

Challenges to the Proportionality Principle in the Face of “Precaution State” and the Future of Judicial Review*

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I. Challenges to the Proportionality Principle: an Introduction

Although the proportionality principle finds acceptance in many constitutional systems, the growth in its meaning for judicial review is followed by some scepticism about its effectiveness and adequacy¹. The application of the proportionality principle in constitutional review is sometimes criticized to be far too relative to guarantee inalienable fundamental rights in cases in which these rights come in conflict with the overwhelming security interests of the community. According to its critics, the proportionality test tends to be ineffective because the “necessity” in preventing potential future terrorist attacks, for example, can justify practically every governmental impingement on individual freedom.

To be sure, much of the problems relate mainly to proper usage of the proportionality test and not the adequacy of the proportionality principle *per se*. The adoption of the proportionality principle as constructive concept for judicial review does not automatically settle all the problems concerning how to apply the proportionality test to various cases.

Nevertheless, there arise also problems relating to the intrinsic suitability of the proportionality principle in the constitutional enquiry under the contemporary settings. This concern is of special significance in the face of emerging “precaution state”. In the contemporary risk society, it is said to be important to prevent the risk in advance, instead of reacting to the danger in the traditional way. People sometimes call for abandoning the traditionally fundamental principle *in dubio pro reo* if it seems to impede the government from taking measures allegedly necessary to prevent an eventual future attack on an earlier stage². In its origin, the pro-

¹ To one aspect of the difficulties for the application of the proportionality principle under the contemporary circumstances (although not sharing the skeptical view about the proportionality principle), see my contribution to the 7th World Congress of IACL in Athens in 2007, published as Hiroshi Nishihara, *Constitutional Meanings of the Proportionality Principle in the Face of the “Surveillance State”*, 26 WASEDA BULLETIN OF COMPARATIVE LAW 3 (2008).

² Cass Sunstein, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE*, Cambridge (Cambridge University Press) 2005, pp. 13-106; Stefan Huster / Karsten Rudolph, *Vom Rechtsstaat zum Praeventionsstaat?*, in dies. (Hrsg.), *VOM RECHTSSTAAT ZUM PRÄVENTIONSSTAAT?*, Frankfurt (surkamp) 2008, S. 9. ff.;

portionality principle is mounted into a system of the *Rechtsstaat* in which the human liberty is deemed to be general rule, its restriction by governmental power, on the other hand, to be an exception³. Exactly this presupposition is in question in the settings of “precaution state”.

It was in 1931 when Carl Schmitt lamented over fundamental rights losing their constitutional bite (*leerlaufend*)⁴. This was due to the identification of fundamental rights with the principle of “administration according to the Congressional Act: *Gesetzmäßigkeit der Verwaltung*”, which the contemporary constitutionalism has overcome by introducing and activating intensive judicial review of legislation. The general acceptance of the proportionality principle as structural foundation should have accomplished this development. But in reality, constitutional review by the judiciary on the basis of fundamental rights in general, and the application of the proportionality principle within judicial review in particular, seems again to lose its bite in the face of “precaution state”.

In the followings, I first wrap up briefly the theoretical discussion in Japan as to whether to accept the proportionality principle as fundamental architecture of judicial review (II). It is rather theoretical in its nature, but still has practical meaning in that the issue is presented how to handle with new legislative tendency putting more emphasis on the value of “security”. In analyzing the Japanese discussion, it shall be observed that there are several patterns of understanding the proportionality principle.

I then go on to classify these patterns alongside two fundamental models of the proportionality principle (III), namely value-judgment model and effect-assessment model. While the proportionality in the narrow sense represents the central criterion within the proportionality test in the framework of the former, the second strand, necessity for achieving leg-

Erhard Denninger, *Prävention und Freiheit*, in: Huster/Rudolph (Hrsg.), *VOM RECHTSSTAAT ZUM PRÄVENTIONSSTAAT?*, Frankfurt (surkamp) 2008, S. 85 ff.; Matthias Koetter, *Subjektive Sicherheit, Autonomie und Kontrolle*, *DER STAAT* 43 (2004), S. 371 ff.

³ The most elaborate explanation of the liberal *Rechtsstaat* can be found in the theory of the “distribution principle: *Verteilungsprinzip*” by Schmitt. Carl Schmitt, *VERFASSUNGSLEHRE*, Berlin (Duncker & Humblot) 1928, S. 126.

