Przegląd Europejski, ISSN: 1641-2478
vol. 2021, no. 1
doi: https://doi.org/10.31338/1641-2478pe.1.21.7

Precautionary proportionality principle as an instrumental preventive measure from the COVID-19: can European human rights survive in the state of public health emergency?

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Abstract
The authors believe that the C. Schmitt's notion of unconstraint sovereignty is not flawless. Both A. Dicey's theory of British constitutional law and the international human rights instruments have required the measures of the derogation of human rights must be given in accordance with proportionality principle. However, these normative requirements have hardly been applied to the judicial scrutiny by the two supranational courts in Europe. Correspondingly, some European public authorities favour the more radical precautionary principle. Although this principle is more effective in suppressing the new coronavirus, it is associated with numerous side effects. Thus, the authors propose in this article an innovative concept of precautionary proportionality principle.
Keywords: COVID-19, Europe, coronavirus, human rights, sovereignty, rule of law, fundamental rights protection, proportionality principle, precautionary principle.

Zasada proporcjonalnej ostrożności jako instrumentalny środek zapobiegawczy w walce z COVID-19: czy europejska koncepcja praw człowieka przetrwa stan zagrożenia zdrowia publicznego?

Streszczenie
Autorzy wychodzą z założenia, że koncepcja nieograniczonej suwerenności C.Schmitta nie jest pozbawiona wad. Zarówno brytyjska teoria prawa konstytucyjnego A. Dicey'a, jak i międzynarodowe instrumenty dotyczące praw człowieka wymagają, aby stosowanie środków ograniczających prawa człowieka było zgodne z zasadą proporcjonalności. Jednak te wymogi normatywne były rzadko wykorzystywane do sądowej kontroli przez dwa ponadnarodowe sądy w Europie. Odpowiednio,

władze publiczne niektórych państw europejskich preferują bardziej radykalną zasadę ostrożności. Chociaż wykazuje ona większą skuteczność w powstrzymywaniu koronawirusa, wiążą się z jej stosowaniem liczne skutki uboczne. W odpowiedzi na wskazane problemy autorzy proponują w niniejszym artykule innowacyjną koncepcję zasady proporcjonalnej ostrożności.
Słowa kluczowe: COVID-19, Europa, koronawirus, prawa człowieka, suwerenność, zasada praworządności, ochrona praw podstawowych, zasada proporcjonalności, zasada ostrożności.

According to the statistics released by the Coronavirus Research Centre at the John Hopkins University, more than 1.79 million people have lost their lives during the COVID-19 pandemic in 2020. Scientists have been actively developing the vaccine and drugs, however, it is still too early to assert our human life would be returned back to the norm very soon. Some restrictive measures against people's liberty remain for a long time, while some governments would restart the harsh measures, e.g., curfew and lockdown, for resisting the impact of COVID-19 on the public health order. In such an exceptional circumstance, human rights concerns should not be indispensable.

However, the context that our human race under the unprecedented COVID-19 threats triggers us to contemplate the solution to save human rights from enduring emergency measures. These extraordinary measures are two-fold. On the one hand, it could safeguard the life of the nation and preserve the constitutional order, on the other hand, the constitutional liberties would be severely derogated. As it is known, the European Constitutional States have shared common traditions in respecting human rights, but many liberal states also share the common features that executive would be taken as the right authority responsible for declaring and dealing with the emergency (Bjornskov, Voigt 2016: p. 108).[1] Thus, one of the negative consequences of the state of emergency might be a complete removal of the rule of law from the *Kompetenz-Kompetenz* scenario. Parliamentary members would be reluctant to question the legality of emergency decision, while judges may grant the unconstrained discretion to the executive bodies' emergency decision. Cass Sunstein has purposed an (in)famous notion of "judicial minimalism" for precluding the judiciary from intensive judicial control on the legality of emergency measures, leaving those constitutional controversies undecided (Sunstein 2004: p. 48). In fact, Sunstein's theory is nothing more than an echo from the Justice Rehnquist's argument that civil liberty is undesirable to be occupied into a favourite position in the war time (Breyer 2003). When the national security is at risk, the government gains greater justification to intrude on the individual liberty (Sunstein 2004: p. 52). The minimalism theory intensively limits judicial competence into a comparatively narrow scope, but left those controversial issues to be solved by the other branch of the government (Sunstein 2004: p. 49).

However, the minimised notion on the judicial power may displace the judges as a group of servants subjected to executive authorities. It might cause more potential damages than the positive effect on the national security guarantees (Dyzenhaus 2006b: p. 49). Governors, who have possessed the unconstrained power in the exceptional

[1] Through the empirical research, both authors conclude that the 121 of 159 state constitutions have empowered the head of state to declare the state of emergency.

periods, can almost do anything that seems necessary to overcome the crisis at hand without fears from other branches checks. The fundamental rights are easily predictable as a cost for the benefits of executive rapidly and effectively responding to the threats.

Normatively, the nature of emergency power should not be arbitrary, but it needs to satisfy the proportionality to the circumstance of exigency (Greene 2018: p. 208–209). General Comment No. 29 ICCPR specifically requires a degree of rights derogation must be in strict accordance with proportionality principle (HRC 2001: par. 4). However, Dyzenhaus finds that "the sophisticated version of the doctrine of proportionality test in the constitution and human rights law" in the context of the state of emergency "has not been developed" (Dyzenhaus 2012: p. 460). Though his argument sounds as a frustration to the human rights advocates, domestic and international judges theoretically still need to facilitate this doctrine assessing the legality of the extraordinary measures. A refined and precise approach should be developed in the judicial and legislative process, where the court and parliament, though having to collaborate with the executive, enabled to provide the minimum baseline to limit the executive power.

In the first part, we focus on those theoretical issues on the nature of the state of emergency and its relationship to the rule of law. It is necessary to rethink the Carl Schmitt dictatorship theory on the remarks of unconstrained sovereignty and suspension of rule of law. If the challenge is to be valid theoretically in the end, an argument springs out that nature of sovereignty embodies both the supreme authority in formal and inherent spirit of rationality in substantive. Apart from theoretical challenge, the analysis of European human rights norms and the relevant Strasbourg case-law concerning derogation plays a fundamental role for Contracting states derogating Convention rights in line with Strasbourg criteria. In the final part, our concerns would emphasise the balance of fundamental rights and public health order. Regarding the Strasbourg Court almost has no experience in performing the task in such a field and many uncertainties and peculiarities on the transmission of the COVID-19, we would purpose a new doctrine – precautionary proportionality test – indicating that a normative combination of the precautionary and proportionality principle as an analytical instrument for determining whether the national extraordinary measures are appropriate and rational. Since the Strasbourg judges usually defer to national decisions by providing a wide margin to the state, unless the state reasons undermine the European common fundamental values. On the other hand, judicial inspiration has never been one-way road, the Strasbourg Court judges may be inspired by the national and EU judges with regards to the fundamental interpretation and the reason on the way of employing the proportionality test. Thus, the new doctrine is likely to be initially employed by the national authorities, and then the European Court of Human Rights judges may refine it after a long time of deliberation.

A theoretical critique of Carl Schmitt's theory of sovereignty

In the Schmitt's sense, the validity of law depends on the regular situation. All law is situational. In the regular time, law would be repeatedly executed in accordance with the

written rules or the judicial analogy, while the law would recede at the time of the state of emergency (Schmitt 2005: p. 12).[2] The validity of normal legal regulation is subjected to the normal situations, where every part of life could be factually applied under the homogenous medium (Schmitt 2005: p. 13). In contrast, the validity of legal norm is to disappear in an exceptional circumstance because "the precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly a matter of an extreme emergency and how it is to be eliminated" (Schmitt 2005: p. 7). Thus, the decision that a real exception exists cannot be derived from the general norms, but "the sovereign is the one who can decide the state of exception" (Schmitt 2005: p. 1). The sovereign authority will reappear in the state of emergency. It has the nature of the unlimited *autoritas*, which is a *de facto* power superior to any normative legal power, manipulating the state action without the need to the consideration of the law.

The unconstrained sovereign authority turns the state into a dictatorship regime in the state of exception, the sovereign decision is always legitimate. Neither moral nor legal criteria is appropriate to judge the sovereign decision, but the exclusive one is "whether they can achieve their goals" (Schmitt 2013: p. 8). Schmitt asserts the moral or legal consideration would be "obnoxious and wrong" (Schmitt 2013: p. 8) hindrance to the achievement. As the sovereignty itself has the irrational feature, the sovereign decision in the context of the state of emergency must be a production of irrationality. Thus, the Schmitt's conception of sovereignty is deprived of any substantial features, but merely a formal sense to describe an unconstrained power. Schmitt's arguments on the irrational unconstraint sovereignty may potentially create a danger to the state stability under the circumstance of emergency. The extraordinary measures, though might effectively overcome the internal or external threats to the nation, may potentially induce a new type of emergency, when people resist to the extraordinary measures turning into an internal massive chaos. Consequently, the arbitrary exercise of unconstrained sovereign may exacerbate the crisis situation.

