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**THE PROPORTIONALITY OF RESTRICTING CERTAIN RIGHTS
OR LIBERTIES IN CRIMINAL PROCEDURE**

SPECIALTY 554.03 – CRIMINAL PROCEDURAL LAW

Summary of the PhD thesis in law

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CONCEPTUAL LANDMARKS OF THE THESIS

The relevance and importance of the topic addressed. Human rights and liberties, as well as their obligations, in any democratic state constitute the most important social and politico-legal institution, which objectively assesses the level of societal development, serving as an indicator of its maturity and civilization. Moreover, rights and liberties are not absolute. It is precisely this fact, which finds expression in the legal possibility of limiting rights and liberties, that allows them to be fully and efficiently realized.

In a rule-of-law state, any restriction can only be understood in favor of the individual. The existence of certain interferences in the rights and liberties of the individual objectively stems from the characteristics of the state's structure; from the functions that the state must fulfill in ensuring security and national defense (under certain conditions, this can be reduced to limiting individual liberties); from international agreements; and from the social nature of the state regime, which envisages the existence of coercive measures.

In this context, the issue regarding the admissibility conditions of limiting fundamental rights deserves special attention. The necessity of studying this issue is determined by the very essence of fundamental rights as a measure of permissible behavior. On the one hand, restrictions prevent the abuse of fundamental rights. Absolute freedom is inconceivable, given the biological, social, and spiritual nature of humans and the need to protect the interests of other individuals, society, and the state. On the other hand, the criteria analyzed represent the limitation of the powers of authorities and public agents who restrict fundamental rights. Thus, the chosen theme aims to address this subject and serves as a reference point for establishing the constitutional value system, balancing individual and public interests.

Therefore, despite the diversity of political, economic, ethnographic, geographic, social, legal, and other conditions that characterize states, such an approach, closely linked to increasing individual responsibility, ensures the integration of social order and personal freedom, including in criminal proceedings. The exercise of fundamental rights can be restricted, and the possibility and limits of such restrictions, even for the purpose of protecting constitutionally recognized values, have been established by the legislator not arbitrarily but in accordance with criteria provided in the Constitution.

Assessing the admissibility and depth of restricting fundamental rights is one of the most important and sensitive areas, drawing the attention of the European Court, the Constitutional Court, and the legislature. The main means of this assessment is the principle of proportionality, which consists of several criteria that the legislator is generally obliged to respect in the legislative process

and which, under the law, are to be evaluated by the Constitutional Court to eliminate the risks of disproportionate limitation of human rights and liberties.

The framing of the topic in the international, national, zonal concerns of the research team and in an inter- and transdisciplinary context. According to art. 2 para. (1) of the Association Agreement between the Republic of Moldova, on the one hand, and the European Union and the European Atomic Energy Community and their member states, on the other hand¹, agreed on "respect for democratic principles, human rights and fundamental liberties, as proclaimed in the Universal Declaration of Human Rights and defined in the European Convention for the Protection of Human Rights and Fundamental Liberties, in the Helsinki Final Act of 1975 of of the Conference for Security and Cooperation in Europe, as well as in the Charter of Paris for a new Europe from 1990 (...), and art 12 paragraph (3), among the objectives, establishes: "Respect for human rights and fundamental liberties will guide all cooperation activities in the field of freedom, security and justice".

The European Union, taking over and developing the norms of international human rights instruments, has assumed full responsibility for the establishment of a secure community for the benefit of its citizens and, to this end, has developed numerous directives and regulations aimed at regulating as effectively as possible the complex nature of fundamental human rights and liberties.

Since the integration into the European Union is a national objective of major importance, the harmonization of the legislation of the Republic of Moldova with the rules of the European Union law is a determining and indispensable factor for its successful achievement. The experience of the new member states of the European Union demonstrates that, in order to become a full member of the European Union, not only political and economic measures are necessary, but also, in principle, a fundamental revision of the legislative system to align it with the minimum requirements provided in the legal documents that constitute the *acquis communautaire*.

According to Annex 2 of the Action Plan for the implementation of the Strategy on ensuring the independence and integrity of the justice sector for the years 2022-2025², Strategic Direction II Access to Justice and Quality of Justice, Objective 2.1 aims to improve access to justice and the human rights protection system in the judiciary sector. This includes enhancing mechanisms that facilitate access to justice by ensuring stability and clarity in criminal law. It is essential to establish criteria for analyzing information regarding the application of preventive detention measures and to periodically

¹Association agreement between the Republic of Moldova, on the one hand, and the European Union and the European Atomic Energy Community and their member states, on the other.[online] [cited: 02.04.2024]. Available: <https://mecc.gov.md/sites/default/files/acordul-de-asociere-rm-ue.pdf>

²Strategy on ensuring the independence and integrity of the justice sector for the years 2022–2025.[online] [cited: 02.04.2024]. Available: https://www.legis.md/cautare/getResults?doc_id=129241&lang=ro

analyze this information to ensure the effective respect of the right to liberty. Additionally, simplifying and streamlining judicial procedures is crucial for achieving these goals.

In Article 54 paragraphs (1), (2), and (4) of the Constitution of the Republic of Moldova, it is provided that "in the Republic of Moldova, laws cannot be adopted that would suppress or diminish the fundamental rights and liberties of the individual and citizen. The exercise of rights and liberties cannot be subjected to restrictions other than those provided by law, which correspond to the norms universally recognized in international law and are necessary in the interests of national security, territorial integrity, economic well-being of the country, public order, for the prevention of mass disturbances and crimes, for the protection of the rights, liberties, and dignity of others, for preventing the disclosure of confidential information, or ensuring the authority and impartiality of justice. Restrictions must be proportional to the situation that determined them and cannot affect the existence of the right or freedom." We emphasize that para. (3) of the same art. 54 of the Constitution of the Republic of Moldova stipulates: "The provisions of paragraph (2) do not admit the restriction of the rights proclaimed in articles 20-24", the respective articles prescribing the assessment to justice (art. 20), the presumption of innocence (art. 21), not retro the activity of the law (art. 22), the right of every human being to know his rights and duties (art. 23) and the right to life and to physical and moral integrity (art. 24), and in the OSCE system, the right of access to justice is susceptible to a legitimate limitation in the conditions of not reaching the very essence of the restricted right and satisfying the requirement of proportionality.

Regarding the restriction of the individual right to freedom and security, art. 25 para. (2)-(5) of the Constitution provides that the search, detention or arrest of a person is allowed only in the cases and with the procedure provided by the law. Regarding the restriction of the inviolability of the domicile, art. 29 para. (2)-(4) of the Supreme Law stipulates that the inviolability of the domicile can be violated only for the execution of an arrest warrant or a judicial decision; to remove a danger, the life, physical integrity or property of a person is threatened; to prevent the spread of an epidemic. Searches and searches in front of the lot can be ordered and carried out only in accordance with the law. Surveillance during the night is prohibited, except in cases of flagrant delinquency.

Consequently, we conclude that although the Constitution of the Republic of Moldova does not explicitly enshrine the legal nature and criteria for the applicability of the proportionality principle, it expressly states and regulates special conditions that authorize legitimate, necessary, and proportionate interventions by authorities in the exercise of inalienable rights and liberties of human beings.

The principle of proportionality should be seen as an instrument for the preferential resolution of conflicts between two subjective rights, between a norm that establishes rights and liberties on the one hand, and a public interest on the other hand, or between an individual and a public interest. It is important to consider that the outcome resulting from the measures taken should not be more oppressive than the anticipated benefits, meaning that the formula "the more advanced the measure affecting individual welfare, the more justified the grounds for intervention" must be respected.

Enhancing efforts to ensure these objectives constitutes one of the priority directions of criminal policy in the Republic of Moldova.

In the doctrine of criminal procedural law, the issue of proportionality of restricting rights or liberties has been the subject of study by researchers. Scholars who have addressed the discussed topic include renowned theorists such as Mr. I. Dolea, D. Roman, T. Osoianu, I. Covalciuc, B. Glavan (Republic of Moldova); M. Andreescu, R. Slavoiu, C. Birsan, M. Udrioiu, M.-M. Pivniceru, T. Papuc, M.-V. Tudoran, D. Bogan (Romania); I. Z. Fedorov, A. Yu. Shumilov, A. A. Podmarev, M. A. Ustimov, A. K. Utarbaev (Russian Federation); R. Dworkin, K. Henckels, R. Alexy, A. Barak (USA); D. Grimm (Canada); J. Boulouis (France), among others.

