„Krytyka Prawa", tom 11, nr 2/2019, s. 253–269, ISSN 2080-1084, e-ISSN 2450-7938, Copyright by Akademia Leona Koźmińskiego

MAGDALENA MICHALSKA[1]

Proportionality as the Tool for Adjudicating Conflicts of Fundamental Rights – Criticism and Retort

Abstract

Even though the proportionality principle is well-established for judicial review in matters pertaining to human rights in modern constitutional law in numerous jurisdictions, it has recently become subject to a growing tide of criticism. The article aims to describe and critically analyze the main arguments raised by the opponents of using proportionality as the tool for adjudicating conflicts of fundamental rights. After briefly describing the typical and the most common structure of the proportionality test as it is used in constitutional law, the author would present – and then dismiss – the three most significant allegations towards the proportionality analysis, namely: the problem of incommensurability, the alleged proportionality's moral neutrality as well as the scope of judicial discretion that is claimed to be too wide according to some of proportionality's opponents.

Keywords: proportionality analysis, criticism of proportionality, limitation of fundamental rights, constitutional law

[1] Magdalena Michalska, MA – graduate of the Faculty of Law and Administration of the Jagiellonian University; e-mail: magdalena.michalska1995@gmail.com; ORCID: 0000-0001-5533-0734.

Ministry of Science and Higher Education Republic of Poland

English-language editing of that article was financed under Agreement No. 645/P-DUN/2018 with funds from the Ministry of Science and Higher Education allocated to the popularization of science.

 DOI: 10.7206/kp.2080-1084.309

„Krytyka Prawa", tom 11, nr 2/2019, s. 253–269, ISSN 2080-1084, e-ISSN 2450-7938, Copyright by Akademia Leona Koźmińskiego

MAGDALENA MICHALSKA

Zasada proporcjonalności jako metoda rozstrzygania konfliktów praw podstawowych – krytyka i obrona

Streszczenie

Chociaż we współczesnym prawie konstytucyjnym w wielu jurysdykcjach zasada proporcjonalności stanowi powszechnie akceptowaną metodę umożliwiającą rozstrzyganie konfliktów praw podstawowych oraz ocenę dopuszczalnego stopnia ich ograniczeń, w ostatnim czasie stała się ona przedmiotem narastającej krytyki. Celem artykułu jest opisanie i dokonanie krytycznej analizy głównych argumentów podnoszonych przez przeciwników tej koncepcji. Autorka przedstawia najbardziej klasyczną trójelementową formułę testu proporcjonalności, a następnie prezentuje trzy najczęściej podnoszone argumenty przeciwko stosowaniu mechanizmu proporcjonalności, które ostatecznie kolejno odrzuca.

Słowa kluczowe: zasada proporcjonalności, krytyka zasady proporcjonalności, ograniczanie praw podstawowych, prawo konstytucyjne

Ministry of Science and Higher Education
Republic of Poland

English-language editing of that article was financed under Agreement No. 645/P-DUN/2018 with funds from the Ministry of Science and Higher Education allocated to the popularization of science.

Introduction

In the most general terms, the principle of proportionality requires that any action undertaken must be proportionate to its objective.[2] In the modern constitutional law it is "widely regarded as the preferred judicial adjudication procedure for managing disputes involving an alleged conflict between an individual interest/rights provision and a legitimate public interest".[3] The proportionality test, being a textbook example of the global migration of constitutional ideas, has raised, without much exaggeration, more interest than any other problem in the emerging discipline of international constitutional law.[4]

The idea of proportionality as a legal concept originated in the second half of the 19th century in German administrative law.[5] Initially, its aim was to prevent the abuse of discretionary powers by the public administrative authorities.[6] Over time, it was transposed into constitutional law, where it performs a central role in the adjudication of disputes concerning fundamental rights. At present, it is well-established for judicial review in matters pertaining to human rights in numerous jurisdictions, including: Poland, Britain, Germany, Austria, France, as well as in international legal orders, mainly under the European Court of Human Rights and the Court of Justice of the European Union.[7]

However, the proportionality principle – that has generally been widely accepted in modern democracies so far – has recently become subject to a growing tide of criticism. This article aims to analyze and to critically evaluate the main reasons for this criticism.

The paper will proceed as follows. At the beginning the author will briefly present the structure of proportionality analysis in its most classic formula as described in

---

2 T.-I. Harbo, *The Function of Proportionality Analysis in European Law*, Leiden–Boston 2015, p. 1.

3 Ibidem.

4 J.A. Neto, *Borrowing Justification for Proportionality. On the Influence of the Principles Theory in Brazil*, Cham 2018, p. 7 (*Foreword*).

