Paradigm shift in public interventions in turbulent times. More precaution, less proportionality?

Dawid Sześciło
Stanisław Zakroczymski

Introduction

Precautionary principle has been already for decades one of the leading concepts guiding public interventions in the areas of environmental protection or food safety. As defined by national legislation, international law and jurisprudence, it is interpreted as a general directive calling public authorities (primarily legislators) to embark on public intervention (regulation) in advance of reaching certainty about its scientific justification, if abstaining from intervention could lead to major and irreversible damage to environment or public health. In its most popular versions, this "better safe than sorry" doctrine favors proactive, pre-emptive and often more profound public interventions in the absence of full evidence supporting such a radical intervention.

Largely thanks to Cass Sunstein's book "Laws of fear", precautionary principle got out of the niche of environmental and food safety (public health). Although being very critical about this concept, Sunstein contributed to recognizing that precautionary principle might be considered as more universal doctrine of public intervention, not confined to two fields of public policy where it emerged. Our contribution departs from observation that there is an increasing demand to revive debate around precautionary principle as a style (rule) of public interventions. In particular, there is a need to consider to what extent this approach might become (or is becoming) the leading strategy of interventions tackling massive challenges, such as pandemics, security threats, climate change or economic inequalities. The catastrophic, even apocalyptic, discourse on necessity of radical changes in political, economic and social life to prevent catastrophic events, appears to create demand for precautionary-based interventions. If Slavoj Zizek is right that we are 'living in the end of times' awaiting four horsemen of apocalypse (Zizek 2005), is the precautionary principle the right and only survival or prevention strategy?

In this theoretical contribution, we do not aim at judging the potential emergence of precautionary principle as a dominant rule of public interventions in turbulent times. Our goals are limited to capturing the nature and key characteristics of precautionary-based public interventions. We fulfill this task by contrasting precautionary approach to what appears to be the dominant style of public interventions in democratic constitutional states, i.e. interventions designed and implemented according to proportionality rule. Proportionality formally remains a fundamental principle governing public interventions in all modern democracies, often enjoying the status of the constitutional rule. In general terms, it is a multi-stage procedure for testing whether public intervention, often involving interference with the rights and freedoms, is sufficiently justified. Principle of proportionality became much more than just a technical rule of designing public interventions or judicial decision-making, but a foundation of democratic constitutionalism structured around idea of cautious, restrained and carefully balanced interference of the state into rights, freedoms, markets.

Although some overlaps between both styles of interventions will be also identified, we perceive them as largely contradictory and competitive, what we will demonstrate in details in the first part of the paper. The second part will focus solely on the precautionary-based style of public interventions, striving to highlight some ideas for institutional mechanisms mitigating the risks and threats inextricably associated with potential emergence of precautionary principle as a dominant rule of public interventions in turbulent times. These propositions are of general nature, rather teasing more in-depth discussion than offering fully-fledged, ready-to-implement solutions.

Proportionality-based public interventions

Contemporary understanding of proportionality as the underpinning principle governing relationship between the state and the citizen is rooted in the idea of *Rechtstaat*. As Cohen-Eliya and Porat point out the requirement of proportionality, defined generally as use of public authority in proportion to the goal defined by law, 'corresponded to the *Rechtstaat* requirement and complemented it.' (Cohen-Eliya, Porat 2010: 271-272). After the Second World War, principle of proportionality became a cornerstone of democratic and liberal constitutionalism, based on the idea that democracy must not only 'define and stabilize the exercise of state power through majoritarian machinery' but also 'give legal priority to equal citizenship and respect of human dignity', through proportionality-based judicial protection of fundamental rights (Weinrib 2006: 9-18). It offered a tool to 'maintain a semblance of neutrality' in solving constitutional disputes over values in the secular, liberal pluralistic society (Schneidermann, 2013: 568-569). It also became general principle moderating the public intervention and curbing discretional powers of public authorities.

