

**Development of Standards of Review by the Constitutional
Court from 1996 to 2011:
Reception and Localization of the Proportionality Principle**

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Abstract

This paper researches on the development of judicial standards of review by the Constitutional Court during 1996 and 2011. The focus is on the reception and localization of the principle of proportionality, through competition and integration with the U.S. theory of standards of review. This paper finds, beginning from J.Y. Interpretation No. 414 of 1996, the Constitutional Court started the formal reception of constitutional principle of proportionality from Germany. By September 2003, it had become one of the constitutional principles embedded in Article 23 of Constitution, though its casual applications often ran short of necessary reasoning. Since October 2003, the Constitutional Court further introduced the US theories of tripartite standards of review and the German theory of density. By adapting both to the principle of proportionality, the Constitutional Court gradually developed a framework of “one principle, three standards” and apply it to the cases of most constitutional rights, except for equality. This paper argues, “categorization of the principle of proportionality” or “integration of the principle of proportionality and standards of review” could be regarded one of the most noticeable contributions made by the Constitutional Court during the said period. On top of the above findings, this paper asks a second question: why the ratio of constitutional declarations remained almost unchanged before and after 2003, even though the application of proportionality principle appeared to be more frequent and much better reasoned after 2003?

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This paper finds, under the framework of tripartite standards of review, the most benign “lenient review” (equivalent of the rationality review in the US) has been the most employed test, followed by the intermediate scrutiny. Its frequent uses may explain the majority of decisions still declaring constitutional the reviewed laws and regulations either before or after 2003. What remains to be watched is whether the newly emerged intermediate scrutiny would become the core test in practice, given its accommodation with *ad hoc* balancing.

Keywords: Constitutional Court, principle of proportionality, standards of review, densities of review, categorization, *ad hoc* balancing, strict scrutiny, lenient review, intermediate scrutiny, heightened review