5 A. Barak, *Proportionality. Constitutional Rights and their Limitations*, Cambridge–New York 2012, p. 178.

6 E. Łętowska, *Wprowadzenie do problematyki proporcjonalności*, [in:] P. Szymaniec (ed.), *Zasada proporcjonalności a ochrona praw podstawowych w państwach Europy*, Wałbrzych 2015, p. 17.

7 A.L. Bendor, T. Sela, *How proportional is proportionality?*, "International Journal of Constitutional Law" 2015, 13, p. 530; see also: A. Stępkowski, *Zasada proporcjonalności w europejskiej kulturze prawnej: sądowa kontrola władzy dyskrecjonalnej w nowoczesnej Europie*, Warszawa 2010, pp. 208–209.

 DOI: 10.7206/kp.2080-1084.309

judiciary and legal literature. In the next parts of the article, the main arguments of the opponents of the proportionality analysis will be presented and examined. In each of these parts, the author will try to access whether those arguments are reasonable and noteworthy as well as whether they should influence the current way of application of the proportionality test. Finally, the conclusions will be collected and summarized in the last part of the article.

The structure of the proportionality analysis

The proportionality analysis is the doctrinal tool: no legal act – neither international nor national – involves the complex definition or the specific guidelines regarding the application of the proportionality principle. Due to the lack of normative criteria as to the proper manner of the practical usage of this analysis, it is necessary to refer to both judiciary and legal literature in order to determine the exact structure of the proportionality analysis. Depending on the judicial system "proponents of proportionality analysis differ among themselves on matters of detail, but the structure of the arguments is sufficiently similar to make 'proportionality' itself the object of inquiry".[8] Therefore, for the purpose of this article, being aware that this is a substantial simplification, the author will treat proportionality as a general doctrinal tool, and will not place it in a particular legal order.

The majority of constitutional rights are not absolute – they are relative and it is legally permissible – not to mention necessary – to limit their scope in some particular events.[9] Thus, they are not always implemented to the full extent. The criterion by which such an implementation is measured is that of proportionality.[10] Simply speaking, it "refers to a set of rules determining the necessary and sufficient conditions for a limitation of a constitutionally protected right to be constitutionally permissible".[11] The core idea of proportionality test is that it provides a structured form of analysis.[12] In its classic form, it involves a three-step test and requires considering suitability, necessary and proportionality in the narrow sense (propor-

8 M. Tushnet, *Advanced Introduction to Comparative Constitutional Law*, Cheltenham–Northampton 2014, p. 71.

9 B. Banaszak, *Prawo konstytucyjne*, Warszawa 2015, p. 377.

10 A. Barak, op. cit., p. 178.

11 A.L. Bendor, T. Sela, op. cit., p. 530.

12 M. Tushnet, op. cit., p. 72.

tionality *sensu stricto*) of any limitation of the scope of human rights protection.[13] An additional requirement, sometimes considered as the fourth (or, in fact, the first to be controlled) element of the proportionality analysis is that the value or interest that interferes with the fundamental right in question must pursue a legitimate goal (legitimate goal stage).[14]

The first proportionality requirement – the one of suitability – implies that "a means or measure must be suitable to protect or achieve the aim or end, which serves as a justification to adopt the measure or means in the first place".[15] In other worlds, this stage requires analyzing whether the particular legal act, for instance, is capable of achieving – at least to some extent – a legitimate aim that served as a justification for its implementation.[16] Unless there is a rational connection between the policy interfering with the right and the achievement of the legitimate aim, the infringement of the fundamental right cannot be considered proportional. If the court concludes that the mean or measure is suitable, it analyses whether it is necessary as well. At this stage it analyzes whether the impairment of the fundamental right in question has been as little as possible.[17] The law is considered to be necessary only in the event that "there is no less intrusive but equally effective alternative".[18] If the act or the law in question fulfills this necessity test, the final part of the proportionality analysis is carried out, namely, the proportionality *sensu stricto* test (also called the balancing test or the test of proportionality in the narrow [strict] sense). According to this stage, the disadvantages caused by the measure must not be disproportionate to its advantages.[19] In other words, the law must not impose a disproportionate burden on the right-holder.[20] The core idea of the foregoing structure can be summarized as follows: "(...) the proportionality test is about the resolution of a conflict between the right and a competing right or interest, and this conflict is ultimately resolved at the balancing stage. However, before engaging in the balancing exercise it is important to establish that there exists a genuine

13 See more: K. Wojtyczek, *Zasada proporcjonalności*, [in:] B. Banaszak, A. Preisner (eds.), *Prawa i wolności obywatelskie w Konstytucji RP*, Warszawa 2002, p. 682; J. Zakolska, *Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego*, Warszawa 2008, p. 9.