In our view, the Schmitti's conception of the irrational nature of sovereignty should be questioned. His earlier description of sovereignty in his books *Politiche theologie* and *Die Diktatur* should be revised by his later monograph *Verfassunsglehre* as the definition of Constitution (*Verfassung*) are distinguished from the Constitutional law (*Verfassungsgesetz*), representing the state identities in respect to both political values and the institutional arrangements. The Constitution is a set of fundamental norms (*lex fundamentalis*) determined by constituent power holders, on which a unified national political community is established in the normative sense (Schmitt 2008: p. 94). These constitutional norms are prohibited from being substituted by the constitutional amendment procedure since they are both the symbol and fundamental principles of the political community (Schmitt 2008: p. 151–152). In general terms, these basic norms should be composed of protection of fundamental rights, separation of power, judicial independence as well as the federalism on the ground that all sorts of constitutional states are established on such

[2] Schmitt states "in such a [emergent – J.F. & Y.W.] situation, it is clear that the state remains, whereas the law recedes" (Schmitt 2005: p. 12).

principles. If the state remains, these basic norms must keep awake. However, Schmitt's assertion arises the question of whether all the constitutional norms would be temporarily suspended in the state of emergency or the suspension scope would be limited to parts of them (Schmitt 2008: p. 156). This theoretical confusion lies in his conceptual distinguish between Constitution and Constitutional law. Does the suspension, though temporarily for preserving life of the nation and constitutional order, extend to those constitutional fundamental norms compatible with Schmitt's sense that the state will remain in the state of emergency? Schmitt's answer sounds vague on such an issue. On one side, he argues the existence of the minimal constitution remains in any exceptional circumstance, unless that *pouvoir constituant* is replaced by a new group (Schmitt 2008, p. 140).[3] However, Schmitt fails to tell which basic constitutional norms are composed into such a vague concept. On the other side, he claimed that the suspension of all the general norms, including those fundamental ones, would be allowed considering that the political goal is to preserve the safety of the nation (Schmitt 2008: p. 156).

The ambiguity of Schmitt's opinions could be solved by exploring the inherent quality of sovereignty, which could be revealed through a reversed tracing approach. The Schmitt's sense of sovereignty is assumed to be an original force creating the state and dictating the state Constitution. The basic identities of national state, though being the written norms in the constitutional texts, represent the will of sovereignty or constituent power holders. Could we say the fundamental constitutional norms are the contingent production of sovereign decisions? Tracing these constitutional identities back on the track and contemplating their relation to the creator (original sovereignty) are the crucial steps to unveil the inherent quality of the sovereignty. Actually, liberal-oriented constitutional principles are not contingently produced nor dictated by the sovereign will. The constitution-making process is dominated by the constituent assembly exercising the constituent power in the name of nation. The fundamental principles highlight the basic features of the new state. They are dependent on the political reality and state ideology shaped by the dominant political groups, rather than a contingent decision by the irrational sovereign. Even the constituent assembly members repeatedly discuss and deliberate on any specific provision or institution demonstrating that the final version of constitutional draft is designed in the weight of every word. All the anti-totalitarian constitutional principles reveal the inherent quality of sovereignty – rationality and moderation. Regular law recedes in the state of exceptional, while the inherent quality of sovereign remains. The rationality prevents the sovereign from being an arbitrary authority. In this sense, the sovereignty that dictates a liberal constitution would still be restrained by rationality in the exceptional stage.

The theory of the inherent quality is echoed by Albert V. Dicey, who proposes the preservation of the rule of law in the exceptional time, unless the official, who seriously

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[3] Schmitt states that "where the constitution-making power exists, there is also always a constitutional minimum, which need not be impinged on by statutory violations of constitutional laws, revolution, and coup d'états, when only the constitution's foundation, the constitution-making power, remains, whether it is of the king or of the people" (Schmitt 2008: p. 140).

broke the law can successfully plead a pardon from the national parliament. The Act of Indemnity legalizes the illegality (Dicey 1979: p. 412–413).[4] The rule of law institution would not pose a rigid requirement on the public official strictly observing the rules. It permits the public officials to exercise extra-legal powers for the sake of preserving fundamental principle and tenet, but the burden of proof would be imposed to the public officials with regards to "such action is necessary for nation and the public in the face of calamity" (Gross, Ní Aoláin 2006: p. 11). The most distinguished difference between Schmitt and other common law scholars lies in who handles the final power, when laws are suspended in the state of emergency. Schmitt favours the executive as he proposes the President of Weimar Republic can declare all the fundamental rights derogation under the framework of Parliament's Enabling Act (Schmitt 2013: p. 193–194), while Gross, inspired by Dicey's theory, places the public executive officials in the position of servants of the sovereign authority holders. The parliamentary members, as the real sovereign holders, can make the final words on whether pardoning those public officials or not, regardless of how serious the results they have committed to. However, Gross' suggestion, though being compatible with the British constitutional arrangement of parliamentary supremacy, neglects the judiciary capacity under the common law of regulating the operation of emergency power. Dicey's legal philosophy rejects any type of administrative states, where the national executors handle the unlimited vast powers, while the courts stay in a weak position prohibited from exercising effective judicial review (Dicey 1979: p. 227–228; Dyzenhaus 2006b: p. 56). Even though in the event of suspending the rule of law and derogating common rights, "the burden of proof falls distinctly upon the person putting forward this contention" (Dicey 1979: p. 397), and substantially, "the power… by the exertion of any amount of force strictly necessary for the purpose" (Dicey 1919: p. 398). Ferejohn and Pasquino interpret the Dicey's words as "strictly necessary for the purposes" implying a proportional sense (Dicey 2002: p. 238).

Ackermann and Dyzenhaus, for the fear of permanence of emergency evolving into a new fascist regime, insist on the judiciary joining the rule of law project in the collaboration with other national organs. Ackermann purports to escalate the degree of judicial control intensity with the ongoing extension of period of the state of emergency (Ackermann 2004: p.1070)[5], while Dyzenhaus stresses the result of enhancing judicial competence scrutinising those emergency decisions is able to impede the dark side between parliament and executive organs. Apart from that, the space of "legal black zone" and "legal grey zone" would be shrunk under the effective judicial review. The

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4 Dicey argues that "there are times of tumult or invasion when for the sake of legality itself the rules of law must be broken… The Ministry must break the law and trust for the protection to an Act of Indemnity. A Statute of this kind is…the last and supreme exercise of Parliamentary sovereignty. It legalizes illegality… [It] … combines the maintenance of law and its authority of the House of Parliament with the free exercise of that kind of discretionary power or prerogative which, under some shape or other, must be at critical junctures be wielded by the executive government of every civilised country" (Dicey 1979: p. 412–413).

5 Ackermann suggests "the longer the likely period of emergency, the greater the need for judicial supervision. Indeed, it may make sense of design a graduated system of increasing judicial scrutiny: minimal for the first two months of detention, with more intrusive scrutiny thereafter" (Ackermann 2004: p. 1070).

former phenomenon indicates the "zone of administrative discretion created by law, but within which there is no legal constrain on the decision makers" (Greene 2020: p. 4), while the latter risks the judicial oversight reducing to an inutile power by cloaking the thin veil of legality that result in the "overly deference and light touch review" (Greene 2020; p. 5). This unconstrained executive power lays incompatible with the previous Dicey's description of common law tradition. Moreover, the Schmitt's conception of sovereignty that essentially possesses the unconstrained dictating features in itself is not without question with regards to control the emergency event in efficacy. Dyzenhaus suggests that the pure formal notion of sovereignty would have to be replaced with a rights-friendly dogmatic, namely substantive conception of rule of law (Dyzenhaus 2006b: p. 31).[6] The Act of Indemnity, even though objectively concedes to pardon those serious crime by the political deliberation, whereas it possesses the formal sense of legal validity. In contrast, the overriding values – substantive conception of rule of law – assume to be the real "authority" overriding the positive legal validity, filling the validity traps in a circumstance where no longer a higher law above control the parliamentary decision in the name of parliamentary sovereignty (Dyzenhaus 2006a: p. 2035).

In fact, Venice Commission and UN human rights bodies repeatedly stress the fundamental importance of judiciary role in protecting fundamental rights during the state of emergency. The domestic courts must have full jurisdiction to review measures of restriction and derogation for their legality and justification, and for their conformity with the relevant provisions of the European Convention on Human Rights (Venice Commission 2006: par. 46). UN Special Rapporteur announces: "\When a state of emergency affects the exercise of certain derogable human rights, administrative or judicial measures shall be adopted to the extent possible with the aim of mitigating or repairing the adverse consequences, this entails for the enjoyment of the said rights" (Venice Commission 2020: p. 20).

