Constitutional Meaning of the Proportionality Principle in the Face of the "Surveillance State"*

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1. Constitutional Control over Governmental Power in Crisis?

At the end of the Cold War, many hoped that the idea of fundamental freedom would celebrate its final victory over many kinds of suppression. Although this was less than twenty years ago, the situation has totally changed.

One factor is legal responses to "September 11th, 2001" in several countries. To mention the most famous example, the USA PATRIOT Act of 2001, which was partly extended and partly made permanent in March 2006, expanded governmental authority with regard to secret searches and surveillance in terrorism probes. Some of the measures introduced by this Act incurred public criticism concerning their constitutionality. For example, Section 218 of the PATRIOT Act empowers the FISA court to issue an order for electronic eavesdropping where a significant purpose is the collection of foreign intelligence information[1]. In the framework of anti-terrorism legislation, citizen's rights to privacy and freedom are increasingly limited.

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[1] This is to revise 50 U.S.C. § 1804 (a) (7) (B) and § 1823 (a) (7) (B).

However, it was long before "September 11th" when the constitutional system change for more limitation to personal freedom was considered to be needed. As early as 1973, the U.S. Supreme Court declared that the Fourth Amendment of the Constitution set other standards for governmental activities in the area of foreign intelligence security than for those for criminal prevention[2].

To add one more similar example, the German Basic Law (Constitution) was revised in 1998 in order to make acoustical surveillance of private houses possible, also some years before the major terrorism attack. In this case, the need for acoustic surveillance of private houses was considered so important in the fight against organized crimes as to justify the formal revision of the constitution itself. Afterwards, the Federal Constitutional Court approved this constitutional revision as one not violating the universal core of the Basic Law[3]. Also in Germany, more and more emphasis is put on the security of citizens, at the cost of privacy and personal freedom.

Such tendencies are also to be found in Japan in various forms. In this country, the main concern lies not in the rapid development of anti-terrorism legislation. To be sure, several new law empowered investigative authorities with a wide range of surveillance and eavesdropping rights in the last years[4], but measures are well controlled through intervention of the judiciary. Somewhat more troublesome is the newly developed practice of video-surveillance on the street, in the face of which the theories of privacy and personal freedom seem to fail. The biggest problem in Japan in this respect is the movement toward a total revision of the Constitution, however. As is well known also among foreign observers, the argument for the revision is aimed at changing the war-renouncing Article 9 to make it possible for Japan to use force overseas, but this is not the only purpose. Rather, those advocating the constitutional revision maintain the need to change the system of fundamental rights as a whole, in order to subject

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2 *United States v. U.S. District Court*, 407 U.S. 297 (1973) at 322. This judgment confined the scope of the Court's holdings in *Katz v. United States*, 389 U.S. 347 (1965) and later cases.

3 Decision on 3rd March 2004, BVerfGE 109, 273.

4 The most important statute is the Communication Eavesdropping Act of 1999.

individual freedom (including freedom of expression) under the national interest (as acknowledged by the government and national leaders). Here, the constitutional limitation of the governmental power is altogether at stake.

One common factor to those global tendencies is the inflation of the idea of security and general devaluation of privacy and personal freedom. In the face of this general trend, questions arise: Can the idea of personal freedom be treated as something left to the discretion of political majority? Or are there any elements which root so deeply in the core of the constitutionalism that they should be guaranteed so long as a Constitution is in validity?

In the following, I would address the principle of proportionality as hypothetical core element of the constitutionalism. This principle aims in its original intention at guaranteeing citizen's rights through securing minimum standard of means-ends relationship for the state's activities. In the constitutional history, the principle of proportionality has experienced rise and fall, and its position in the constitutional system is still not very clear; some argue that the principle of proportionality already ended its historical function in the face of recent constitutional development. Nevertheless, the significance of proportionality principle for sound governance has not been exhausted yet and worth analyzing further, especially since the value of the idea of personal freedom is recently put into question.

