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BASIC APPROACHES TO THE HISTORY OF THE PRINCIPLE OF PROPORTIONALITY

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The article is devoted to the basic approaches to the general history of proportionality doctrine grounds, distinguishing the periods of its development as a general principle of law and it»s formalization as a public law principle.

Key words: the principle of proportionality; the history of the development; general principle of law.

Deep theoretical investigations on the concept of the principles of law have been started in Ukraine relatively recently. Over the last few years domestic scientists have published a number of important theoretical works devoted to the study of the concept of the principle of law and investigation of certain principles of law. The major works on the subject are: the monograph by Serhiy Holovaty «The Rule of Law: Idea, Doctrine, Principle» [1] and the monograph by Stanislav Pogrebnyak «The Fundamental Principles of Law (Substantive Characteristics)» [2]. Such authors as Shevchuk S., Maidanyk R., Shloer B., etc. also investigated the origin, evolution and conception of certain principles of law.

As compared to other general principles of law, investigated by domestic scientists, the principle of proportionality still remains unrecognized, obscure and little known in national judicial practice. We deem it necessary and relevant to Ukrainian law to pay attention to this principle for a number of reasons. The most important of them comes from the orientation of the Ukrainian state policy in the field of human rights standards for European experience on fundamental rights regulation. Application of proportionality in the case-law of the European Court of Human Rights, the European Court of Justice and the Higher Courts of Western European countries is becoming increasingly commonplace in recent times. Besides, the references to proportionality (mostly undirect) can be found in the case-law of the Constitutional Court of Ukraine (in particular, adjudication dated December 29, 1999 No. 11-rp/99 in death penalty case; April 19, 2001 No. 4-rp/2001 over timely notification of peaceful assemblies case; June 12, 2007 No. 2-rp/2007 over political parties establishment in Ukraine case, etc.) Nonetheless theoretical research of the principle of proportionality and its application in Ukrainian jurisprudence remain insufficient.

This situation is not peculiar because of the long period of Ukrainian statehood history (the USSR period), when the ratio between the individual rights and public interests was tilted in favour of the latter at the legislative level. According to this reason, the recognition and implementation of the principle of proportionality in Ukrainian jurisprudence requires deep

understanding of the historical process of gaining significance by the principle of proportionality as a universal and general principle of law.

The aim of this paper is to introduce a generalized view on the proportionality doctrine development by investigating the main approaches used by the scientists to determine the origin of this principle as a general principle of law.

The proportionality doctrine as a separate, general principle of law has passed through a long historical period of formation. There are several approaches used by the researchers to mark the beginning of proportionality idea development. The analysis of views prevalent in scientific papers allows to distinguish at least two main approaches. The unifying aspect of both approaches is that all the authors acknowledge the year 1794, when the rule of «necessary measures' was initially set by General state laws for the Prussian states, as the time of origin of the modern principle of proportionality.

As for the other aspects of the principle of proportionality development history, it must be noted that, scholars are divided on this issue. Proponents of the first approach regard the history of the proportionality principle formation more widely, starting from the idea of distributive justice and its foundations in the works of ancient and medieval authors, it's development in jurisprudence of modern times, and in particular, the actual formalization of proportionality as a principle of public law in 1794 in Prussia. This opinion is supported by the vast majority of researchers of this issue (A. Barak, J. Cristofersen, E. Engle, etc.) Another approach brings together the authors (A. Panomariovas, E. Lozis, E. Ellis, etc.) who tend to believe that proportionality in its present form can be found only starting from the year 1794, i.e. the time when formalization of the idea of proportionality as a principle of public authority organization took place for the first time in the Prussian state along with the development of the ideas of liberalism and humanism in Europe and further recognition of proportionality as a general principle of law in the law of the European Union.

According to the first approach, as it is stated in scientific literature, the vestiges of the principle of proportionality can be found in the Code of Hammurabi (reign 1792-1750 B.C.) [3, p. 31], where the proportionality concerns the process of penalties emposition and compensation for damages. From this time the ideas that in some way or other correspond to the modern principle of proportionality can be found in the works by Aristotle, Cicero, Ulpian, Seneca, St. Augustine, T. Aquinas, Grotius, Beccaria, Montesquieu and other thinkers, as well as in some sources of law, such as the Magna Carta in 1215, the English Bill of Rights of 1689, the Bill of Rights of 1791.