⁴ Carl Schmitt, *Freiheitsrechte und institutionelle Garantie der Reichsverfassung* (1931), in: ders., *VERFASSUNGSRECHTLICHE AUFSÄTZE*, 2. Aufl., Berlin (Duncker & Humblot) 1958, S. 141, following the expression by Richard Thoma.

islative goal, is treated to be cardinal in the framework of the latter. The German Federal Constitutional Court (*BVerfG*) tends to adopt the first understanding, whereas the Court of Justice of the European Union handles the proportionality principle in the second way. Applied in the context of “precaution state”, both models have their merit and weakness, which shall be weighed against each other.

It shall be further asked whether some alternative framework can effectively substitute the proportionality principle altogether (IV). Candidates are absolute constitutional rules which allegedly exclude every moment of balancing. It shall be especially examined whether these absolute rules can really avoid the risk of losing their bite also in the face of “precaution state”.

In any event, the rise and fall of fundamental rights depends upon whether we can find suitable method to distinguish justifiable legislative restriction into fundamental rights from impermissible ones. The following analysis aims at presenting some aspects of the proportionality principle eventually useful for such distinction.

II. The Proportionality Test as Ways for Ensuring Suitable Legislative Value-Judgment?: Japanese Discussion and Question about Comparability of the Proportionality Test with Sliding Scale Model

In Japan, a group of younger theorists propound the idea that introduction of a comprehensive system of the proportionality test shall put the praxis of judicial review on better-founded doctrines⁵. This new trend tries to substitute the rigid three-tiered approach in American style (strict scrutiny, scrutiny in intermediate level and rationality standard) with the proportionality principle. The tiered approach has been well established in the Japanese constitutional theory since 1970s, but scarcely accepted by the judicial praxis, so that the theory has been losing touch with the prax-

⁵ Especially, Go Koyama, “KENPOJYO NO KENRI” NO SAHO, Tokyo (Shogakusha) 2009; Kazuhiko Matsumoto, KIHONKEN-HOSHO NO KENPO-RIRON, Osaka (Osaka University Press) 2001.

is.

In spite of adhering to preferred position of free speech that the tiered approach would require, the Japanese Supreme Court exercises a special type of proportionality principle⁶. Since mid 1950s, the Court has required restrictions to freedom of speech and some other rights be “necessary and reasonable” to achieve some goals demanded by public welfare⁷. How rigidly the necessity is recognized has swung a little from time to time: one of the impressive periods was from 1966 to 1973, in which statutory restrictions to the right of public employee to strike was only applied where the damages to public life were proved to be really enormous⁸; however, the tactics of the Court of the day not to strike down the statutory restrictions altogether, but only limit its application, had its wanes when new justices, appointed by the government with some political intention, departed from the precedents and widened their application area again⁹.

Nevertheless, it is one thing for the Court to allow a wide discretion to the legislator to define allegedly “necessary and reasonable” measures, and another to require legislative measures to be “necessary and reason-

⁶ Fundamental rights of individuals are guaranteed practically for the first time by the Japanese Constitution of 1948, the present one. The first Japanese written constitution, the Constitution of the Great Japanese Empire of 1889, proclaimed only formally some rights of subjects, but put them under wide discretion of the legislator so that those rights could be and were arbitrarily restricted by legislation. Article 13 of the Japanese Constitution put an end to such uncertainty, which reads: “All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.” In the first era, however, the Japanese Supreme Court remains highly deferential and accepted every statutory restriction on fundamental rights as covered by “public welfare”. In 1960s, with some *avant-couriers* since mid 1950s, it started to elaborate its reasoning, without abandoning its highly deferential standpoint. Only 7 provisions of Congressional statutes in 8 cases have been struck down to date.

⁷ Japanese Supreme Court, Judgment on 30th March 1955 (concerning restriction on publication by candidates during an election campaign).

⁸ Japanese Supreme Court, Judgment on 26th October 1966 (Post Worker Union case) and Judgement on 2nd April 1969 (Tokyo Teachers’ Union case).

⁹ Japanese Supreme Court, Judgment on 25th April 1973 (All Forest Officer Union case).

able". In few cases where statutes were struck down, the Court put many things in consideration — such as nature of rights restricted, degree of the violation of rights, purpose of the restriction, and empirical impact of the governmental intervention — and heightened the rigidity of the scrutiny¹⁰. The recent movement calling for systematic introduction of the proportionality principle looks a catalyst in the Court's requirement of "necessity" and tries to materialize it in the sense of proportionality test practiced in European countries.