2. Constitutional Function of the Proportionality Principle

It was not very long ago as the proportionality principle acquired any constitutional meaning. Traditionally, it was solely a principle in administrative law, especially in German police law. Guaranteed in the form of police proportionality, it confined the exercise of police intervention to the extent that was necessary for achieving some statutory defined overriding goals. Aimed at safeguarding citizens' rights from administrative injuries, it constituted an element of overwhelming principle of the liberal state (*der liberale, bürgerliche Rechtsstaat*). "The state's power is principally limited, while rights of the individuals are principally unlimited", as it was formu-

lated in a famous theory of the liberal state[5].

It was a contribution of the German Federal Constitutional Court to develop an embracing constitutional standard from this principle of administrative law. Already in a judgment on 11th June 1958, the Constitutional Court applied the proportionality principle, requiring the legislator to use only such prerequisites for the purpose of business regulations that were proportional to the goal pursued[6]. This judgment invited an intense discussion about whether the judiciary was justified to set such a fact-related criterion. Some argued that the constitutional usage of the proportionality principle would lead to the dictatorship of the judiciary inevitably[7]. Nevertheless, the proportionality principle found a solid foundation in later German case law, as it represented a suitable doctrine to prevent an uncontrolled supremacy of the legislator.

To analyze the German situation from an idealistic point of view, constitutional use of the proportionality principle is located at the meeting point of two different constitutional theories[8]. This principle can be explained in terms of the liberal state, as safeguarding the border between the territory of the individuals and the public domain regulated by the state. This explanation was principally rejected by those who criticized the "territory oriented way of thinking" that was inherent in theories of legal positivism[9]. But the rejection does not go so far as to overthrow the proportionality principle altogether, because it can be explained as a method to accommodate competing interest within the system of constitution: a method to produce a "practical concordance"[10].

In this theoretical constellation, the proportionality principle has been

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5 Carl Schmitt, *Verfassungslehre*, Berlin 1928, S. 126 f. Schmitt called this underlying principle "distribution principle".

6 BVerfGE 7, 377, referred to as "*Apothekenurteil*".

7 Ernst Forsthoff, *Der Staat der Industriegesellschaft*, München 1971, S. 140 f. It is interesting to note that the criticism against the constitutional use of the proportionality principle arose from those who committed to the basic structure of the liberal state and not in the first instance from those who valued the distribution principle as already overcome in the contemporary social state.

8 See Hiroshi Nishihara, *Das Recht auf geschlechtsneutrale Behandlung*, Berlin 2002, S. 256.

9 Rudolf Smend, *Verfassung und Verfassungsrechts*, Berlin 1928.

developed to a general framework of judicial scrutiny. It contains now a three layered test: Are the regulatory means adequate for the objective to be achieved?(adequacy); are the means necessary to achieve the objective?(necessity); and finally, are the disadvantages created by the means in proportion with the advantages achieved by the regulations?(proportionality in a narrow sense)[11]. Compared to the American two tiered system, the proportionality principle has the merits and demerits that the necessity of a certain intrusion in a citizen's right can be evaluated in strength according to the importance of the right curtailed; it avoids an automatic application of previously fixed examination.

As a country accepted German constitutional system at the beginning of her modernization, Japan is also under influence of the proportionality principle. Although applied in a great deference to the judgment of the legislator, Japanese courts has required since the 1960's, at least formally, the legislative intrusion in citizen's rights to be at minimum[12].

The last step of the development of proportionality principle was brought by European courts. Especially the case law of the Court of Justice of the European Communities broadened the application area of the proportionality principle. Since the judgment in the *Johnston* case on 15th May 1986[13], the European Court of Justice has consequently applied the proportionality test in order to decide whether unequal treatments of men and women are to be justified as the necessary means to achieve an overriding objective. It was in its origin contrary to the German theory which found the proportionality test only applicable to the limitation of freedom and out of place in equality cases[14]. The European Court of Justice overcame this limitation by developing a new doctrine of equality

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[10] Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th edition, München 1995, S. 28, 142.

[11] See Klaus Stern, *Der Staatsrecht der Bundesrepublik Deutschland*, Bd. III/2, München 1994, S. 761 ff.; Bodo Pieroth / Bernhard Schlink, *Staatsrecht 2. Grundrecht*, 22nd ed., Heidelberg 2006, S. 66.

[12] For example, right to smoke may also limited "only if the regulation can be evaluated as necessary and reasonable". Judgment of the Japanese Supreme Court on 16th September 1970.

