Lenaerts, P. Van Nuffel, R. Bray, T. Hartley, etc. In their writings scholars reveal the essence and key aspects of formation of the basic EU and international law principles, the role and place of the proportionality principle in this area, analyze the contemporary context of its application and its importance in regulating legal relations.

The purpose of the paper is to analyze the genesis of the proportionality principle as one of the fundamental principles of the European Union law and to highlight its relevance in the modern context.

Proportionality tests have first been formulated in the High State Administrative Courts in Germany in the late 19th century to investigate police action.

Legal theorists, foremost the German constitutional scholar R. Alexy and his followers have developed the principle of proportionality (or balancing: strict proportionality) as the gold standard of constitutional adjudication which allows all different rights and principles to be weighed against each other in the same dimension.

An important additional feature of proportionality as construed by R. Alexy is the following: “The Law of Balancing requires the increasing intensity of interference with liberty to be matched by an increasing weight of reasons justifying the interference. The analogy of the proportionality principle can be also seen in the English concept of reasonableness. Therefore, in the European Union context proportionality has been derived from the laws of the Member States, especially Germany and France” [9].

The legal concept of proportionality is recognized one of the general principles of European Union law by the European Court of Justice since the 1950s. The first case concerned with the notion of proportionality took place in 1954, while the second one was considered by the ECJ in 1970 (*Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* ECR 1125 Case 11/70). Namely during that case, the European Advocate General provided an early formulation of the general principle of proportionality in stating that “the individual should not have his freedom of action limited beyond the degree necessary in the public interest” [11].

As we have mentioned above, general principles of Union law are invoked to assist in the interpretation of Treaty provisions and secondary legislation, to provide guidance for the exercise of powers granted by the founding Treaties or secondary legislation and to provide additional criteria under Article 267 TFEU for determining the legality of acts of the Union institutions and the Member States.

General principles evidence the Court’s attempt to contribute to the construction of a mature legal system based upon a combination of substantive rules and principles that aid the understanding of those rules and the system as a whole.

The general principles are about the search for consistency in the creation of the Union legal order: they pull the different rules together into something that has a shape as a whole [5].

The Treaty of Lisbon in article 5 embraced and confirmed the proportionality principle on the level of European Union legislation. Paragraph 4 of the article states that under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. Furthermore, according to article 5, the institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality [1].

Protocol № 2 (on the application of the principles of subsidiarity and proportionality) to the Treaty on the Functioning of the European Union comprises additional regulations on how these principles should be applied.

The main objective of the Protocol is to establish the conditions for the application of the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union, and to establish a system for monitoring the application of those principles,

Pursuant to the article 1 of the Protocol, each institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union [2].

According to the principal of proportionality, public authority may not impose applications on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure.

The most striking point about the doctrine of proportionality is that it leaves a great deal to the judgment of the court [10].

In the case law, the principle of proportionality serves principally to assess the legality of an exercise of power where an admittedly legitimate aim is pursued, but at the same time other objectives deserving protection are damaged.

As has already been mentioned, the principle of proportionality requires action to be both “appropriate” to attain its objectives and not go beyond what is necessary to achieve them (“indispensable”).

The Union action must first be appropriate to achieve the proposed objectives. In addition, the action must be indispensable and therefore incapable of being replaced by measures [7].

Proportionality principle helps to provide guarantees that the legislation adopted does not set on its subjects any unreasonable and disproportional restraints given the objective of every single act or the sphere of legislation.

Regarding the process of application of the proportionality principle, professor G. de Burca has therefore argued that the general principle in European Union law of proportionality entails a three-part test: 1) is the measure suitable to achieve a legitimate aim, 2) is the measure necessary to achieve that aim or are less restrictive means available, and 3) does the measure have an excessive effect on the applicant’s interests.

Thus, the test requires the administrative body to substantiate its actions and requires analysis on possible options. Therefore, the proportionality principle is often regarded as the broadest basis for judicial review [11].

As a general principle of the union law, the principle applies also to Member states when they implement Union law. And to the acts of Member states when they act within the field of Union law. For instance, when they seek to limit one of the rights conferred on individuals by the treaty [3].

In the wake of the Snowden revelations, various governments have more aggressively sought to defend their activities by distinguishing between the automated collection and scanning of private communications, on the one hand, and the actual scrutiny of those communications by human beings.

The basic document that deals with the processing of personal data within the European Union is Data Protection Directive (Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data).

According to this Directive, personal data may be processed only to such an extent as it would be:

- collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes;
- adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
- accurate and, where necessary, kept up to date;
- kept in a form which permits identification of data subjects for no longer than is necessary [4].

International human rights law, however, makes clear that the collection and retention of communications data amounts to an interference with the right to privacy.

This requirement of proportionality is particularly important in the context of mass surveillance, which is based on the indiscriminate collection and retention of communications and metadata without any form of targeting or reasonable suspicion.

In 2006, the European Parliament and the Council of the European Union adopted Directive 2006/24/EC (Directive), which regulated Internet Service Providers' storage of telecommunications data.

Civil rights organization Digital Rights Ireland argued that the Directive was becoming the basis for mass surveillance laws that violated fundamental human rights. National court then forwarded its questions to the European Court of Justice.

The European Court of Justice (ECJ) evaluated the compatibility of the Directive with Articles 7 and 8 of the Charter and declared the Directive to be invalid.

Although the ECJ deemed that the Directive was legitimate in its aim of fighting serious crime, it did not pass the proportionality test that the ECJ applied to evaluate the appropriateness of the measures undertaken to achieve that goal. More specifically, the ECJ found that the implementation of the Directive could potentially interfere, to a great extent, with the fundamental rights of the entire EU population for an unspecified length of time.

A European Union Directive requiring Internet Service Providers to store telecommunications data in order to facilitate the prevention and prosecution of crime was found to be invalid for breaching Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (Charter) [6].

By its very nature, mass surveillance does not involve any form of targeting or selection, let alone any requirement on the authorities to show reasonable suspicion or probable cause. Accordingly, mass surveillance is inevitably disproportionate as a matter of simple definition [8].

Principle of proportionality is one of the most basic and influential principles in public international law as such and in the scope of the European Union law.

Being one of the general principles in the Union legislation it was developed by the European Court of Justice in order to avoid the refusal of justice, to fill the gaps in European legislation, to strengthen the coherence of European Union legislation and other possible aspects.

Furthermore, in the contemporary perspective new spheres and possibilities of the proportionality principle application can be found. Considering protection and observance of human rights in the up-to-date world, the principle of proportionality appears to be one of the most significant levers for regulating this sphere. In this case the principle acts as a controlling factor in order to find the accurate balance between necessary actions and possible infringement of human rights.

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