This proposal is criticised by commentators advocating the traditional framework, on the ground that the comprehensive introduction of the proportionality test would only end up with establishment of an uncertain "sliding scale", justifying all the deferences that the Court shows toward legislator. This criticism, however, presupposes a peculiar understanding of the proportionality principle.

Also the statement that the sliding scale approach leads inevitably to all too deferential judicial control may well be doubted. For, on the one hand, Justice Th. Marshall, the "most elaborate"¹¹ advocate of the sliding scale model, intended by no means to make judicial review ineffective, but rather to recognize that "[the U.S. Supreme Court] has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the

¹⁰ Especially in the Supreme Court's judgment in Japanese drug store case on 30th April 1975. Certain similarity in its argument to the German drug store case (*Apothekenurteil*, BVerfGE 7, 377, on 11th June 1958) can easily be identified — though no mention was made to the German three-tiered test applied to restrictions on freedom of occupation. The Supreme Court applied the necessity test in relatively strict way and explained that this approach is valid to cases where freedom of opening new shops are restricted for the security purpose (in this case: avoidance of low-quality medicine), i.e. other purpose than socially motivated protection of the vulnerable.

¹¹ This evaluation is expressed by Gerald Gunther, *CASES AND MATERIALS IN CONSTITUTIONAL LAW*, 11th edition, New York (Foundation press) 1985, pp. 589-590. The characterization "sliding scale approach" owes its popularity also to Gunther.

basis upon which the particular classification is drawn”¹². The main aim of this model is to activate review where rationality test would otherwise be applied.

But it is also true, on the other hand, that the sliding scale model, if put on the Japanese settings, tends to lose its bite. As is shown in the citation above, Marshall’s model questions whether the *prima facie* discrimination is justifiable. In asking this question, the sliding scale approach mixes up value-judgment and empirical investigation: the more important the governmental objectives are, the less intensively the means-end relationship is judicially controlled. But judgment about importance of some governmental goals is a factor especially susceptible to popular opinion. That means: if public hysteria dominates the discussion, hardly any substantial judicial control is to be expected. In this respect, concerns about sliding scale model expressed in the Japanese discussion are not entirely without reason.

This difficulty is one of the main sources of ineffectiveness the proportionality test may fall into. Emotional factors in the population, such as vague fear of terrorist attacks or crimes, affect increasingly political debate. At this point, the paradox of security feeling comes in effect: people feel sometimes insecure without having some objectively identifiable danger (“my daughter may be killed by some pedophile”) and call for protective measures (e.g. prohibition of animation and comics describing sexual activity of/with minors¹³); governmental measures are often

¹² *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) at 98-99 (Marshall J. concurring).

¹³ Besides the traditional prohibition of publicating and distributing “lubricious” materials at large by penal law, production of child pornography (photo and movies) was prohibited in 1999 in Japan on the ground of harmful impacts to the children participating in the production. Now, some local governments (especially in Tokyo) propose new legislation prohibiting production of animation, comics and drawings describing sexual activity of/with minors. Such measures can be justified neither through harmful impact on real children nor by mentioning its effect in decreasing crime, and therefore put in relationship with “healthy moral environment” or something like that. While such legislative purpose was not considered to be legitimate under traditional way of thinking, it is sometimes considered to be legitimate in the new tendency of “precaution state”. About the tendency that concerns about security readily justify educational measure indoctrinating children and sometimes also relating

proven to be ineffective in such cases, exactly because there is no real danger to tackle, but this ineffectiveness (e.g. one more reported case of child murder) leads to public demand of more severe protective measures. In the traditional system, legislative purposes only emotionally sustained by the public, without having any objective foundation, are excluded in the process of constitutional balancing. On the contrary, such emotional factors come readily into consideration nowadays¹⁴. However, if such subjective and emotional moments in the population count as “values” to be weighed against these of fundamental rights, there is no controlling reasonably the process of balancing in the form of proportionality test¹⁵.

III. Two Models of the Proportionality Principle and the Primacy of the Effect-Assessment Model in the Face of “Precaution State”

The observation that the proportionality principle as well as sliding scale approach faces difficulties described above assumes certain understanding about structure of the proportionality principle — that those two approaches are even comparable. However, this assumption, its founda-

adults in democratically identified “sound” morality, see Koetter, *supra* note 2, S. 396 f. To the revision of the Japanese Fundamental Act of Education in 2006 supposedly in this context, requiring schools to conduct in more patriotic education see Nishihara, *supra* note 1, p. 8.