It is worth mentioning that the works of these authors, among others, will constitute the theoretical basis of the research. These publications, produced relatively recently, represent studies approved and valued by the scientific community. They have provided substantial support in the scientific endeavor concerning the proportionality of restricting rights or liberties in criminal procedure. Moreover, we appreciate that these approaches to the subject have been mainly undertaken in the context of doctoral theses in the field of public international law, as well as in the preparation of theoretical and practical articles for scientific conferences or specialized journals. Attention to the proportionality of limiting rights and liberties has not been examined in isolation, but in relation to other procedural categories and institutions.

Given the aforementioned considerations, it is essential to conduct comprehensive research on the proportionality of restricting the exercise of rights or liberties in criminal procedure, overlaying this with existing practice, and formulating systemic proposals to optimize not only legal provisions but also their practical application.

The purpose of the thesis is to conduct a comprehensive research on the principle of proportionality and its application mechanisms in restricting rights or liberties in criminal procedure.

The objectives proposed in the thesis are:

- *Determining the content of the concept of proportionality as the basis for ideas about justice in various philosophical currents.*
- *Investigating the emergence and development of the concept of proportionality as a fundamental legal principle.*
- *Analyzing international and regional instruments concerning proportionality and the mechanisms implementing it.*
- *Establishing the correlation between the principle of proportionality and other fundamental principles.*
- *Identifying justified intrusions in the rights to private life, correspondence, and domicile through the conduct of evidentiary procedures in criminal cases.*
- *Analyzing guarantees of individual rights from the perspective of the proportionality principle in conducting evidentiary procedures, as well as in the detention of suspects, the application of preventive measures depriving liberty, and other procedural constraints.*
- *Researching the practice of applying the proportionality test in specific cases and demonstrating, based on empirical study, that the proportionality test is not a legal fiction but is utilized by national courts.*
- *Formulating recommendations aimed at streamlining judicial practice and harmonizing procedural tools in criminal procedural law with the requirements of Article 54 of the Constitution of the Republic of Moldova, decisions of the Constitutional Court, and relevant case law of the ECtHR.*

These objectives outline a comprehensive approach to examining the principle of proportionality in the context of criminal procedure, aiming to contribute both theoretically and practically to the understanding and application of this important legal principle.

Research Hypothesis: If the scientific foundations of proportionality are determined, the criteria of the proportionality test in carrying out actions and measures limiting fundamental rights and liberties are identified, and if the theoretical and practical necessity justifying interferences and the adequacy of measures taken in the course of criminal proceedings for the purpose of discovering crimes, identifying perpetrators, and administering evidence are elaborated and grounded, then the application of the proportionality test will enhance the procedural and legal guarantees of fundamental rights and liberties.

Synthesis of research methodology and justification of chosen research methods: The doctoral thesis has been developed through the application of a set of scientific methods and procedures, notably: historical method (examining recognized and active institutions in various periods in the territory of the Republic of Moldova); systematic method (simultaneous analysis of the system of norms determining the principle of proportionality and the system of norms outlining interferences in certain rights and liberties); comparative method (focused on variables of interest in explaining/understanding the phenomenon; comparative identification of normative provisions adopted in different states and their application to a fixed basis – the legislation of the Republic of Moldova, in terms of regulation, interpretation, and implementation); logical method (application of reasoning, using procedures to analyze premises and deduce conclusions through syllogism); textual method (acceptance of grammatical interpretations to perceive the direct and immediate meaning of used terms); document analysis method (for the collection of quantitative and qualitative data: finding, evaluating, selecting, verifying); case study method (particularly descriptive and explanatory case studies), etc.

The empirical basis of the research consists of the relevant case law of the ECtHR, the Constitutional Court of the Republic of Moldova, the Constitutional Court of Romania, and cases from the trial courts. The thesis reflects and analyzes procedural acts of prosecutors, investigating judges, and appellate courts from criminal case materials.

The scientific novelty is substantiated by the fact that although the principle of proportionality is frequently encountered in the ECtHR jurisprudence as a classical legal principle, there are few scientific works offering a comprehensive view on its essence and legal nature. Researching the genesis of the principle of proportionality is necessary in a theoretical context, as it studies the foundations of the philosophical and legal ideas behind this principle, answering questions such as "What is the principle of proportionality?", "Where does it originate from?", and "What is the significance of this fundamental rule?" in relation to the detention of individuals, the imposition of preventive measures depriving liberty, certain procedural coercive measures, and the conduct of evidentiary proceedings.

This thesis aims to complement previous studies in the field, highlighting new trends and aspects of development in criminal procedural law specific to the current stage of societal development. It is noteworthy that since 2012, the Criminal Procedure Code of the Republic of Moldova has undergone significant amendments concerning preventive measures, other procedural coercive measures, and evidentiary proceedings, including special investigative activities – areas

where fundamental rights and liberties are subject to interference. Therefore, it is crucial to clarify the acceptable depth ensuring proportionality.

The theoretical importance and practical value of the thesis lie in addressing the relative scarcity of works defining and determining the legal essence of the principle of proportionality, despite its application in ECtHR jurisprudence. Apart from the historical development of the concept of proportionality, this research unveils its legal and philosophical nature, detailing how proportionality should be applied to achieve a balanced relationship between the means employed and the legitimate objectives pursued during legal proceedings, for the purpose of evidence administration in criminal proceedings and limitation of liberties in the application of procedural coercive measures.

The scientific results will be useful in legislative processes; in the practical activities of judges, prosecutors, law enforcement officers, and lawyers; in educational processes, both initial and continuous, for specialists in the field. These considerations affirm that our research direction is purposeful, and the chosen topic remains relevant and of interest both theoretically and practically.

Aproving the Results. The results of the investigations conducted have been presented at national and international scientific conferences, including abroad, and have been reflected in scientific articles.

Publications on the Thesis Topic. On the topic of the doctoral thesis, 9 scientific papers have been published.

Volume and Structure of the Thesis: The thesis consists of 205 pages of main text, including: introduction, four chapters, general conclusions and recommendations, a bibliography of 375 titles, a statement of responsibility, and the author's CV.

Keywords: proportionality, right to privacy, individual freedom, interference, restriction.

THESIS CONTENT

Chapter 1, entitled Analysis of the situation in the matter of the proportionality of the restriction of some fundamental rights or liberties in the criminal procedure, contains a review of the scientific materials on the topic of the doctoral thesis published in the Republic of Moldova and Romania, but also in other states, such as the Russian Federation, the States United States of America, France, etc.

The concepts and points of view, formulated by researchers Dolea I., Roman D., Osoianu T., Covalciuc I., Glavan B. and others (Republic of Moldova); Andreescu M., Slavoiu R., Birsan C., Udroi M, Pivniceru M.-M., Papuc T., Tudoran M.-V., Bogan D. et al. (Romania); Fedorov I. Z., Shumilov A. Yu., Podmarev A. A., Ustimov M. A., Utarbaev A. K. (The Russian Federation); Dworkin R., Henckels K., Alexy R., Barak A. (USA); Grimm D. (Canada); Boulouis J. (France) and others, were analyzed in the content of the doctoral thesis, constituting a solid support in the advancement of the investigation and the formulation of subsequent visions and conclusions.

At the same time, it is found that the specialized sources from the Republic of Moldova in the field of proportionality of the restriction of certain rights or liberties in the criminal procedure are not sufficient for the complex research of this subject. However, the autochthonous doctrinal patrimony records a significant lack of scientific works in this field, and the action of the principle of proportionality on the occasion of limiting some rights or liberties during the criminal process has not been the subject of scientific studies, except tangentially.

Following the exam, the degree of investigation of the doctoral thesis theme was established, the scientific problem of major importance was formulated, solved by the scientific approach carried out and the research objectives were outlined.

Chapter 2, entitled Generalities regarding the principle of proportionality and its elements, is dedicated to: The definition, origin, concept and content of the principle of proportionality; The correlation between the principle of proportionality and some fundamental principles; The principle of proportionality in the regulations of the legal instruments of the European Union; Conclusions in Chapter 2.

It was emphasized that proportionality represents a classic principle of law, which runs through the entire system, being found both at the base of separate norms and in entire legal institutions. It assumes that any decision or measure adopted by the competent bodies is to be based on a fair and equitable evaluation of the facts, on an adequate balancing of the interests involved, as well as on a coherent selection of the means and mechanisms to be used in order to achieve a predefined purpose.