Judiciary, including constitutional courts, played decisive role in translating this general idea into set of specific standards and requirements for public interventions, even in the absence of explicit references to this rule in the national constitutions. The proportionality principle only in some cases enjoys the status of the constitutional rule. For example, it is explicitly expressed as a general principle in the constitutions of Portugal (Article 18.2 and 18.3) or Israel (Basic Law on Human Dignity and Liberty, Article 8). Most of the constitutions of the post-communist countries also entail the general principle of proportionality (e.g., Article 31.3. of the Constitution of Poland, Article 16 of the Constitution of Croatia). In contrast, the constitutions of the Western democracies often do not express such a principle explicitly (e.g., constitutions of United States, France, Spain). This is also the case of the Basic Law of the Federal Republic of Germany, which stipulates only the formal restriction of the limitation of the basic rights (the form of general and abstract law is required) and settles that the 'essence' of a basic right may not be affected (Article 19).

Such a modest normative basis did not prevent the Federal Constitutional Court from developing a complex proportionality test to review cases of restrictions of the human rights. As Grimm mentions, the Court has never explained why the constitution required limitation of rights to be proportional. He stresses that the principle was introduced by the judges 'as if it could be taken for granted'(Grimm 2007: 385). Another important proponent of the principle of proportionality is European Court of Human Rights. However, there is no general principle of proportionality expressed in the European Convention on Human Rights, there are particular provisions concerning the possible proportional limitation of the several rights and freedoms protected by this act (e.g., freedom of expression, freedom of assembly), based on which the Court developed a very influential case-law. What makes the Strasbourg's role even more

important – it also commanded national courts (especially those exercising the judicial review of legislation) to deploy the proportionality test (Stone Sweet, Mathews 2008: 161-162).

As documented above, the principle of proportionality has a broad practical application in judicial practice. There is also no doubt that this happened as the result of the activist approach of the judges of the high courts throughout the world, which makes the proportionality principle the 'important doctrinal underpinning for the expansion of judicial authority globally.' (Stone Sweet, Matthews 2008: 161-162) The legal doctrine and the court caselaw developed a four-stage test of proportionality of the public intervention. First stage consists in the investigation of the legitimacy of the goal of the limitation, second is the examination of the suitability of the intervention, third – its necessity and fourth – its 'proportionality *sensu stricto'* known also as 'balancing' stage which aims at prioritizing between two rights competing in concrete circumstances (Möller 2014: 131-140). However details concerning the understanding of the specific stages of the test vary between jurisdictions, the essence of the principle and its sub-requirements is common.

The application of the proportionality principles goes far beyond the sphere of the public intervention against the individual rights and freedom. The principle of proportionality is, e.g., invoked in the Treaty on the European Union, which establishes it as one of the main rules concerning the EU's actions (Article 5.4). The principle is established also in European Charter on Local Self-Government in terms of the exercising of the administrative supervision of the local authorities' actions by the central administrative organs (Article 8.3.).

It became more and more clear that proportionality principle is not confined to a technical rule for judicial review of administrative acts, but it represents broader trend towards curbing state's interference in rights, freedoms or markets. It reduces the discretion of the public policy makers (i.e., representatives of the executive and legislative branch of government) to a great extent. They must be aware that any act of their power is subject to *ex ante* and *ex post* scrutiny through demanding proportionality test. This imposes on them the obligation of providing in-depth justification of their actions, especially from the perspective of the balance between the objectives of the public interests and the private interests, rights, and freedoms. In the scholarship the proportionality principle was described as the cornerstone of the 'culture of justification' as opposed to the 'culture of authority' (Gardbaum 2014: 4). In consequence, any public intervention in the proportionality regime may be introduced as the reaction to the well-analyzed public problem. The pre-emptive public intervention, based on the not fully confirmed information are not allowed, except for the state of emergency.

Evolution of the proportionality principle towards general regulatory strategy of cautious, restrained and carefully balanced public interventions was accompanied by developing the proportionality-based policy making 'infrastructure'. The most prominent element of this process was emergence of the concept of Regulatory Impact Assessment (RIA), at least since the 1980s. Section 2 of the Executive Order 12291 of 1981 by President Ronald Reagan, often perceived as foundational act for RIA movement, stipulated, *inter alia*, that 'regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society' and 'among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen.' Those regulations refer implicitly to the requirements of, respectively, 'legitimate goal' and 'suitability' of the proportionality test. The avoidance of arbitrariness, promotion of accountability and ensuring the proportionality of the legislation were also listed among the OECD principles of RIA for the developing countries (Kierkpatrick, Parker 2003). It is worth noting that RIA regulations

and standards apply the proportionality principles' requirements to any public intervention and do not refer explicitly to the limitation of human rights and freedoms. The creation and growth of popularity of RIA was connected to the neoliberal concept of deregulation that gained popularity since the 1970s and 1980s (Rodrigo 2005: 2; Green 2015).

