

Principle of Proportionality in Limiting Human Rights and Its Application in Case of Emergency

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Abstract: This research examines the principle of proportionality from both theoretical and practical views. In the context of Vietnam, this is a new and potential principle which is recognized ambiguously in the Constitution and need to be clarified in the reality. Especially in case of emergency, the application of the principle of proportionality is an instrument to protect human rights. This research implies that the legal framework for this principle needs to be improved so that the state's methods for solving the case of emergency could not violate the human rights.

Key words: principle of proportionality, human rights, case of emergency

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1. Introduction

A case of emergency is a common reason for the state to deeply intervene in personal and social life, with the dominant trend being that the state limits human rights to a greater and abnormal extent. The issue of restriction of human rights is often mentioned in Vietnam along with Article 14, Clause 2 of the 2013 Constitution. This provision provides us with a new perspective on human rights that involves a great focus on the phrase “limited by law”, hoping that from here the arbitrary restriction of rights will no longer exist¹. However, causes and germ of this arbitrariness do not originate in the form of text², but from the consciousness of the person who wrote and implemented it, therefore the above hope seems illusory. Also, in Article 14, Clause 2, we pay more attention to the following paragraph: “in case of necessity for reasons of national defense, national security, etc.”; or more specifically, the words “necessity” and “for reasons”. The constitution seems to have opened up a risk of arbitrariness by not clarifying what can be considered “necessity” and “for reasons” or in other words, in what circumstances a state agency may invoke objective factors relating to national defense and security, etc. as a “reason” for restricting rights. In addition, according to the momentum of that regulation, regardless of whether the form of text is “law” or “regulation”, a reason for security, national defense, etc. can still be arbitrarily utilized

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¹ For example: Nguyen Thanh Tuan, Some new points on human rights, basic rights and obligations of citizens in the Constitution of the Socialist Republic of Vietnam, <http://moj.gov.vn/qt/articles/stories/news/Pages/pages/ideas.aspx?ItemID=11>.

² There are many different opinions about the legal form of the text that limits the rights. There is an opinion that it is only a “law (law or code) enacted by the National Assembly”, see: Luu Duc Quang, Constitutional Principles on human rights, civil rights, National Political Publishing House, Ha Noi, 2016, p. 74. Or there are other ideas that human rights may be restricted by laws and authorized legislative documents, and human rights may be limited by regulation. See also: <http://khpl.moj.gov.vn/qt/tintuc/Pages/hoat-dong-khoa-hoc.aspx?ItemID=129>.

to limit human rights. As a result, we still need to find a radical solution, going straight to the content of the right restriction behavior to see if the behavior is right or not. Only then can we prevent arbitrary restriction of rights. An effective tool to do this is the principle of proportionality.

Historically, the principle of proportionality is based on the earliest ideas of the rule of law, associated with great thinkers such as Aristotle, Cicero, Justinian, Augustino, Thomas d'Aquino, etc. (Eric Engle, 2009). Most notably, however, this principle was formed from German administrative law and spread throughout the Civil Code system. Meanwhile, the philosophy of judging the rightness in restricting the rights of the Commonwealth system is based on equilibrium theory, a theory considered by continental European scholars to be "vague, general and structureless" (Moshe Cohen-Eliya & Iddo Porat, 2010). In this article, we aim to clarify some important aspects around the principle of proportionality to provide a basis for its future application. Those aspects are developed based on the following main questions.