Proportionality can be analyzed as the result of combining three elements: the decision taken, its finality and the factual situation to which it applies.

The idea of proportionality in the state-citizen relationship was analyzed in the works of W. von Humboldt, who considered that "the state should completely refrain from attempts to directly or indirectly influence the morals and character of the nation, if this is not a consequence natural and inevitable of the other absolutely necessary measures; everything that contributes to the achievement of this goal - first of all, the supervision of special training, religious institutions, etc. – all this must be completely outside the limits of his competence"³. Therefore, the state cannot excessively limit the rights and liberties of its citizens, even if these measures aim to ensure the well-being of society, or the excessive interference of the state in the private life of citizens would be unacceptable.

Philosophical interpretations at different stages of the development of human civilization by Pythagoras, Plato, Aristotle, Cicero, Confucius, Thomas Aquinas, JJ Rousseau, Montesquieu, Immanuel Kant, John Locke, etc. concerning proportionality are the most different, but the fact remains that it has always been seen as an indispensable part of "virtue" and "justice", including the justice of the social order.

Proportionality as an element of the concept of justice is as old as the model of an organized society. Philosophers proved the necessity of ensuring the requirement of proportionality as a condition of justice in spheres of relations such as the distribution of goods (material and non-material values); conviction for a crime; use of force in self-defense, including in international relations (in case of armed actions); the interference of power in the life of the individual and society⁴.

The history of affirming the principle of proportionality as a criterion for the admissibility of state coercive measures and interference with human rights goes back to the 19th century Prussian police law. The subject of police legislation covered the establishment and protection of internal security, including "measures concerning spiritual welfare (care for education, correction of morals, etc.)"⁵. From the second half of the 18th century, the elements of a state of law (Rechtsstaat) or, more precisely, of a state governed by laws, gradually took shape in Prussia. If earlier the actions of the state were considered legal, even if they were not regulated, over time, the idea was accepted that "any

³ ГУМБОЛДТ, В. Language and philosophy of culture. Moscow: Progress, 1985, p. 86–87

⁴VIZDOGA, D. The philosophical content of the principle of proportionality. In: International Scientific Conference "Perspectives and Problems of Integration in the European Research and Education Area", IX Edition, Cahul, June 03, 2022, p.142-148. [online] Available:http://conference-prospects.usch.md/files/archive/2022/Volumul_IX-Part_1_2022.pdf

⁵МАЛИНОВСКАЯ, В.М. Features of the development of the science of administrative law in Germany. В: Law and management. 21st century 2017. № 1 (42), с. 52.

action of the authorities should be explicitly permitted by law and not go beyond what is necessary to achieve the goals pursued"⁶.

It was considered, on the one hand, that the police had the right to take the necessary actions to prevent any danger or harm to public safety, on the other hand, the life, liberty and property of the person had to be protected from the abusive intrusions of the police. In the practice of administrative courts in Prussia, the principle of proportionality was applied in the context of a formal analysis of the goals pursued by the police and other public administration authorities and the means used in this regard. The ends were required to be prescribed by law, and the means used had to be appropriate and necessary to achieve them. The choice of means was conditioned by their effectiveness, in a context in which the task was to restrict human rights to the minimum possible. Thus, the application of the principle of proportionality was limited only to the first three elements of the classical test for proportionality – by verifying the legality, the purpose pursued by the authorities and the adequacy (adequacy and inadequacy) of the means chosen to achieve it⁷.

It was concluded that the principle of proportionality developed gradually, in parallel, in two meanings: philosophical and legal, the respective processes influencing each other, being interdependent. Consequently, proportionality has become one of the foundations of the constitutional system of most modern democratic states.

Having analyzed the correlation of the principle of proportionality with some fundamental principles, the elements of interconnection with the principle of legality, of ensuring rights, liberties and human dignity, with the principle of subsidiarity and that of officiality were scored.

Starting from the idea that, in accordance with universal and European human rights standards, Western states have undertaken to respect, protect and promote the legal status of the person within their borders, respectively the right to make use of certain limitations or restrictions, but these interferences must be provided by law and be necessary for the protection of public security, good morals or the fundamental rights and liberties of others. It was found that said interferences are allowed only for the purposes for which they were provided, to be legal and proportionate to the specific need for which they were created and not to be imposed for discriminatory purposes or applied in a discriminatory manner.

⁶КОЕН-ЕЛИЯ, М., ПОПАТ, И. The American method of weighing interests and the German test of proportionality: historical roots. В: Comparative constitutional review. 2011. № 3 (82), с. 64–65.

⁷VIZDOGA, D., Proportionality of the restriction of individual freedom according to the Code of Criminal Procedure of the Federal Republic of Germany. In: International Scientific Conference "The relevance and quality of university education: skills for the present and the future", October 9, 2020, Balti, p.284

It was deduced that, in its constant jurisprudence, the ECtHR developed the criteria applicable to the assessment of proportionality, to which it assigned: a) Existing measures/proposed measures - criterion that requires correlation with the necessity category, in the direct sense. In order to assess the necessity of a proposed measure, by replacing or supplementing the measure in force, it is necessary, first of all, to justify the efficiency (yield) of the measure implemented in relation to the proposed one. If the proposed measure is considered to be in accordance with the criterion of necessity, the proportionality assessment follows by evaluating the legitimate aim pursued and the imperative social necessity of the person's right to private life; b) The scope - it is possible to refer to the number of people on whom the measure applies, the size of the information collected or the period during which this information will be kept. The scope may include all these elements or only some of them, depending on the nature of the measure in question; c) Safeguards - in context, the term "safeguards" is of particular importance and can include, for example, actions taken to limit the scope of a measure or to specify when or how it can be carried out. At the same time, it can imply the need to take another objective solution before applying that measure in a particular context. The safeguards may also cover the possible remedies available to any persons in relation to the measure in question or its effects and the limits to which they may be exercised; d) The nature of the interference - may include the type of information collected, the context in which it is to be applied or the nature of the activity that is the object of the measure; e) The gravity of the damage or the related damage or the effect on the public the nature of the interference, including the types of activity affected or information collected, are relevant arguments, as must be the nature of the pressing social need to be answered. The more severe the problem and/or the greater, more serious and more significant the damage or prejudice to which society could be exposed, the more justified the interference.

It is concluded that despite all the problems associated with its implementation, the principle of proportionality remains universal and the proportionality test is still a widely used procedure and methodology of judicial reasoning in the resolution of human rights disputes.

Chapter 3 discusses the Proportionality of the restriction of certain rights or liberties by carrying out evidentiary procedures in the criminal case, with reference, in particular, to: Proportionality of carrying out special investigative measures; The test of proportionality when conducting the search and the lifting of objects and documents; The proportionality of the restriction of some rights and liberties during the performance of other evidentiary procedures, concluding with the conclusions in Chapter 3.

It is insisted on the special attention required by the way in which the legislator applies the principle of proportionality, a context in which the restriction of fundamental rights within the framework of special investigative activities is a possibility provided by the law on the temporary and proportional exemption from the exercise of certain human rights and liberties, made under the provisions of art. 135-13812 CPP.

Special investigative measures differ from traditional means of investigation, in particular, in that they use specific secret technologies and techniques. For these reasons, a balance is required between the interest in discovering crimes, including organized transnational ones, and the task of preventing them, on the one hand, and the need to respect rights and liberties when using special investigative techniques, on the other other side. In most states, the collection of evidence by means of these techniques is conditional upon the establishment by law of safeguards against potential abuses of power.

One of the cumulative conditions for the authorization of special investigative measures, according to the provisions of art. 20, para. (3) of the Law on special investigative activity, it is "the justification of the impossibility of carrying out the tasks of this law in another way, the necessity and proportionality of carrying out the special investigative measure and the expected result", and the basis for the termination of the special investigative activity is, according to the provisions of art. . 20, para. (10) of the same law, "disproportionate or manifest violation of the rights and legitimate interests of individuals".

Being aware of the danger of undermining democracy, invoking its defense, the ECtHR stated that the States parties cannot, in the name of the fight against espionage or terrorism, adopt any kind of measures they consider necessary, imposing sufficient guarantees against abuse (case of Klass et al., Judgment of September 6, 1978)⁸.