¹⁴ Koetter, *supra* note 2, S. 341 ff. proposing the concept of “subjective security”.

¹⁵ In the Japanese context, the statutory prohibition of political activities for the public employee is often applied very rigidly, which causes severe criticism from constitutional theory. It is interesting to observe here that the Supreme Court judgments upholding such prohibition rest on some emotional justification: Not the neutrality of the public service as such, but popular confidence in this neutrality is recognized to be legislative objective which, in its turn, demand the prohibition in question as necessary means. Supreme Court, Judgment on 6th November 1974 (Sarufutsu post-officer case). Or, to mention a more recent case in another context, the feeling of living in a well-ordered housing complex is found to be important enough to justify the penalization of those outsiders as committing trespass who were on the open staircase of that housing complex in order to put some political leaflets (criticizing Japanese military assistance to Iraq-War in 2003) in every post-box at the door of each apartment. Supreme Court, Judgment on 11th April 2008.

tion and appropriate scope, may be questioned here.

This assumption corresponds also to the standard understanding of the proportionality principle in the United States. Alec Sweet characterizes the proportionality approach as “a unified framework of analysis that allows the court to tailor the stringency of review to the particulars of each claim” and observes “something similar” in Justice Marshall’s model¹⁶. In this understanding, the proportionality principle represents, at least partly, a framework of balancing between two competing values.

To be sure, this understanding finds its parallel in German constitutional theory, where the proportionality principle originally comes from. The proportionality was, in its origin, a fundamental principle in German police-force law, confining the discretion of the executing officer on-site: the police activities violative of citizen’s rights are permissible only insofar as the violation is in proportion to interest protected by the activities¹⁷. This idea is now applied in the constitutional context. One possible way to figure out its core may be to require the values protected at the expense of fundamental rights be at least as important as these rights. This is a question about value-judgment.

In the real theoretical development in Germany, the constitutional principle of proportionality has taken somewhat elaborated form. By the mainstream German theory, this principle is combined with the fundamental principle of the “constitutional integrity: *Einheit der Verfassung*” and understood to be a method to adjust two competing values both of which have constitutional significance. Application of the proportionality principle is, according to this understanding, a way to find a solution in which both conflicting constitutional values come into effect at most (“creation of practical concordance: *Herstellung der praktischen Konkordanz*”) ¹⁸. The third step of the proportionality test — proportionality-

¹⁶ Alec Sweet/Jud Mathews, ALL THINGS IN PROPORTION? AMERICAN RIGHTS DOCTRINE AND THE PROBLEM OF BALANCING, Yale Law School Faculty Scholarship Series (2010) at pp. 70-71, available at http://digitalcommons.law.yale.edu/fss_papers/30/ (visited on 15th October 2010).

¹⁷ Otto Mayer, DEUTSCHES VERWALTUNGSRECHT, BD. 1, Berlin (Duncker & Humblot) 1928, S. 223.

¹⁸ Konrad Hesse, GRUNDZÜE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, 20. Aufl., Heidelberg (C.F.Müller) 1995, S. 28.

ty in the narrower sense in the meaning that the benefit of measures in achieving some legislative goals is weighed against costs envisaged on the part of fundamental rights — is considered to be the central part. For the mainstream German theory, the proportionality principle is, in its core, a method of value-oriented balancing. This understanding shall be called “value-judgment model”.

However, if the use of the proportionality principle is understood to be process of value-oriented balancing, there arise several problems. One is already observed in relation to the sliding scale model: if value-judgment and effect-assessment are all mixed up, then a peculiar situation can even occur that purpose justifies selection of every possible means. This problem leads to the second one. According to this model, the whole process of balancing is summed up as value-comparison. Then all questions are reduced to issues concerning value-judgment. But if the question whether the legislator made suitable value-judgment in enacting a law is at stake, it is difficult for courts to substitute the congressional value-judgment by their own, especially in case there is popular support to the congressional decision.

However popular this model may be in the German constitutional theory and praxis, it is worth noting that there are also alternative model of the proportionality principle. This alternative model is put forward by those German constitutional scholars who are rather critical to empower (constitutional) courts to make arbitrary value-judgment¹⁹. Fundamental value-judgment in the legal system is, according to the critical theory, not the court’s business, but an important political task that the parliament should shoulder. Then, it is worth remembering that the original proportionality principle in the traditional police-force law functioned on the ground that fundamental value-judgment is already made on the legislative level in conditioning the administrative discretion²⁰. Also in constitutional context, the proportionality principle may not be handled as if the constitutional court were free to make every possible value-judgment.