It should be noted that the idea of proportionality did not obtain a wide circulation and was not formed in a specific public law principle during this period. Aristotle was the first to apply the term «proportionality», but until the XIX century this term was not used as a concept of the nature of relations it covered. Still it is quite adequate to recognize that the principle of proportionality originated in this period, when the process of philosophical understanding of proportionality as a means of expression of justice developed and the meaning of proportionality with respect to many legal relations shaped, although actually the proportionality did not exist as a real principle of public law. Thus, the first approach confirms the antiquity and continuity of the formation of proportionality doctrine, breaking it into two periods – the first period, which covers the history of the development of ideas that define the principle of proportionality, and the second period – the formation of proportionality as a principle of public law proper.

Consider the basic stages of the history. From antiquity to modern times ideas that now constitute the content of the principle of proportionality were developed by the thinkers of the past around at least the three main issues: 1) the issue of fair distribution of the benefits (goods and intangible benefits) and duties (Aristotle); 2) the issue of a just punishment for the crime (Cicero, Grotius, Beccaria); 3) the issue of fighting a just war (Cicero, St. Augustine, Aquinas, Grotius). Only in the XIX century these ideas were conceptualized as a general principle of public law, formulated to prohibit the state affect any aspects of human life without the substantial need for it (W. von Humboldt, J. St. Mill).

The idea of proportionality was mentioned for the first time by Aristotle in his work «Nicomachean Ethics» and developed further on. Aristotle applied the idea of proportionality to describe distributive justice. Proportionality is regarded by Aristotle as the mid-point of balanced relationship in which neither party suffers from a judicial sentence due to inequitable distribution of the benefits. Thus, the difference between fair and unfair verdict depends on the proportionality of the decision. «Justice is proportionality, and injustice is disproportionality. Consequently, [in the latter case] one proportion is higher, and in the other it is lower» [4, p. 152]. Aristotle was first to proclaim that proportionality is a necessary component of the essence of law: «Proportionality is the mid-point, and justice consists in proportionality» [4, p. 152]. In general, Aristotle develops the notion of proportionality as a means of implementation of distributive justice, i.e. duly distribution (i.e. distribution according to merits of both sides). Public authorities must secure such justice by conducting court proceedings and distributing benefits or obligations between the members of society.

Aristotle»s understanding of inalienability of proportionality and justice is considered as a classic conception of the ancient law confirmed by a famous statement by Ulpian (the Digest, 1.1.10 pr.): «Iustitia est constans et perpetua voluntas ius suum cuique tribuendi» (Justice is the constant and perpetual will to render to every man his due) [5, p. 86–87].

Cicero defined another aspect of understanding of this idea. He considered proportionality as a means of establishing justice in sentencing. He set forth a principle which today is recognized as one of the most important principles of the modern theory of sentencing: «Let the punishment match the offense»; «There is a certain extent and proportionality in sentencing» [6, p. 473]. Roman thinkers did not miss the fact that it is not possible to ensure an accurate proportionality in such cases, for people tend to follow their inner convictions even when they are demanded to act impartially. Being fair is different from being impartial, for such factors as family relationships, fellow citizens» sentiments, mercenary motives, etc., can affect the process of determining the boundaries and scope of justice. For this reason, Seneca formulates a humanist principle of proportionality determination: «As a perfect proportionality is challenging and deviations in both directions are inevitable, let preference lean towards humanity" (Seneca, On Mercy, Book I, Chapters 1, 20) [6, p. 478]. Cicero also originated the third line in the process of comprehension of proportionality concept, namely its definition in the context of the issue of just war. In his essay De Officiis (On Obligations) Cicero stated that war as a public policy method of dispute settlement should be applied only after the State has exhausted all other means of peaceful settlement. Any other cause for war (casus belli) more likely belongs to beasts than to a civilized man. He claims: «Wars should only be launched in an effort to live peacefully and not to suffer from injustice» (On Obligations, Book 1, Section 11) [7, p. 15]. Out of this concept the notion of just war originates as «a method that discerns barbarism from

the use of force as a required element of a sovereign policy» [7, p. 15]. That is war must be reasonable and the only possible way of protecting the state»s citizens and territory.

Cicero's influential position of a concept of just war perception only as a means of self-defense was further developed in works of medieval thinkers – St. Augustine and Thomas Aquinas – and then inherited by modern mindset, being elaborated by Hugo Grotius in his treatise «On the Law of War and Peace». While these outstanding representatives of European political and legal thought have different beliefs in one aspect or another, they drew attention to the fact that the consequences of war, military expenditures and the means of waging war, as well as human sufferings caused by war, must not be disproportionate to the war aim.

Thus, St. Augustine further develops the notion of just war in his book entitled «City of God». He notes that the desire to live in peace is the natural desire of every man. Only the «counterparty»s injustice makes the wise to fight a just war» (Book 19, Chapter VII) [8, p. 333]. Peace is the only war aim: «What else is victory if it is not a subjection of the rebels. When this happens, peace will come. Therefore, wars are fought with that aim. (...) Piece is the desired end of any war» (Book 19, Chapter 12) [8, p. 338]. St. Augustine did not apply the term «proportionality» in his works; still he used the concept of just war which corresponds to necessity and proportionality principles of the modern international humanitarian law.