As regards the interception of communications, the Court held that they would constitute both a restriction of the right to private life and a restriction of the secrecy of correspondence⁹. In particular, in Malone vs. Great Britain, the Court found a violation of the Convention, as the measure of technical

⁸TUDORAN, VM Theory and practice of judicial audio or video interceptions and recordings. Bucharest: Ed. Universul Juridic, 2012., p. 62-63; VOLONCIU, N., BARBU, A. Criminal procedure code commented. Art. 62-135. Evidence and evidence. Bucharest: Ed. Hamangiu, 2007., p. 145.

⁹The decision of the ECtHR in the case of Halford vs. Great Britain from June 25, 1997, application no. 20605/92, § 44 [online] [accessed 11.04.2023]. Available:<https://hudoc.echr.coe.int/tur?i=001-58039>; The ECtHR decision in the case of Weber and Saravia vs. Germany, from June 29, 2006, application no. 54934/00, § 77 [online] [accessed 10.06.2023]. Available:<https://hudoc.echr.coe.int/fre?i=001-76586>

surveillance of the interception of communications was not provided for at that time by British law¹⁰. Another particularly important element in respecting the right to privacy is for the law to be clear and predictable, especially in the case of technical surveillance measures¹¹. At the same time, the measure will have to be proportionate to the legitimate aim pursued, as was considered the keeping, in a police register, of information regarding bomb threats against a person¹².

The European Court found, in the matter of respecting the right to correspondence, that interference in respecting this right is not necessary in a democratic society or proportionate to the intended purpose, in situations such as: interception of correspondence with the lawyer, in which the abuses of the prison authorities were denounced during detention¹³, retaining the correspondence addressed by the lawyer to his client, in which he advised him to use the right not to give any statement, as this procedural attitude would be more advantageous¹⁴, rejecting the request to correspond with a lawyer, in order to promote a civil action, in order to guarantee the rights provided by art. 6 of the European Convention¹⁵, the deletion from the correspondence sent by a person deprived of liberty by the investigating judge of some passages that included insulting remarks or jokes addressed to the staff of the place of detention.

On the contrary, in the case of Erdem vs. Turkey¹⁶, the Strasbourg Court considered that the interference with the right to correspondence of a person deprived of liberty, suspected of being affiliated with a terrorist organization, ordered by an independent magistrate, who had no powers in relation to the criminal investigation phase, represents a necessary measure in a democratic society and which is proportionate to the objective pursued: national security, the defense of public order and the prevention of the commission of crimes, since, even under these conditions, the person deprived

¹⁰The decision of the ECtHR in the case of Malone vs. Great Britain, from August 2, 1984, application no. 8691/79, § 68 [online] [accessed 11.04.2023]. Available: <https://hudoc.echr.coe.int/eng?i=001-57533>

¹¹The ECtHR decision in the case of Kruslin vs. France, from April 24, 1990, application no. 11801/85, § 36 [online] [accessed 18.05.2023]. Available: <https://hudoc.echr.coe.int/eng?i=001-57626>

¹²The ECtHR decision in the case of Segerstedt-Wiberg et al. vs. Sweden, from June 6, 2006, application no. 62332/00, § 88-89 [online] [accessed 10.04.2023]. Available: <https://hudoc.echr.coe.int/eng?i=001-75591>; SUIAN, M. The perspective of respecting the right to life in the context of the use of special surveillance or research methods. In: Judicial Courier. 2021, no. 11., p. 650.

¹³ECtHR decision in the case of Ekinici and Akalin vs. Turkey, from January 30, 2007, application no. 77097/01 [online] [accessed 10.04.2023]. Available: <https://hudoc.echr.coe.int/eng?i=002-2923>

¹⁴The decision of the ECtHR in the case of Schonenberger and Durmaz vs. Switzerland, from June 20, 1998, application no. 11368/85 [online] [accessed 10.04.2023]. Available: <https://hudoc.echr.coe.int/eng?i=001-57575>

¹⁵The decision of the ECtHR in the case of Golder vs. Great Britain, from February 21, 1975, application no. 4451/70 [online] [accessed 10.04.2023]. Available: <https://hudoc.echr.coe.int/eng?i=001-57496>

¹⁶The ECtHR decision in the case of Erdem vs. Germany, from July 5, 2001, application no. 38321/97 [online] [accessed 10.04.2023]. Available: <https://hudoc.echr.coe.int/eng?i=001-59560>

of liberty was not prohibited from contacting his lawyer, who he could communicate to him orally the content of the correspondence¹⁷.

The inviolability of the domicile is ensured by the rules of criminal procedure, which guarantee that searches, investigations of the domicile, on-site investigation, removal of objects and documents and other actions can be ordered and carried out on the basis of a judicial warrant. In the authorization court decision, the exceptions allowed by art. 8 of the ECHR should be mentioned, the article of the Criminal Procedure Code that admits the interference and the conditions under which it is allowed should be indicated. Thus, the legality of the interference will be justified, in which context the investigating judge will indicate the date of initiation of the criminal investigation, the article of the Criminal Code imputed, the suspected or accused person and any other relevant data, which will confirm the legitimate purpose of the interference. An important requirement is the justification of the impossibility of the normal development of the process without carrying out the measure to be authorized. Implicitly, the judge will have to justify the necessity in a democratic society and the proportionality of the interference.

It was established that the internment of the accused in an inpatient medical or psychiatric institution for supervision, under the conditions of carrying out the appropriate expertise, is nothing more than "a restriction of the right to freedom and inviolability" and, therefore, the measure taken must be justified through the lens of proportionality.

It is argued that the principle of proportionality, related to the limitation of fundamental rights and liberties in the process of carrying out evidentiary procedures, has the following in mind: 1) the measures (means) of restricting fundamental rights and liberties must be strictly determined by constitutional goals; 2) the measures and means of containment applied to pursue the defense of social values; 3) restrictive measures and means must not be more severe than necessary; 4) the level of limitation of a certain right must correspond to the purpose for which the restriction was established; 5) the restriction cannot affect the basic content of the right, distort its essence, prevent its realization; 6) measures and means of limiting rights and liberties cannot lead to disproportionate, excessive and redundant intrusions.

In Chapter 4, entitled Justified interference with the right to individual freedom of the person by taking preventive measures and other procedural-criminal coercion measures, the aspects related to: Proportionality test when taking the detention measure are thoroughly analyzed; Proportionality in

¹⁷VODA, A. The right to private and family life in ECtHR jurisprudence. In: Pro Law, no. 4/2010, p. 200-201.

the application of preventive measures; Proportionality of the application of other coercive procedural measures. It ends with conclusions in Chapter 4.

Starting from the postulate that the freedom and safety of the person constitute a fundamental human right, it is found that, being one of the relative rights, the state authorities are entitled to deprive people of their freedom in the manner and in the cases provided by law.

Referring to the inviolability of the person, detention and preventive custodial measures in the form of preventive arrest and house arrest were analyzed.

Although detention has a preventive and urgent nature, its implementation requires special vigilance in order to ensure respect for fundamental human rights. Important to mention is the fact that this institution, useful enough, is nevertheless not mandatory for the criminal process, it will be used only in exceptional situations.

It was concluded that the legislator, although not in an express way, referred to the principle of proportionality, highlighting that the application of the measure of detention is disproportionate in the event that the subject commits a minor crime, for which the criminal law provides as a punishment, detention on a term of less than one year, thus creating a balance between the inviolability of each person's freedom and the need to limit it¹⁸.

For the choice from the system regulated in art. 175 paragraph (3) CPC, in a concrete case, of the preventive measure, an important requirement is the proportionality between the nature and term of the imposed restrictions and the eventual criminal punishment to which the defendant could be subjected by the sentence the court of law. The court, when resolving the matter regarding the preventive measure, has the obligation to appreciate and justify the proportional character of the interventions in relation to the individual circumstances of the criminal case.

From the economy of the procedural-criminal regulations, the cumulative conditions in which the question of applying the measure of preventive arrest can be raised: 1) the criminal investigation must be started, the obligation imposed by art. 279 par. (1) CPP, upon the application of any coercive procedural measures, except detention; 2) there must be a reasonable suspicion that the person who committed the offense is accused, in which context the reasonable suspicion presupposes the existence of certain facts that would convince an objective and impartial observer that it is possible to kill the person father to have borne the burden for which it was put under accusation; 3) for the infraction incriminated, the criminal law provides for a prison sentence for a term greater than three years.