2. Why "Proportionality"?

Proportionality is very close to justice, a centuries-old desire of human. The Hammurabi Code, articles 196, 197; and the Gospel according to Matthew chapter 5, verse 38 all refer to the famous principle of "return" (*lex talionis*): "an eye for an eye, and a tooth for a tooth" as a standard of justice of the ancient time (Nguyen Anh Tuan, 2008). Moreover, distributive justice originated from Aristotle with the ideology of justice at different levels, for those who deserve each different level. He values fairness (*équité*) and considers it more important than the law (Cao Huy Thuan, 2000, p. 37). In general, in the Western ideological foundation, proportionality is natural reasoning because it most clearly reflects human's reason and judgment capability. The source of that thought is rationalism and individualism, with the basis of seeing the human being as an independent being, having to "seek the individual good and the happiness", to "see oneself as complete" and justice is rated "according to each person's value" (Alain Laurent, 2001, p. 25). At present, the principle of proportionality is a basis for explaining interference in the direction of state sanctions because "in order to be fair, state sanctions must be done in a way that is commensurate and equal to all citizens" (Youngjae Lee, 2012, p. 1838).

Even in the Eastern Asian ideology that Vietnam is also a part of, the corresponding ideological ideas are quite prevalent. In the I Ching, the Lower System, section 7, Confucius refers to three major cases of disaster: (1) One with high status but has low morality; (2) One with little wisdom but does vital tasks; (3) One with limited capacity but having to bear great responsibility (Nguyễn Hiền Lê, 2016). As can be seen, Confucius emphasized the need for factors such as morality and status; intellect and tasks; competence and responsibility; to be compatible to each other to avoid causing disaster. Even in Vietnam, a long-standing culture also traces the idea of fairness, commensurate with the idioms: "You scratch my back and I'll scratch yours", "U cake goes, Di cake comes", "Eat the hind leg and give each other the foreleg", "He lost the trotters and she lost the wine", "He ate pies, she ate rolls". Even in the behaviors and social relations; Vietnamese culture has always emphasized the proportionality and balance. Therefore, in general, proportionality not only is a legal principle, but also has the color of a natural and universal law.

Conducting according to the principle of proportionality, therefore, is rationality and conformity. It is also natural for the law to recognize and apply the principle of proportionality. Therefore, it is compatible with all cultural backgrounds and can be readily available in all societies, including Vietnam. Indeed, we have already applied this principle, in both our culture and law. Marks in civil law with the recognition of fairness (Article 6 of

the 2015 Civil Code) or in criminal law with the provision of legitimate defense within limits (Article 22 of the 2017 Penal Code) are the evidence for the principle of proportionality in some branches of law. Thus, the adoption of this principle by the constitutional legal branch is entirely possible to explain.

3. What Is “Proportionality”?

Proportionality is still a rather vague concept if you want to apply it directly, even though its theory is fascinating. Therefore, concretizing the proportionality test is necessary and it will be more convenient for organizations and individuals who want to consider whether their behavior is commensurate or not. Specifically, to analyze and evaluate the proportionality, there are four stages³, including the following factors⁴: (1) Legitimacy, (2) Conformity, (3) Necessity, (4) Balance.

First of all, concerning the legitimacy factor.

The legitimacy is intended to explain the purpose of restricting the right or not. The common arguments given to justify the legitimacy of acts of restricting rights are: the existence of democracy, national security, public order, crime prevention, child protection, community health, tolerance, humanity, the rule of law (Aharon Barak, 2012, p. 102). The above reasons may be expressed clearly or deduced from constitutional principles. In general, most acts of the state manage to pass this step (Jeremy Brown, 2012), because it merely recognizes whether the state’s intention is outside the legitimate objectives of the law. Usually, public authorities must clearly state their purpose or intent and rarely, the purpose or intention goes against basic arguments for restricting rights.

Secondly, regarding the conformity element.

A requirement for conformity is set out between the means of restricting rights and the purposes of restricting the rights. To be specific, the relationship between them must be reasonable. If there is no agreement between the restriction of the right and its purpose, the restriction of rights is considered wrong. In the Unions New South Wales case against the city of New South Wales⁵, the 1981 Election Fundraising Act was reviewed by the court. This law limits the right of people who are not candidates in election fundraising for anti-corruption purposes. The court held that there was no link between restricting the right to raise the election funds and the purpose of anti-corruption in cases where fundraisers and candidates are closely linked.