[13] Case 222/84 "*Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*",[1986]ECR 1651.

[14] See the structural analysis by Stephan Huster, *Rechte und Ziele*, Berlin 1993.

rights. In the framework of anti-discrimination legislation on the European level, the Court of Justice understands gender equality as guaranteeing a subjective right not to be discriminated against; an unequal treatment is, then, considered to be a *prima facie* violation of this individual right, which then is examined in its justification by applying the proportionality principle[15]. In the 1990's, German case law had to adapt to this European framework in developing a new criterion of "necessity in solving problems particular for one sex"[16] [17].

3. Limit of the proportionality principle in the era of "surveillance state"?

Although the proportionality principle reached its peak of development at the end of the 20th Century, it is being confronted with new structural problems nowadays. Functions of the proportionality principle depends upon how clearly the objective of a certain state activity is defined. This definition is becoming somewhat more difficult as new phenomena of "surveillance state" emerge. The state tries to undertake the responsibility for the safety of everyday life of its citizens, not in the sense of "social security", but in terms of safety from crimes and misconduct of fellow citizens.

In the area of criminal prevention, objectives was clear as long as the state was expected to react to violated rights and to a certain level of danger. Yet people's growing awareness of safety compelled the government to intervene in citizens' activities on an earlier stage than was considered necessary for *ex post facto* punishment. Precaution principle (*Vorsorgeprinzip*, as is called in German), preventive measures on an earlier stage, and continuous surveillance are keywords often used in the latest development in government practice.

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[15] Nishihara, *supra* (note 8), p. 96; Hiroshi Nishihara, Two Models of Equality, 19 *Waseda Bulletin of Comparative Law* (2001), p. 1.

[16] BVerfGE 85, 191; 92, 91.

[17] Whether the doctrine of the European Court of Justice can be maintained in the traditional course also after the Directive 76/207/EEC was revised by Directive 2002/73/EC, which introduced explicitly the compatibility test, is a highly interesting question, but belongs outside the purpose of this paper.

It is considered not enough for a state to take countermeasures to crimes and other violations of public safety. The awareness that prevails today would be: it is too late if something did happen. People require more and more preventive measures. In the application of the prevention principle, the exercise of governmental power is placed earlier.

Behind this process, the concept of security has changed its meaning. In the past, security meant a situation in which no danger existed; in this case, what counted as danger could be defined clearly by legislation. In other words, security has always had some substances in a traditional way of thinking: The main issue had been how to react to a breach of peace and order. In this context, proportionality could operate in estimating the proposed measure in terms of its particular and general preventive effects.

On the contrary, security means today an ideal which one could only dream of, but never realizes. According to the change of the concept of security, the objective of governmental intervention also shifted. Now it is the sense of security on the side of citizens that the government should care about. What is important is not the security itself, but the fact that the government does something for management of the risks perceived by people.

In this situation, the proportionality principle clearly fails. As criterion concerning the rational means-end relationship, the proportionality principle only functions in a situation where some clear merit is achieved, against which the importance of costs is to be calculated. If the subjective sense of security is at issue, every governmental measure can contribute to emotional satisfaction to some extent, regardless of whether it leads to risk reduction. What counts in the broken-window theory is the presence of policemen and is not how eagerly they work. In short, the proportionality principle fails where every measure is emotionally meaningful[18].

One typical difficulty is to be observed in the discussion about the proper extent of video-camera surveillance. If an advocator says cameras reduce the number of crimes within its sight, it is difficult to deny the argument; the intuitive expectation that crimes are only displaced to outside the camera sight is never demonstrative. If the installation of surveil-

[18] See Matthias Kötter, Subjektive Sicherheit, Autonomie und Kontrolle, *Der Staat* 43 (2004), S. 371 ff.

lance system is justified on the assertion that one feels safer if one knows people around him/her are observed by the police watching the display of the surveillance camera, we can hardly deny the validity of this assertion. It is no longer the effects of surveillance system in preventing crimes and its side effects which are at stake. On the other hand, the competing rights lose also clear-cut contents if put in such context where emotion and feeling count as the good reason. The privacy interest put forward by those arguing against camera surveillance seems only to have some emotional anxiety in the misuse of information collected. So, after all, the discussion amounts to balance different types of anxiety. The proportionality principle seems to have no role to play in this constellation. Is it really so?