14 K. Möller, *Proportionality: Challenging the critics*, "International Journal of Constitutional Law" 2012, 10, p. 711.

15 T.-I. Harbo, op. cit., p. 23.

16 M. Klatt, M. Meister, *The Constitutional Structure of Proportionality*, Oxford–London 2012, p. 8.

17 Ibidem; J. Zakolska, op. cit., p. 25.

18 K. Möller, op. cit., p. 711.

19 T.-I. Harbo, op. cit., p. 36.

20 K. Möller, op. cit., p. 711.

 DOI: 10.7206/kp.2080-1084.309

conflict (suitability) between the right and a relevant (legitimate) competing interest (legitimate goal) which cannot be resolved in a less restrictive way (necessity)".[21]

As noted by Stavros Tsakyrakis, it is only rarely that measures are completely irrational, and it is almost always possible to argue that they are suitable and necessary to accomplish a legitimate aim; thus, only very occasionally does the measure fail during the first two steps of the proportionality analysis, which means that the above-described test is reduced, more often than not, to balancing.[22] Therefore, it is not surprising that the "balancing" stage, being the main and the most significant part of the proportionality analysis, is also a subject to criticism much more often than the other stages. It will be described in more details in next parts of the article.

From numerous arguments against the application of the proportionality analysis when determining the possible scope of limitation of human rights, I would like to focus on three that are not only raised much more often than the others, but also seem to be the most significant and serious ones. Those three allegations read as follows: firstly, there is a serious problem of the incommensurability of values balanced in the proportionality test; secondly, the proportionality analysis avoids moral reasoning; and thirdly, the discretionary power of the judge conducting the balance is too wide. They will now be explained, analyzed and, ultimately, rejected one by one.

On a final note, it is worth highlighting that the other arguments against the application of the proportionality analysis that are more or less frequently repeated in legal literature are, for instance, that proportionality does not provide a sufficient protection of human rights,[23] that it does not adequately accommodate liberal theory,[24] or that proportionality necessarily gets the moral questions wrong.[25] However, considering the limited volume of this article and its illustrative purposes, they will only be noted here and will not be analyzed in detail.

The problem of incommensurability

The first main argument raised by the opponents of the proportionality analysis is that it causes the problem of incommensurability. This problem arises when

21 Ibidem.

22 S. Tsakyrakis, *Proportionality: An assault on human rights?*, "International Journal of Constitutional Law" 2009, 7, p. 474.

23 A. Barak, op. cit., p. 488.

24 Ibidem, p. 468.

25 K. Möller, op. cit., p. 718.

"there is a need to trade one interest or value for another interest, while there is no common denominator between the interests".[26] In other words, the proportionality test "calls for comparing the benefit of a certain restriction of a right with the damage caused by this restriction".[27] This, however, is considered by some opponents of the proportionality analysis to be impossible, or at least non-sufficiently clear. To illustrate this problem, A.L. Bendor, T. Sela rhetorically ask how is it possible, for instance, to compare the benefit to the security of the State with the harm to one individual's freedom of expression?[28] An even more glaring example of how the values compared in the balancing stage of the proportionality test are incommensurable is the one provided by Justice Scalia in the concurring opinion in the *Bendix Autolite Corp. v. Midwesco Enterprises Inc.* case.[29] Namely, she noted that balancing the two interests "is more like judging whether a particular line is longer than a particular rock is heavy". It is clear that the discussed allegation is connected (or is a consequence of) the third part of proportionality test, that is to say, the requirement for proportionality in the strict sense, since it is, indeed, the latter that involves balancing the two values or interests in question. Thus, in general terms, according to the incommensurability objection "it is not possible to perform a quantitative comparison between gains and losses for rights or the public good by means only of rational criteria (as distinct from feelings, conventions or other sub-rational criteria)."[30]

This allegation is, to some extent, related to the other two that will be described in Parts IV and V of this article, especially the one according to which the "balancing" part of the proportionality analysis provides a judge with too wide a discretion. This is because the objection of incommensurability is based on a rationale that "since solving problems of competing principles through balancing presupposes a comparison between them, and since there is no common measure that can be applied to all of them, then the outcome of such a balancing is merely the outcome of an irrational and fully subjective choice of those responsible for the decision (usually the judge)."[31] The problem of the scope of judicial discretion will be analyzed in more details later, however, it should be noted here that the lack of a common measure does not deprive the proportionality analysis of its clear structure, which

---

26 A.L. Bendor, T. Sela, op. cit., p. 540.

27 Ibidem, pp. 540–541.

28 Ibidem.

29 The judgment of 17th June 1988, 486 US 888, 897 (1988); see: A. Barak, op. cit., p. 483.

30 F.J. Urbina, *A Critique of Proportionality and Balancing*, Cambridge–New York–Melbourne–Delhi–Singapore 2017, p. 39.

31 V.A. da Silva, *Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision*, "Oxford Journal of Legal Studies" 2011, 2, p. 278.