How the Strasbourg human right criteria dealing with the state of emergency

The 1950 European Convention on Human Rights and the relevant ECtHR case-law set a number of normative limitations on the derogating of the fundamental rights in the state of emergency. In principle, the degree of fundamental rights derogation must strictly comply with the exigencies of the situation under the Art. 15 ECHR. Thus, the arbitrary exercise of emergency power would be prohibited. All the emergency measures, though supersede the threshold of restriction in the normalcy, are still scrutinised by an overriding rule – proportionate to "pressing social need" and "exigency of the situation". Some scholars note the emergency power has already been abused by many EU Mem-

[6] He argues that "for if we can keep that grip [contemplating what is the appropriate during the ordinary or normal times as it is about the kind of test that emergency situation pose different conception of rule of law – J.F. & Y.W.], we keep alive the possibility that a substantive conception of the rule of law has a role to play in legal response to emergencies. And with that possibility vivid, we maintain a critical resource for evaluating the legal responses to emergencies as well as the judicial decisions about the legality of those responses" (Dyzenhaus 2006b: p. 62).

ber States, who have taken it as an instrument "curtailing dissent, dissolving Parliament, postponing elections or cementing the powers of a would-be dictator" (Scheinin 2020). It is the main reason for the reservation of external judicial review in this unprecedented global pandemic era.

Until now, eight contracting states have officially declared the state of emergency and notified the specific Convention rights that would be subjected to the derogation during the period of the emergency measures (Wallace 2020: p. 794). In contrast, the other contracting states choose not to follow that way, instead of starting emergency measures in accordance with the sunset clause embodied by the domestic statutes. Due to the fact that sunset clauses are applicable to the extraordinary situation, the state executives are usually placed in the primary position exercising such an exceptional power. In this circumstance, the limits of power cannot be appropriately regulated by the ordinary law. Initially, any extraordinary measures are appropriately provided that they are proved to be effective in overcoming the external or internal crisis. However, effectiveness is only one of the criteria determining the quality of the extraordinary measure. Then, the judicial assessment of the legality of measure may rely on the basis of the parameter of proportionality test in the irregular circumstances. The ideal pattern on the degree of fundamental rights derogation should meet the proportionate standard to the epidemiological situation under the proof of empirical presumption or scientific evidence under domestic or international law (Governo Italiano 2020; HRC 2001: par. 29).[7] It is necessary to re-examine the Strasbourg jurisprudence for outlining precisely the scope of state obligation in the extraordinary situation.

The conventionality of lockdown measures under the ordinary regime of the ECHR

During the pandemic era, we have noticed that nearly all the European states governments adopted the lockdown measures for preventing the new coronavirus spreads. Though it is hard to provide a precise definition of the term "lockdown", all the measures share a common feature that the restrictions have superseded the ceiling in the normal level. As to concrete measures, not only the patients who are in confirm or suspect are to be deprived from the physical liberties and the rights to movement, but also the healthy people are subjected to the mandatory quarantine.

Actually, the question on the necessity and efficiency of the quarantine has never been ceased from the inception of the pandemic. Strasbourg case-law has very limited help in terms of providing a judicial parameter to draw a boundary line of the emergency power in the circumstance of wide spreading of the coronavirus. In the *Enhorn* judgment, the Court assured that the compulsory isolation order and involuntary displace of applicant in the hospital constituted the deprivation of liberty within the meaning of Art. 5(1) ECHR (see: ECtHR 2005, par. 33). Though the text of Art. 5(1) permits the lawful detention

[7] The paragraph 27 of the General Comment no. 29 provides that "all the restriction and suspension are based on the best scientific evidence".

"for the prevention of spreading of infectious diseases", the Court narrowly interprets the scope of permission in combined with the consequentialism. The lawfulness detention of individuals must satisfy two essential criteria: (a) whether "the spreading of the infectious disease is dangerous to public health or safety" and (b) whether "detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest" (ECtHR 2005, par. 44). The contracting state is obliged to promptly cease the deprivation unless no other alternatives could achieve the objective.

The question arises of whether these Strasbourg criteria based on the *Enhorn* judgment sufficiently provide the state efficient and useful guidance in the derogation of the fundamental rights during the COVID-19 pandemic. The applicant in the *Enhorn* case was an HIV virus carrier who has infected a homosexual partner by the sexual intercourse without wearing protective device. Obviously, the transmission channels of two fatal viruses are distinguished differently. The WHO has confirmed that novel coronavirus is evidently transmitted among the mass through the respiratory droplet and contact route (WHO 2020a). Even the healthy people may be contagious easily by the respiratory droplet from those infected persons without symptoms. In several days before the WHO declaration of public health emergency of international concern, the death rate accounts for 4% in Wuhan, China (WHO 2020b). According to the WHO report in the earlier of 2020, a preliminary R_0 was estimated 1.5–2.4 and 25% of confirmed cases reported were severe. This evidence sufficiently achieves the threshold concerning the criteria "infectious disease is dangerous to public health". Until now, the original source of novel coronavirus is still unknown for the WHO experts. The lack of vaccines and wondering drugs curing the coronavirus are haunting fears over all the countries. Thus, quarantine of those highly suspected or persons confirmed infectious is a proportional but necessary measure mitigating the rapidness of coronavirus transmission.

However, *Enhorn* decision cannot act as a valid precedence for forcibly quarantining all the healthy people at home or other habitants. Absolutely, the lockdown measures or forcible quarantine of healthy people at home or other places of habitat seriously affect the fundamental rights and human dignity. The literal meaning of Art. 5 has never extended to derogate the rights to liberty or movement to the non-infectious healthy people, since that the Strasbourg Court is obliged to narrow interpretation in this issue. Venice Commission has confirmed that "since the curfew system is by its very nature an exceptional measure entailing restrictions to fundamental rights, the texts governing it must be interpreted narrowly, in terms both of substance and of competence and scope" (Venice Commission 2016: p. 16). Nothing in the *travaux preparatoires* indicates the drafters intended to extent the scope of those restricted people to the non-specific healthy ones. Thus, the literal meaning of Art. 5(1) ECHR, though could be accommodated into the emergency situation with regards to protecting public health order, excludes the legal possibility in the aspects of systemic quarantine toward normal healthy people. However, the Council of Europe seems to weaken its position facing COVID-19 threats. In the report concerning the rule of law and human rights protection during the global pandemic, the human rights experts

permit the scope of exceptional measures depriving the liberty of those non-infectious people for several weeks and months on ends do not necessarily constitute the violation of the Convention rights so long as if they are necessary, proportionate and lawful to the public interest to be pursued and non-discriminatory. Meanwhile, the contracting parties are obliged to provide effective measures to ensure the measure does not go beyond lawful under Art. 13 ECHR (Parliamentary Assembly 2020: p. 7).

The fundamental rights derogation and proportionality principle under the Art.15 of ECHR

In our opionion, the previous European report creates a potential danger to the European Convention regime in regard to the Strasbourg Court's artificial accommodation of the ordinary legal provision to the exceptional circumstances. This Strasbourg approach notably disrespects the rule of law, whilst the danger of seepage of distorting interpretation activities may expand to all other types of emergency situation (Dyzenhaus 2008: p. 41). Consequently, the borderline of rule of law and arbitrary judicial power would turn to vague, while the normative role of Art. 15 ECHR concerning the European human rights derogation would probably be dysfunctional. Gross caveats that *Brogan* jurisprudence is likely to be extensively employed into the complaints, where it enables the contracting parties to adopt more severely extraordinary measures under the Convention's ordinary provisions. Though the Court notices that the UK has withdrawn the emergency declaration at then, the Strasbourg judges were not reluctant to scrutinise the state action in a consistent security concern threatened by the external terrorists under the ordinary provisions (ECtHR 1988: par. 48).[8] This judicial approach creates a model of accommodation of ordinary law openness to the emergency situation, recognising the judicial "context justification" as an alternative way of contracting parties officially declaring the state of emergency under the Art. 15 ECHR (Gross, Ní Aoláin 2006: p. 279). Gross worries seem to go extreme regarding his anxieties on the Convention provisions losing their rigidity nature to constrain the states arbitrary power. In contrast, the judicial validity of "contextual approach" relies on a premise of consistent aggregation of social situation graveness. The endurance of emergence and people's fears are two important variable factors concerned. In other contingent or simple emergence cases, Art. 15 ECHR draws an exclusive scope of jurisdiction, while the other Convention provision remains to be parameter for the ordinary restriction in the state of normalcy. This conclusion is not without a question. The Strasbourg Court may recalibrate the European human rights

