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The principle of proportionality in the jurisprudence of the Polish Constitutional Tribunal

by

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INTRODUCTION – TWO ASPECTS OF THE PRINCIPLE OF PROPORTIONALITY

The notion "principle of proportionality" should be understood broadly, as the fundamental concept of the democratic State governed by the rule of law according to which every activity of public authorities should remain in proportion to goals that are to be achieved. Such a rule is the element of the principle of democratic State governed by the rule of law and, on the grounds of Polish Constitution 1997[1], stems from the general rule of law clause (Article 2 of the Constitution).

One of the aspects of the discussed principle concerns the proportionality in the sphere of public authorities' activity which consists in the imposition, by the legislator, of restrictions upon the enjoyment of individual's rights and freedoms. Before adopting the currently-operative Constitution of the Republic of Poland, the aforementioned aspect of the proportionality had been construed on the basis of the general rule of law principle. Within the Constitution 1997, the constitutional legislator created the separate and autonomous basis for the discussed principle, i.e. Article 31(3) of the Constitution[2].

Hereinafter, I would like to present some cases ruled by the Constitutional Tribunal of the Republic of Poland, in which the Tribunal made use of two different aspects of the principle of proportionality, i.e. the principle of "rationality and proportionality" of the activity of public organs and – in particular – the principle of proportionality in limiting constitutional rights and freedoms.

"RATIONALITY AND PROPORTIONALITY" OF PUBLIC AUTHORITIES' ACTIVITY

In the light of the Constitutional Tribunal's jurisprudence, the principle of proportionality should be respected by public authorities in all spheres of its activity, not only the activity related with the influencing over the status of individuals.

In its judgment of 22nd September 2006 (ref. no U 4/06)[3], the Constitutional Tribunal found that the provision of the Resolution of the Sejm of the Republic of Poland (i.e. the first chamber of Polish Parliament) of 24th March 2006 appointing the Investigative Committee "to examine decisions concerning capital and ownership transformations in the banking sector, and the activities of banking supervision authorities from 4th June 1989 to 19th March 2006", which defined the scope of activity of the newly-appointed investigative commission, infringed *inter alia* the principle of "rationality and proportionality" of the activity of public authorities, as stemming from Article 2 of the Constitution (the rule of law clause).

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[1] English version of the Constitution of the Republic of Poland 1997 is published At the Constitutional Tribunal's website (*ibidem*).

[2] For instance, in the reasoning for the judgment of 6th February 2007 (ref. no P 25/06), the Constitutional Tribunal emphasized that the principle of proportionality "is not limited only to the spheres in which particular rights or freedoms are restricted in a direct manner. It should also find its application in situations where certain informative-related duties are imposed upon citizens, or other entities, for the purpose of obtaining by public authorities certain public good […]. In such situations the burden […] should remain in adequate relation with the result assumed by the legislator."

[3] Unofficial English translation of the full text is published at the Constitutional Tribunal's website: www.trybunal.gov.pl/eng (translation by Marek Łukasik).

In the opinion of the Constitutional Tribunal, the appointing of Sejm's investigative committee, which proceeds according to the rules set forth in the Criminal Procedure Code, shall be an extraordinary measure. Such conclusion stems from the very nature of investigative committees, whose functioning and scope of competence should based on Article 111(1) of the Constitution ("The Sejm may appoint an investigative committee to examine a particular matter."), being constitutionally-distinguished Sejm's commission – when compared to "regular" commissions (see Article 110(3) of the Constitution, according to which: "The Sejm shall appoint standing committees and may also appoint special committees.").

The Constitutional Tribunal found that some objectives of "banking" Investigative Commission may be attained by way of undertaking appropriate activities by the existing, standing committees of the Sejm, acting separately or collectively (in particular, the Public Finances Committee, the Economic Committee or the State Treasury Committee)[4]. The Tribunal emphasised that a comprehensive assessment of the banking system, especially based on comparative studies, is possible within ordinary competencies of the Sejm. Therefore, the inclusion of an investigative committee, being an "extraordinary" organ of the Sejm, to achieve an objective that may be achieved by other means (parliamentary standing committees), violates the principle of rationality and proportionality of public authority activities, stemming from the rule of law clause (Article 2 of the Constitution).

In the light of the aforementioned argumentation, one may notice that the Constitutional Tribunal made reference to the concept according to which the making use, by organs of public authorities, of extraordinary measures, in the situation where the assumed goals might be achieved through ordinary (regular) measures, should not take place in the democratic State governed by the rule of law.