 DOI: 10.7206/kp.2080-1084.309

forces the judges making a particular decision to justify it so specifically and to take into account so many aspects of the reasoning that this, in my view, sufficiently prevents their excessive arbitrariness.

As noted by V.A. da Silva, the allegation of incommensurability is "neither new nor directed exclusively against the recently growing use of balancing or of the principle of proportionality in European courts."[32] In fact, the debate on the incommensurability of values is long lasting in both legal and philosophical thought.

At first glance it may be, in fact, true that comparing values that are to be compared during the proportionality analysis is a truly tough task. How can it be determined, for instance, "(...) how much satisfaction of the right to privacy is needed to justify a given restriction of freedom of expression and freedom of the press? How much economic development justifies a certain degree of environmental degradation? Can freedom of profession be used as a reason for a lesser degree of protection of the health of individuals?."[33] However, what ought to be emphasized is that balancing is always made among concrete alternatives and not among abstract values. For instance, we do not balance the abstract value of freedom of privacy, with the abstract value of the protection of the environment: what one intends in the process of balancing such values "is always to compare the numerous possibilities of protecting and realizing such rights in a concrete situation and to weigh among them."[34] As I will elaborate more on in Part IV of this article, the proportionality analysis provides a *frame* that has to be *filled* with the social and cultural background and the circumstances of the particular case. In this context it is clear that "(...) what is at stake is not to compare or weigh abstract values or rights, but to compare *trade-offs* in concrete situations. It is not a coincidence that Alexy's 'law of balancing' indicates exactly the same idea. According to this law, 'the greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other'."[35] In other words, "the proportionality test assesses each value in its own terms, without the need to compare incommensurable values, and then asks with respect to each one how close the infringement in the case was to the core of this value."[36]

---

32 Ibidem, p. 288.

33 Ibidem, p. 274; see also: M. Szydło, *Komentarz do art. 31*, [in:] M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom I. Komentarz. Art. 1–86*, Warszawa 2016, p. 800.

34 Ibidem, p. 286.

35 Ibidem; see also: R. Alexy, *A theory of constitutional rights*, Oxford 2002.

36 M. Cohen-Eliya, I. Porat, *American balancing and German proportionality: The historical origins*, "International Journal of Constitutional Law" 2010, 2, p. 269.

To illustrate that it is possible to compare the incommensurable values in more picturesque manner, David Luban gives an example of a college athlete. He has no intention of playing his sport professionally after graduation. He finds that he can become *slightly* more proficient when it comes to his sport activities by undertaking a new training schedule, that is so time-consuming that the extra time spent on training will have devastating effects on his studies.[37] Even though the category of knowledge and the category of excellence in play lacks any common measure, the vast majority – if not all – of the people would probably agree that it would be irrational of him to do the extra training.[38] The conclusion is that the *incommensurability* of values or interests does not necessarily imply their *incomparability*; the foregoing example clearly demonstrates "not only that a rational choice is possible, but also that the rational choice is rather clear: (...) the reason for this is the existence of a clear large/small trade-off."[39]

The alternative yet similar way of solving the incommensurability problem has been suggested by Aharon Barak, according to whom a common denominator required to conduct the constitutional balance, does in fact, exist: it is in the form of 'marginal social importance' in fulfilling one principle and the marginal social importance in preventing harm to another principle.[40] He noted that if a balancing is carried out between two constitutional rights, what should be balanced is the marginal social importance gained by the protection of one constitutional right and the marginal social importance gained by preventing more harm to the other constitutional right. If, however, the public interest (such as national security or public safety) is on one side of the balance, the comparison is between the marginal social importance of the benefits gained by advancing this particular public interest and the marginal social importance of the benefits gained by preventing the harm to the constitutional right in question. In other words, one should answer the question "whether the marginal social importance of the benefits to one constitutional principle is important enough to justify the marginal social importance in preventing the harm caused to the other."[41]

All of the doctrine views presented above lead, in fact, to the conclusion that what is actually balanced during the proportionality analysis is the scope of 'loss' of one right or value and the 'gain' of the other one. Such balancing is, as already demon-

37 D. Luban, *Incommensurable Values, Rational Choice, and Moral Absolutes*, "Cleveland State Law Review" 1990, 38, p. 75.