¹⁸VIZDOGA, D. Individual freedom from the perspective of restraint and the principle of proportionality. In: Journal of the National Institute of Justice, 2022, no. 2, p. 9-14

Therefore, preventive arrest cannot be applied in the case of committing minor offenses or for which the criminal law establishes any other punishment than the one, e.g., a fine or fine humanity; 4) the presence of risks established in art. 176 paragraph (1) of the Criminal Code, the disposition, extension of preventive detention is justified; 5) by other preventive measures it is impossible to remove the risks invoked.

We share the point of view that, once the existence of the conditions for taking preventive measures is established, "the judicial body has the task of choosing the preventive measure with discernment and responsibility"¹⁹. The possibility of assuming that the accused will prevent the conduct of the criminal process, which is not based on circumstances established in this regard, cannot serve as grounds for restricting the constitutional rights of the person. The purposes of restricting the rights of the person, specified by law, must be thoroughly motivated by certain concrete circumstances, which, taken together, justify the application of certain restrictions²⁰.

The judicial body is asked to choose in concrete one or another of the preventive measures provided by the law, which must be the most appropriate in relation to the deed (in its materiality) that is blamed on the accused or the defendant²¹. "Ideally, I. Petruhin points out, the reasons for the application of preventive measures must be reflected in the materials of the criminal case, being confirmed by collected evidence. Only under such conditions can the legality and validity of the application of preventive measures be verified"²².

The realization of proportionality and appropriateness control by the issuing judicial authority is difficult to identify with regard to the warrants issued, in view of the fact that the judge gives reasons by conclusion, only in the situation where he finds that the conditions for issuance are not met, not when he considers that they are fulfilled, in the latter case, the law not imposing the issuance of a conclusion, the mere issuance of the mandate leading us to the idea that it passed the test of proportionality and opportunity²³.

Thus, the principle of proportionality is seen not only as a remedy for assessing the existence of a legitimate purpose in order to limit human rights and the appropriateness of the means used, but also for "weighing" the public and private interests involved. Proportionality establishes the legitimate purpose of limiting the right and a reasonable balance between it and the means provided by the

¹⁹ MATEUȚ, Gh. Treatise on criminal procedure. Volume II. Bucharest: Ed. CH BECK, 2012., p. 385.

²⁰ КОЛОКОЛОВ, Н. А. Judicial control in the stage of preliminary investigation: reality and perspectives. В: Государство и Право, №11/1998, с. 98-99.

²¹ MATEUȚ, Gh. Treatise on criminal procedure. Volume II. Op.cit., p. 388.

²² PETRUHIN, I. L. Personal immunity and coercion in the criminal process. Op. cit., c. 107.

²³ DEDIU, D. European arrest warrant. Bucharest: Ed. Universul Juridic, 2022., p. 191.

limiting legal norm, the absence of less radical means, as well as an appropriate balance between the limitation of the right and the benefits derived from its application²⁴.

In the context, it was found that the requirement of proportionality, related to the measure of seizure of assets and temporary suspension from office, must be analyzed according to the same requirements as the proportionality test.

In the view of the author M. Udroi²⁵, in order for the security measures to be applied, three cumulative conditions must be met: 1) the measure must be necessary to avoid the "concealment, destruction or evasion of assets from criminal prosecution". We mention that, in this sense, it is not required to demonstrate that the stated actions are being prepared for the respective goods. 2) the assets on which the seizure is placed "can be the object of special confiscation or extended confiscation or can be used to guarantee the execution of the penalty of the fine or the damages caused by the crime"; 3) the insurance measure must establish "fair proportionality between the restriction of the right to property and the purpose pursued by the imposition of the insurance measure".

In the system of other coercive procedural measures, questions related to the proportionality of the interference raise provisional suspension from office. The provision of the norm from art. 200 para. (1-2) The CPP provides answers to two important issues: the circle of people against whom the measure can be taken and the risks that the continuation of the professional activity could present. Thus, the provisional suspension from office can only be taken against the suspect, accused or defendant and only if "the crime of which he is accused was committed in connection with the exercise of his duties and there are sufficient reasonable grounds to assume that keeping him in office could violate the order established by this code or would prevent the examination in all aspects, complete and objective, of the circumstances of the case".

In relation to the application of the criminal procedural coercion measure of suspension from office, we inevitably face two important aspects: the term for which it can be taken and the possibilities of the accused to carry out another work activity, in order to cover his expenses, in order to meet the needs vital, or, in paragraph (7) of art. 200 CPP, it is stipulated that during the reference period the remuneration of work is interrupted.

²⁴VIZDOGA, D. The proportionality of the restriction of individual freedom according to the Code of Criminal Procedure of the Federal Republic of Germany. In: International Scientific Conference "The relevance and quality of university education: skills for the present and the future", October 9, 2020, Balti. p.282-286.

²⁵UDROIU, M. Criminal procedure. The general part. Vol.II. Op. cit., pp. 1026-1027.

The Constitutional Court of the Republic of Moldova ruled on the proportionality of the suspension from office by Decision no. 21 of 28.11.2023²⁶, as a result of the notification regarding the exception of unconstitutionality of art. 14 para. (1), 55 par. (1), (4) and (6) and 62 par. (1) from Law no. 3 of February 25, 2016 regarding the Prosecutor's Office (the legal regime of incompatibilities for the period of suspension from the position of prosecutor in connection with the initiation of criminal prosecution regarding the person holding this position) (reports no. 186g/2022 and no. 206g/2022).

Assessing proportionality in a narrow sense, the Court held that the restrictions imposed on the position of prosecutor "act on the basis of the status of prosecutor, even if the person does not temporarily exercise his duties." It was found that "under the guise of protecting the impartiality of the prosecutor's office, the contested measure risks becoming abusive, turning into a means of determining the suspended prosecutors to resign from their position, in order to engage in another function to ensure their existence".

The first step is to check whether there is a legitimate purpose to restrict the right. Legitimate purposes (as specified in constitutions, laws and international human rights instruments) can be formulated as general (applicable to any human right) or special (applicable to specific rights) grounds for restricting human rights. In fact, all this boils down to the protection of the rights of others or the safety of public interests²⁷.

The second element of the proportionality test is the identification of a rational correspondence between the legitimate aim pursued and the means chosen to achieve it. It must be established that these means can actually ensure the achievement of the legitimate aim, i.e. the implementation of the respective measures is, objectively, capable of leading to the expected result. Obviously, if the chosen means cannot lead to the achievement of the goal or do not ensure its full achievement and possibly even distort its meaning, the principle of proportionality is not respected²⁸.

The third component of the proportionality test involves assessing the necessity of the restrictions applied to human rights. In the present case, it is necessary to demonstrate that, of all the possible ways of achieving the legitimate aim, the easiest measure was chosen, that is, the one that leads to the lightest restriction of the right. The necessary measures are those that maximize the

²⁶Decision no. 21 of November 28, 2023 regarding the exception of unconstitutionality of articles 14 para. (1), 55 paragraphs (1), (4) and (6) and 62 para. (1) from Law no. 3 of February 25, 2016 regarding the Prosecutor's Office (the legal regime of incompatibilities for the period of suspension from the position of prosecutor in connection with the initiation of criminal prosecution regarding the person holding this position). [online] [cited: 10.12.2023].

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²⁷BARAK, A. Proportionality. Constitutional Rights and their Limitations / Translated from the Hebrew by D. Kalir. Cambridge; New York, 2012. pp. 245-302. 638 pp. ISBN: 9781107401198.

²⁸Ibid.

achievement of the legitimate purpose, while at the same time minimizing the restriction of rights. If it is established that there are alternative means by which the objective is achieved with a lesser restriction of rights, the principle of proportionality will be violated²⁹.

The final element, which represents proportionality in the narrow sense, is a parallel between the benefits obtained by achieving the legitimate aim and the inconvenience suffered by the person whose rights have been restricted. This aspect differs from the other two previous components, which focus on the relationship between the legitimate aim and the means to achieve it. The last stage focuses on the right that is limited. Here it is as if there is a "balancing" of the interests that have been secured by the restriction of the right against those that have been prejudiced by the person whose right has been restricted. The principle of proportionality requires a "fair balance" between both interests³⁰.

Failure to comply with the principle of proportionality and failure to apply the proportionality test leads to a reduction of human rights guarantees, to the violation of legal certainty and to the taking of unjustified decisions.

