REVISTA
BRASILEIRA DE DIREITO

The constitutional principle of proportionality in foreign and Russian law: a theoretical and practical analysis

O princípio constitucional da proporcionalidade no direito estrangeiro e russo: uma análise teórica e prática

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Revista Brasileira de Direito, Passo Fundo, vol. 16, n. 2, p. 1-21, Maio-Agosto, 2020 - ISSN 2238-0604
[Received/Recebido: Julho 28, 2020; Accepted/Aceito: Fevereiro 17, 2021;
Publicado/Published: Março 17, 2021]
DOI: https://doi.org/10.18256/2238-0604.2020.v16i2.4235

Como citar este artigo / How to cite item: clique aqui!/click here!

Abstract

The article is devoted to a comparative legal study of the European principle of proportionality and the American method of weighing interests, their origins, common and distinctive features, socio-cultural and historical foundations, the application of the principle of proportionality in the Russian legal order. Historically, the origins (roots) of the European principle of proportionality go back to the German administrative-legal doctrine, and the American method of weighing as an initial principle is associated with private law and only later was extended to the public law sphere. The article assesses the impact of these principles on the Russian legal doctrine and law enforcement practice.

Purpose: The main purpose of the article is to identify the general and distinctive features of the European principle of proportionality and the American method of balancing interests in order to comprehend on this basis the Russian legal model for ensuring the balance of private and public interests. Tasks: to explore the historical, socio-cultural, doctrinal foundations of the genesis of the European principle of proportionality and the American method of weighing interests; to identify the common and special features characteristic of these methods; to show the influence of these methods on Russian doctrine and law enforcement practice; compare the Russian principle of balance between private and public interests with the European principle of proportionality; formulate recommendations and suggestions for improving Russian law enforcement practice.

Methods: historical and legal, logical, formal and legal, systemic and structural, method of interdisciplinary legal research, method of system analysis.

Discussion: the European principle of proportionality and the American method of weighing interests, although they do not belong to new phenomena of legal thought, nevertheless, due to their fundamental importance both at the constitutional and other sectoral levels of development of law, are constantly in the center of the field of vision of legal thought abroad, as well as in Russia. The emergence of various approaches to understanding the legal provision of the balance of private and public interests is causing lively, sometimes quite sharp, discussions in the scientific field. The article focuses on the historical, socio-cultural, political and legal features of the development of the European principle of proportionality and the American method of balancing interests, which leads to both close interaction and convergence, as well as the need for their joint scientific research, which can give a significant theoretical and practical effect.

Conclusion: the article states that the distinctive features of the European principle of proportionality and the American method of weighing interests are not of an essential, paradigmatic nature, which allows us to conclude that in this case there are no grounds for a fundamental opposition to each other of the above-named constructive models as methods of understanding legal reality, as well as legal means of ensuring a balance of private and public interests. The development of the European principle of proportionality has a significant impact and impact on the formation of Russian political and legal thought and practice in the field of interaction between private and public law, ensuring an organic combination of private and public interests, which is reflected in the legal position formulated by the Constitutional Court of the Russian Federation concerning the principle of ensuring proportional observance, balance of private and public interests in the implementation of legal regulation of public relations.

Keywords: The constitutional principle of proportionality. Criteria. Test. Legal system. Methodology. Efficiency. Interest-weighing method. Comparative analysis. Balance of interests. Private and public interest. Minimal damage. Protection.

Resumo

O artigo é dedicado a um estudo jurídico comparativo do princípio europeu da proporcionalidade e do método americano de ponderar interesses, suas origens, características comuns e distintivas, fundamentos socioculturais e históricos, a aplicação do princípio da proporcionalidade na ordem jurídica russa. Historicamente, as origens (raízes) do princípio europeu da proporcionalidade remontam à doutrina administrativa-jurídica alemã, e o método americano de ponderação como princípio inicial está associado ao direito privado e só mais tarde foi estendido à esfera do direito público. O artigo avalia o impacto desses princípios na doutrina russa e na prática de aplicação da lei.

Objetivo: O objetivo principal do artigo é identificar as características gerais e distintivas do princípio europeu de proporcionalidade e o método americano de equilibrar interesses, a fim de compreender, com base nisso, o modelo jurídico russo para garantir o equilíbrio de interesses públicos e privados.

Tarefas: explorar os fundamentos históricos, socioculturais e doutrinários da gênese do princípio europeu da proporcionalidade e do método americano de ponderar interesses; identificar características comuns e especiais características desses métodos; mostrar a influência desses métodos na doutrina russa e na prática da aplicação da lei; comparar o princípio russo de equilíbrio entre interesses públicos e privados com o princípio europeu de proporcionalidade; formular recomendações e sugestões para melhorar as práticas de aplicação da lei na Rússia.

Métodos: histórico e jurídico, lógico, formal e jurídico, sistêmico e estrutural, método de pesquisa jurídica intersetorial, método de análise de sistemas.

Discussão: o princípio europeu da proporcionalidade e o método americano de ponderar interesses, embora não pertençam a novos fenômenos do pensamento jurídico, no entanto, devido à sua importância fundamental, tanto nos níveis constitucionais quanto em outros setores do desenvolvimento do direito, estão constantemente no centro do campo de visão do pensamento jurídico. no exterior, bem como na Rússia. O surgimento de várias abordagens para entender a provisão legal da balança de interesses privados e públicos está causando discussões animadas, às vezes bastante acentuadas, no campo científico. O artigo enfoca as características históricas, socioculturais, políticas e legais do desenvolvimento do princípio europeu da proporcionalidade e o método americano de equilibrar interesses, o que leva a uma interação e convergência próximas, bem como a necessidade de sua pesquisa científica conjunta, o que pode dar um efeito teórico e prático significativo.