Therefore, in addition to serving as a cornerstone of liberal constitutionalism, the proportionality principle also corresponded well with the neoliberal vision advocating for less expansive state and creating more hurdles to public interventions (Kelsey 2010: 40). As a regulatory strategy, it is clearly linked with the deregulation agenda, expansion of regulatory impact assessment and more recent popularity of behavioral interventions, promoted as an alternative to classical regulation. All these techniques and approaches illustrate distrust into expansive public intervention, perceiving it as last resort and raising the bar for any interventionist initiatives.

Towards precautionary-based public interventions – from sectoral phenomenon to dominant style of public interventions?

The origins of precautionary principle are commonly attributed to the German *Vorsorgeprinzip* introduced into the environmental law in the 1970s, where it gradually reached the status of the leading principle of the national environmental legislation (Arndt 2009: 16-17). German environmental law shaped the understanding of the precautionary principle as a rule of preventive rather than reactive actions aiming at environmental protection, underlining the need for avoiding damage by acting at the source rather than just mitigating and reducing it (Koepfer 2013: 376). German concept of precaution also recognized that scientific uncertainty cannot serve as an excuse for inaction in case of high risk of irreversible damage (Whiteside 2013: 74).

This initial conceptualization of precautionary principle corresponds well with its contemporary definitions, present in the academic discourse, international law and jurisprudence. Most of them perceive precautionary-based intervention as a general rule authorizing public intervention aiming before full scientific understanding of the relevant risk is reached, considering the potentially catastrophic consequences of inaction (Cameron and Abouchar 1991: 1; Sunstein 2005: 4; Jackson and Steingraber 1999: 18) As such, it demonstrates deviation from the default, proportionality-based model of intervention, where the science provides clear recommendations about the need and forms of public intervention, and the role of policy makers is just to translate these recommendations into normative framework, ensuring that intervention is confined to what is absolutely necessary to tackle specific policy problem.

In contrast, under precautionary rule we accept intervention even if the scientific message lacks this sharpness and clarity. We give mandate to act when only contours of what might be the risks justifying intervention are visible (Zander 2010: 2). Irrespective of this scarcity of scientific base for intervention, the precautionary rule encourages policy makers to demonstrate 'preventative anticipation', i.e. "a willingness to take action in advance of scientific proof of evidence of the need for the proposed action on the grounds that further delay will prove ultimately most costly to society and nature, and, in the longer term, selfish and unfair to future generations" (O'Riordan and Cameron 2013: 17). In the more cautious version, it enables action in the absence of decisive evidence of harm stemming from lack of regulation. In the strongest variant, it justifies undertaking intervention in any case where there is a risk of significant damage, and continuing intervention until there is a clear scientific evidence that the damage will not occur (Sunstein 2005: 18-19).

Regardless of the version, precautionary principle lowers the threshold for regulatory actions of public authorities (von Schomberg 2006: 23). Compared to proportionality rule, we allow intervention that most likely would not pass the key criteria of various regulatory impact assessment tests. One may conclude that we give the governments and legislators the mandate to 'shoot in the dark', empowering them to conduct policy experiments with less or no strings attached. However, the more precise description of the nature of the precautionary approach is enabling public authorities to overreact, i.e. to introduce measures that go beyond what under the current state of scientific knowledge is justified in order to tackle specific problem.

While recognizing simplicity and clarity of this concept, we cannot ignore its intellectual flaws and deficits, especially with regard to its approach to scientific knowledge. As we demonstrated, precautionary approach justifies intervention in the absence of scientific certainty. Critics of precautionary principle aptly point out that this formula states a truism that should apply to any public intervention (Sunstein 2005: 24) or creates artificial distinction between situation where there is a scientific consensus and those where scientific information is insufficient or uncertain (Majone 2002: 104). In other words, there is always some degree of scientific uncertainty or our understanding of any matter could always be better. Further, it is not possible to set any quantitative indicator measuring the scientific certainty, enabling to set any firm threshold for activation of the precautionary approach.