GENERAL CONCLUSIONS AND RECOMMENDATIONS

The results obtained in this doctoral thesis were reflected in the following: was determined the content of the concept of proportionality as the basis of ideas about justice in different philosophical currents (320, p. 142-148); the emergence and development of the concept of proportionality as a fundamental principle of law was researched (315, p.60-66); international and regional proportionality instruments and the mechanisms that put it into action have been identified; the correlation between the principle of proportionality and other fundamental principles was established (315, p.60-66); was identified justified interference with the right to private life, correspondence and domicile, by carrying out the evidentiary procedures in the criminal case (318, p.341-344); the guarantees of the person's rights were analyzed from the perspective of the principle of proportionality in the process of carrying out some evidentiary procedures (322, p.37-42; 202; 203), but also in the apprehension of the person suspected of committing the crime (317, p.9-14), the application of preventive custodial measures and other procedural-criminal coercion measures was elucidated (319, p.96-102); the practice of applying the proportionality test in specific cases was researched, proving, based on the empirical study, that the proportionality test is not a legal fiction, as it is used by national courts; recommendations were

²⁹Ibid., pp. 317–339.

³⁰Ibid., pp. 340–370.

formulated aimed at making judicial practice more efficient and making the criminal procedural tools in the field compatible with the requirements of the provisions of art. 54 of the Constitution of the Republic of Moldova, the decisions of the Constitutional Court and the relevant jurisprudence of the ECtHR.

Following the complex research of the topic of the doctoral thesis, the important scientific problem that resides in the development of the instrument for identifying the proportionality test applied to the disposition of preventive measures depriving of liberty, of some procedural-criminal measures of coercion and the carrying out of certain actions of criminal prosecution, a fact that led to the clarification for theorists and practitioners in the field of criminal procedural law of the respective conditions, with a view to applying them in cases where, in order to achieve the goals provided by the law, the restriction of fundamental rights and liberties is required.

The solution of the important scientific problem was demonstrated by the conclusions developed on the basis of the research hypothesis, as follows:

1. Respect for human dignity, as a constitutional criterion for the admissibility of restricting fundamental rights, prohibits the state from turning the person into a "naked instrument". The establishment of restrictions on rights and liberties must be proportionate to the values of the rule of law, protected by the Constitution and laws. The principle of proportionality, as a criterion for assessing the adopted measures, will relate to the crowd: situation - decision - finality. According to this principle, human rights are not absolute and the exercise of a person's rights must be weighed against the wider public interest. Compliance with the principle of proportionality ensures the balance between the right and freedom of the person guaranteed by the law and the need to carry out procedural actions (See: Chapter 2, Subchapter 2.1.).

2. The restriction of fundamental rights is an indispensable element of the constitutional status of the person. Being closely related to the principles of this legal model, it interpenetrates and integrates the system of its elements. The restriction category manifests itself in legal personality, citizenship, guarantees, which are conditions for realizing the rights and obligations of the person and determine their volume (See: Chapter 4, Subchapter 4.1.).

3. International instruments and national normative acts raised the right to freedom and security, the inviolability of private life, the secrecy of correspondence, the inviolability of property to the rank of general principles, through which they offered effective guarantees of protection, including against any unjustified interference (See: Chapter 2 , Subchapter 2.2.).

4. The principle of proportionality of the interference is the criterion for evaluating the constitutionality of the limitation of any right or freedom, as well as a guarantee of the exclusion of arbitrary, unreasonable, unlawful and excessive coercion. The principle of proportionality also requires the establishment of clear and reasonable terms for admissible restrictions in the exercise of rights and liberties. Such restrictions, such as preventive custodial measures and special investigative measures, cannot be maintained indefinitely. Any restriction of a right can only be allowed as a temporary measure (See: Chapter 4, Subchapter 4.2.).

5. Fulfilling the obligations to defend and ensure fundamental rights and liberties requires the existence of an effective legal protection mechanism. The principle of proportionality must be seen as a key element of the constitutional system of modern democracies and a guarantee of respect for human personality as a supreme value. Although each state has its own legal system, the principle of proportionality is a universal one, consistently applied by the European Court of Human Rights and, thus, is taken into consideration in the jurisprudence of the member states, regardless of whether it has found its direct enshrining in legislation or exists only as a fundamental concept (See: Chapter 2, Subchapter 2.3.).

6. The principle of proportionality in a broad sense presupposes an interdependence between the means of limiting the fundamental right and the objective of public interest. It also includes: adequacy – checking if the means is, in fact, able to ensure the achievement of the intended goal; minimal character – the availability and choice of alternative means that are less intrusive to fundamental rights. Proportionality in the narrow sense manifests itself by contrasting individual and public values in "conflict", according to their importance and significance in the constitutional system (See: Chapter 3, Subchapter 3.2.).

7. Restrictions on rights and liberties during the conduct of evidentiary procedures can be justified and allowed, only if there is an adequate character, a just measure and the necessity that justifies the interferences. The application of the proportionality test, in the context of the disposition and conduct of the evidentiary procedures, seeks that the administration of the evidence of the accusation does not cause violations of the fundamental rights of the person that would be unjustified or disproportionate, thus, having to find the balance in each individual case, which would allow the achievement the legitimate purpose by the least intrusive means. In this sense, the guide in action is the jurisprudence of the European Court. The steps of the proportionality test of a limitation of human rights must be consecutive, and the negative result of one of them makes the others excessive. Thus, the requirements that make up the content of the principle of proportionality are not cumulative. The

violation of any of them is sufficient to recognize the action of the authorities as disproportionate (See: Chapter 3, Subchapters 3.1-3.3.).

8. The proportionality and purpose of the limited intervention of state agents in the private life of citizens, especially through special investigative measures, requires clarification regarding the circle of persons. Thus, any interference, in this case, must be strictly individual, and not general. It cannot be universal and total in nature. Such interventions must be motivated, based on the concrete circumstances of the case, related to the person concerned, accompanied by a limited degree of discretion on the part of the executor and a real external control, including judicial, in order to justify the respective measures (See: Chapter 3, Subchapter 3.1.).

9. The main criteria for applying the principle of proportionality in relation to the limitation of individual freedom are the following: a) to constitute the only possible and necessary measure, appropriate to the circumstances that determined its application, the level of gravity of the situation and the reality of existing threats; b) the measure be proportionate to the important purpose for which the restriction is imposed and allow, when this is necessary, to cause a lesser limitation; c) the choice of the most appropriate means of limiting rights and liberties must best correspond to the intended purpose; d) the scope must be the minimum necessary and cannot include disproportionate measures; e) to be legal in nature and not to exceed the limits provided by law; f) the character of the measures must not affect the very essence of the rights and liberties that are the object of the restriction, in order to prevent their complete suppression; g) to have a provisional and exceptional character (See: Chapter 4, Subchapter 4.2.).

10. When analyzing the legality of restrictions of rights or liberties in the criminal procedure, we cannot limit ourselves to the simple allegation that these restrictions are proportionate to the need to protect constitutional values, but must be motivated which specific human rights and liberties can be violated, if the interest public is not protected. Such a position presupposes a "conversion" of the common good into corresponding rights, which makes it possible to consider the competition between an individual right and the common good as a competition of rights (See: Chapter 4, Subchapter 4.2.).

Description of personal contributions, emphasizing their theoretical significance and practical value. The personal contributions consist in proving the thesis that the proportionality of the interference is one of the criteria for evaluating the constitutionality of the restriction of any right or freedom, as well as a guarantee of the exclusion of arbitrary, unreasonable, unlawful and excessive coercion. Following the study, it was concluded that the principle of proportionality must be viewed

from a philosophical and legal point of view, both concepts being mutually influenced, interdependent, constituting one of the pillars of the constitutional systems of the majority of modern democratic states. The thesis contains relevant arguments, proving that the proportionality of the interference must be established within the limits of a minimum threshold of severity, which reduces the risk of evading criminal liability, of obstructing the conduct of the criminal process, of continuing the criminal activity, and of a maximum threshold of severity, which is consistent with the principle of humanism. The test of proportionality was subjected to a complex examination, applied every time the necessity of an intervention is found, in the context of the disposition and conduct of evidentiary procedures, the limitation of individual freedom and the taking of coercive measures in criminal proceedings, from which it follows that human rights and liberties they can only be limited in the public interest, appropriate to justifiable purposes, and the purpose for which a human right is limited cannot be achieved in any other way. Following the research, pertinent conclusions were formulated.