Conclusão: o artigo afirma que as características distintivas do princípio europeu da proporcionalidade e do método americano de ponderação de interesses não são de natureza paradigmática essencial, o que nos permite concluir que, neste caso, não há fundamento para uma oposição fundamental entre si dos modelos construtivos acima mencionados como métodos de compreensão jurídica. realidade, bem como meios legais para garantir um equilíbrio de interesses públicos e privados. O desenvolvimento do princípio europeu da proporcionalidade tem um impacto significativo na formação do pensamento e das práticas políticas e jurídicas russas no campo da interação entre direito privado e público, garantindo uma combinação orgânica de interesses privados e públicos, o que se reflete na posição jurídica formulada pelo Tribunal Constitucional da Federação da Rússia sobre o princípio de garantir proporcionalidade. observância, equilíbrio de interesses privados e públicos na implementação da regulamentação legal das relações públicas.

Palavras-chave: Princípio constitucional da proporcionalidade. Critérios. Teste. Sistema jurídico. Metodologia. Eficiência. Método de ponderação de juros. Análise comparative. Equilíbrio de interesses. Interesse público e privado. Dano mínimo. proteção.

1 Introduction

The current model of constitutional law formed in European jurisdictions includes the procedure of judicial control and a two-stage system of human rights protection composed of the relevant rules on the protection of rights and the doctrine of proportionality. Earlier, the topic the constitutional principle of proportionality was presented by us at an international scientific conference in Yekaterinburg. In this article, we decided to dwell in more detail on theoretical and practical problems[1].

The principle of proportionality which is based on the Frederick the Great's doctrine takes its roots in the German law, provided for the limitation of the power of state bodies in the exercise of police functions. Several years later, the principle of proportionality was added to the legal system of European countries thanks to the activities of the judiciary (through the practice of the court) and doctrine. Subsequently, the principle of proportionality was borrowed and appeared in Russia.

2 Main part

1. Notion and nature of the European principle of proportionality. 2. Social, historical, cultural, and other grounds for introducing the principle of proportionality. 3. A comparative analysis of the European principle of proportionality and the American method of weighing interests. 4. A comparative analysis of the Russian principle of balancing private and public interests and the European principle of proportionality.

M.N. Semyakin characterized the principle of proportionality: "The essence of the principle in question can be summarized in the following way: government bodies cannot impose obligations beyond reasonable limits of necessity, driven by the public interest, on individuals, legal entities and other subjects with the purpose to reach the established public aim. Sometimes this principle is interpreted rather liberally".[2] For example, David Beatty claims, the principle of proportionality is the "ultimate rule of law".[3]

M.N. Semyakin claimed "methodologically and practically speaking, it is interesting to look at the opinions of different researchers on the issue of ratio and importance of the European principle of proportionality and the American method

1 *See:* SEMYAKIN, Mikhail. The principle of proportionality in the foreign legal doctrine and practice and its interpretation in Russia in the context of ensuring the protection of the rights and legal interests of subjects. *Russian people and power in the context of radical changes in the modern world. materials of the XXI Russian scientific-practical conference (with international participation).* 2019. p. 300-305.

2 SEMYAKIN, Mikhail. The principle of proportionality in the foreign legal doctrine and practice and its interpretation in Russia in the context of ensuring the protection of the rights and legal interests of subjects. *Russian people and power in the context of radical changes in the modern world. materials of the XXI Russian scientific-practical conference (with international participation).* 2019. p. 301.

3 BEATTY, David. *The Ultimate Rule of Law.* Oxford; New York: Oxford University Press, 2004. 193p.

of weighing interests, including cases when the said methods are contrasted with each other".[4] As mentioned by F. Schauer, U.S. "Supreme Court judges are reluctant to borrow constitutional provisions and models appearing in other jurisdictions, in particular, the principle of proportionality. The American constitutional law is more based on rules than non-American law (primarily, European); it does not contain a standardized test for proportionality".[5]

Thus, "the difference between the American method of weighing interests and the European principle of proportionality is very often reduced to differentiating such phenomena which are relevantly based on rules and standards".[6]

M.N. Semyakin said: "comparing the said two methods, researchers underline that when applying the method of weighing interests, the court retreats from strict adherence to the protection of individual rights[7] and, in fact, is forced to compare different in nature (incomparable) interests[8]; unlike the method of weighing interests, the principle of proportionality is well structured and is of the scientific character, etc".[9]

"Noteworthy is the fact that the said characteristics focus only on specific differentiating features of the two methods but not on their methodological (paradigmal) differences, and are primarily accounted for by historical and cultural peculiarities and other traditions typical for civil law and common law systems".[10] In particular, the test for proportionality, which appeared in the German law, historically developed in the sphere of administrative law and was directed at the protection of individual rights of citizens which was insufficiently provided for by the legislation. At the very beginning of its development, the principle of proportionality was indirectly applied to the sphere of private law.

4 SEMYAKIN, Mikhail. The principle of proportionality in the foreign legal doctrine and practice and its interpretation in Russia in the context of ensuring the protection of the rights and legal interests of subjects. Russian people and power in the context of radical changes in the modern world. Collection of scientific papers of the XXI Russian scientific-practical conference (with international participation). 2019. Pp. 161-162; SEMYAKIN, Mikhail. The principle of proportionality in the foreign legal doctrine and practice and its interpretation in Russia in the context of ensuring the protection of the rights and legal interests of subjects. Russian people and power in the context of radical changes in the modern world. materials of the XXI Russian scientific-practical conference (with international participation). 2019. Pp. 300-305.

5 SCHAUER, Frederick. Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture. *European and US Constitutionalism*. Ed. by G. Nolte. p. 49-50.

6 *See*: SCHAUER, Frederick. The Convergence of Rules and Standards. *New Zealand Law Review*. 2003. No. 3. p. 303.

7 FALLON, Richard H. Strict Judicial Serutiny. *UCLA Law Review*. Vol. 54. 2007. No 5. p. 1307.

8 FRANTZ, Laurent B. The First Amendment in Balance. *Yale Law Journal*. Vol. 71. No. 8. 1962, p. 1424-1426.

9 *See:* SEMYAKIN, Mikhail. Ibid. p. 301.