It is by no means a marginal problem, since this development affects the very core of personal freedom: freedom of thought and conscience. Somewhat more serious in this sense is the situation in education. The emphasis on the subjective sense of security also affects the view about what children should learn in the school. The ultimate goal of surveillance is often formulated in pedagogical terms: surveillance definitely contributes in the long-run to the enhancement of security, because it leads people to internalize common values and ways of thinking that never conflict with the security[19]. Formation of one's conscience in the majority's sense is the final step of the surveillance state.

In Japan, the Fundamental Act of Education is revised in December 2006 so as to approve patriotic indoctrination in public schools, with the explanation that it serves to strengthen the moral education of younger generation. Under the old Fundamental Law, education within the country was aimed at helping individual children to build character by limiting government intervention in the curriculum as much as possible. Now, the revised law has restored central government control over education and has advocated many spiritual concepts as patriotism, public awareness, respect of tradition, and other moral convictions as educational targets. This can also be characterized as earlier located governmental intervention in order to ensure security.

Also in the realm of education, governmental control over the curricu-

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[19] See the concept of "discipline" by Michel Foucault, *Surveiller et punir*, Paris 1975.

lum may contribute to realization of a peaceful security. Again, it seems difficult to reject moral education in public schools on the argument that governmental intervention should be confined to the extent that is necessary to achieve some overriding goals. Education itself represents an important goal.

The surveillance state tends to expand itself until it targets every portion of personal conscience of its citizens. Is it necessary? As long as someone feels safer, the answer is "yes". But, is it really so?

4. Potential of the Proportionality Principle beyond the Difficulties

In reality, the meaning of the proportionality principle has not been exhausted yet. On the contrary, it is only solution to avoid tyranny of security.

The last mentioned example of school education illustrates how the governmental intervention into the sphere of personal autonomy can be disguised. The first point is to identify the governmental intervention as such. In the view of cultural minorities, moral instruction in the sense of the majority's moral conviction is simply an intrusion which ignores the value of individual personality. Also children have the right to cultivate their own personality and individuality. With this in mind, the proportionality principle does function here. Not the necessity of the overall curricula, but the necessity of the individual content of the curricula for student disobeying educational discipline is to be estimated by applying the proportionality principle[20].

Similarly, the failure of the proportionality principle in the face of the surveillance state is the only seeming problem. It is always worth remembering that constitutional rights are not useful for the member of the majority and are guaranteed ultimately for the sake of the minority. If we forget this fundamental insight, we apt to run the risk of stressing to much the state's duty to protect fundamental rights in the horizontal relationship[21] and then, we disregard the importance of securing the rights of

[20] Hiroshi Nishihara, Gewissensfreiheit in der Schule, *Der Staat* 32(1993), S. 569.

minorities not to be intruded into the sphere of their personal autonomy.

5. Conclusion

Basically, I am strongly convinced of the potential of the proportional principle. The main reason underlying this presumption is its methodological clarity: In using it, you can avoid the confusion of value-judgment and empirical prognosis, which often occurs in simple balancing.

This expectation, however, is not connected with optimism about the future of the proportionality principle. On the contrary, I am concerned about the latest development which can nullify the effect of the proportionality principle: the development of the "surveillance state".

The potential of the proportionality principle rises and falls with the clarity in defining the state's objective. If emotions are used as the justification of the state's intervention, it becomes impossible to deny its necessity. You can prove that surveillance cameras are inefficient in preventing crimes, but you cannot deny the fact that someone might feel safer under the surveillance by cameras. Everything becomes necessary.

How can we deal with this problem? Balancing does not help us here, because the relative weight of security depends very much on the majority's sense of their safety. Again, only the proportionality principle can help us. Our chance to avoid total surveillance rests upon the possibility to combine the second and third strands of the proportionality principle. Removal of people's anxiety is not a state's objective of paramount importance. It will not be easy to persuade every legal expert, but I think this is the only way for the freedom to survive.

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[21] See Johannes Dietlein, *Die Lehre von den grundrechtlichen Schutzpflichten*, Berlin 1992.