The scientific novelty and originality is argued by the fact that the principle of proportionality, although it is frequently encountered in the jurisprudence of the ECtHR, being a classic principle of law, there are still few scientific works, which would provide a broad vision of its essence and legal nature. The research of the genesis of the principle of proportionality is necessary in a theoretical context, being studied the bases of the formation of the philosophical and legal ideas of this principle and "what is the burden of this fundamental rule" in relation to the detention of the person, with the taking of preventive measures depriving of liberty, of certain measures of procedural coercion criminal and on the occasion of conducting evidentiary proceedings. The thorough study of these aspects allowed the formulation of general and particular conclusions, some of them being of absolute novelty for the theory of the criminal process, having practical, applicative connotations. Therefore, the research carried out and completed with the elaboration of the doctoral thesis is in accordance with the demands of novelty and scientific originality.

The legal and empirical basis of the study consists of the regulations of the international instruments in the field of fundamental rights and liberties, of the constitutional norms, of the provisions of the Criminal Procedure Code, of the practice of criminal and judicial prosecution in the matter of the restriction of fundamental rights and liberties in the criminal process, of the jurisprudence of the European Court of Human Rights.

The scientific basis of research consists of works published by scientists from the Republic of Moldova, Romania, Russia, the USA, Canada, France, etc.

The theoretical significance of the thesis. Even the principle of proportionality is applied quite often in ECtHR jurisprudence, however there are relatively few works in which the given principle would have been defined, its essence and legal nature determined. The present research, in addition to the historical development of the concept of proportionality, reveals its legal and philosophical nature, presents in detail what the action of proportionality should be, in order to ensure the balanced relationship between the means used and the legitimate goal pursued when carrying out legal procedures, for the purpose of administering evidence in the criminal process and limiting liberties when applying criminal procedural coercion measures. The researched subjects are analyzed as a whole, with the exposure of their content from a theoretical, methodological and organizational-institutional perspective; the doctoral thesis contributing to the expansion of the limits of the knowledge of the action of proportionality in the science of criminal procedural law, and the formulated conclusions constituting a platform in the initiation and debate of the relevant aspects by other researchers.

The practical value of the thesis. The scientific results will be useful in the legislative process; in the practical work of judges, prosecutors, prosecution officers and lawyers; in the didactic process, initial and continuous training of specialists in the field.

The mentioned testifies that the vector of our researches is not accidental, and the respective topic remains current and has both theoretical and practical interest.

Data on approval of results. The scientific results and basic conclusions of this doctoral thesis were discussed at the meetings of the Department of Procedural Law of the State University of Moldova. The scientific investigations were reflected in 9 (nine) publications in specialized magazines from the country and abroad, in the summaries of communications presented at national and international scientific conferences.

Indication of the limits of the obtained results, with the determination of the remaining unresolved issues resides in the development and deepening of scientific investigations regarding the impact of the correct application of the principle of proportionality in contravention processes. At the same time, it is important to study the experience of some states that have advanced in the field, identify the applied innovations and take over what can be useful for the Republic of Moldova, especially in the process of harmonizing the legislation with the EU regulatory framework.

Recommendations:

Completing the Criminal Procedure Code with the introduction of a new article – 101, which will have the following wording:

"The principle of proportionality in the criminal process.

(1) During the criminal process, the courts, the criminal investigation bodies and the bodies carrying out the special investigative activity have the obligation to respect and apply the principle of proportionality, so that the restrictions and interferences in individual rights and liberties are justified, necessary and proportionate to the legitimate purpose of the criminal process.

(2) Applying the proportionality test, account will be taken of:

a) the importance and prejudicial degree of the imputed act;

b) the adequacy of the measure;

c) pursuit of a legitimate purpose;

d) restrictions and interferences should be among the appropriate measures, which constitute the least intrusive means to individual rights and liberties;

e) the measure applied should not be clearly disproportionate between the purpose pursued and the impact on individual rights and liberties.

(3) Decisions adopted and actions taken in the criminal process must be properly motivated, taking into account the principle of proportionality, ensuring the balance between the general and the individual interest.

(4) Violation of the principle of proportionality is grounds for contesting court decisions and annulment of adopted procedural documents."

This proposed rule would contribute to strengthening the principle of proportionality in the criminal process of the Republic of Moldova, ensuring respect for individual rights and liberties, in accordance with international standards and the principles of the rule of law.

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ADNOTARE

VIZDOGA Domnița. „Proportionalitatea restrângerii unor drepturi sau libertăți în procedura penală”.

Teză de doctor în drept la specialitatea științifică:

554.03 - Drept procesual penal. Chișinău, 2024.

Structura tezei: introducere, patru capitole, concluzii generale și recomandări, bibliografia din 375 de titluri, 205 pagini text de bază. La tema tezei au fost publicate 9 (nouă) lucrări științifice.

Cuvinte-cheie: proporționalitate, viață privată, libertate individuală, ingerință, restrângere.

Scopul lucrării constă în realizarea unei cercetări complexe a principiului proporționalității și a mecanismului de aplicare a lui la restrângerea unor drepturi sau libertăți în procedura penală.

Obiectivele cercetării rezidă în: determinarea conținutului conceptului de *proporționalitate* ca bază a ideilor despre justiție în diferite curente filosofice; cercetarea apariției și dezvoltării conceptului proporționalității ca un principiu fundamental de drept, a instrumentelor internaționale și regionale în materie de proporționalitate și a mecanismelor care îl pun în acțiune; stabilirea corelației între principiul proporționalității și alte principii fundamentale; identificarea ingerințelor justificate în dreptul la viață privată, corespondență și domiciliu prin realizarea procedurilor probatorii în cauza penală; analiza garanțiilor drepturilor persoanei din perspectiva principiului proporționalității în procesul de efectuare a unor proceduri probatorii, dar și la reținerea persoanei bănuite de comiterea infracțiunii, aplicarea măsurilor preventive privative de libertate și a altor măsuri de constrângere procesual-penală; cercetarea practicii de aplicare a testului de proporționalitate în spețe concrete și demonstrarea, în baza studiului empiric, că testul de proporționalitate nu este o ficțiune juridică, acesta fiind utilizat de către instanțele naționale; formularea recomandărilor menite să eficientizeze practica judiciară și să compatibilizeze instrumentariul procesual-penal în domeniu, în acord cu exigențele prevederilor art. 54 din Constituția Republicii Moldova, ale hotărârilor Curții Constituționale și cu jurisprudența relevantă a CtEDO.

Noutatea și originalitatea științifică este argumentată prin faptul că principiul proporționalității, deși se întâlnește frecvent în jurisprudența CtEDO, fiind un principiu clasic de drept, totuși există puține lucrări științifice care ar oferi o viziune largă asupra esenței și naturii sale juridice. Cercetarea genezei principiului proporționalității este necesară în context teoretic, fiind studiate bazele formării ideilor filosofice și juridice ale acestui principiu și „care este încărcătura acestei reguli fundamentale” în raport cu reținerea persoanei, luarea măsurilor preventive privative de libertate, a anumitor măsuri de constrângere procesual-penală și cu ocazia desfășurării procedurilor probatorii.

Rezultatele obținute se concretizează în tezele științifice principale promovate spre susținere și în **problema științifică importantă soluționată** care constă în *elaborarea instrumentarului de identificare* a testului de proporționalitate aplicat la dispunerea măsurilor preventive privative de libertate, a unor măsuri procesual-penale de constrângere și desfășurarea anumitor acțiuni de urmărire penală, fapt care a condus la clarificarea pentru teoreticienii și practicienii din domeniul dreptului procesual penal a condițiilor respective, în vederea aplicării în cazurile când, pentru atingerea scopurilor prevăzute de lege, se impune restrângerea drepturilor și a libertăților fundamentale.

Semnificația teoretică: Deși principiul proporționalității este aplicat destul de des în jurisprudența CtEDO, totuși există relativ puține lucrări în care ar fi fost definit principiul dat, determinate esența și natura sa juridică. Prezenta cercetare, pe lângă dezvoltarea istorică a conceptului de *proporționalitate*, îi dezvăluie natura juridică și cea filosofică, prezintă detaliat care ar trebui să fie acțiunea proporționalității pentru a asigura un raport echilibrat între mijloacele folosite și scopul legitim urmărit cu ocazia realizării procedurilor legale, în vederea administrării probelor în procesul penal și a limitării libertăților la aplicarea măsurilor de constrângere procesual-penală.