In the XIII century St. Augustine»s ideas were further developed by Thomas Aquinas, who in his work «Summa Theologica» formulated the basic requirements, according to which war can be defined as a just one. Thomas Aquinas states: «There are three criteria by which a war can be judged to be just. First, powers and authority of the governor who ordered to start a war. (...) Second, there must be a fair reason for going to war, namely that the attacked were attacked because they committed some misconduct. (...) Third, the warring party must have a just intention, e.g. establishment of the right or averting the evil» [9, p. 498].

One has to agree with the opinion expressed by E. Engle who noted: «Aquinas presented the first decomposition of Aristotle's concept into the now known multi-step proportionality procedure» [10, p. 5], for the criteria set by Thomas Aquinas correspond to the criteria of the authorized entity, legitimate purpose, and necessity. Thomas Aquinas believed that a war can be judged to be just only if it was started by the State to protect its citizens» welfare from invaders, or if the other guilty State refused to pay damages or restore the valuables which had been seized unjustly.

The theory of proportional self-defense itself was considered as a general principle of law by Hugo Grotius [10, p. 5]. Developing the ideas of his predecessors on criteria of self-defense, restitution and penalties by which a war can be judged to be just in the framework of public law, he in his turn makes attempt to set similar criteria to justify a private war, i.e. he extends the application area of the idea of proportionality of self-defense to private law. Hugo Grotius protects the right of self-defense as a natural right of man, however one should not resort to extreme measures (e.g. murder) if there are other means to avoid the damage or if such damage is not real and can be predicted (e.g. planned conspiracy, unjust court decision, etc.) [6, p. 176 – 179]. Thus, Hugo Grotius united the ancient and medieval knowledge, which later serves as a foundation for its further transformation in major legal ideas of the modern era. For the first time proportionality protects human rights in terms of private relations, declaring the right of every man to inviolability and privacy.

Thus, the idea of proportionality proclaimed by Aristotle as justice, i.e. fairness, already in ancient times found its expression in several areas of law and legal thought – in criminal law (just sentencing), humanitarian law (just war) and administration of justice in general.

The second approach to the periodization of the history of proportionality principle formation brings together the authors who tend to believe that the history of the proportionality principle as a modern public legal standard dates back to the development of Prussian legal system in the XVIII century. They link the modern meaning of the principle of proportionality to the name of the German lawyer Carl Gottlieb von Svarez, who in his lectures to the Crown-Prince Frederick William III in 1791 noted that «the state has the right to restrict the rights of an individual only to the extent that is necessary to protect the freedom and safety of all the others» [11, p. 2].

Carl Gottlieb von Svarez was among the founders of the largest codification of the Prussian private law of XVIII century – General state laws for the Prussian states (Allgemeines Landrecht) enacted in 1794. He is the author of several scientific works, served as a Minister of Justice and teacher of the future King Frederick William III, and is considered one of the most famous German lawyers of his time. Svarez asserted a great educational influence on the then-existing political system of absolute monarchy by reducing its direct impact on the judicial system and formalizing in legislation the limits of its power. So, for example sub-paragraph 10, paragraph 17, Part II of General state laws for the Prussian states enacted in 1794 (Allgemeines Landrecht) set down the rule of 'necessary measures' (die nöthigen Anstalten) which the administration had to follow while taking measures restricting rights of individuals«to maintain public order» [12, p. 260].

At the beginning of the XIX century the Supreme Administrative Court of Prussia (Preussisches Oberverwaltungsgericht) submitted in its rulings a more comprehensive explanation of the rule of «necessary measures» [12, p. 260]. It stated that ascertainment of the fair ratio between the consequences, which might arise, and the measures selected for application by the authorities was one of the conditions of powers implementation. On the other hand, powers implementation should meet the second condition, i.e. the condition of efficiency, which meant that the chosen measure must assist in achieving the legitimate objective. Such an explanation of the rule of «necessary measures» paved the path for the spread of the concept of proportionality and for its development in the law of Prussia as well as in scientific studies of German lawyers and philosophers [12, p. 260].

Thus, in our opinion, the first theoretical work that directly defends the idea of limitation of state power and is a reflection in theory of the principle formed almost at the same time by Svarez in General state laws for the Prussian states, is the Wilhelm von Humboldt»s work entitled «On the Limits of State Action» which he wrote in 1792 [13]. The idea of this work can be generally expressed by the following statement of its author: «The State should refrain from any solicitude for the positive welfare of its citizens and should not act beyond the necessity to prevent the danger by protecting them from both internal and external enemies; for no other reason should it not limit their freedom» [13, p. 48].