When contrasted with the proportionality-based interventions, precautionary approach reveals further characteristic features. The table below offers a more comprehensive comparison of both styles of public interventions, beginning with tracing ideological connotations and ending with identification of more practical differences in application of both approaches.

Table 1 Proportionality-based and precautionary-based public interventions - comparison

	Proportionality-based public interventions	**Precautionary-based public interventions**
Ideological background and associations	Liberal constitutionalism, neoliberalism, regulatory state	Collectivism, positive (interventionist) state, Neo-Weberian State
Threshold (conditions) for intervention	Decisive evidence justifying the need for intervention generated through comprehensive ex ante assessment	Intervention allowed with insufficient evidence backing it, as long as lack of action may lead to catastrophic consequences
Timing of intervention	Reactive	Pre-emptive
Approach to intervention	Striking fair balance between objectives of the public interest and private interests, rights and freedoms	Clear prioritization of the objectives of public interest
Hierarchy of intervention tools	Classical regulation as ultima ratio	Classical regulation as a default option
Infrastructure (policies) of intervention	Regulatory impact assessments, developing alternatives to classical regulation (e.g. behavioral insights)	Reaffirmation of administrative law and classical legalistic paradigm

Control and accountability mechanisms	Ex ante and ex post RIA, extensive judicial (constitutional) review based on proportionality test, including ex ante constitutional review	?

In terms of ideological roots, one could say that precautionary-based interventions contribute to more democratic public policy making, as precautionary rule shifts the burden of taking decisions from scientists to policy makers (Freestone and Hey 1996). However, it is not that obvious if we recall e.g. the Schumpeterian conditions for success of democratic method, underlining that effective range of political decision should not be extended too far and favoring greater role of experts in shaping public policies (Schumpeter 1943). Less disputable are the connotations of the precautionary rule with collectivism. Rather than concentrating on protection of individual rights and freedoms against excessive public intervention, precautionary approach accentuates the need for collective goods (e.g. environment, public health), not only for the benefit of the current population, but also with strong focus on responsibility for future generations. Further, precautionary principle appears to offer an opportunity for revival of some form of the positive (interventionist) state, i.e. paradigm of public intervention characterized, among others, by greater policy discretion of the state and wider scope of direct involvement of the state into economic management, including expanding public ownership (Majone 1997: 141-142). Precautionary approach could be also linked with the Neo-Weberian reaffirmation of the state as a major actor responsible for and capable of addressing environmental, social or technological challenges (Pollitt and Bouckaert 2004: 99).

The crucial dilemma of precautionary principle refers to conditions and circumstances justifying its application (threshold for intervention). It is widely recognized that it is not a rule of universal application, but rather extraordinary policy making approach. For Taleb et al., precautionary approach "should be evoked only in extreme situations: when the potential harm is systemic (rather than localized) and the consequences can involve total irreversible ruin, such as the extinction of human beings or all life on the planet" (Taleb et al. 2014: 1). It is clear that such a narrow and restrictive approach is not followed in practice. Although existential threat to humans and/or environment is the major factor triggering precautionary principle, it could be activated not only to avert damage for the "all life on the planet", but harm of smaller, even local scale.

In addition to this, precautionary-based interventions should be pre-emptive in terms of timing and aggressive in terms of general approach. Swift action is required, well ahead of the materialization of catastrophic risks. Further, there is less room for careful balancing of various interests in designing of intervention, that is characteristic to proportionality rule. Under precautionary regime, there is a clear hierarchy of interests and objectives. Priority is given to the need of preventing disastrous events, legitimizing hardline approach towards any interests undermining this objective.

Once we establish grounds for recourse to precautionary principle, we may eventually translate it into practical policy tools. This is also challenging task, considering that the principle itself does not determine the extent and nature of the measures aiming at its implementation (Fisher and Harding 2006: 116). Among key instruments manifesting precautionary approach, Cooney and Dickson list strict prohibitions or bans on specific activities, requirements of demonstrating safety prior to allowing some activities, various monitoring and licensing standards and

imposing conditions or restrictions on some activities (Cooney and Dickson 2012: 16). However, these instruments are not by nature different from classical regulatory measures available under the regime of proportionality. Distinctive for precautionary rule is, however, the lower threshold justifying their application and stronger legitimacy for more far-reaching interventions, based on classical tools of administrative law, i.e. bans, prohibitions, restrictions of rights and freedoms. Precautionary approach leaves little room for more sophisticated and 'softer' policy tools (e.g. behavioral insights), as their effectiveness is by nature limited. To sum up, there are no policy tools designed exclusively for the proportionality principle, but there is a considerable qualitative and quantitative difference in use of the same tools under precautionary and proportionality regimes.