[8] The ECtHR states "having taken notice of the growth of terrorism in modern society, [the Court – J.F. & Y.W.] has already recognised the need, inherent in the Convention system, for a proper balance between the defence of the institution of the democracy in the common interest and the protection of individual rights" (1988, par. 48). The Court notes that UK had withdrawn the declaration of state of emergence from the Council of European, but the Strasbourg judges still permit the possibility of limited violation of Convention rights as extend to the emergency situation in the certain background circumstance. They explicitly express that "[the exclusion of derogation – J.F. & Y.W.] does not, however, preclude the proper account being the taken of the background circumstance of the case" (ECtHR 1988, par. 48).

standards downside, bending to the needs of contracting states for more efficiently counteracting terrorist violence. It brings an explicitly negative effect that the rights guaranteed by the ECHR lose its constraint compatibilities on the administrative power in the normative level, while the implicit negative effects appear, when the Strasbourg judges usually defer stating stringent measures in judicial practice. Even though the Court decisions are suitable and necessary adapting to the social situation, it is inevitable that the normative role of Art. 15 ECHR would be replaced by the ordinary provision of ECHR. In the judgment of *Brannigan & McBride*, the Court refused to blame the UK's decision on the deprivation of suspects liberty and due process. In contrast, it recognised the existence of public disturbance in the North Ireland in the light of document materials and the fact of terrorist activities in that region, which constituted the evidence that "such a public emergency existed at the relevant time" (ECtHR 1993, par. 45-47). Actually, the Strasbourg manner of determination encourages the appearance of *de facto* model of state of emergency. The State would be allowed to subsist the emergency risk control after the termination of the state of emergence.

The Art. 15 ECHR is almost deployed by the contracting states in the areas of counter-terrorism, *coup d'état* and warfare. The Strasbourg Court, though explicitly asserts its task on supervising the state obligation under the Convention framework, often accords the respondent states a wide margin of appreciation to assess both the existence of public emergence and the appropriate measures on fundamental rights derogation (Mowbray 2012: p. 840). The earlier case judgment *Ireland vs. UK* is a landmark case decision. The ECtHR judges employed a loosen approach evaluating the conventionality of the state emergency measure. The pressing social need dealing with the external threats actually justified the Convention rights derogation under the Art. 15 ECHR. In general, the Court is reluctant to rigidly constrain the state adopting the emergency measures counteracting to the threats to the national security, rather it held the subsidiary position, where "the national authorities are in principle in a better position than the international judges to decide both on the presence of such an emergency and on the nature and scope of derogation necessary to avert it" (ECtHR 1978, par. 207).

Although the width of state discretion seems to contain all the choices of state favourite extraordinary measures, the Strasbourg Court has never considered conferring the contracting parties unlimited discretion on this issue. In contrast, the Court explicitly stated that "[T]he States do not enjoy an unlimited power in this respect. The Court (...) is empowered to rule on whether the States have gone beyond the 'extent strictly required by the exigencies' of the crisis (...). The domestic margin of appreciation is thus accompanied by a European supervision" (ECtHR 1978, par. 207). The Strasbourg attitude resembles a cocktail mixed between the timidness of judicial control of the state sovereign action and the ambition to harness for the state extraordinary power by its supervision. Though the "rhetorical" sound reflects the Court self-restraint on its judicial review position, the main purpose of Strasbourg statement demonstrates that "public emergence" would not be a pretext to "unwarranted deviation from the guarantees provided by the European Convention" (Gross, Ní Aoláin 2001: p. 635). The true Strasbourg

intention should not be out of our radar. Usually, the scope of margin would be outlined in the concrete circumstance by the Strasbourg judges. Although, the Court generously tends to offer the state more discretional space tackling the balance protection of national security and individual interests, human rights are susceptible to incursions and infringement under the state pressure of the emergency and national crisis. Effective supervision on the legality of emergency measures becomes the main task of the Court.

Actually, since its inception of the 1950s *Lawless* decision, the meaning of Convention terms "threatening the life of nation" definitely refers to an exceptional situation, where the crisis and emergency "affect the whole population and constitute threats to the organised life of the community" (ECtHR 1961: par. 28). The derogation of European rights would be allowed in the context that the domestic ordinary law and criminal courts are deficient in their ability to restore peace and order (ECtHR 1961: par. 33). In the *Greek* case concerning the legitimacy of suspension of fundamental rights after the Greek military successfully overthrew the democratic government through *coup d'etat* in 1960s, the European Commission on Human Right clarified the four criteria on the convention rights derogation: (1) it must be actual and imminent; (2) its effects must involve the whole nation, rather than a purely political threat to the state government; (3) the continuance of the organised life of the community must be threatened; (4) the crisis and danger must be exceptional, in which the normal measures or restrictions are plainly inadequate (de Schutter 2010: p. 519).

On the other side, the nature of affected rights should be considered as a crucial variable in the assessment approach in a company with other relevant factors. The Strasbourg usually repeated its statement in the *Brannigan & McBride* decision that "[it] must give the appropriate weight to such relevant factors as the nature of rights affected by the derogation, the circumstances of leading to, and duration of, the emergency situation" (ECtHR 1993: par. 43). The judicial analysis ties closely with the consistently social needs. The previous case-law standard on the derogation of the right needs to be consistently re-examined by the Strasbourg Court. The needs of states in the exceptional situation should be taken into account and the connection between the emergency measure and actual effects need to be assessed during the judicial review process. Though the Strasbourg Court should posit in a self-restraint standing before the state authority decision, the relevant international human rights treaties present a list of non-derogable rights in that the derogation on these rights cannot effectively relieve the urgency of the situation. The protection of non-derogable rights is only one aspect of the Court paying attention, while, on the other side, the Court has to identify the core scope of Convention rights concerned, as the minimal standard of protection in all the conditions. The Strasbourg Court has ever determined that complete vacancy of judicial control over suspect detention results into the violation of due process rights under the Art. 5 ECHR. Though the State possesses the reasonable justification to prolong suspect detention, their rights on the remedy of access to *habeas corpus* cannot be deprived by the excuse of the state of emergency.

However, there are too many technic difficulties for the Court to calculate the weight of the competing interests in a transparent and precise approach. In many judgments,

the Strasbourg focus has to shift from considering whether the human rights derogation substantively complies with the European Convention standards to whether the result of derogation undermines the minimal procedural requirement in accordance to the ECtHR protection of rights to fair trial under the Art. 6 ECHR. The *Alparslan* decision is a landmark decision, where the Court rejected the conventionality of state detaining the judge during the *coup d'état*, because the domestic provision in question disregarded the special procedural relating to the protection of judicial independence and judges rights to life required by the ECHR (ECtHR 2019a: par. 104–115). Besides, the Court warns the Turkish authority that the Strasbourg permission on the pre-trial detention applicable to very limited circumstances in the state of emergence, when all the other measures have proved incapable of fully guaranteeing the proper conduct of proceedings (ECtHR 2018: par. 211). In the recent case judgment of *Bas*, the Court explicitly stresses the intensity of judicial scrutiny should be amplified with the passage of time (ECtHR 2020: par. 224). Thus, the Contracting States enjoy a large width of margin of appreciation during the initial several months, while the degree of the burden of proof taken by the contracting states would be escalated accompanying with the extension of emergency. Thus, these judgments reflect the Strasbourg Court relies on the assessment of the complete protection of procedural rights in the circumstance of emergency situation. Though the core part of rights, theoretically, is immune from the interference in the normative sense, the judicial review can hardly guarantee their completeness, while the procedural protection of rights turns to be a crucial parameter for the Court determining the conventionality of the emergency measure.

Gross and Ní Aoláin remind us not all the contracting states are treated in equal position before the Strasbourg Court, whereas the democratic credentials of respondent states is to be a quasi-determinative factor in the assessment of emergency measures (Gross, Ní Aoláin 2006: p. 287). We have witnessed that Turkish emergency measures are usually blocked beyond the bar of justification since that the purpose of declaring emergency deviates from the purpose of preserving the liberal constitutional order, rather a political oppression to the dissenting groups. It is common where the Court found the evidence offered by Turkish government cannot be accepted as solid proofs for derogating Convention rights, but a sort of governmental unfound allegation purporting to silence human rights defenders (ECtHR 2019b: par. 217–232) or arbitrarily infringe of due process guaranteed under Art. 5 ECHR (ECtHR 2018: par. 139).