Valoarea aplicativă: Rezultatele științifice vor fi utile în procesul de legiferare; în activitatea practică a judecătorilor, procurorilor, ofițerilor de urmărire penală și avocaților; în procesul didactic, de formare inițială și continuă a specialiștilor în domeniu.

Implementarea rezultatelor științifice: Rezultatele investigațiilor efectuate au fost prezentate la conferințele științifice naționale și internaționale, inclusiv peste hotare, și reflectate în articole științifice.

ANNOTATION

**VIZDOGA Domnița - "Proportionality of the restriction of certain rights or liberties in criminal proceedings". PhD thesis in law in the scientific specialty:
554.03 - Criminal procedural law. Chisinau, 2024.**

Thesis structure: introduction, four chapters, general conclusions and recommendations, bibliography from 375 titles, 205 basic text pages. Nine (9) scientific papers have been published on the thesis topic.

Keywords: proportionality, privacy, individual freedom, interference, restriction.

The aim of the thesis: is to carry out a complex research on the principle of proportionality and the mechanism of its application to the restriction of rights or liberties in criminal procedure.

Research objectives: Resides in determining the content of the concept of proportionality as the basis of ideas about justice in different philosophical currents; researching the emergence and development of the concept of proportionality as a fundamental principle of law; international and regional instruments on proportionality and the mechanisms that put it into action; establishing the correlation between the principle of proportionality and other fundamental principles; identifying the ingerințe of justificate in the right to privacy, corespondence and domiciliu through the conduct of evidentiary proceedings in criminal cases; analysis of the guarantees of the person's rights from the perspective of the principle of proportionality in the process of carrying out evidentiary procedures, but also in the detention of the person suspected of committing the crime, the application of preventive measures of deprivation of liberty and other measures of procedural-criminal coercion; researching the practice of applying the proportionality test in specific cases and demonstrating, on the basis of empirical research, that the proportionality test is not a legal fiction, as it is used by national courts; formulating recommendations aimed at making judicial practice more efficient and at making the procedural-criminal instruments in this field compatible, in accordance with the requirements of Art. 54 of the Constitution of the Republic of Moldova, the decisions of the Constitutional Court and the relevant case law of the ECtHR.

Scientific novelty and originality: is argued by the fact that the principle of proportionality, although frequently encountered in the case law of the ECtHR, being a classic principle of law, there are few scientific works that would provide a broad view of its essence and legal nature. The research of the genesis of the principle of proportionality is necessary in a theoretical context, studying the basis of the formation of the philosophical and legal ideas of this principle, and "what is the burden of this fundamental rule" in relation to the detention of the person, the taking of preventive measures of deprivation of liberty, certain measures of procedural-criminal restraint and during the conduct of evidentiary proceedings.

The results obtained are materialized in the main scientific theses promoted for support and in **the important scientific problem solved**, which consists in the elaboration of the instrument for identifying the proportionality test applied to the ordering of preventive measures of deprivation of liberty, of some procedural-criminal measures of constraint and the carrying out of certain actions of criminal prosecution, which led to the clarification for the theorists and practitioners in the field of criminal procedural law of the respective conditions, with a view to their application in cases where, in order to achieve the purposes laid down by law, it is necessary to restrict fundamental rights and liberties.

Theoretical significance: although the principle of proportionality is applied quite often in the case law of the ECtHR, there are relatively few works in which the principle has been defined and its essence and legal nature determined. The present research, in addition to the historical development of the concept of proportionality, reveals its legal and philosophical nature, presents in detail what the action of proportionality should be in order to ensure a balanced relationship between the means used and the legitimate aim pursued when carrying out legal procedures for the purpose of administering evidence in criminal proceedings and limiting liberties when applying procedural-criminal coercive measures.

Applied value: the scientific results will be useful in the law-making process; in the practical work of judges, prosecutors, prosecution officers and lawyers; in the teaching process, initial and continuing training of specialists in the field.

Implementation of scientific results: the results of the investigations carried out have been presented at national and international scientific conferences, including abroad, reflected in scientific articles.

АННОТАЦИЯ

Домница ВИЗДОГА. „Соразмерность ограничения отдельных прав и свобод в уголовном процессе”.
Диссертация на соискание ученой степени кандидата юридических наук по научной специальности: 554.03
- Уголовно-процессуальное право. Кишинев, 2024.

Структура диссертации: введение, четыре главы, общие выводы и рекомендации, библиография из 375 наименований, 205 страниц основного текста. По теме диссертации опубликовано 9 (девять) научных работ.

Ключевые слова: соразмерность, неприкосновенность частной жизни, свобода личности, вмешательство, ограничение.

Цель работы: провести комплексное исследование принципа соразмерности и механизма его применения к ограничению прав и свобод в уголовном процессе.

Задачи исследования: определить содержание понятия соразмерности как основы представлений о справедливости в различных философских течениях; исследовать возникновение и развитие концепции соразмерности как основополагающего принципа права; международные и региональные акты о соразмерности и механизмы ее реализации; установить соотношение принципа соразмерности с другими основополагающими принципами; выявить обоснованность вмешательства в право на неприкосновенность частной жизни, тайну и господство при осуществлении доказательственных процедур в уголовном деле; проанализировать гарантии прав личности с точки зрения принцип соразмерности в процессе осуществления процедур доказывания, а также при задержании лица, подозреваемого в совершении преступления, применении меры пресечения в виде заключения под стражу и иных мер уголовно-процессуального пресечения; изучение практики применения критерия соразмерности в конкретных случаях и демонстрация на основе эмпирических исследований того, что критерий соразмерности не является юридической фикцией, как он используется национальными судами; формулирование рекомендаций, направленных на повышение эффективности судебной практики и обеспечение совместимости процессуально-уголовных инструментов в данной сфере в соответствии с требованиями ст. 54 Конституции РМ, решениями Конституционного суда и соответствующей прецедентной практикой ЕСПЧ.

Научная новизна и оригинальность: аргументируется тем, что принцип соразмерности, хотя и часто встречается в прецедентном праве ЕСПЧ, являясь классическим принципом права, мало научных работ, которые бы давали широкое представление о его сущности и правовой природе. Исследование генезиса принципа соразмерности необходимо в теоретическом контексте, изучая основы формирования философско-правовых представлений о данном принципе, а также "какова нагрузка этой фундаментальной нормы" применительно к задержанию лица, применению мер пресечения в виде лишения свободы, некоторых мер процессуально-уголовного пресечения и при проведении доказательственного производства.

Полученные результаты материализованы в основных научных тезисах, получивших поддержку, и в решенной *важной научной проблеме*, заключающейся в разработке инструментария для определения критерия соразмерности при назначении мер пресечения в виде лишения свободы, некоторых процессуально-уголовных мер пресечения и осуществлении некоторых действий уголовного преследования, что привело к разъяснению теоретикам и практикам в области уголовно-процессуального права соответствующих условий с целью их применения в случаях, когда для достижения целей, установленных законом, требуется ограничение основных прав и свобод.

Теоретическая значимость: несмотря на то, что принцип соразмерности довольно часто применяется в прецедентном праве ЕСПЧ, работ, в которых бы давалось определение этому принципу, выяснялась его сущность и правовая природа, относительно немного. В настоящем исследовании, помимо исторического развития понятия соразмерности, раскрывается его правовая и философская природа, подробно представлено, каким должно быть действие соразмерности, чтобы обеспечить сбалансированное соотношение используемых средств и преследуемой законной цели при осуществлении процессуальных действий в целях обеспечения доказательств в уголовном судопроизводстве и ограничения свобод при применении мер процессуально-уголовного принуждения.

Прикладное значение: научные результаты будут полезны в законотворческом процессе; в практической деятельности судей, прокуроров, работников прокуратуры и адвокатов; в учебном процессе, при первоначальной и последующей подготовке специалистов в данной области.

Внедрение научных результатов: результаты исследований были представлены на национальных и международных научных конференциях, в т.ч. за рубежом, отражены в научных статьях

VIZDOGA Domnita

**THE PROPORTIONALITY OF RESTRICTING CERTAIN RIGHTS OR LIBERTIES IN
CRIMINAL PROCEDURE**

Specialty 554.03 – Criminal procedural law

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