All these characteristics of precautionary approach may provoke legitimate concerns about the increased risk of excessive public interventions deteriorating the level of protection of individual rights and freedoms. With greater flexibility and less restrictions in designing public interventions, proportionality rule may suggest renewal of pre-Rechstaat administrative liberty and 'freedom of the State' (Sordi 2010: 29), with all adverse consequences for legal certainty and respect for individual rights and freedoms. In the worst case scenario, precautionary-based 'laws of fear' may be used by political leaders as a vehicle of transformation of the states towards authoritarian rule. Here we approach the central legal (constitutional) challenge associated with precautionary rule, i.e. lack of clear mechanism and rules for reviewing the precautionary-based interventions and holding policy makers accountable, especially for abusing it through ungrounded recourse to precautionary rule. Proportionality regime developed a complex machinery for testing public interventions, both ex ante (through rigorous RIA mechanisms) and ex post, primarily through extensive judicial and constitutional review. These tools are theoretically applicable also to precautionary-based interventions, but in practice they are inadequate to them. RIA requires strong evidence backing intervention, that in case of precautionary-based intervention is missing or insufficient to pass the RIA test. Judicial or constitutional review under proportionality rule concentrates on spotting and eliminating any interventions that go beyond what is absolutely necessary to tackle specific policy problem, while allowing overreaction and excessive intervention is essential to precautionary approach. Bearing this in mind, developing tailored and consistent approach of legal scholarship and jurisprudence to application of precautionary rule is needed and we will further focus on this topic in the second part of this paper.

Distinctive features of precautionary-based interventions become even more tangible when we discuss specific examples of interventions inspired by this rule. Most recently, the references to precautionary rule were made in the context of various policy responses to the COVID-19 pandemic. Large-scale epidemiological risks are one of the most obvious fields of application of precautionary rule as they require swift and aggressive intervention to tackle public health risk of uncertain proportions (Baral et al. 2020). While not all policy responses to the pandemic qualify as precautionary-based, some clear examples of this approach were among the most common interventions, including lockdowns and travel bans. Although different in scope and rigidity, both measures were implemented in the absence of strong scientific evidence for their effectiveness to contain pandemics. They reflected the idea that considering the risk of exponential growth of infection rates, it is recommended to overreact and err on the side of safety (Malcai and Shur-Ofry 2021: 19). Only months after first wave of lockdowns, some studies emerged with regard to their impact on curbing infections (see e.g.: Islam et al. 2020; Atalan 2020; Kharroubi & Saleh 2020; Talic et al. 2021). Some of them demonstrate association of this kind of measures with the reduction of incidence of COVID-19, but it is far too early to

claim that clear causal link between the harshest public health measures and positive health outcomes has been proven.

Measures applied in response to the COVID-19 pandemic might have been the most spectacular exemplifications of precautionary approach in the modern era, but the nature of current and emerging global challenges justifies speculations about the potential advent of precautionary principle also in other policy domains. In particular, considering the magnitude and urgency of actions required with regard to climate change as the most fundamental global challenge of our times, precautionary approach emerges as the most adequate rule guiding climate policies. There is an increasing awareness in the climate policy debate about the inevitability of aggressive and rapid precautionary actions needed to prevent catastrophic events associated with climate change (Van der Sluijs and Turkenburg 2006; Otto et al. 2015; Wiener 2016, Aven 2020). Hartzell-Nichols (2017) even calls for 'catastrophic precautionary principle' marked by uncompromising efforts to stabilize global mean surface temperatures driven by the superiority of moral obligation to tackle climate change over economic interests.