10 *See:* SEMYAKIN, Mikhail. Ibid. p. 301-302.

On the contrary, the method of "weighing interests" was initially applied by private law and was later extrapolated by public law. Of interest is also the fact that "the method of weighing interests came as the reaction of the legal doctrine to a rather 'jealous' libertarian protection of human rights by the U.S. Supreme Court, which frequently interpreted the corresponding provisions of the U.S. Constitution rather literally".

Moshe C.-E. and Iddo Porat said that "the test for proportionality developed within the frameworks of formalistic and doctrinal practice of German administrative courts and had nothing to do with the anti-formalistic movement in the philosophy of law while the method of weighing interests supported by the movement of progressivists was directed against formalism in the U.S. judicial practice".[11] Though many researchers "in the American legal system give priority to the concept of "weighing interests", the latter, however, does not have the status of the official concept and is considered rather controversial".[12]

"The two methods of cognition are closely interrelated and are rather comparable; therefore it is rather unlikely that there are methodological grounds to contrast them as absolutely different conceptual approaches. As mentioned by Moshe Cohen-Eliya and Iddo Porat, "these two methods – of weighing interests and the test for proportionality – have some common important features and are often considered in one and the same context"".[13] The European principle of proportionality and the American method of weighing interests pursue their most important aim: to provide the optimal protection of rights and legitimate interests of people.

The two methods are applied when some constitutional right is restricted or encumbered; both of these methods make a comparative analysis of the restricted or encumbered constitutional right and the interest of the government.[14] It is interesting to note that "within the meaning and spirit of the European Convention on the Protection of Human Rights and Freedoms, the European Court developed and added different criteria for admissibility of state interference in property rights. In particular, in *Sporrong and Lonnroth*, the Court formulated the principle which served as the foundation for further judicial practice applying Article 1 of Protocol 1 to the European Convention: "For the purposes of the current provision (Protocol 1), the Court shall establish whether a fair balance between the public interest and protection of private rights has been reached".[15]

11 MOSHE, Cohen-Eliya, Iddo Porat. American weighing method interests and the German proportionality test: historical roots. *Comparative Constitutional Review*. 2011. Vol. 3 (82). p. 59–81.

12 *See*: MOSHE, Cohen-Eliya, Iddo Porat. Ibid. p. 60 ; SEMYAKIN, Mikhail. Ibid. p. 301.

13 *See*: MOSHE, Cohen-Eliya, Iddo Porat. Ibid. p. 60 ; SEMYAKIN, Mikhail. Ibid. p. 301.

14 ALEINIKOFF, Alexander. Constitutional Law in the Age of Balancing. *Yale Law Journal.* Vol. 96. No. 5, 1987. p. 943-1005; PORAT, Iddo. The Dual Model of Balancing. *Cardozo Law Review.* Vol. 27. No. 3, 2006. p. 1393-1448.

15 *See*: GADZHIEV, Gadis. Constitutional Principles of Market Economy (Development of Civil Law Basics in the Decisions of the Constitutional Court of the Russian Federation). Moscow. 2004. p. 71; SEMYAKIN, Mikhail. Ibid. p. 131-132.

However, the European law considers the principle of proportionality as one of universal principles in law[16] and, as a result, it does not cause so many controversies and doubts as it happens with the method of weighing interests in the U.S. judicial practice and legal doctrine. Richard Fallon states, that "the application of the method of weighing interests frequently causes protest of dissenting judges who claim that the court retreats from strict adherence to the protection of individual rights".[17]

Some authors suggest applying the method of weighing interests, so well popular in the American legal doctrine and practice, more widely, to extend it to the constitutional legal doctrine, instead of making it marginal and contrasting it with the European principle of proportionality.[18]

Sometimes, the current situation is explained by the isolationism and unilateralism of the American legal tradition.[19] At the same time, "different approaches to the perception and evaluation of the European principle of proportionality and the American method of weighing interests are very often explained by other circumstances"[20], including those of the analytical nature.

Thus, German and Canadian scholars often claim that the test for proportionality is better structured and distinguishes three separate but analytically interrelated tests (criteria) (relevance – the chosen means must be relevant to reach the established public aim; necessity – the chosen means must limit the right of a private person to the minimum extent possible; proportionality in its narrowest meaning – the restriction of a right must be well balanced with the protected public interest) and has a more scientific character than the method of "weighing interests" which is often "vague", general and non-structured.[21]

Based on the above said, researchers often make the conclusion that the "test for proportionality is more valuable and helps judges structure their decisions making them more transparent and legitimate. The method of weighing interests, on the contrary, is not clearly structured and gives judges more discretion, thus contributing to legitimization of human rights violations on the part of the government"[22], etc.

16 *See:* SEMYAKIN, Mikhail. Ibid. p. 301.

17 FALLON, Richard H. Strict Judicial Serutiny. *UCLA Law Review.* Vol. 54. 2007. № 5. p. 1307.

18 *See*: for example: GRIMM, Dieter. Proportionality in Canadian and German Constitutional Law Jurisprudence. *University of Toronto Law Journal*. Vol. 57, No. 2, 2007. p. 383-397.

19 *See*: WEINRIB, Lorraine E. *The Postwar Paradigm and American Exceptionalism*. The Migration of Constitutional Ideals / Ed. by S. Choudhry. Cambridge; New York: Cambridge University Press. p. 85; RUBENFELD, J. Commentary: Unilateralism and Constitutionalism. *New York University Law Review*. Vol. 79, No. 6, 2004. p. 1971.

20 *See:* SEMYAKIN, Mikhail. Ibid. p. 300-305.

21 GRIMM, Dieter. Op. cit. p. 395; WEINRIB, Lorraine E.. *The Postwar Paradigm and American Exceptionalism*. p. 96.

22 MOSHE, Cohen-Eliya, Iddo Porat. American weighing method interests and the German proportionality test: historical roots. Comparative Constitutional Review. 2011. Vol. 3 (82). p. 59–81.