¹⁹ Bodo Pieroth / Bernhard Schlink, *GRUNDRECHTE: STAATSRECHT II*, 25. Aufl., Heidelberg (C.F.Müller) 2009, pp. 68-73. See also Bernhard Schlink, *ABWÄGUNG IM VERFASSUNGSRECHT*, Berlin (Duncker & Humblot) 1976.

²⁰ Ernst-Wolfgang Böckenförde, *Grundrechte als Grundsatznorm*, *DER STAAT* 29 (1990), p. 20.

The third step of the proportionality test plays only marginal role, while the first and the second step — where “suitability” of the proposed governmental measure in fulfilling some legislative purpose and its “necessity” is questioned — are considered to be fundamental. This model shall be called “effect-assessment model”.

In looking for some practical example which actualizes the alternative model, the praxis of the Court of Justice of the European Union (ECJ) attracts attention. Especially in enforcing the prohibition of gender discrimination provided in Treaty and Equal Treatment Directives, ECJ has applied the proportionality principle in a way in which the factor of balancing is almost excluded. It asks in most cases whether departure from the equal treatment principle is justified as necessary means to achieve goals expressly enumerated in Directives²¹. The proportionality test is, in this context, applied rigidly as method to ask whether proper means-end relationship can be identified. Later, when the proportionality test is also used in cases concerning indirect discrimination, the ECJ can no longer rely on statutory enumeration of legitimate objectives, but still tries to avoid engaging in value-judgment as far as possible²².

It is important to note that the proportionality test applied in this man-

²¹ The leading cases are Case 222/84 “*Johnston*”, [1986] ECR 1651 para. 36-40; Case 318/86 “*Commission v. France*”, [1988] ECR 3559 para. 12. Since then, provisions authorizing exceptions has always been “narrowly interpreted” because of their exceptional character: Case C-450/93 “*Kalanke*”, [1995] ECR I-3051 paras. 20 ff. To the ECJ model of the proportionality principle Hiroshi Nishihara, *DAS RECHT AUF GESCHLECHTSNEUTRALE BEHANDLUNG NACH DEM EGV UND GG*, Berlin (Duncker & Humblot) 2002, pp. 109-131; Hiroshi Nishihara, *Two Models of Equality; Frameworks to Define the Appropriate Extent of Affirmative Action for Women*, 19 WASEDA BULLETIN OF COMPARATIVE LAW 1 (2001) = revised version of paper presented at 5th World Congress of IACL in Rotterdam in 1999.

²² Here, the ECJ asks whether indirect discrimination can be justified in terms of “aim unrelated to any discrimination based on sex”. Case 170/84 “*Bilka-Kaufhaus*”, [1986] ECR 1607 para 30; Case C-33/89 “*Kowalska*”, [1990] ECR I-2591 para. 12; Case C-167/97 “*Seymour-Smith*”, [1999] ECR I-623 para. 76. Also in this context, the necessity to achieve such aim is strictly scrutinized. To the statement that the proportionality principle is out of place in such constellation where violation of *prima facie* rights is justified not in relation to some “external” objective, but on the intrinsic nature of the subject treated differently, see Stefan Huster, *RECHTE UND ZIELE*, Berlin (Duncker & Humblot) 1993, pp. 164 ff.; Nishihara, *supra* note 21, pp. 160-161.

ner relates only to factual relationship between proposed governmental measure and objectives put forward to justify the measure. Courts are reviewing only empirical statement the government presents, and not engaging in value-judgment. Of course, the empirical statements at issue here have not always clear truth-value: They are often prediction and prognosis which are uncertain in its nature. But it is one thing to admit the uncertainty of such empirical statements, and other to separate them from balancing concerning value-judgment.

Actually, when the German praxis acknowledges multi-tiered “reviewing density: *Kontrolldichte*” in applying the proportionality principle²³, it is not because courts should show some deference to parliamentary value-judgment, but even because the parliament should have some prerogative in making prognosis in uncertain situation: in particular cases, the legislator is allowed to introduce measure whose effectiveness no one can predict; it is no use striking down such experimental measures because of its uncertainty. But if the correctness of prognosis is at stake, the final estimation can be put off until it — e.g. effectiveness of legislative measures — turns out to be or not to be correct²⁴. All these are not the case in value-judgment. The correctness of value-judgment is never to prove if once made, and its modification represents only a next value-judgment.