Thirdly, considering the necessity factor.

Necessity is shown where there is no more optimal solution that can be selected in a certain case. That is, for an act of right restriction, it must be the most essential of all choices. A fairly simple example is that in Germany, there was a ban on selling one type of candy that was easily confused with another existing product, which the court concluded to be unnecessary because other measures could be used such as mandatory warning label (Bui Tien Dat, 2015).

Finally, as regards to the balance factor.

³ There is also a method to consider the validity of the right restriction through the principle of proportionality but with only three stages:

- Suitability
- Necessity
- Proportionality

See also: http://www.academia.edu/21038017/Stages_of_the_Principle_of_Proportionality, p. 4.

⁴ Available online at: http://www.academia.edu/21038017/Stages_of_the_Principle_of_Proportionality.

⁵ Available online at: [https://www.federationpress.com.au/pdf/Unions%20NSW%20v%20New%20South%20Wales%20\[2013\]%20HCA%2058_Chapter%2029.pdf](https://www.federationpress.com.au/pdf/Unions%20NSW%20v%20New%20South%20Wales%20[2013]%20HCA%2058_Chapter%2029.pdf).

Balance is the necessary state between the benefits gained and the losses resulted from the restriction of rights. For example, in international law of armed conflict, all attacks are expected to cause casualties for civilians in excess of achieving a specific and direct military advantage⁶.

In general, the proportionality is expressed through many factors, of which a single factor not being met can lead to the act being considered inadequate.

4. Who Needs “Proportionality”?

In a narrow sense of constitutional fundamental right, all acts of restricting these rights should be commensurate. However, at a wider angle, proportionality is also essential for every behavior. Because of its universality and its proximity to the natural law, the principle of proportionality also has a relatively wide appeal when a lot of subjects in the society need it.

First, legislatures need to know about the principle of proportionality. This involves both authorized legislative agencies and local legislative bodies; in general, those who have the authority to set the rights and obligations for the people. They need to understand that the rules they make are likely to violate the principle of proportionality and thereby determine whether or not to set such regulations. Within the framework of the Lisbon Treaty, there was a protocol requiring countries when drafting a legislative law to consider its proportionality⁷. This is an evidence of what this principle means in legislative activity in European countries.

Next, law enforcement agencies also need to understand this principle because their behaviors also involve many factors limiting human rights. It is no coincidence that this principle stems from administrative law, since administrative acts and decisions are the most risky area for human rights violations. Primarily, the scholar Fritz Fleiner stated, “the police should not shoot a parrot with cannons” (Fleiner Fritz, 1928, p. 404). Thus, in every single act of a law enforcement person, the principle of proportionality needs to be strictly followed.

Of course, the court must also understand this principle. In many cases in countries around the world, the court has applied a proportionality analysis method to consider the validity of a law or a decision that limits the rights. In a certain sense, the principle of proportionality serves as a tool for the court to consider the constitutionality of a law. Author Benedikt Pirker has devoted a whole book to prove this with the big idea that courts must have a strategy to use the proportionality analysis method in the most comprehensive and effective way to exercise its power of justice protection (Benedikt Pirker, 2013). In Vietnam, in the context of the court having a duty to protect justice, it will be a great omission if we ignore an effective tool for the court to perform this task better.

Finally, it is the individual in society who needs to grasp this principle of proportionality. It is no coincidence that the principle of proportionality is regarded as a legal guarantee against the arbitrariness of legislative and executive powers and at the same time is regarded as a “rule of common sense”⁸. Indeed, individuals do not need to know this principle as thoroughly as a lawyer, but it is important that they have a corresponding viewpoint from within their subconscious mind. It is necessary not only for people to regulate their own behavior but also to know whether or not we realize our rights are inadequately restricted. The spread of proportionality thinking in the law

⁶ Available online at: <http://www.jus.uio.no/smr/english/research/phd-nchr/military-necessity/>.