38 Ibidem, p. 76.

39 V.A. da Silva, op. cit., p. 287.

40 A. Barak, op. cit., p. 484.

41 Ibidem.

 DOI: 10.7206/kp.2080-1084.309

strated, definitely doable. Thus, the initial apparent lack of a common scale on which the two conflicting values or interests can be compared does not make the balancing stage of proportionality test impossible. Constitutional principles *per se* are, obviously, incommensurable. This incommensurability, however, does not alter their comparability in concrete situations.[42] Another conclusion of the incommensurability of constitutional values is that any imaginable alternative to the proportionality analysis would force the judges to operate on abstract incommensurable values as well. What is actually an argument for using the proportionality analysis is that it provides a clear structured instruction on how to *compare* those incommensurable values. To my knowledge, a similarly useful alternative instruction has not been provided, by any of the opponents of proportionality.

Avoiding moral issues

The second argument of the opponents of proportionality to be analyzed is that it does not resolve any moral issues – instead, it "pretends to be objective, neutral, and totally extraneous to any moral reasoning."[43] In other worlds, the core concept behind this allegation is, as noted by Grégoire Webber, that "(...) the structure of proportionality analysis itself does not purport (at least explicitly) to struggle with the moral correctness, goodness or rightness of a claim but only with its technical weight, cost or benefit. The principle of proportionality – being formal or empty – itself makes no claim to correctness in any morally significant way."[44]

There is a grain of truth in the argument that the proportionality principle is "empty" and that *in and of itself* it is morally neutral. However, it is difficult to agree that this constitutes any kind of allegation towards the entire concept.

Proportionality, being a structure that guides judges through the reasoning process as to whether the excessive infringement of fundamental rights occurred in the particular situation, is just a starting point and the *frame* for the exact assessment of constitutionality of the legal act in question. As I will elaborate more on in Part V of this article, proportionality itself lacks its own value but is an instrument used in order to access the value of the other principles. This leads to the conclusion that, proportionality is, indeed, an empty legal framework that must be filled with content. However, in order to fill it with this content – namely, to resolve the very

42 V.A. da Silva, op. cit., p. 301.

43 S. Tsakyrakis, op. cit., p. 474.

44 G.C.N. Webber, *The Negotiable Constitution. On the Limitation of Rights*, Cambridge–New York 2009, p. 90; see: K. Möller, op. cit., p. 716.

concrete conflict of constitutional rights or values – proportionality not only does not avoid, but it *requires* moral reasoning. The latter allows for different levels of protection, according to the principles and values of each legal system.[45] Thus, it is clear that the proportionality test *per se* "(...) is largely independent from any specific catalogue of basic rights. It is 'appropriately multicultural' and refers to the process of analysis which is not greatly influenced by local moral or political beliefs.[46] However, it does not mean that the *results* of proportionality analysis – that are, in fact, much more important than the theoretical assumptions of this concept – do not refer to the social, cultural, and, more importantly, to the very exact *moral* aspects of particular cases.

One of the very features of the proportionality principle is that it operates at a high level of abstraction.[47] However, this cannot be confused with moral neutrality.[48] To elaborate more on that, it is worth emphasizing that, for instance, the main concept standing behind the whole idea of proportionality, namely, that only legitimate goals can be used to justify an interference with the right, is a *moral* statement; similarly, "the claims that an interference must be suitable, necessary, and not disproportionate are obviously moral statements about the conditions under which an interference with a right is justified".[49] We should keep in mind that the act of balancing is not merely a simple judicial technique, but, primarily, a mental process.[50] Therefore, it seem clear that the moral reasoning is not only a part of this process, but it also, that it is the *unavoidable* part of it.

V.A. da Silva argues with the argument that balancing is "totally extraneous to any moral reasoning" by saying that it completely ignores that "(...) just as almost everything in legal reasoning, the definition of degrees of satisfaction and non-satisfaction of a principle will always be subject to fierce disputes, which will involve all types of arguments that may be used in legal argumentation in general, including the moral considerations" that the opponents of proportionality analysis miss so much.[51] In light of what was noted in previous paragraphs, it is hard to disagree with that.

---

45 A. Barak, op. cit., p. 489–490.

46 M. Klatt, M. Meister, op. cit., p. 7–8.

47 See more: A. Frąckowiak-Adamska, *Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego Wspólnoty Europejskiej*, Warszawa 2009, p. 27.