One of the most important theoretical benefits gained by adopting the effect-assessment model is that it accounts clearly the normative contents of constitutional provisions guaranteeing fundamental rights. They provide rules that violation of fundamental rights is impermissible unless the violative measure is necessary means to fulfill some overriding constitutional values. Where the value-judgment model is applied, this constitutional requirement never takes the form of clear normative obligation to the legislator, because constitutionality or unconstitutionality of legislative measures is only established after constitutional judges made their own balancing and decided whether or not to substitute the legislative value-

²³ BVerfGE 7, 377 (*Apothekenurteil*); 50, 209 (*Mitbestimmungsurteil*).

²⁴ This is even the structure of the “observation duty of the legislator” connected with “plausibility control” introduced by the Judgment BVerfGE 50, 209. See Stefan Huster, *Die Beobachtungspflicht des Gesetzgebers: Ein neues Instrument zur verfassungsrechtlichen Bewältigung des sozialen Wandels?*, ZEITSCHRIFTEN FÜR RECHTSSOZIOLOGIE 24 (2003), pp. 3-26.

judgment by their own — in this case, there is, in reality, no constitutional obligation to the legislator identifiable in advance. On the contrary, if the effect-assessment model is adopted, main issue of the judicial review lies in re-examination of the legislative fact-findings. What kind of normative judgment has been made can be identified prior to applying the proportionality test. In this way, the effect-assessment model leads to clarifying individual component of argument underlying the legislative judgment at issue.

To be sure, the question remains whether there is “overriding constitutional value” to be protected. The application of the effect-assessment model presupposes some normative system which confines the legislative value-judgment to what is constitutionally legitimate. In this respect, it is worth noting that the ECJ-jurisprudence on gender equality rests on the clear prohibition of discrimination and explicit enumeration of exceptions in the Directives. Similarly, the elaborated complex of the German proportionality analysis functions on the ground that the German Basic Law (*Grundgesetz*) has well-structured system of constitutional commission to the legislator — legislative restrictions to some rights are explicitly authorized in several cases whereas other rights are guaranteed absolutely on the text (only “immanent” limitations are approved to such rights).

In Japanese case, the Constitution abstained from authorizing the Diet to legislative restriction in provisions guaranteeing fundamental rights, partly because such authorization was interpreted as *carte blanche* to the legislator under the former, imperialistic Constitution of 1889. Instead, the Constitution refers to “public welfare” in three provisions, general provision on rights to life, liberty and pursuit of happiness (Article 13), and ones guaranteeing the free choice of occupation (Article 22) and property rights (Article 29). Especially the “public welfare” clauses in the latter two are interpreted to admit extensive legislative restriction of these rights with the purpose to accommodate competing economic interests of the whole population. Other rights guaranteed without reservation are understood to have only “immanent” limitation, i.e. limitation that these rights may not be exercised in a way which violates other citizen’s rights directly. Although the prevailing theory derives something like the preferred position of free speech from this distinction of fundamental rights with and without “public welfare” clause, this distinction can

also be interpreted to establish a general rule concerning constitutionally legitimate objectives: socio-economical motivations are outlawed if other rights than economic freedom are restricted.

It is already well known that the proportionality principle cannot represent a complete system of criteria and standards used in the process of judicial review in its own²⁵. Especially in the effect-assessment model, supplement by other criteria limiting legislative objectives is needed. Admitting this imperfection, it can be maintained that the effect-assessment model is preferable in its ability to structure individual factors of legislative judgment according to its nature as normative and empirical ones. We have already seen that the value-judgment model of the proportionality principle is vulnerable to popular pressure. If the main component of the proportionality test is balancing concerning values, its application against the majority will cast always severe problem of its legitimacy. But, it is different if the main component is accounted to be review of legislative fact-findings and prognosis. It would be important not to mix up both components in a process of balancing.

IV. Replacement of the Proportionality Principle by Absolute Rules?

It is now clear that some process of balancing always accompany the proportionality principle, within its application or prior to its application. Some recognize destabilizing moment for fundamental rights in being subjected to balancing and criticize the introduction or application of the proportionality principle on that ground. Instead, they propose absolute rules as embodiment of fundamental rights.

The most important theory criticizing balancing in defining “moral rights” is one put forward by Ronald Dworkin. He rejects a model of legal argument which recommends “striking balance between the rights of the individual and the demands of society at large” as “false one” and finds the metaphor of balancing at the “heart of its error”²⁶. Alternatively, he

²⁵ Vicki Jackson, *Being Proportional about Proportionality*, 21 CONSTITUTIONAL COMMENT 804 (2004).