Unfortunately, there is no evidence for the Strasbourg Court has ever deployed the proportionality test in transparency. Compared to the persuasive fact analysis and strong protection of the procedural rights of the remedy to the victims, the Court seems reluctant to substantively employ the doctrine of proportionality test to assess the legality of the state emergency decision for fear that the intensive interference of the state emergency decision would trigger state resistance to the Court's decision. Up to now, there is only one case where the Strasbourg Court determined the result of disproportionality of the UK emergency decision on detaining the foreign national suspects. However, it is not a landmark decision, whereas nothing more than a generous judicial deference to

the UK highest Court Lord, Leonard Hoffmann, opinion in the *Belmarsh* in the aspect of illuminating whether the *Al-Qaeda* threat constitutes the state of emergency (House of Lords 2005: par. 134). Hoffmann argues since that the goal of terrorist attack aims to destruct the life and property of citizens, it creates a fundamental difference between terrorist threat to the life of the citizens and emergency threats to the life of the nation. The latter security crisis purports to overthrow the British liberal-democratic regime and subjected all the people to a totalitarian regime. The Strasbourg Court appreciates Hoffmann's points on the nature of the state of emergency as well as the case decision based on the proportionality test that prohibition of two foreign national applicants access to the court trial over an undue long period of detention results into the disproportionate derogation of right under Art. 15 (ECtHR 2009: par. 184–185). Thus, the Court omits the efforts to review the case *de novo* by the doctrine of proportionality test.

The application of precautionary proportionality test to the derogation measures during the COVID-19 pandemic

Proportionality principle vs. precautionary principle

The unprecedented pandemic challenges the national and transnational capacities in the management of pandemic crisis. Many European governments adopt the more radical precautionary measures for flattening the curve of the number of the infectious people. The legal concept of the precautionary principle specifically applies to those events, when the result of danger is uncertain at the scientific level. Due to primary protection of the right of life and health, the government usually poses an intensive control or prohibits the relevant activities with the potential high risk. The constitutional legitimacy of precautionary principle lies in the protection of health rights. However, this judicial doctrine may bring us a question of whether it can legitimately override one constitutional interest over the other competing ones. Almost in all the circumstances, the reference to the precautionary principle usually symbols a *carte blanche* unconditionally sacrificing those constitutional protected economic rights, but primarily guaranteeing public health as the results of legislative and judicial deliberation. The General Court of the European Union has ever stated that "in the situation of balancing of health protection against the economic freedom, the decision makers…will almost the inevitably lean in favor of protecting public health" (Judgment of General Court of European Union 2011: par. 141).

Though the precautionary principle is not explicitly referred as a fundamental norm for state making the containing coronavirus measures, the EU legal order provides the possibility on the basis of the CJEU case-law and relevant legislative norms. For example, Art. 191(2) TFEU states the precautionary principle and related preventive action in the light of the principle thereon should be implemented as a basic normative requirement to establish a high level of protection. The legislative meanings have been processed by the CJEU to be a new interpretation that "it is for the Community and Member States to prevent, reduce, and in so far as is possible, eliminate from the outset, the source

of pollution or nuisance (...) to eliminate recognised risks" (Judgment of the Court 2000: par. 37). The Luxembourg Court has extended the sphere of precautionary principle application from the uncertain risk to all the preventive measures against the certain harm result. The original legislative purpose confines the principle strictly into the environmental protection, while the CJEU gradually extends it into other areas. The Court has ever emphasised that the precautionary principle would be applicable into the other Community policies related to protection of public health (Judgement of the Court 2019: par. 41; 1996: par. 64). Thus, the COVID-19 Pandemic is apparently under *ratione materia*.

Some opponents may question the appropriateness to apply such a principle into the COVID-19 because the harmful result of COVID-19 is a certainty. It seems there is no conceptual compatibleness between the fact and legal definition. However, this voice represents a rigid understanding of the principle. In practice, the previous refereed EU case-law and numerous national legislative acts do not strictly distinguish the classic definition of the precautionary principle from the preventive measure against the certain harm. Apart from that, since some crucial information and characteristics concerning the essential nature of the SARS-CoV-2 are still unknown for the global scientists, the orthodox definition of precautionary principle remains the applicability space at present. The fact of the COVID-19 rapidly mutates and unpredictable risks to the human race health force the state government taking precautionary approach dealing with the potential dangers and risks. We should not deny that the global resurgence of COVID-19 pandemic reflects our human limited knowledge on the course of coronavirus transmission and the source of origins. Adopting stringent lockdown measures or temporarily forced quarantine order, prohibiting the human physical close-distanced communication, as the extraordinary measures applicable to all the people absolutely represent the application of precautionary principle containing the coronavirus. Wearing a mask in the public sphere turns to be a common mandate requirement for all the subjects no matter who is infectious or not. People who are not obeying the rules would be imposed to the criminal penalties in pursuance of new emergence criminal law (Canestrini 2020: p. 120).

The precautionary principle has a significance in the constitutional level with respect to the protection of public health order, but it is a two-fold spade in the aspects of overcoming the commonly recognised risk. The negative effect would be enlarged, when the Schmitt's theory involved, indicating that the unconstrained sovereignty enables its holder or the agents to do anything effectively combating the emergency without necessarily having to consider the law and cost-effect rationality. All the consideration would confine on how would be the effects on overcoming the emergency events. The radical Schmitt's theory, arguably, cannot ensure a new emergency event may appear before or after the targeted one disappeared. In the context of containing coronavirus, it is without the question of legitimacy of extraordinary measures aiming to protect public health order, while the paradox lies in the aspects of abusive application of precautionary principles would definitely breach "means-ends-rationality", in which the legislators must strike a fair balance between the costs and benefits in the constitutional level. The essence of precautionary principle permits the state authorities to take prompt measures

without having to wait for all the certain scientific evidence revealed. The negative results must be narrowed to the least. The Court of Justice of the European Union caveats that all the precautionary measures should be review promptly in accordance to new scientific studies on the issue. Less intrusive measure would be proposed into the law amendment in light of new informational (Judgment of the Court 2016: par. 50).

As to the COVID-19 pandemic, it differs from the other types of crisis applicable to the precautionary principle. The influences brought by the COVID-19 comprehensively radiates to all the fundamental social and economic fields, other than the traditionally involved environmental or agricultural fields. How to rationally balance the competing interests turns to be a key normative issue for the decision-makers? The solution must be guided by the normative combination of proportionality and precautionary principle. The disproportional cost of precautionary measures, given its sacrifice on the benefits of individual liberties and national economic growth, should only be confined to the initial several months. The assessment on lifting the precautionary measures would follow in the later when the later scientific confirmation overthrows the previous presumption or finds an alternative measure dealing with the risks to human health.

Recently, Klaus Messerschmidt has warned us that the precautionary oriented COVID-19 legislation threatens the legal order based on the rule of law if the normal constitutional rights are unconditionally derogated under the circumstance of containing the coronavirus (Messerschmidt 2020: p. 283). The abusive use of the precautionary principle dilutes the sovereign and constitutional rationality in the sense that other constitutional interests lose their impacts on the final decision. However, the normative meaning of the precautionary principle under the EU law framework does not point to that all the precautionary measures, no matter how the degrees of extraordinary and intensive interference of the fundamental rights they are, take in the absolute priority position without the questions. In 2000, the European Commission's *Communication on the precautionary principle COM(2000) 1 final* officially provided that the precautionary measures should be "proportional to the chosen level of protection" and tailored "based on an examination of the potential benefits and costs of actions or lack of action" (Garnett, Parson 2017: p. 503). It indicates that the prior assessment on the level of danger and calculation on advantage and disadvantage of the adoption of such a measure are the unnecessary consideration steps before the final decision. The European Commission Guidance places the proportional analysis as a crucial judicial technique tailoring the involved scope of the precautionary principle on the derogation of fundamental rights (Scott 2018: p. 12). Thus, the Precautionary principle has no precedence over the proportionality principle in the normative and practical levels.

The Court of Justice of the European Union has been making efforts to fill the gaps of these two fundamental principles at the normative level. In the judgment of *Pesce*, The Luxembourg judges stress the relationship of two fundamental principles is not competing, rather the proportionality test would be employed as a basic tool assessing the legality and acceptableness of the result brought by the precautionary-based measures in that the "principle must, in addition, be applied having regarded to the principle of proportionality,

which requires that measures (...) should not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, and where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantage caused must not be disproportionate to the aim pursued" (Judgments of the Court 2016: par. 50). Accordingly, no matter how the preventive measures extremely intervene the fundamental rights guaranteed by the State Constitution, the drafters of legislation or decision makers must recourse to rational and predictable analysis based on the proportionality test.