Russian aggression on Ukraine and global security tensions it generated, will most likely open another sphere, where precautionary approach could flourish, i.e. national security policies. As described by Sunstein (2005), some form of precautionary approach characterized the American "war on terrorism" following 9/11 attacks, marked by curbing civil liberties or 'pre-emptive' military actions, especially the Iraqi war. Precautionary-based measures potentially expected in the aftermath of the current war may range from enhanced supervision of strategic markets and industries (e.g. precautionary nationalization of energy sector) to increased surveillance of individual citizens and various. Some measures are already being implemented. As an example, the Polish Act on the Special Solutions Concerning Counter-acting the Aggression on Ukraine and Serving the Protection of National Security, enabled the Minister of Home Affairs to freeze the assets of the persons and companies if there exist probability that they may be used to support the Russian aggression. Initial review of this law and administrative acts based on it demonstrates that it allows major interference in the property rights in the procedure providing great deal of 'administrative liberty' to the executive.

We may conclude then, that evolution of political, social, economic and environmental affairs in global scale appears to foster demand for precautionary approach. Nature and magnitude of various policy challenges creates increasing pressure, but also temptation for policy makers to shift from proportionality-based interventions for 'quiet times' to precautionary-based interventions for turbulent era. Regardless of our attitude towards this shift, wider debate preparing our constitutional and legal systems to handle risks and challenges associated with it, is needed.

Legal and constitutional challenge of precautionary-based public interventions

The regime of proportionality created some kind of 'comfort zone' with relatively clear procedure for legal review of public interventions, both *ex ante* and *ex post*. As we highlighted above, this procedure cannot be easily extrapolated to interventions under precautionary rule. Standard proportionality test applied to precautionary-based intervention will fail in most of the cases. We will not be able to demonstrate sufficient evidence to justify intervention and measures applied will most likely be claimed excessive. It is, by nature, not feasible to merge these contrasting styles of intervention into single, consistent model of precautionary, but proportional interventions. In the literature on precautionary principle, we may occasionally identify attempts to reconcile both approaches by calling for proportionality in precautionary

policy responses (see e.g: Jackson and Steingraber 1999: 24). While this idea may sound sensible as a rule of moderation of precautionary-based interventions, its operationalization faces this inherent conflict between both modes of operation.

Considering this, we rather need tailored mechanism for review of precautionary-based interventions that on one hand, would prevent abuse of the precautionary principle and, at the same time, preserve the expected benefits of its wider application. This mechanism should be activated both by the policy makers and actors reviewing public interventions, especially courts (including constitutional courts). Similarly to proportionality test, it should consist of set of criteria (requirements) for validation of interventions. Considering key elements and characteristics of precautionary approach, we have developed initial proposal for such test. While the first two elements form a threshold for the very application of the precautionary rule, the last one concentrates on adequacy of specific policy measures based on this approach.

Table 2 Test for precautionary-based public interventions – a proposal

(1) Characteristics of risk (threat) justifying intervention	Existential threat to population (life, health, security) or environment; and/or exponential nature, i.e. characterized by the possibility of rapid growth within short period of time effectively undermining any control and mitigation efforts.
(2) State of knowledge (scientific basis for intervention)	Lack of scientific consensus on necessity and effectiveness of intervention combined with high likelihood of damage in case of inaction
(3) Adequacy of measures applied – fitting into margin of overreaction	There is a logical link demonstrated between measures applied and expected effect of prevention or significant reduction of damage, though clear causal link has not been proven through rigorous empirical procedure. Interests (rights, freedoms) and groups incurring burden of intervention or facing significant restrictions are identified and specific measures are developed to mitigate adverse effects to them.

Recognizing these criteria in procedures for ex ante impact assessment of proposed policies and legislation, as well as by the constitutional and other courts reviewing legislative and administrative measures, is essential first step in 'domestication' of precautionary-based public model of intervention by the legal systems. However, it might not be sufficient, especially to minimize the risk of its excessive use. Some additional safeguards might be put under consideration. This includes, in particular, special regime for adopting the legislation based on precautionary rule, i.e. introduction of the supermajority rule for adopting the law based on the precautionary principle in order to minimize the risk of abusing precautionary measures by the ruling (simple) majority.