Probably, it is possible to agree that the principle of proportionality in relation to the method of weighing interests is 'better structured' and has a more 'formal' character and, therefore, is more 'practical' and 'scientific', however, in our view, the most important is to understand how such categories as 'weighing interests' and 'proportionality' are to be compared.

There is a rather straightforward opinion in this respect: "Only the application of the third criterion – proportionality in its narrowest meaning – is an analogy to the method of weighing interests. The first two criteria concern test of aims and means not affecting the weighing of interests, at least, as it is understood in the American judicial practice".[23]

However, some foreign researchers rightfully state that it seems that the application of the first two criteria of the principle of proportionality – relevance and necessity – is also, to a certain extent, connected with weighing interests.[24]

In fact, when we apply the criterion of relevance, we conduct an intellectual operation aimed at establishing whether the chosen means is relevant (appropriate) to reach the public aim and therefore it naturally presupposes comparing (balancing) this means with the stated public aim.

Similarly, the application of the necessity criterion presupposes comparing the following 'parameters': is the restriction of a right of a private person minimal when compared with the necessity to guarantee the public interest to reach the established public goal?

The American constitutional law practice also applies some tests rather similar to the first and second criteria of the principle of proportionality. Thus, the test for the least restricting means applied in the American constitutional law is very similar to the second criterion of the principle of proportionality[25] – necessity, under which restriction (damage) of rights and legitimate interests of a private person must be minimal.

As for the first test of the principle of proportionality – relevance of the chosen means restricting a right – it is, in fact, used at all levels of adjudicating constitutional disputes in the U.S.

The principle of proportionality and the method of weighing interests have one and the same ground for their application: limitation or encumbrance of some constitutional right or a corresponding provision.

23 MOSHE, Cohen-Eliya, Iddo Porat. Ibid. p. 62. *See* also: REGAN, Donald H. Judicial of Trade within a Federal or Quasi-Federal System: Protectionism and Balancing. Da Capo. *Michigan Law Review.* Vol. 99. No. 8. 2001. p. 1853.

24 *See*, for example: GRIMM, Dieter. Op. cit. p. 395; DAVIDOV, Guy. Separating Minimal Impairment from Balancing: A Comment on h. v. Sharpe (B. C. C. A.). *Review of Constitutional Studies*. Vol. 5. No. 2. 2000. p. 195.

25 *See*, for example: STRUVE, Guy Miller. The Less Restrictive Alternative Principle and Economic Due Process. *Harvard Law Review.* Vol. 80. No. 7. 1967. p. 1463-1488.

Some legal scholars underline that the test for proportionality in its analytical structure is deprived of such an important disadvantage which is typical for the method of weighing interests as the necessity to compare absolutely different values. When the test for proportionality is applied, only similar values are compared: in accordance with criteria typical for each of them, the damage caused by one of such values is assessed (for example, to private rights and interests) and, at the same time, the extent to which it affects another value (constitutional rights and freedoms) to minimize the damage caused and, consequently, so that constitutional rights and freedoms would be restricted to the minimum extent possible. Therefore, the conclusion is made that the test for proportionality enables to focus on the circumstances of a case but not on judgments concerning values, and thus better contributes to the legitimacy of a judicial decision and makes it less subjective.[26]

However, such judgments in our view are unlikely to be well-grounded. The above arguments put forward as advantages of the test for proportionality are also typical for the method of weighing interests which enables to make similar conclusions.

In both instances – in applying the test for proportionality as well as the method of weighing interests – we inevitably have to compare not only relative (comparable) "parameters" from the viewpoint of quality but other constitutionally important values. Thus, "in *Schneider v. New Jersey*, a well-justified aim, the public interest – cleanliness of city streets – did not receive priority over a less significant damage to the freedom of speech, taking into account the constitutional importance of the latter in a democratic society".[27]

In November 2018, the RF Supreme Court refused to satisfy the appeal of "the *Pobeda* airline company which insisted on limiting the right of passengers to a free-of-charge carriage of hand luggage above the established limit (5 kg), substantiating it by the fact that passengers abuse their right; the rule (p.135 of the General Rules for Carriage of Passengers, Baggage and Cargo) which contains the list of objects to be taken aboard above the established limit of free-of-charge hand luggage was adopted without taking into account the technical specifications of aircrafts, it violates the business model of lowcosters and can endanger the safety of flights.

In this situation, the highest judicial instance had, on the one hand, to 'weigh' the interests of the airline company to implement the business model of a lowcoster, comply with technical specifications of aircrafts, etc., and, on the other hand, to protect human rights and freedoms, in particular, the right to free movement and the right to take appropriate hand luggage. In this case, the Court gave preference to the necessity to secure the rights and freedoms of a man and a citizen as these are the values of a higher – constitutional – level"[28].

26 BEATTY, David. The Ultimate Rule of Law. p. 169.

27 *See*: MOSHE, Cohen-Eliya, Iddo Porat. Ibid. p. 63.

28 *See*: SEMYAKIN, Mikhail. Ibid. p. 304.

Thus, in our view some differences in the analysis of the test for proportionality and the method of weighing interests are dependent on cultural, historical and some other peculiarities of different legal systems (European-continental and American) which does not give grounds to oppose the said constructions as two different methodological paradigms of legal reality cognition.

For better understanding of securing the proportionality (balance) of rights, "weighing" of private and public interests, it is worth relying on the criterion used in economics, and namely the Pareto efficiency. "Under this criterion, better economic welfare (improvement under Pareto) will take place every time when either an individual or a group of people improve their economic well-being as a result of some transaction, introduction of these or other legal rules, etc., provided nobody else bears any losses[29]. In case when further improvement of the well-being of some is impossible without causing damage to others, economists speak about the optimal result - Pareto optimality".[30]

Certainly, in practice, Pareto optimality can be reached quite conditionally. However, in the context of research methodology of applying the constitutional principle of proportionality, reliance on the Pareto criterion of efficiency is rather reasonable, at least, from the viewpoint of a possible (or necessary) minimization of damage (ideally, to avoid any damage) to the rights and legitimate interests of another person when the rights of one person are restricted or encumbered; and, in this respect, A. Karapetov considers "under Pareto it is possible to expect improvement – to secure a balanced (proportionate) and fair allocation of rights and obligations among corresponding subjects".