PROPORTIONALITY IN LIMITING CONSTITUTIONAL RIGHTS AND FREEDOMS[5]

Pursuant to Article 31(3) of the Constitution 1997, "Any limitation upon the exercise of constitutional freedoms and rights may by imposed only by an Act of Parliament, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights."

According to the Constitutional Tribunal, the aforementioned provision "refers to the principle of proportionality (prohibition on excessive interference), which constitutes an inseparable element of the rule of law concept. In assessing whether the principle of proportionality (prohibition on excessive interference) has been infringed, it is necessary to answer three questions: whether the enacted legislation is capable of producing the desired effects; whether the legislation is indispensable for protecting the public interest to which it relates; whether the effects of the enacted legislation remain proportionate to the burdens imposed thereby upon a citizen"[6]. Accordingly, the permissibility for legislative limiting of constitutional rights or freedoms is conditional upon fulfilling the requirements of: indispensability, functionality and proportionality.

The analysis of the contents of Article 31(3) of the Constitution permits to indicate four

[4] The presented theses of Constitutional Tribunal referred to Article 2(2) of the challenged Sejm's Resolution, according to which the scope of Investigative Committee's activity shall include: "the examination of the shape of the banking system in Poland in comparison with other States, particularly with middle-sized and big European Union States […], the examination of the ownership structure of banks operating as joint-stock companies in Poland in comparison with middle-sized and big European Union States […]."

[5] All quotations taken from summaries of the Constitutional Tribunal judgments, published at the website of the Constitutional Tribunal (http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm).

[6] Judgment of the Constitutional Tribunal of 12th January 2000 (ref. no P 11/98).

pre-conditions for the constitutional admissibility of imposing limitations upon rights and freedoms.

Firstly, any limitations should have their basis in the explicit legal provision contained within an Act of Parliament. This is a reference to the concept of "*la matière reservée à la loi*".

In the reasoning for the judgment of 30th October 2001 (ref. no K 33/00) the Constitutional Tribunal emphasized that "The norm expressed in the first sentence of Article 31(3) of the Constitution, whereby any limitations upon the exercise of constitutional rights and freedoms may be imposed >>only by statute<<, signifies more than merely the necessity for the statute to indicate the scope of restriction on constitutional rights and freedoms and requires, furthermore, sufficient specificity whenever a statute interferes in the sphere of such rights and freedoms. […] a statutory provision which is so vague and imprecise that it causes uncertainty amongst its addressees as regards their rights and obligations, and leads organs responsible for application of that law to assume the role of legislator, must be viewed as infringing constitutional requirements." According to the Tribunal, legal provisions restricting rights and freedoms must fulfil the following criteria: "First, it must be formulated so as to allow for an unambiguous determination of the subjects whose rights and freedoms are limited and in which circumstances those limitations will apply. Second, the provision must be sufficiently precise, so as to ensure its consistent interpretation and application. Third, the provision must be drafted in such a manner that its scope of application may include only those situations which a reasonable legislator must be presumed to have intended to regulate with the relevant limitations on the exercise of constitutional rights and freedoms".

Secondly, the limitations must be justified by the need to protect one of the values enumerated in the Constitution (these are: public security, natural environment, health or public morals) or the freedoms and rights of other people.

In the Constitutional Tribunal's opinion, expressed in the reasoning for the judgment of 21st June 2005 (ref. no P 25/02), "values enumerated in Article 31(3) of the Constitution, justifying the limitation of constitutional rights and freedoms, express all aspects of public interest as a general determinant of the limits of an individual's rights and freedoms. […] In light of Article 31(3) of the Constitution it is also crucial to determine whether an infringement of the principle of proportionality has occurred, i.e. whether an appropriate relationship exists between the aim intended to be served by the challenged legal provision and the means leading to fulfilment of this aim. The discussed provision permits only such limitations as are indispensable to achieve one of the aims enumerated therein".

Thirdly, the introduced restrictions may not infringe the essence (the material core) of a given right or freedom. This means that the "limitation" of a right or freedom must not turn into "deprivation" of individuals from such a right or freedom.

In the reasoning for the judgment of the Constitutional Tribunal of 12th January 2000 (ref. no P 11/98) the Constitutional Tribunal said that "The concept of the essence of rights and freedoms […] is based on the assumption that it is possible to distinguish certain basic elements (the core) of a particular constitutional right or freedom, in the absence of which such a right or freedom would cease to exist, from other additional elements (the periphery) that the ordinary legislator may formulate or modify in various different ways without destroying the identity of the given right or freedom".

Fourthly, the introduced restrictions should be necessary from the point of view of a democratic State. That criterion was recently utilized by the Constitutional Tribunal in one of the most controversial cases that were ruled by that organ[7].