In the Western constitutional tradition supermajority rule is applied in two main groups of cases. In most of constitutions, the supermajority is required in constitutional amendment procedure – the standard majority in such cases is two-thirds of votes (e.g., Belgium – Article 195, Poland – Article 235.5, Serbia – Article 203). However, there are cases in which the threshold is even higher (e.g., in Bulgaria standard procedure is that amendment should require three-quarters of votes of all members of parliament in three ballots held on three different days) or lower (e.g., in Czech Republic – 60% of votes in both houses – Article 39.4.). The application of

supermajority principle in the matter of constitutional amendment has roots in first modern constitutions of 18th century's enlightment era. It is expressed in article V of the Constitution of U.S. (two-thirds of votes in each House). In the French constitution of 1791, the implicit supermajority was introduced as it was required for the amendment of the constitution to be adopted by three consecutive legislatures (Title VII.2). The second group form the provisions concerning the impeachment of the head of state. Also in this matter the vote by two-thirds of votes seems to be standard (e.g. Germany – Article 61.1., Greece – Article 49.2., Latvia – Article 51). Apart from those two 'classical' groups of cases, the supermajority is applied also in such issues as the removal of the high officials, rejecting of the head of state's legislative veto or adopting organic laws. Moreover, in American political system the supermajority has extraordinarily broad application thanks to the filibuster mechanism that imposes effective supermajority requirement for the enactment of most of legislation in U.S. Senate (Fisk, Chereminsky 1997).

There are numerous voices supporting the supermajority rules as defending the minorities from the abuse of power by majority and encouraging the governing political forces to seek for the agreement with the representatives of opposition in some important issues (e.g., McGinnis, Rappaport 1999). Most of them starts from the famous fear of the 'tyranny of majority', which would be imposed disregarding the interest and the views of the minority expressed by Alexis de Toqueville in 'Democracy in America' (Tocqueville 1946). However, it cannot go unnoticed that in recent scholarship there are numerous voices raising criticism against the supermajority solutions. In her complex historical analysis Melisa Schwartzberg goes as far as to say that that unequal count of votes imposed by the supermajority rules 'is an affront to the dignity' of the members of the legislative body (Schwartzberg 2013: 7). The critics of supermajority rules refer also to the case of Hungary, where the governing right-wing party achieved the supermajority of two-thirds of seats and uses it to introduce the special legislation in the 'ordinary' issues such as family law or taxation in order to prevent the possible change of such laws by the next ruling party (Pozsàr-Szentmiklósy 2017: 288-289).

In response to the criticism, it should be stated that our proposition aims at introduction of supermajority mechanism in procedural not substantive matter – i.e., it does not introduce the new supermajority requirement in some spheres of public regulation but in the methodology of public intervention. It is, e.g., not said that all epidemic regulation should be adopted by supermajority votes, but they should undergo such procedure if they limit fundamental rights in a way based on the precautionary principle. Moreover, the cancellation of the precautionary principle-based legislation shold not require obtaining supermajority, as it would reinstate a default more human rights friendly model of public intervention. Therefore, there would not be possible to introduce such laws to safeguard some legal solution from potential change introduced by the political opponents. However, Pozsàr-Szentmiklósy's suggestion should be taken into consideration concerning the construction of the in-detail regulation concerning the supermajority needed for trigerring the precautionary principle. It is possible, e.g., to introduce the 'dynamic supermajority' not expressed in the absolute numbers but requiring obtaining votes from the opposition parties disregarding the number of seats the governing coalition gained in the parliament. Responding to the Schwartzberg's argument one should take into consideration that applying the precautionary principle instead of the proportionality shall in many cases lead to restriction of human rights which foundation is dignity of human being.

Conclusions

Evolution of the precautionary principle from narrow, sectoral rule applicable to public interventions in selected fields (environmental policy, public health) to style of intervention of more universal application appears to be inevitable, considering magnitude of global policy challenges and necessity of urgent and aggressive actions. However, as with any actions driven by fear and panic, also precautionary-based interventions are associated with major risks. The question arises, how to benefit from precautionary approach, but at the same time prevent transformation towards unconstrained political and administrative liberty, where public authorities could (ab)use precautionary approach to arbitrarily curb rights and freedoms or impose excessive burdens. Legal scholarship faces urgent task of developing procedural safeguards and guidelines on application of precautionary principle in broader spectrum of public policies. Our paper contributed to this discussion by proposing a mechanism for testing and reviewing the precautionary-based public interventions. While it is far from comprehensive and universal tool, it offers initial proposal for further fine tuning and testing.

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