"In the Russian legal system, the principle of proportionality is one of its most important concepts"[31]. "Speaking about the interference of the state in entrepreneurial activities", the RF Constitutional Court held that "under the federal law, restriction of the right to possess, own and dispose of property as well as of freedoms of entrepreneurial activities is possible only when it complies with requirements of fairness, adequacy, proportionality, commensurability and necessity to protect the constitutionally significant values, including private and public rights and legitimate interests of other people, and when it does not affect the very essence of constitutional rights, i.e. it does not restrict the limits and application of the corresponding constitutional rules"[32]. In this or that form, the said legal provision has been reflected

29 SEMYAKIN, Mikhail. Formation of economic analysis of private law in Russia: problems and prospects for development. *Journal of Business and Corporate Law*. 2018. Vol. 2 (10). p. 42-48.

30 *See*: KARAPETOV, Artem. *The Economic Analysis of Law*. Moscow. Statut, 2016. p. 124-125.

31 *See:* SEMYAKIN, Mikhail.. Ibid. p. 300-305.

32 Ruling of the RF Constitutional Court No. 14-P of 16 July 2004 "On the Issue of Checking Constitutionality of Several Provisions of Article 89 (2) of the Tax Code of the Russian Federation in Connection with Complaints from Citizens A. D. Egorov and N. V. Chuev".Collection of Legislation. 2004. No. 30. Art. 3214. ConsultantPlus.

in some Rulings of the RF Constitutional Court.[33]

From the above said legal position, we can make the conclusion that, speaking about the "possibility of restricting the right to possess, own and dispose of property as well as of freedoms of entrepreneurial activities, the RF Constitutional Court has established some constitutional requirements". Semyakin M.N. analyzed this problem and came to the following conclusions, with which we agree:

"First of all, such restriction is possible only on a ground provided for by the federal law, thus excluding any possibility to establish such a restriction in other normative legal acts such as decrees by the RF President, Rulings of the RF Government, etc.

Secondly, "restriction of the above said rights and of freedoms of entrepreneurial activities is possible if it is necessary to protect the constitutionally important values which, in the opinion of the RF Constitutional Court, include also private and public rights and legitimate interests. Consequently, the application of these or other restrictive measures is possible only in such cases when relevant constitutional rights and legitimate interests are violated, i.e. with the purpose of their protection".

Thirdly, the said restriction shall comply with requirements of fairness, a moral phenomenon; however, in this context it has its constitutional importance.

Fourthly, such restrictions must be adequate, reasonable and proportionate to the rights to be protected, i.e. to properly secure the balance of private and public rights and legitimate interests.

Fifthly, a very important requirement that shall be complied with in case the said constitutional rights and freedoms and legitimate interests are restricted is that such restriction shall not affect the very essence of constitutional rights. The RF Constitutional Court interprets that the meaning of the wording "shall not affect the very essence of constitutional rights" means inadmissibility to restrict the limits and application of the content of corresponding constitutional provisions, which can hardly be considered relevant from the viewpoint that any constitutional right has a lot of limits (boundaries) – time, spatial and others – however, not every restriction of such a type can affect the very essence of the corresponding constitutional right"[34].

The above position of the RF Constitutional Court was later developed in the constitutional law practice and, in particular, in its Ruling No. 15-P of 27 June 2012 in the case of I. B. Delova, who under the claim of the St. Petersburg State Institution of Social Service "Psycho-neurological Institute No.3" was found legally incapacitated by the court. The complaint by I. B. Delova says that her right to privacy and the right to private property in violation of Articles 19, 23, 35 and 55 of the RF Constitution are not proportionately "restricted by the provisions of Article 29 (1) and (2), Article

33 *See*, for example: Ruling of the RF Constitutional Court No. 6-P of 31 May 2005, No. 2-P of 28 February 2006, No. 16-P of 13 July 2010, and others. ConsultantPlus.

34 *See:* SEMYAKIN, Mikhail. Ibid. p. 300-305.

31 (2) and Article 32 of the RF Civil Code, since they do not provide for a possibility to restrict the capacity of a citizen necessary to protect their rights in connection with their mental disorder proportionate to the degree of impairment of the ability to understand the importance of their actions or control them, and thus depriving such a citizen of the right to independently take legally important actions, including the right to dispose of their pension to satisfy the everyday needs" (quoted from Ruling of the RF Constitutional Court No. 15-P of 27 June 2012). "Having considered the provisions of Article 29 (1) and (2), Article 31 (2) and Article 32 of the RF Civil Code, the RF Constitutional Court has decided (p. 2) to find the interconnected provisions of Article 29 (1) and (2), Article 31 (2) and Article 32 of the RF Civil Code unconstitutional and, namely, not compliant with Article 15 (Part 4), 19 (Parts 1 and 2), 23 (Part 1), 35 (Part 2) and 55 (Part 3), because the current civil law does not provide for a possibility to differentiate civil law consequences when deciding upon their incapacity if a person suffers from mental disorder which would be **proportionate to** the degree of real reduce of the ability to understand the importance of their actions or control them"[35], and thus depriving such a citizen of the right to independently take legally important actions, including the right to dispose of their pension to satisfy the everyday needs.