48 K. Möller, op. cit., p. 716.

49 Ibidem.

50 A. Barak, op. cit., p. 487.

51 V.A. da Silva, op. cit., p. 275.

 DOI: 10.7206/kp.2080-1084.309

Another argument against the moral neutrality of proportionality reasoning is that this reasoning "(...) is meant to protect both the human rights and the public interest at the same time. [Thus] it allows the imposition of certain restrictions on constitutional rights, but ensures that those limitations are properly justified."[52] The justification in question, again, cannot fail to refer to any kind of moral reasoning. Moreover, since human rights are obviously creatures of morality, the application of the proportionality principle with regard to those rights – whether it is made by the legislator or by the court – must also be moral reasoning.[53]

The clear conclusion from the previous paragraphs is that proportionality not only does not avoid moral issues – it, in fact, allows "for any morally relevant reason to be assessed in establishing which of the values, principles, or interests in conflict should prevail; particularly the last balancing stage will demand not the application of a concrete method, but that the judge engages directly with the reasons given by the parties and assesses them through practical reasoning unconstrained by a particular legal method or other legal categories."[54] Whether this moral reasoning would be carried out properly and would actually reflect the desirable moral values of the particular society – this depends heavily on the morality and on the good faith of the particular judge. However, the mere possibility that this moral reasoning would not be carried out properly does not mean that the entire application of the discussed concept avoids any references to morality.

In order to strengthen this argumentation, it should be noted that the proportionality analysis is not only "some kind of" moral analysis; it is, if conducted properly, "exactly the right kind of moral analysis because the proportionality structure pushes judges toward the important issues: it forces them, first, to collect possible reasons for the interference with the right and to assess their legitimacy; it then asks them to assess, for each of these goals, whether the interference is rationally connected to the respective goal; it further requires them to consider possible alternatives; and, finally, to address the question of whether the right or the competing rights or interests take priority."[55] This means that proportionality provides the court with the clear structure of the arguments (including *moral* arguments) in each particular case. If the judges followed this structure in a proper way, then, whether they like it or not, they would have to face the moral issues and conduct the moral reasoning so as to deliver the judgment.

---

52 A. Barak, op. cit., p. 468.

53 K. Möller, op. cit., p. 717.

54 F.J. Urbina, op. cit., p. 126.

55 K. Möller, op. cit., p. 726.

Too wide a judicial discretion

Another common objection against proportionality principle in human rights adjudication is that the proportionality analysis – in particular, the balancing conducted within proportionality *sensu stricto* – provides the judge with too wide a discretion.[56] This, in turn, results in damaging judicial certainty, since there is no way to predict the outcome of their reasoning in advance.[57] The existence of some level of discretion the judge enjoys is a direct consequence of the general vagueness of the proportionality principle. Again, the problem of vagueness is particularly intensified when focusing on the sub-test of proportionality in the narrow sense. According to this argument, the lack of rational standards to be applied when carrying out the proportionality test can make the "weighing" part of it either arbitral or unreflective, according to customary standards and hierarchies.[58] Thus, the act of balancing between competing interests lacks any rational, objective foundation since it not based on any rigorous criteria.[59]

The discussed allegation can be easily connected with the other one, maybe of an even more serious nature, namely, that balancing between competing values or interests should be done by the legislator and the judge simply lacks legitimacy to do so.[60] Allowing the judge to "balance" those values as the part of proportionality analysis means, according to this argument, that the principle of the separation of powers is being violated.

To answer those arguments, it is crucial to realize that "the constitutionality of a considerable proportion of statutes is decided based on criteria dominated by intuition."[61] It goes without saying that this applies also, if not primarily, to adjudicating conflicts between fundamental rights. It is only natural that the act of balancing involves some degree of discretion upon the person conducting it, be it the legislator, a member of the executive branch, or, as in the discussed situation, the judge.[62] Notwithstanding the foregoing, which still speaks in favor of the proportionality test is that it provides, as already mentioned in Part II, the structured form of analysis. As a consequence, the scope of an unavoidable judicial discretion exercised in this process is successfully limited. Thus, the proportionality analysis is – if