It is worthy to note the CJEU requires the Member States of employing the principle on the basis of case-by-case studies of the various contents risking to the public health in the condition that the luck of scientific epistemological certainty on the pharmacological harms of the herb in question (Judgment of the Court 2009: par. 31, 34). However, this meticulous approach is uncommon in the process of judicial review concerning the legality of precautionary measures since the threshold of the principle is not high enough but only set in the level of the probable harm to public health or environment. Lacking of consensus scientific evidence could not block the applicability of the principle. Could it imply the proportionality principle actually would be crashed in front of the precautionary principle? In the *Etimine* judgment, the Court of Justice rejects to review the legality of European Commission discretion. Though the scientific study was ongoing then, the Court defers to the European Commission precautionary measures on the underlying reasoning that disputes fell into the sensitive fields of protecting public health and environmental problem (Judgment of the Court 2011: par. 128–129), unless the scientific founding was manifestly inappropriate. The Court replied that the applicant concerned proportionality test had not been infringed, since the chemical material in question was put on the list of the reprotoxic materials after hearing the advice of the EU committee experts.

Preventive measures based on the precautionary proportionality principle

To some extent, our proposed term "precautionary proportionality principle" is an oxymoron. Theoretically, the context of employing the precautionary principle lies on the uncertain scientific evidence on the risk of public health, while proportionality test entails factual and normative analysis between the competing interests. International human rights bodies normatively require that the declaration of the state of emergency must be satisfied with the criteria of reality and imminence. The contradiction between the applicable preconditions of the two fundamental principles should not be the only concerned matter. Since that the uncertain risks to public health exist in many other types of the state of emergency, it remains some spaces for the precautionary principle to be employed in these circumstances.

In the situation of the COVID-19, the precautionary measures take a fundamental role in preventing the spread of the fatal coronavirus in the healthcare process (Crosby L., Crosby E. 2020: p. 1–4). Some NGOs and state governments advocate the application of such a principle, when not enough information revealed by the global scientists

(Pinto-Bazurco 2020). However, the precautionary but extraordinary lockdown measures result in a sluggish national economy, increasing amount of people living in the poverty and reducing the amount of tax. Thus, the state governments have to consider all the possible disadvantages and advantages after balance between the measures dealing with the protection of public health order and reviving national economy.

Some scholars argue that all the containing coronavirus measures should comply with the commonly held fundamental rights criteria (Spadaro 2020: p. 318). However, the human rights discourse sounds too vague to direct the states designing the emergency decision in such a complex circumstance. All the rights are interdependent and interrelated. The doomy situation of the economy definitely has a direct link to the deteriorating healthcare standards. The rapid decline in the state capacities of the social and economic rights protection undermines the human dignity. Up to now, no evidence indicates the long-lasting pandemic would terminate soon. Nearly all state governments are trapped in this dilemma. How the state governments reconcile two contrasting poles becomes a key question on the table. Both the jurisprudence of the European Court of Human Rights and Court of Justice of the European Union are disabled to provide us any definite answers concerning how to proportionally derogate fundamental rights. In contrast, the two supranational courts generously prefer to provide a wide margin of discretion to the domestic authorities in response to containing coronavirus. Even one precautionary measure is proved unnecessary and disproportional by the following scientific studies, the Strasbourg Court is likely to recognize the conventionality of the domestic measure in accordance with reasoning given in the *Ireland vs. UK* case judgment where the pure retrospective examination did not possess the same weight as the prior concerns taken into consideration in the original circumstance of emergency (ECtHR 1978: par. 214). In the EU legal framework, Member States take primary action responding to the public health emergency in accordance with the Art. 168(8) TFEU. The ECJ competence in quashing the national precautionary measure merely remains in the theoretical possibility, rather than the Court would actually determine the Member States breaching the law.

The real enemy of our human race is high fatality of the new coronavirus, rather than a group of invaders or terrorists. The goal of combatting the coronavirus spread is not equal to a war in pursuit of safeguarding our constitutional order or integrity of the country. Guaranteeing the constitutional liberties and inviolable human dignity are still the core task of any non-totalitarian state government. Proportionality principle playing a fundamental role remains to be an analytical instrument rationalising the restriction or derogation of fundamental rights affected. However, the uncertainty must be concerned with the process of application of the proportionality principle. The weight formula proposed by Robert Alexy is instructive:

$$W_{1,2} = \frac{W_1 \times I_1 \times R_1}{W_2 \times I_2 \times R_2}$$

The variable *R* is added, representing the degrees of reliability to fact assessment, to the weight formula describing the intervened degree of competing constitutional rights on the two ends of scale (Alexy 2003: p. 446). The heavier weight of interference with an interest has a positive relationship with the certainty of its underlying premises (Alexy 2003: p. 446). Though the degree of Certainty may rely on the legislative and judicial discretion, the fact that Weight Formula absorbs the precautionary principle into the proportionality test formula, confines the scope of discretion to the decision-makers. Connecting precautionary measures to the proportionality test constructs the conceptual framework of precautionary proportionality principle. In fact, uncertainty on the scientific research and legislative regulation on the risks are the ordinary tasks to the constitutional states. It would paralyze the legislature if all the scientific findings are guaranteed in certainty. In the case judgment of *B Kalkar*, the German Constitutional Court states that "uncertainty of scientific finding is a nature of human knowledge" (BverfGE 1978: par. 89). The German Constitutional Court rejects the precedence of substantive constitutional principle (constitutional rights) in the *Mitbestimmung* judgement, but points out that "uncertainty about the effect of law in an uncertainty future of cannot exclude the power of legislature to pass that law, even it has a wide impact" (BverfGE 1979: par. 332). However, it is by no means of the Constitutional Court's intention to disarm its judicial competence on checking the constitutionality of such a legislative result on the basis of uncertain ground. Rather, the legislative discretion has been limited to the epistemic balance based on the degree of certainty and substantive balance of rights interference. The two laws of balance are combined into the weight formula proposed by Alexy as a mathematical approach applying the proportionality in *stricto sensu* (Alexy 2002: p. 418–419).

The *Cannabis* judgment brings us instruction with regards to the court employing the precautionary principle under the proportionality framework. The German Constitutional Court's deference to the completely bans on cannabis deal did not stem from the pure proportionality test. The Court notices that the moderate consumption of cannabis causes minor threats to individual health. Unless to be a consistent user of cannabis, occasionally small consumption of cannabis would not cause any physical severe amotivational syndrome or be accustomed to the intoxication. The cannabis danger to the health today is seen as being smaller than the legislators expected, when they passed the Act. However, the scientific information alone should not rule out the legality of Act comprehensively prohibiting the cannabis deal since the German Constitutional Court concerns not only on the intoxication of cannabis, but on potential dangers to the public health order and difficulties to combat the crimes. Particularly, the legalisation of cannabis deal may encourage more young people to consume them and enlarge the drug market dominated by organised criminal groups. Thus, the Court shifts from applying the pure proportionality principle for balancing the weights of interference between two competing constitutional rights to assess the consequence of legalisation of the cannabis under the precautionary principle, resulting into the emphasis on the priority of safeguarding public health order and protecting the young people from the

health risk physical and phycological dependence on the cannabis (BverfGE 1994: par. 184) as well as the legitimate aim to protect the third person from the potential risk posed by the cannabis addicts (BverfGE 1994: par. 188) Thus, the legitimacy of parliamentary legislation does not have to be connected to the precision of the danger. The best possible protection against danger and risks turns to be the supremacy value in the legislative task of certain fields e.g., public health protection.

However, the decision might be reversed if the Constitution Court determined the case by the pure proportionality test. Theoretically, the nature of the proportionality principle has an inherent tension with the precautionary principle. The latter principally places the competing abstract constitutional interests in equal position (BverfGE 1973: preamble par. 2, qtd. in Lindahl 2009: p. 362)[9], unless in some exceptional circumstances, where the loss of lives has apparently far more weight than loss of property or other procedure rights (Schlink 2011: p. 293).[10] Alexy offers an explanation on such issue as "the right to life (…) has a higher abstract weight than the general freedom of action" (Alexy 2003: p. 440). Since the objective of proportionality test seeks to achieve an optimisation result (maximisation) between the two competing constitutional interests, legal permission on one party easier loss of life would hollow the ultimate goal of the proportionality test, in which the loss of life would make the cost-benefit calculation meaninglessly. Thus, the right to life has a special normative significant in the constitutional rights framework. The common protection on the right of life between these two principles constitutes the commonality of these two principles.