"Having considered the provisions of Article 29 (1) and (2), Article 31 (2) and Article 32 of the RF Civil Code, the RF Constitutional Court has decided (p. 2) to find the interconnected provisions of Article 29 (1) and (2), Article 31 (2) and Article 32 of the RF Civil Code unconstitutional and, namely, not compliant with Article 15 (Part 4), 19 (Parts 1 and 2), 23 (Part 1), 35 (Part 2) and 55 (Part 3), because the current civil law does not provide for a possibility to differentiate civil law consequences when deciding upon their incapacity if a person suffers from mental disorder which would be **proportionate to** the degree of real reduce of the ability to understand the importance of their actions or control them" (quoted from Ruling of the RF Constitutional Court No. 15-P of 27 June 2012)..

"Comparing the principle of proportionality applied in the Russian legislation with the European proportionality test model, we can state that both legal constructions, in fact, have common essential parameters (criteria)".[36] Thus, "when characterizing the European test for proportionality, there are three criteria distinguished: first of all, it is a means to achieve a public aim which shall be appropriate to achieve such an aim (appropriateness); secondly, the chosen means shall limit a right of a private person to the least extent possible (necessity); thirdly, the damage caused to a private person by the restriction of their right shall be

35 Ruling of the RF Constitutional Court No. 15-P of 27 June 2012 "On the Issue of Checking Constitutionality of Article 29 (1) and (2), Article 31 (2) and Article 32 of the RF Civil Code in Connection with Complaint by I. B. Delova". *ConsultantPlus*.

36 *See:* SEMYAKIN, Mikhail. Ibid. p. 300-305.

proportionate to the benefit of the government to achieve the established aim (proportionality in its narrowest meaning)".[37]

"Putting aside some structural peculiarities of the analysis of the European test for proportionality, it should be mentioned that the above criteria are well covered by the requirements distinguished when characterizing the principle of proportionality established by the provision put down by the RF Constitutional Court"[38].

As a rule, these or those public restrictions are imposed to satisfy some public interests to achieve some specific public aim. In this connection, there must be some analytical procedure: to choose the appropriate (optimal) legal means "to achieve a publicly important aim; at the same time this means must limit the right of a private person or their legitimate interest to the minimum extent possible"[39]; and the limitation of such a right shall be proportionate to the achieved public effect.

Thus, as a novelty of civil legislation, Article 809 (5) of the RF Civil Code has been "amended to impose limitations concerning the establishment of usurious interests under the loan agreement concluded between individuals and a legal entity which is not involved in professional activities on providing consumer loans and a borrowing person. In this case, the principle of proportionality is implemented mainly because when the size of consumer loan interests is two or several times exceeding the average size of interest and thus making it burdensome for the borrower (usurious interests), a borrowing citizen can ask the court to reduce the amount of interests to the average amount of interests taken in similar circumstances".[40]

Another situation, when criteria of the principle of proportionality shall be complied with, concerns such a category of people as self employed, an experiment conducted at present. On November 23, 2018, the Federation Council approved three bills to impose a tax on self-employed citizens; it is expected that in 2019-2028, the city of Moscow, Tatarstan, Moscow and Kaluga regions will conduct an experiment imposing a tax (4%) on the professional income of the self-employed.

On the one hand, the public is interested in making the labor market more transparent, making the said category of people more socialized, involving them in the process of paying taxes who will thus make their contributions to the budgets of the RF constituent entities, municipal units, etc. But on the other hand, to make citizens express their willingness to take an active part in the society, we need efficient incentives: a low tax rate; the ability of the self-employed to enjoy state support measures, to conclude loan agreements connected with bank crediting; to legally conduct financial operations without any fears that their accounts can be blocked under some suspicion; no necessity to get registered as a sole trader, to have an online cash register, and submit corresponding reports, etc.

37 *See*: MOSHE, Cohen-Eliya, Iddo Porat. Ibid. p. 61.

38 *See:* SEMYAKIN, Mikhail. Ibid. p. 300-305.

39 VITRYANSKY, Vasiliy. News on agreements in the field of banking and other financial activities. *Economy and law*. 2017. Vol. 11 (490). p. 3-29.

40 VITRYANSKY, Vasiliy. Ibid. p. 3-29.

Only if the above mentioned public interest is possible to get well balanced, to 'equalize' with the benefits and incentives for the self-employed, the conducted experiment can be successful.

The constitutional principle of proportionality establishes some rules, requirements, restrictions and prohibitions which are binding not only for the legislator, but also for courts and other law enforcement state bodies and officials.

The specified principle as a form of expression of a general legal principle of proportionality implies a rather wide discretion of courts: courts have a possibility to provide legal assessments: whether introduced public restrictions are in fact necessary, adequate and proportionate to achieve a public aim; it is important for the formation and legitimization of the necessary economic and other policy of the Russian Federation.

Unfortunately, "the principle of proportionality is either insufficiently reflected or often ignored in the law making activities of courts[41] (especially, when making new laws) as well as in their law enforcement activities"[42]. Thus, the new provision of Article 819 of the RF Civil Code has significantly changed the balance of interests between banks and borrowers having limited the rights of the latter, so that now we see legalization of "different commissions (interest rates) imposed by banks on borrowers, in the form of "other payments established by the loan agreement", including the ones "connected with loan granting", and when granting a consumer loan – all payments provided for by the law on consumer crediting".[43] Moreover, this Article gives banks the right to discharge debts under loan agreements by granting new loans without transferring money on the borrower's account (Article 819 (1)[1] of the RF Civil Code).

Another case: on 14 August 2018, the Izmailovskiy district court of Moscow refused to satisfy the claim of people whose relative died in a Moscow hospital and who were deprived of their access to the deceased. The doctor's refusal was based on the fact that there were other patients in the intensive care unit and if the relatives had been allowed in, doctors would have had to stop rendering medical assistance to other patients. The court decision has also stated that Russia does not have any law or any legal normative act which would regulate relatives' visits of patients in the intensive care unit.[44]

However, the Appellate Board of the Moscow City Court cancelled the decision of the Izmailovskiy district court of Moscow and made the Moscow City Hospital named after D. D. Pletnev pay moral damages to the relatives of the deceased patient.[45]

In our view, it is difficult to classify the decision of the Izmailovskiy district court of Moscow as rather balanced and well-grounded when comparing and assessing

41 It concerns, for example, a new provision established by Article 488 (7) of the RF Civil Code, in its systematic application together with the provision of Article 22 (9) of the RF Land Code.