56 A. Barak, op. cit., p. 487.

57 Ibidem.

58 K. Möller, op. cit., p. 727.

59 A. Barak, op. cit., pp. 484–485.

60 Ibidem, p. 490.

61 A.L. Bendor, T. Sela, op. cit., p. 544.

62 A. Barak, op. cit., p. 485.

 DOI: 10.7206/kp.2080-1084.309

applied properly – never arbitrary. Furthermore, the alleged judicial discretion must, on the one hand, fulfill the general principles of judicial coherence and judicial consistency, and, on the other hand, reflect the fundamental values of the legal system.[63] Therefore, I agree with Aharon Barak, according to whom "(...) balancing brings – rather than confusion – a sense of order and method into constitutional law analysis. It forces the judge to identify the relevant principles and to provide a justification for the right's limitation."[64]

Moreover, the allegedly "too wide" judicial discretion, has not been taken by the court itself – it has been, either explicitly or implicitly, granted to this court by the constitution.[65] Similarly as the legislator is, to some extent, conducting the proportionality analysis at the stage of lawmaking, the courts are fully entitled to conduct balancing while applying legal norms to particular situations: first, this is the foundation for the institution of judicial review, and second, it constitutes an extremely important tool in judges' hands for protecting a democratic constitutions.[66] It such context, it is worth emphasizing that "the institutional structure of the court, its independence, and its distance from day-to-day political pressures, put judicial balancing closer than any other type of balancing to the balancing required by the constitution. Further, the court is fully equipped, both professionally and ethically, to perform the task."[67]

Another important aspect is that one of the most inherent feature of the proportionality analysis is that the proportionality itself does not – as already mentioned above – provide the final result of the moral reasoning, but merely directs the judges toward developing the final moral argument on their own.[68] This is a direct consequence of the very specific nature of the proportionality analysis, namely, that this analysis *itself* does not express any value, but is merely – or as much as – a tool used to balance the other values.[69] It would be trivial to argue that it is impossible to regulate every aspect of life – for instance, any imaginary conflict that may occur between two fundamental rights or one fundamental right and public interest – in the legal act. Some level of judicial discretion is unavoidable in almost any court case. Why would it be particularly inappropriate with regard to human rights? Due to the lack of any particular value the proportionality principle

63 Ibidem, p. 486.

64 Ibidem.

65 Ibidem, p. 491.

66 Ibidem, p. 492.

67 Ibidem.

68 K. Möller, op. cit., p. 724.

69 A. Frąckowiak-Adamska, op. cit., p. 27.

represents *in itself,* it seem clear that it is a human being – a judge – who has to carefully apply the particular circumstances of the case to the frame that proportionality analysis provides. Unless the judges enjoy some level of discretion, this application would not be doable.

In this context it is worth noting that, contrary to what some opponents of the proportionality principle seem to suppose, proportionality has never aspired to lead to the *objective* truth or, in other words, to deliver the only one right answer with which everyone would agree on.[70] It has never been the exact goal of proportionality in general and balancing in particular; more than that, only an idealized approach to the issue of fundamental human rights adjudication could raise this type of claim.[71] Balancing, would provide a single "right" answer only assuming that this answer "cogently derives from accepted premises", or, in other words, that "justification of its premises has been previously accepted as valid."[72] In light of the above, it is meritless to argue that proportionality is not a perfect constitutional tool since the significant scope of judicial discretion together with the vagueness of this principle results in delivering different judgments, depending on exactly which person evaluates the particular case. This is because, obviously, "the disagreement is ubiquitous in legal argumentation and it would make no sense whatsoever to expect that balancing or proportionality could make it disappear."[73]

To conclude on this issue, it needs to be noted that the mere fact that conducting a balance requires some level of judicial discretion does not, in any way, strengthen the argumentation against the proportionality principle. What, in fact, would speak in favor of abandoning the proportionality analysis, would be to "prove that the discretion exercised by judges in a balance is wider than that granted to them in the proposed alternatives for resolving conflicts between competing principles."[74] Such proof, however, has not been provided by any of the opponents of proportionality.

Conclusion

The allegations against the proportionality analysis described in this article pose a significant challenge to some aspects of this analysis. However, notwithstanding the foregoing, it is still the most preferred method of determining whether consti-

70 V.A. da Silva, op. cit., pp. 291–292.

71 Ibidem.

72 Ibidem.

73 Ibidem.

74 A. Barak, op. cit., p. 487.

 DOI: 10.7206/kp.2080-1084.309

tutional rights have been violated and, to this day, no reasonable alternative to the proportionality analysis has been suggested in the legal doctrine or in the judiciary. As stated by Kai Möller, "in light of the spectacular success of the principle of proportionality in constitutional rights adjudication around the world, it is crucial to continue the debate about its value and, inseparable from this, its proper content and meaning; and for this debate critical voices are not only welcome but, indeed, indispensable."[75] However, it is hard to resist the impression that the arguments against the application of proportionality analyzed in details in previous parts of the article – not to mention the others, less significant ones – are not convincing, or, at least, they are not convincing enough to abandon the proportionality test in favor of any other method of accessing the possible scope of limitation of fundamental rights. Thus, the constant attack towards the proportionality principle is simply not justified enough.