Unfortunately, the commonality cannot sufficiently fill the normative gap between these two principles. The first two steps of Alexy's proposed three-pronged proportionality test formula seek to establish a rational connection between means and ends in aspect of facts assessment. The empirical uncertainty of the fact would raise the question of whether the restrictive measures inappropriately infringe the fundamental rights. In the event of COVID-19, the people would resist to the lockdown measures if very few infectious cases or death to be heard or informed in their residence community. At the moment that the evidence found by the scientists is not enough to prevent the coronavirus spreads again in 2021, the government cannot prove these extreme measures e.g., lockdown and mandatory quarantine, are the least intrusive measures and proportional for maintaining the public order. However, these extraordinary measures should be temporarily tolerable in this exceptional circumstance. With more epistemological knowledge to be accumulated with the ongoing clinical treatments and observation, and some new findings of scientific studies published, the state governments are obliged

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9 In the *Lebach* decision, the German Constitutional Court provides that "in principle, neither of the two constitutional values has a higher rank than other. In the specific case, the intensity of the intrusion in the personal sphere should be weighed against the interest of information to the public" (BverfGE 1973: preamble par. 2, qtd. in Lindahl 2009: p. 362).

10 Schlink has mentioned a German Constitutional Court judgment where the judges, considering that the suspect would be posited into a danger and great pains during the surgery of extraction of cerebro-spinal, rejects using this medical examination to determine the mentality of criminal into non-serious crime. Apart from that, the life of perpetrator, particularly young child, weigh more than the property. It is inappropriate to permit an adult but a disable man to shoot a teenager who has stolen his apples.

to promptly adapt the stringent policy or emergency legislation to the expert advices. The priority of policy-making process would stress the recovery of social economy and increase the rate of employment. The health risk cannot be eliminated in the short period since we have not found the source of coronavirus yet, neither do we have enough safe and effective vaccine in some countries. The resurgence of coronavirus has occurred in Europe and some territory in China in the winter of 2020. Some state governments retrigger the stringent lockdown and curfew measures, while others prefer to some flexible measures responding to a new wave of COVID-19 spreading.

Assuming the human rights protection is the primary objective of the government in the constitutional states, the reconciliation of the proportionality and precautionary principle is a necessary innovative technique to the social and global governance in the current days. The essentiality of the juridical technique underlines making mild and appropriate precautionary measures in compliance with the proportionality test. The normative combination between two principles lies in the common legitimate aim – protection of public health order. The nuanced differentiation is the proportional restriction made on the basis of predictable premise and certainty on its connection to the competing constitutional interest, while the latter lacks certainty on its connection to the competing interest. In this context, the executive should be granted a wide discretion in the first initial months to make and implement the emergency measures, considering that they had known little on the source and way of transmission of the coronavirus. The medical resource would be exhaustedly provided to a huge amount of people having acutely infected such a highly fatal coronavirus in the first several months.

In the second stage, the precautionary measure, whether extreme or not, must be readapted to new epistemological information. The assessment on lifting extreme measures should be on the table. Though the new scientific information may not sufficiently provide the evidence upholding the termination of all the precautionary measures, the national or local governments have to assess the risk of massive infection and strike a balance with other affected constitutional liberties. Provided that the amount of hospitalised acute infected people has been decreasing and infected people are consistently recovering, national authorities should do terminate lockdown measures, but only imposed some mild measures e.g., wearing mask and keeping social distance in the public sphere, regarding the dangers that new waves of COVID-19 may break again if not any preventive measure imposed to the social life. Thus, the replacement of extraordinary lockdown with the mild measures will result into an optimisation between the protection of public health order and the individual liberties. Proportionality test prevails over the precautionary principle. The national Constitutional Court needs to balance the cost of the constitutional rights derogation to the benefit of protecting public health order. In a circumstance, where only less than 50 people are presented in a public demonstration in the municipal big square, the legislative total ban on the public gathering would be unconstitutionally provided that the basic rules on the social distance and wearing mask are easily to obey to. In contrast, the implementation of the previous stringent measure may continue in the context social distance can hardly be observed and highly risk on the

easily infectious coronavirus turned to be high fatality once again. In particular, the decision-makers have to pay a great caution to strike a balance between the protection of public health order and the plan on the economy recovery. All the decisions must guarantee the probable aggregation of the amount of infectious people collapsing the medical resource.

In the third stage, the COVID-19 may resurge in the human society when the winter comes. The slow research and development of vaccine and our limited knowledge on the virological mutation pose a threat to the human life again. Up to now, our knowledge of the source of coronavirus and on its transmission cannot help the national and local authority to overcome the crisis. At the end of 2020, the number of infectious people accelerates higher than the peak point in the March 2020. The national authority and scientists need to assess new situation in order to make a deliberative policy. Although unexpected virological mutation multiplies the difficulties in the containment, the good news that the fatality rate has been consistently attenuating. We have not yet known the answer to a question of whether the fatality rate of COVID -19 in the winter would be much higher than in the summer. If concerned statistics in this winter are stably low, the national authorities should not reimplement the previous extreme measures. The decreasing ratio of death and the relative easier recovery from the infection would make COVID-19 equal to a normal flu, rather the scared SARS in 2003 and COVID-19 in the earlier time of 2020. Mandatory quarantine and lockdown measures are not necessary any longer. May the entertainment facilities or pub need to be closed because close-distance talking and body touches are common there. The university and school can remain open considering they have enough working staffs to collect the statistic concerning the daily temperature and design the flexible way of teaching organisation. Unless the death rate of COVID-19 increases or a new type of high fatality coronavirus mutation has been detected, those extraordinary measures should not be employed again.

Conclusions

The COVID-19 causes an unprecedented threat to our human society. However, the crisis is also a big test for our modern liberal-democracies on the regional and state capacities responding to the global pandemic. In particular, human rights protection is one of the fundamental issues in the context of combatting the coronavirus. Schmitt's radical theory of sovereignty in the circumstance of the state of emergency should be abandoned. Granting the state unconstrained sovereign authority may help the government effectively overcome the cause of emergency, while a new emergency may occur, when the exercise of irrational sovereign authority triggers many unexpected mass resistance and social chaos. In contrast, the inherent qualities of the modern democracies, which could be detected in the text of Constitution, possess the characteristics of the self-constraint and rationality. It implies the political sovereign decision is still regulated by the rationality amongst the liberal democracies.

As to the supranational protection of the fundamental rights in the state of emergency, the jurisprudence of the ECtHR and Court of the Justice of European Union

provide us very little help. Only one case judgment verifies the isolation of infectious people constitutes the serious interference of right to physical liberty under the Art. 5 ECHR. This measure could be allowed only in the circumstance that it is the last resort to contain the coronavirus. However, the Strasbourg Court has no experience adjudicating the cases concerning the coronavirus control under the Art. 15 since that almost all the landmark cases concern the rights derogation concerning the fighting terrorist or *coup d'etat*. Not an applicant has ever filed a litigation against the Contracting states emergency measures in dealing with the COVID-19 (Tzevelekos, Dzehtsiarou 2020: p. 145). Apart from that, the EU law confers Member States primary powers on adopting emergency measures under the Art. 168 TFEU.

The task of Convention rights protection falls on the shoulders of domestic authorities. Regarding some states that have declared the state of public health emergency and started the sunset clause in response to the public health emergency, human rights derogation or restriction would be an inevitable consequence. Although the degree of fundamental rights derogation must be in compliance with the proportionality test under the international human rights treaties, many uncertain aspects of the COVID-19 leave legal space for the government employing precautionary principle. The results of serious derogation from the fundamental rights in the circumstance of lacking uncertain evidence would raise the question of the legitimacy, unless the implementation of precautionary measures would be limited to a temporary period of time.

In our view, the normative combination of the two principles converts into a concept of the "precautionary proportionality principle". This innovative doctrine can be employed as a channel for developing the assessment model in the pandemic era. Both of them have common legitimate aims on the protection of public health order. The precautionary measures would be applicable in the initial several months, but the restriction would be lifted after the epistemic development in the scientific research. Even if the scientific research fails to reveal the key information of virus and transmission channel, the State authorities are obliged to recover normal economic activities and civil liberties, but only impose a minimum restriction on the social interaction, rather than remain harsh human isolation. As to the current situation of the COVID-19, the space left for precautionary measures has been consistently shrinking. Although we have not yet completely known many crucial virological aspects of COVID-19, the current situation is so far better than the initial months. At least, the death rate accentuates and many infects can recover soon. Unless the resurgence of COVID-19 roaring the death rate or mutating into a new unexpected type of virus with high fatality, the extraordinary precautionary-based measures should be restarted again.

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References:

ACKERMANN Bruce (2004), *The Emergency Constitution*, "Yale Law Journal", vol.113, no. 1.

ALEXY Robert (2002), *A Theory of Constitutional Rights*, Oxford University Press.

ALEXY Robert (2003), *On the Balancing of Subsumption. A Structural Comparison*, "Ratio Juris", vol. 16, no. 4.

BJORNSKOV Christan, VOIGT Stefan (2018), *The Architecture of Emergency Constitution*, "International Journal of Constitutional Law", vol. 16, no. 1.