42 *See:* SEMYAKIN, Mikhail. Ibid. p. 300-305.

43 VITRYANSKY, Vasiliy. Ibid. p. 3-29.

44 Decision of the Izmailovskiy district court of Moscow on 14 August 2018 in case No. 02-3784/2018. SPS Garant (accessed on 15 December 2018).

45 MISHINA, Valeria. *Health and Health Care*. Kommersant'. 2018. 15 December.

private and public interests and passing a decision which limits the basic right of a person; it was necessary to guarantee a balance and proportionality of the said interests to minimize the damage caused, but in this situation it was not done. The relatives of the deceased person might have been given the necessary sanitary and hygienic means to properly protect the rights and interests of other patients in the resuscitation department, thus it would have satisfied the criteria of the principle of proportionality, including the requirement to minimize the caused damage.

The principle of proportionality is applied not only in case of limited public rights, correlating such a limitation with the necessity to protect private interest, but also in controversial legal matters occurring between subjects of private law. Thus, a limited liability company "filed a suit against a poultry farm with an arbitration court to establish private easement over a patch of land to provide access by a vehicle and on foot to a building owned by the company and situated on the same territory with the poultry farm".

"Satisfying the claims, the courts of original and appellate jurisdiction established the boundaries of easement but did not define the restrictive conditions that the poultry farm insisted on, because in case of any violations the owner is not deprived of their right to file a suit at a later time to eliminate any violations of their rights under Article 304 of the RF Civil Code".[46]

"A court of cassational instance repudiated the legal acts passed by the court and sent the case for a review relying on the provision of Article 274 (1) of the RF Civil Code under which it follows that easement shall be the least burdensome for the, therefore, when determining the content of this right and conditions for its exercise, the court has to rely on a reasonable balance of interests of the parties to a dispute so that this limited property right meeting only the basic needs of the claimant would not create any significant inconveniences for the owner in charge of the patch of land".[47]

Consequently, when solving a dispute on establishing easement, the court must, first of all, be driven by the necessity to guarantee a balance of interests of the parties so that to further create appropriate legal conditions for a possibility of the most efficient disposal of their property by the parties.

Based on formal legal views, basic rights and freedoms can be limited in cases and following the procedure established by the federal law for the purpose of which the principle of proportionality and its typical criteria are applied. However, both theory and practice face some difficulties connected with the very essence of the concept – "limitation of a right". Another question is the boundaries within which such a right

46 Real rights and ways to protect them. review of judicial practice. *Economic justice in the Urals region*. 2017. Vol. 3 (43). p. 31-44.

47 *See*: Recommendations of the Scientific Advisory Board of the Arbitration Court of the Ural District: "Questions of applying legislation on separate types of obligations" based on the results of the meeting held on June 1-2, 2017 in Ufa. *Economic Justice in the Ural District*. 2017. No. 1. p. 7-8.

can be limited so that it would not be, in fact, emptied. Thus, under provision of Article 1 (5) (2) of the RF Civil Code, limits on transferring goods and services may be imposed in accordance with the federal law, if it is necessary to secure safety, protection of life and health of people, protection of the environment and cultural values.

Any subjective right - serving as a measure of possible (admissible) conduct – always has its own boundaries (limits) established by the law under the principles of good faith, reasonableness, justice, inadmissibility of abusing a right, moral grounds established by the law, etc.

In our view, establishing boundaries (limits) of subjects' conduct in such a way is a necessary component (feature) of the very right, its definiteness, and therefore cannot be considered as its limitation, in the meaning of violation or damage. In this context, it is worth focusing on a well-known German doctrine – "immanent limits" of basic rights.[48] When, for example, Article 10 (1) of the RF Civil Code states that rights cannot be exercised if there is an intention to cause harm to another person, or there are actions to circumvent the law with some illegal purpose, or another exercise of civil rights potentially in bad faith (abuse of a right), the exercise of civil rights with the purpose to limit competition, as well as the abuse of the dominating position in the market, then it does not mean limitation (violation) of civil rights but it is the establishment of immanently typical limits for civil rights by the legislator.

Similarly, the Law on Protection of Consumers establishes some requirements that goods (works, services) offered to consumers by subjects of entrepreneurial activities shall be complied with; it also cannot be viewed as limitation (violation) of rights and freedoms of entrepreneurs, since the establishment of such requirements comes from the constitutional principle that the exercise of rights and freedoms by some subjects shall not harm rights and freedoms of other persons.

Consequently, the establishment of these or those basic rights and boundaries (limits) of subjects' conduct is not a limitation (violation) of basic rights and freedoms of subjects. We can speak about the limitation of a right only in such cases when such a right is limited in comparison with the right established by the constitutional principles and guaranteeing the necessary measure of a person's freedom.

It is necessary to distinguish such constructions as "limitation of a right" and "encumbrance of a right". In case a right is limited, it is impaired (reduction of its volume); and this fact can naturally affect its 'quality'. In case a right is encumbered, its volume is not reduced (from this viewpoint it is not limited), however, by virtue of law or a contract the holder of such a right is imposed some obligations on in favor of another person and, as a result, it can cause some inconvenience for the right's holder. So, when land easement is established (for example, the right of passage through a patch of land), the owner of the land is not deprived of their subjective rights either

48 *See*: State Law of Germany. V. 2. /ed.-in-chief Topornin B. N. Moscow. 1994. p. 185.

completely or partially (rights to possess, use and dispose of); however, as a result, there might be some inconveniences for the owner of the land concerning the exercise (implementation) of the said rights: the owner is obliged to provide another person with a possibility of a passage through their land.