[7] See also the Constitutional Tribunal's judgment of 10th April 2002 (ref. no K 26/00). In the reasoning for this

On 30th October 2006, the Constitutional Tribunal examined the preliminary question referred by a regional court concerning the provision of the Criminal Code 1997 defining the criminal offence of "the defamation" (ref. no P 10/06). According to that provision: "§ 1. Whoever imputes to another person […] such conduct or characteristics that may discredit them in the face of public opinion or result in a loss of confidence necessary for a given position, occupation or type of activity shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year. § 2. If the perpetrator commits the act specified in § 1 through the mass media, he/she shall be subject to a fine the penalty of restriction of liberty or the penalty of deprivation of liberty for up to two years"[8].

In the opinion of the referring court, supported by numerous organizations active in the field of human rights, in the modern democratic State such values as the private life and good reputation (Article 47 of the Constitution) need not to be protected through the criminal law mechanisms. The referring court claimed that the sufficient protection may be realized within the relevant civil-legal procedures (that concerned, in particular, the system of protection of personal interests, regulated in the Civil Code). For these reasons, the referring court alleged that the penalization of the defamation limits the constitutional freedom of expression (set forth in Articles 14 and 54 of the Constitution) in a way which is not necessary in the democratic State and, therefore, it constitutes a violation of the principle of proportionality, guaranteed in the above-cited Article 31(3) of the Constitution.

The Constitutional Tribunal did not uphold the aforementioned argumentation and ruled that the challenged provisions of the Criminal Code are in conformity with the constitutional principle of proportionality, read in conjunction with the freedom of expression. Implicitly, this signified that – in the opinion of the Constitutional Tribunal – the criminal-legal protection of private life and good reputation is necessary in democracy and may not be sufficiently substituted by the civil-legal mechanisms. Three judges (of twelve) presented dissenting opinions.

First of all, it should be noted that the Constitutional Tribunal stressed the great significance of the press and the freedom of expression for democracy and for the development of democratic standards. Nonetheless, according to the Tribunal, there are no grounds which would justify attributing for these values more intensified protection than for the private life and good reputation.

Thus, the Tribunal resolved the collision between two constitutional values in favour of the private life and good reputation. In the Tribunal's opinion, such a conclusion is justified in the axiology of the Polish Constitution which underlines the close relation between the sphere of privacy and the human dignity. According to Article 30 of the Constitution "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities."

The latter argument, namely the strict link between individuals' privacy and human dignity, leads to the conclusion that the protection of privacy is in the interest of not only a person whose privacy has been violated, but also in the interest of the entire society. Hence,

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judgment the Tribunal said: "The first sentence of Article 31(3) of the Constitution emphasizes that any limitations placed on fundamental rights must be >>necessary in a democratic State<<. Thus, each restriction of an individual's rights and freedoms must, in the first analysis, be assessed from the perspective of the following question – is such a restriction necessary or, in other words, would it have been possible to achieve the same effect by other means which would be less burdensome for the citizen and which would interfere less in the sphere of the citizen's rights and freedoms?"

[8] English translation of the Polish Criminal Code 1997 is published at the website: www.era.int.

the protection of privacy and good reputation constitutes the public interest that needs to be taken into consideration in construing the system of anti-defamation protection mechanisms.

The Constitutional Tribunal transposed the aforementioned argumentation into the field of comparison of the criminal liability, which is aimed at repression, and civil liability, which is aimed – in principle – at compensation.

In the Tribunal's opinion, the constitutional requirements concerning the protection of privacy and good reputation impose on the legislator the duty to create mechanisms which would take into account not only the need to satisfy the victim of defamation (to compensate his/her harm), but also to the need to underline the social condemnation of such activities. The civil liability fulfils only first of these conditions. That is why there is a necessity – the necessity in a democratic State – to encompass the defamation with the scope of criminal law, since where a certain type of behavior is treated by the legislator as a criminal offence, it signifies that such a behavior constitutes a threat to public interest and not only to the rights and freedoms of victims.

These arguments led the Constitutional Tribunal to the conclusion that the challenged provision of the Criminal Code, penalizing the defamation of a person, does not violate the Constitution.

CONCLUSION

The above-presented brief case-study may prove that the interpretation of the principle of proportionality, which is performed by the Constitutional Tribunal in the majority of cases, in particular these related with the rights or freedoms, and its application in particular matter may lead to numerous controversies, problems and dilemmas.

Nonetheless, it should be always borne in mind that the discussed principle is one the fundamental bases for the constitutionally-defined mechanisms of functioning of public authorities, especially as regards the relation between an individual and these authorities, in a democratic State governed by the rule of law. That argument should be always taken into consideration in the process of constitutional review.