BREYER Stephen G. (2003), *Liberty, Security and Courts*, https://www.supremecourt.gov/publicinfo/speeches/sp_04-15-03.html (15.12.2020).

BVerfGE (1978), Entscheidungen Der Amtlichen Sammlung, 49, 89.

BVefvGE (1979), Entscheidungen Der Amtlichen Sammlung, 50, 290.

BVerfGE (1994), Entscheidungen Der Amtlichen Sammlung, 90, 145.

CANESTRINI Nicola (2020), *Covid-19 Italian Emergency Legislation and Infection of the Rule of Law*, "New Journal of European Criminal Law", vol. 11, no. 2.

CROSBY Lauren, CROSBY Edward (2020), *Applying the Precautionary Principle to Personal Protective Equipment Guidance during the COVID-19 Pandemic: Did We Learn the Lessons from the SARS*, "Canadian Journal of Anesthesiologist", vol.67, no. 10.

DICEY Albert V. (1920), *Introduction to the Study of Law of Constitution*, LiberyFund.

DICEY Albert V. (1979), *Introduction to the Study of Law of Constitution*, Macmillan.

DYZENHAUS David (2006a), *Schmitt v. Dicey: Are State of Emergency Inside or Outside the Legal Order?*, "Cardozo Law Review", vol. 27, no. 5.

DYZENHAUS David (2006b), *The Constitution of Law: Legality in a Time of Emergency*, Cambridge University Press.

DYZENHAUS David (2008), *The Compulsion of Legality*, in: Victor V. Ramraj (ed.), *Emergency and The Limits of Legality*, Cambridge.

DYZENHAUS David (2012), *State of Emergency*, in: Michel Rosenfeld, András Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law*, Oxford.

DE SCHUTTER Oliver (2010), *International Human Rights Law: Cases, Materials, Commentary*, Cambridge University Press.

ECtHR (1961), European Court of Human Rights, *Lawless vs. Ireland* (no.3), ap. no. 332/57, judgment 1 July 1961.

ECtHR (1978), European Court of Human Rights, *Ireland vs. UK*, ap. no. 5310/71, decision 18 January 1978.

ECtHR (1988), European Court of Human Rights, *Brogan and Others vs. UK*, ap. no. 11209/84, judgment 29 November 1988.

ECtHR (1993), European Court of Human Rights, *Brannigan & McBride vs. UK*, ap. no. 14553/89 and 14554/89, judgment 25 May 1993

ECtHR (2005), European Court of Human Rights, *Enhorn vs. Sweden*, ap. no. 56529/00, judgment 25 January 2005.

ECtHR (2009), European Court of Human Rights, *A and others vs. UK*, ap. no. 3455/05, judgment 19 February 2009.

ECtHR (2018), European Court of Human Rights, *Mehmet Hasan Altan vs. Turkey*, ap. no.13237/17, judgment 20 March 2018.

ECtHR (2019a), European Court of Human Rights, *Alparslan Altan vs. Turkey*, ap. no.12778/17, judgment 16 April 2019.

ECtHR (2019b), European Court of Human Rights, *Kavala vs. Turkey*, ap. no.28749/18, judgment 10 December 2019.

ECtHR (2020), European Court of Human Rights, *Bas vs. Turkey*, ap. no. 66448/17, judgment 3 March 2020.

FEREJOHN John, PASQUINO Pasquale (2002), *The Law of the Exception: A Typology of Emergency Powers*, "International Journal of Constitutional Law", vol. 2, no. 2.

GARNETT Kenisha, PARSON David J. (2017), *Multi-Case Review of the Application of Precautionary Principle in the European Law and Case-law*, "Risk Analysis", vol. 37, no. 3.

GOVERNO ITALIANO (2020), *Misure urgenti in materia di contenimento e gestione dell' emergenza epidemologica da COVID-19*, Discreto-Legge 23 Febrario 2020, no. 6.

GREENE Alan (2018), *Permanent States of Emergency and the Rule of Law: Constitutions in the Age of Crisis*, Oxford.

GREENE Alan (2020), *Derogating from the European Convention on Human Rights in Response to the Coronavirus Pandemic: If Not Now, When?*, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3593358 (17.12.2020).

GROSS Oren, NÍ AOLÁIN Fionnuala (2001), *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, "Human Rights Quarterly", vol. 23, no. 3.

GROSS Oren, NÍ AOLÁIN Fionnuala (2006), *Law in Time of Crisis: Emergency Power in Theory and Practice*, Cambridge.

HOUSE OF LORDS (2005), *A vs. Secretary of State for the Home Department*, 2 W.L.R 87.

HRC (2001), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, CCPR/C/21/Rev.1/Add.11.

JUDGMENT OF THE COURT (1996) of 8 May 1996, The Queen v Ministry of Agriculture, Fisheries and Food and Commissioners of Customs & Excise, ex parte National Farmers' Union and Others, CASE 157/96.

JUDGMENT OF THE COURT (2000) of 22 June 2000, Fornasar and Others, CASE 318/98.

JUDGMENT OF THE COURT (2009) of 5 March 2009, Commission vs Spain, CASE C-88/07.

JUDGMENT OF THE COURT (2011) of 21 July 2011, Etimine SA v Secretary of State for Work and Pensions, CASE 15/10.

JUDGMENT OF THE COURT (2016) of 9 June 2016, *Pesce and Others*, CASES 78/16 and 79/16.

JUDGMENT OF THE COURT (2019) of 1 October 2019, *Blaise and Others*, criminal proceedings, CASE 616/17.

JUDGMENT OF THE GENERAL COURT (2011) of 9 September 2011, *France vs. Commission*, CASE 257/07.

LINDAHL Lars (2009), *Robert Alexy's Weight Formula for Weighing and Balancing*, in: Augusto Silva Dias et. al. (eds.), *Líber Amicorum de José de Sousa Brito em comemoração do 70.º Aniversário – Estudos de Direito e Filosofia*, Almedina.

MOWBRAY Alastair (2012), *Cases, Materials, and Commentary on the European Convention on Human Rights*, Oxford.

MESSERSCHMIDT Klaus (2020), *COVID-19 Legislation in the Light of the Precautionary Principle*, "The Theory and Practice of Legislation", vol. 8, no. 3.

PARLIAMENTARY ASSEMBLY, *The impact of the Covid-19 pandemic on human rights and the rule of law*, AS/JUR (2020) 13, Strasbourg.

PINTO-BAZURCO Jose Felix (2020), *The Precautionary Principle*, "Earth Negotiation Bulletin", Brief #4, https://www.iisd.org/system/files/2020-10/still-one-earth-precautionary-principle.pdf (23.12.2020).

SCHMITT Carl (2005), *Political Theology: Four Chapters on the Concept of Sovereignty*, Chicago.

SCHMITT Carl (2008), *Constitutional Theory*, Durham.

SCHMITT Carl (2013), *Dictatorship: From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggles*, Cambridge.

SCOTT Joanne (2018), *Legal Aspects of Precautionary Principle*, London.

SPADARO Alessandra (2020), *COVID-19: Testing the Limits of Human Rights*, "European Journal of Risk Regulation", vol. 11, no. 2.

SCHLINK Bernhard (2011), *Proportionality in the Constitutional Law, Why Everywhere But Here?*, "Duke Journal of Comparative & International Law", vol. 22, no. 2.

SCHEININ Martin (2020), *COVID-19 Symposium: To Derogate or not to Derogate*, "Opinio Juris", http://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/ (28.12.2020).

SUNSTEIN Cass R. (2004), *Minimalism at War*, "The Supreme Court Review", vol. 45, no. 1

TZEVELEKOS Vassilis P., DZEHTSIAROU Kanstantsin (2020), *Normal as Usual? Human Rights in Times of COVID-19*, "European Convention on Human Rights Law Review", vol. 1, no. 1.

VENICE COMMISSION (2006), *Opinion on the Protection of Human Rights in Emergency Situations*, CDL-AD(2006)015, Strasbourg.

VENICE COMMISSION (2016), *Turkey, Opinion on the Legal Framework Governing Curfews*, CDL--AD(2016)010, Strasbourg.

VENICE COMMISSION (2020), *Venice Commission Opinions and Reports on States of Emergency*, CDL--PI(2020)003, Strasbourg.

WALLACE Stuart (2020), *Derogation from the European Convention on Human Rights: The Case for Reform*, "Human Rights Law Review", vol. 20, no. 3.

WHO (2020a), *Modes of Transmission of Virus Causing COVID-19: Implication for IPC Precaution Recommendations*, https://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations (12.12.2020).

WHO (2020b), *Statement on the First Meeting of the International Health Regulations, Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV)*, https://www.who.int/news/item/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov) (12.12.2020).

Received: 16.01.2021. Accepted: 15.03.2021.