The State implements positive solicitude for the welfare of its citizens through issuing rulings, i.e. mandatory acts. As the result of such concern, citizens gradually become thoughtless executors of authority regulations. They do not want to evaluate the reasonableness of these regulations; they become indifferent to the consequences of their deeds and shift the responsibility to the State. According to Humboldt, «negative solicitude», i.e. giving citizens liberty to act with a minimum of state interference, is more favourable for the development of

the welfare of citizens for it encourages citizens to show their personal qualities and abilities, as well as strengthens their sense of responsibility for their deeds.

Nowadays, as modern Ukrainian society is reaping the benefits of the state»s «positive solicitude», it is not hard to observe certain historical analogy with the experience of Germany in the XIX century. Every citizen feels it incumbent to act in compliance with the government regulations rather than exercise freedom to act according to the formula – everything, which is not forbidden, is allowed. That kind of «solicitude» manifests itself in an increase in citizens» indifference to the problems of state administration, their inactivity in matters of defense of democratic ideals and their fundamental rights.

Interestingly, today the country thanks to which the initially quite abstract concept of proportionality was developed in judicial practice and works on constitutional and administrative law, does not enshrine this principle at the constitutional level. However, since the early days of the Federal Constitutional Court of Germany, proportionality plays a key role as an important unwritten constitutional principle that emerges from the doctrine of the rule of law and is formalized through the court practice [14, p. 45]. Taking into account the domestic lawyers» propensity to treat anything that is not formalized with suspicion, it is worth to consider German experience of legal practice, which is not limited to only positive law, but also draws attention to the interests of civil society and therefore can influence the existing legal order. It is judicial practice of the Federal Constitutional Court of Germany that the three traditional elements of proportionality, or according to the term used in professional literature – «proportionality test», originate from: suitability, necessity and proportionality stricto sensu (in the strict sense) [15, p. 3]. According to these requirements, the measure used by the state authorities has to be adequate to the set objective; it also has to be really necessary, i.e. there has to be no less restrictive alternative for the selected measure to be applied by the authorities; it has to be proportionate to its negative effects, i.e. most acceptable to all parties [14, p. 44-45]. According to the Federal Constitutional Court of Germany, interference must be necessary and adequate to the pursued objective. It must not impose an excessive burden to the affected individual, and therefore must be used as a necessary instrument of pressure [14, p. 45].

Thus, the German constitutional jurisprudence turned the concept of proportionality formed many centuries ago into the universally obligatory rule (principle) applied while regulating the decisions of almost all branches of state authorities.

Over the last twenty years not only Germany, but also constitutional courts of many other countries around the world apply the principle of proportionality for the purpose of providing by the State absolute guarantee of respect for fundamental (basic) human rights. This principle is applied in countries, such as Germany, France, United Kingdom, Spain, Belgium, Luxembourg, Denmark, Ireland, Greece, Portugal, Italy, Netherlands, Switzerland, USA, Argentina, and this list is not exhaustive [15, p. 1]. Besides, the concept of proportionality is used by international courts, including the European Court of Human Rights and the European Court of Justice. The observance of the principle of proportionality plays an important role when it comes to the deciding on violations of human rights and freedoms fixed in the Convention for the Protection of Human Rights and Fundamental Freedoms.

Thus, after researching the main approaches to the history of the proportionality we can conclude that there are two basic approaches to determine the foundation of the principle as a general principle of law. The first approach considers conception of the principle prior to

emergance of the concept of law ideas itself. The second directs us to the modern concepts, when the principle of proportionality was raised up to realities of modern times and gained contemporary essence. Both approaches do not contradict each other, so they can be considered as complementary. But it is essential to note that having the first approach allows to be seen in the principle of proportionality somewhat more than a single principle of modern European law. This is a general principle inherent the law per se at any stage of its development.

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У статті розглядається узагальнена історія розвитку доктрини принципу пропорційності шляхом дослідження основних підходів до визначення моменту становлення цього принципу як загального принципу права, періодизації його розвитку та фактичного формування принципу пропорційності як загального принципу права.

Ключові слова: принцип пропорційності, історія становлення, загальний принцип права.

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В статье рассматривается обобщенная история развития доктрины принципа пропорциональности путем исследования подходов к определению момента становления этого принципа как общего принципа права, периодизации его развития и фактического выделения принципа пропорциональности как общего принципа права.

Ключевые слова: принцип пропорциональности, история становления, общий принцип права.