⁷ Available online at: <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/protocols-annexed-to-the-treaties/657-protocol-on-the-application-of-the-principles-of-sub subsidiarity-and-proportionality.html>.

⁸ Available online at: <http://lewebpedagogique.com/jmthouvenin/european-governance-2-program/european-governance-2-the-principle-of-proportionality/>.

will easily be encountered with a natural law that exists in human thought in any society.

5. Proportionality in an Emergency Situation

The proportionality principle constitutes a common principle for international law and covers elements of severity, time and scope (M. Eissen, 1993, pp. 125-137). Specifically, Article 4 of the International Covenant on civil and political rights stipulates: “During a state of emergency that threatens the survival of the nation and is officially declared, member nations may apply measures to limit the rights set forth in this Convention, insofar as they arise due to the urgent need of the situation, provided that such measures are not inconsistent with other national obligations under international law and does not contain any discrimination on the basis of race, gender, language, religion or social origin”. Also, Article 15 of the European Convention on Human Rights allows Contracting States to waive some of the rights guaranteed by the Convention during “wars or other public emergencies that threaten the lives of the nation”. The exemptions permitted under Article 15 must meet three important conditions: (1) Must be a public emergency that threatens the life of the nation; (2) All measures to meet (the situation) must be due to “the strict requirements of the urgent needs of the situation”; and (3) Measures to respond to the situation, must be consistent with other national obligation under international law. In summary, the two provisions above require two issues: (1) An emergency situation that must threaten national survival in reality; and (2) Measures taken in that emergency situation are resulted from strict needs of the situation (Tierney S., 2005, p. 668).

On the first issue, the International Covenant on civil political rights as well as the European Convention on Human Rights lack a precise definition of an emergency situation that affects the nation’s life. Human rights agencies established under the Convention, such as the European Commission for Human Rights, have explained this term broadly. The content of Article 15 of the European Convention on Human Rights is explained in the case *Lawless v. Ireland* (1961). To be specific, Article 15 should be understood “naturally and routinely”. A “community emergency” is a special crisis or emergency situation caused to the entire population and creates a threat to the organized life of that community. In the *Greek case* (1969), the European Commission for Human Rights has argued that a public emergency must have the following four characteristics: (1) It is realistic or about to occur; (2) Its influence must be relevant to the whole nation; (3) The existence of a community must be threatened; and (4) Conventional measures are not sufficient.

Regarding the second issue, the basic requirement for a right restriction is that it must be within the strict requirements set out by the situation. And that restriction of rights must be checked for adequacy. In the case *Handyside v. United Kingdom* (1976), the Court made an important requirement that is indispensability. Specifically, the authorities must prove five issues: (1) Other common measures are not sufficient to resolve the threat; (2) The solutions taken must be effective in reducing threats; (3) Measures are applied within a time limit; (4) The degree of rights restriction must be proportional to the severity of the situation; and (5) Protection mechanisms are in place to avoid the abuse of these measures (for example, the need for the supervision of independent and social institutions).

In general, the frameworks of international law on the application of the principle of proportionality still provide proactive conditions for states in both determining what is an emergency and what is appropriate measure. Of course, in an emergency situation, when everything needs to be decided quickly and decisively, the debate about the validity of a right restriction can become a hindrance to the efforts of government. Therefore, attention

should be paid to the monitoring and post-auditing mechanism, which emphasizes the role of independent social organizations and courts as a counterweight so that the government cannot abuse temporary emergency measures.

6. Conclusion

The principle of proportionality is necessary not only for researchers but for everyone. As something so close to natural law, the principle of proportionality does not need a codification to be able to exist and be applied. Nevertheless, in order for each person, especially the state, to appreciate and pay more attention to this principle, we need to take advantage of humanity's standardized knowledge of the principle of proportionality to bring it closer to the reality. Especially, in an emergency situation, decisions are sometimes rushed and subject to the manipulation of certain influence, the principle of proportionality is essential to remind the government to fulfill its duties.

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