We should keep in mind that despite the fact that some practical aspects of the application of the proportionality test may be problematic in particular cases, proportionality is, broadly speaking, an "essential, unavoidable part of every constitutional text" and that it still remains "a universal criterion of constitutionality."[76] Robert Alexy, for instance, emphasizes the unavoidable nature of balancing the part of proportionality analysis, since "there is no other rational way in which the reason for the limitation can be put in relation to the constitutional right."[77] This leads me to the final conclusion, namely, that even if we accept that some aspects of the criticisms are, indeed, accurate, then, proportionality analysis still seem to be the "least bad" overall of the imaginary different approaches.[78] I would like to conclude the above considerations by quoting, once again, Virgilio Afonso da Silva, who answered the criticism towards the balancing stage of the proportionality analysis by noting that "(...) the fact that balancing may be difficult does not imply that no balancing can be achieved. Balancing requires refined perception. It takes practice."[79] And the mere fact of that cannot justify the wave of fierce criticism towards the best tool for adjudicating conflicts of fundamental rights that currently exist.

75 K. Möller, op. cit., p. 731.

76 D.M. Beatty, *The Ultimate Rule of Law*, Oxford 2004, p. 162.

77 R. Alexy, op. cit., p. 74.

78 M. Tushnet, op. cit., p. 73.

79 V.A. da Silva, op. cit., p. 301.

Bibliography

Alexy R., *A theory of constitutional rights*, Oxford 2002.
Banaszak B., *Prawo konstytucyjne*, Warszawa 2015.
Barak A., *Proportionality. Constitutional Rights and their Limitations*, Cambridge–New York 2012.
Beatty D.M., *The Ultimate Rule of Law*, Oxford 2004.
Bendor A.L., Sela T., *How proportional is proportionality?*, "International Journal of Constitutional Law" 2015, 13.
Cohen-Eliya M., Porat I., *American balancing and German proportionality: The historical origins*, "International Journal of Constitutional Law" 2010, 2.
Finnis J., *Natural Law and Natural Rights*, Oxford 1980.
Frąckowiak-Adamska A., *Zasada proporcjonalności jako gwarancja swobód rynku wewnętrznego Wspólnoty Europejskiej*, Warszawa 2009.
Harbo T.-I., *The Function of Proportionality Analysis in European Law*, Leiden–Boston 2015.
Klatt M., Meister M., *The Constitutional Structure of Proportionality*, Oxford–London 2012.
Łętowska E., *Wprowadzenie do problematyki proporcjonalności*, [in:] P. Szymaniec (ed.), *Zasada proporcjonalności a ochrona praw podstawowych w państwach Europy*, Wałbrzych 2015.
Luban D., *Incommensurable Values, Rational Choice, and Moral Absolutes*, "Cleveland State Law Review" 1990, 38.
Möller K., *Proportionality: Challenging the critics*, "International Journal of Constitutional Law" 2012, 10.
Neto J.A., *Borrowing Justification for Proportionality. On the Influence of the Principles Theory in Brazil*, Cham 2018.
Silva V.A., da, *Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision*, "Oxford Journal of Legal Studies" 2011, 2.
Stępkowski A., *Zasada proporcjonalności w europejskiej kulturze prawnej: sądowa kontrola władzy dyskrecjonalnej w nowoczesnej Europie*, Warszawa 2010.
Szydło M., *Komentarz do art. 31*, [in:] M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom I. Komentarz. Art. 1–86*, Warszawa 2016.
Tsakyrakis S., *Proportionality: An assault on human rights?*, "International Journal of Constitutional Law" 2009, 7.
Tushnet M., *Advanced Introduction to Comparative Constitutional Law*, Cheltenham–Northampton 2014.
Urbina F.J., *A Critique of Proportionality and Balancing*, Cambridge–New York–Melbourne––Delhi–Singapore 2017.
Webber G.C.N., *The Negotiable Constitution. On the Limitation of Rights*, Cambridge–New York 2009.
Wojtyczek K., *Zasada proporcjonalności*, [in:] B. Banaszak, A. Preisner (eds.), *Prawa i wolności obywatelskie w Konstytucji RP*, Warszawa 2002.
Zakolska J., *Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego*, Warszawa 2008.

 DOI: 10.7206/kp.2080-1084.309