Similarly, in case of rent, the lessor as the owner of an object is not deprived of their rights (or part thereof); however, during the validity period of the rent agreement the lessor cannot exercise the right to use the object rented under the agreement.

In accordance with Article 55 (2) of the RF Constitution, when undertaking activities on regulating and protecting basic rights and freedoms of a person and citizen, the federal legislator shall not publish such laws which would overturn or impair the rights and freedoms of a person and citizen. In this connection, "it is necessary to establish the correlation of such constructions as "limitation of a right" and "impairment of a right""[49].

According to scientists in the field of constitutional law, "any limitation of a right - exercised not in accordance with constitutionally important aims to such an extent when it is not balanced and not proportionate in their correlation with the set public aim and some expected result – is the impairment of the basic right. However, not every "impairment of a right" is accompanied by its limitation, the reduction of its volume"[50]. Quite frequently, in formal legal terms, the very content of a basic right is not directly limited (in its volume), however, its existence or a possibility of its exercise depend on such conditions which, in fact, level this very right or make it difficult to exercise (implement) for a subject.

Thus, at present, the right of citizens to refuse to pay bank latent commissions repeatedly confirmed by judicial practice as well as the right to refuse to pay for some dubious services is leveled by the provisions of Article 819 of the RF Civil Code which, in fact, "have sanctioned any commissions imposed on debtors by banks and any payments concerning consumer loans provided for by the Law on the Protection of Consumer Credits (Loans)".[51]

Similarly, at present, "the right of the citizen-creditor to return their loan before the time stipulated without the consent of the lender is prescribed as an exception from the general rule provided for by the Law on the Protection of Consumer Credits (Loans) and subject to additional requirements encumbering the stated right"[52] (Article 810 (2) of the RF Civil Code), which can be classified as impairment of this right, though in formal legal terms it is not limited.

49 *See:* SEMYAKIN, Mikhail. Ibid. p. 300-305.

50 GADZHIEV, Gadis. Constitutional Principles of Market Economy (Development of Civil Law Basics in the Decisions of the Constitutional Court of the Russian Federation). Moscow. 2004. 286p.

51 VITRYANSKY, Vasiliy. Ibid. p. 3-29.

52 VITRYANSKY, Vasiliy. Ibid. p. 3-29.

Nowadays, when our society is actively developing an absolutely different - from the viewpoint of a higher quality – level of economy, and namely digital economy, it is extremely important to secure a balance (of commensurability, proportionality) of private and public rights and legitimate interests, their harmonic interaction; equally important is to secure further theoretical and methodological development of the principle of proportionality and its judicial application. In current conditions, when different spheres in the life of our society are being intensively developed, there is an increased number of situations when private rights and interests of individuals, their groups, etc. do not coincide with public rights and interests. To guarantee a harmoniously developing legal order, the state will obviously have to resort to constitutional provisions providing for certain limits and a possibility of limitation of certain basic rights of subjects in some cases.

Therefore, we need further improvement and development of judicial practice in applying the principle of proportionality and its conceptual justification. In particular, it concerns the principle of self-limitation of courts[53], when the latter based on the said model give wide discretion to legislative bodies and the government.

Certainly, courts cannot and shall not substitute the activities of legislative bodies, governments, etc. relying on the constitutional principle of division of powers. At the same time, as it seems, the court cannot and shall not take a passive position in a controversial situation either with limitation or encumbrance of a basic right, expecting a legislative body, government, etc. to normatively solve it in this or that way; and as the practice shows it will take a lot of time. In such situations, the relevant judicial instance may try a dispute rather promptly, relying on the circumstances of the case which are worthy of the attention and based on the interpretation of the current legislation and practice of applying the principle of proportionality, and elaborating the necessary provision to secure a balance of interests of the parties. Such a position of courts is fully compliant with current needs of a rapidly developing market economy and civil society.

3 Concluding Remarks

In short, the following conclusions can be made:

First. The constitutional principle of proportionality "first formed in the administrative law scope as a means of controlling actions of public authorities limiting basic rights and freedoms of citizens was later extrapolated onto the sphere of private rights and legitimate interests of subjects where it is being widely used in the Russian legislation"[54].

53 *See*: GADZHIEV, Gadis. *Protection of Basic Economic Rights and Freedoms of Entrepreneurs Abroad and in the Russian Federation*. Moscow. 1995. p. 67.

54 SEMYAKIN, Mikhail. Ibid. p. 305.

Second. The major meaning of the principle of proportionality is that the "aim of limitation of basic rights to be introduced shall be of a public and really important character, while the means and methods of its achievement shall be adequate (appropriate) to the aim to minimize the damage caused"[55].

Third. The principle of proportionality involves "quite a wide range of subjects – legislators, courts, law enforcement bodies, controlling organs and officials which are, in a way, related to the exercise of basic rights and freedoms by citizens and the guarantee of their restoration and protection"[56].

Fourth. Undoubtedly, the principle of proportionality "expands the limits of judicial discretion, since courts themselves shall interpret and apply such assessment categories as necessity, appropriateness of the chosen legal means, public interest, importance of a public aim, proportionality (commensurability), minimal damage, etc., so that the judicial decision would be based on a balance of interests of the parties and would contribute to efficient development of economic and other public relations"[57].

Fifth. Having some structural peculiarities of their analysis accounted for by cultural and historical differences of the continental – "American and European – law, the principle of proportionality in its European interpretation and the American method of weighing interests do not contradict each other in their methodological basics and represent specific legal remedies (methods) by means of which it is possible to secure a balance of private and public rights and legitimate interests in the society and its harmonious development"[58].

55 GADZHIEV, Gadis. Constitutional principles of a market economy (development of the foundations of civil law in decisions of the Constitutional Court of the Russian Federation). 2004. 286p.

56 SEMYAKIN, Mikhail. Ibid. p. 305

57 SEMYAKIN, Mikhail. Ibid. p. 305

58 SEMYAKIN, Mikhail. Ibid. p. 305

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