²⁶ Ronald Dworkin, *TAKING RIGHTS SERIOUSLY*, Cambridge (Harvard University Press) 1977, pp. 197-198.

develops a theory of rights as “trumps”. Government should “treat all those in its charge as equals, that is, as entitled to its equal concern and respect”²⁷. As logical consequence of the right to be treated as equals, “it is an essential and ‘constructive’ feature of a just political society that government treat all its adult members, except those who are incompetent, morally responsible moral agent”²⁸.

As is seen in his argument, Dworkin emphasizes that rights should be justified not instrumentally in relation to the consequence of their guaranty — which may be weighed against other values —, but “constructively”. Such justification leads to rules concerning excluded reasons: rights enjoy their primacy because certain ways of reasoning are absolutely prohibited for the government to rely upon, especially the reasoning reflecting perfectionistic motivation of the government²⁹.

Important as they are in limiting constitutionally legitimate governmental objectives, these rules banning certain reasoning for fundamental rights impingement are, taken exactly, not absolute in its nature. In Dworkin’s theory, the absoluteness of excluded reasons is artificially incorporated. One key for such artificial incorporation is his concept of “those who are incompetent”, who are excluded from the equal concern. Let’s take the example of children. They are denied equal access to, say, pornography in his theory only because they are deemed to be “incompetent”. Legally endorsed moral indoctrination to children taking place in reality is intrinsically harmful for system in which every member is treated as moral agent. Some moral positions are stigmatized as disgusting in the

²⁷ Ronald Dworkin, *A MATTER OF PRINCIPLE*, Cambridge (Harvard University Press) 1985, p. 190. See also Dworkin, *supra* note 26, pp. 272-273.

²⁸ Ronald Dworkin, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION*, Cambridge (Harvard University Press) 1996, p. 200. This requirement have some consequences, one of which reads: “Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions”. It is clear that Dworkin’s rules outlaw the governmental reliance on some reasons. See also, Dworkin, *supra* note 27, p. 366.

²⁹ To “excluded reasons” and especially their ability to give due consideration to antiperfectionistic concern, see Mattias Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limit of the Proportionality Requirement*, in George Pavlakos (ed.), *LAW, RIGHTS AND DISCOURSE: THE LEGAL PHILISOPHY OF ROBERT ALEXI*, Oxford (Hart Publishing) 2007, p. 131 at 142-148.

process of education, which means direct violation for those children and has certain indirect impact on those adults who confess to these positions. Nevertheless, such are not deemed to be a matter of fundamental rights. Violations to children's moral rights are simply ignored, as well as indirect impact to the adults, or adherent to these positions are categorized as "incompetent". In this point, Dworkin prefers theoretical consistency to the real need for maintaining sound political system. His "constructive" justification of rights is only instrumentally absolute: this justification explains even the absolute primacy of pre-defined rights, but Dworkin does not derive all the consequences from the justification in defining the proper scope of rights. The "constructive" concern is, for Dworkin, of relative validity, accepting exceptional phenomena.

This analysis shows that Dworkin's absolute rule of excluded reasons presupposes definition of its scope, and some balancing is unavoidable in the definition. It may also be the case for other supposedly absolute rules.

Another candidate that may, at least partly, substitute the proportionality principle is a deontological proposition that lies also at the core of Dworkin's argument³⁰: the guaranty of "human dignity". German Federal Constitutional Court has developed an elaborated system of rules derived from the protection of human dignity in Article 1 of its Constitution: "It is prohibited for the public authority to treat people in a way that fundamentally challenge their quality as subject, their position as legal subject, by showing no recognition of the values every individual has on the basis of his/her personality for his/her own sake"³¹. This passage is cited from a judgment striking down a new aero-security law that empowered the air force to shoot down a passenger aircraft in case it is hijacked by terrorists and is about to be used as attack weapon. This is also well-known situation in which balancing hardly functions. If the value "life" is considered quantitatively in comparison to other "lives" in big amount being in danger, utilitarian consideration easily justify invasion of the "smaller amount". The absolute prohibition of violating human dignity operates in such situation. It focuses the attention on the qualitative question of whether the life of an innocent passenger may be victimized.

³⁰ Dworkin, *supra* note 27, p. 198.

³¹ BVerfGE 115, 118 (153).

The importance of qualitative point of view can never be denied. Nevertheless, this absolute prohibition has also its logical difficulties. Its application requires interpretation. In applying such prohibition, its scope must be defined at first. The German Court could, after all, only rely to the intuition that supposed violation is “utterly unimaginable”. Maybe this intuition deserves consensus in the community of constitutionalists. But it is the mission of legal doctrines to propose rationally founded account for judicial judgment. If a judgment can only be explained in terms of intuition, it evidences simply defect in legal doctrine.

Logically, the intuition that the violation is unimaginable is only a result of previous value-judgment, supposedly acquired through a process of balancing³². If it is the case, the previous process of balancing is even the object that a legal doctrine must be able to account for. Here is not the place to deal with the extensive discussion in German theory about whether or not the human dignity clause is absolute. It would be enough to observe that the absolute prohibition of violating human dignity is, also insofar as it exists, only the last resort to rely upon. Legal theory must develop rational framework to acknowledge qualitative importance of values fundamental rights seek to protect. In doing so, it must be recognized that absolute rules can effectively supplement balancing in general and application of the proportionality principle in particular, but not substitute them altogether.

V. The Future of Judicial Review: Conclusion

It is not an easy task to oppose the developing tendency of the “precaution state”. The anxiety felt by vast population over the security of their lives calls for preventive governmental measures which impinge on fundamental rights of individuals in extensive ways. In such situation, judicial review applying the proportionality principle sometimes loses its bite.

It may have several reasons. If, on the one hand, the proportionality

³² Manfred Baldus, *Freiheitssicherung durch den Rechtsstaat des Grundgesetzes*, in: Huster/Rudolph (Hrsg.), *VOM RECHTSSTAAT ZUM PRAEVENTIONSSTAAT?*, Frankfurt (surkamp) 2008, S. 118.

principle is understood as method of value-judgment, exercised in a process of value-comparison, then the governmental interest in satisfying popular demand can have the prevailing weight. If, on the other hand, the proportionality principle is understood as method of effect-assessment in which especially the necessity of certain measures in fulfillment of some legitimate governmental objectives is investigated, then every measure may be justified in relation to emotional interest allegedly important for the population. In the latter case, it would be absolutely essential that the proportionality principle is supplemented by criteria which, for example, limit the legitimate governmental objectives. Here, the effect-assessment model is still preferable because it clarifies the logical structure of the question — what kind of norm is selected by whom previously and what prognosis and fact-findings support the selection of means.

In this sense, the proportionality principle comes into its own only if it is incorporated into elaborate system of fundamental rights dogmatic. Every constitutional provision guaranteeing fundamental rights should be interpreted carefully in terms of content, structure and background postulate³³. What kind of governmental interests are taken into consideration in guaranteeing certain rights and what kind of interests are structurally incompatible with certain rights, are questions that legal theory should be able to answer. Reasons maintained in order to justify absolute rules must also be considered properly in this context.

Dworkin emphasizes anti-utilitarian nature of fundamental rights: “we need rights, as a distinct element in political theory, only when some decision that injures some people nevertheless finds *prima facie* support in the claim that it will make the community as a whole better off”³⁴. This is a very important recognition. We are talking about fundamental rights in democracy. What is good for the majority should be identified in political process, not in legal arguments about fundamental rights. Fundamental rights of the individual constrain, in this context, rule of majority. For that reason, normative content of what fundamental rights guarantee must be

³³ To importance of traditional dogmatics in criticizing the value-dudging balancing by (constitutional) courts, see Ernst-Wolfgang Böckenförde, *Schutzbereich, Eingriff, verfassungsimmanente Schranken*, DER STAAT 42 (2003), S. 174 ff.

³⁴ Dworkin, *supra* note 27, p. 371.

recognized independently on the value-judgment of the majority. The important thing is: conceiving of some absolute moral rights is not the only way to ensure this independence.

As we have seen, absolute rules such as excluded reasons or protection of human dignity are, in their logical structure, incapable of substituting balancing in legal arguments. Those allegedly absolute rules are only applicable if their application area is determined previously through some intuitive judgment. But it is the task of legal theory to develop legal framework through which intuitive judgments are rationalized and formalized. In this situation, application of the proportionality principle clarifies logical structure of each stage in the entire argument and subjects it to proper review. Of course the application of the proportionality principle does not solve all the problems. It is important to incorporate it into an elaborated normative framework of fundamental rights. And development of such legal framework should not be conducted by a single platonic ruler, but in a communicative process within the community of constitutional scholars and judges.

