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**Constitutional Courts in the Process of Articulating  
Constitutional Rights in the Post-Communist States of  
Central and Eastern Europe  
Part IV:  
*Restrictions on Constitutional Rights***

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***Constitutional Courts in the Process of Articulating Constitutional Rights in the Post-Communist States of Central and Eastern Europe (Part IV):***

***Restrictions on Constitutional Rights***

**Wojciech Sadurski\***

This is the fourth and the last working paper in a series devoted to the articulation of constitutional rights by the constitutional courts of Central and Eastern Europe (CEE). For a general introduction to the series, see the first working paper in the series.<sup>1</sup>

***1. Constitutional models of limiting the rights***

As in so many other aspects of constitutional design, all post-communist constitutions in CEE have opted for the continental European model in which constitutional rights provisions are accompanied by guidelines about the constitutionally permitted grounds of statutory limitations of rights. This contrasts with the US Bill of Rights model of absolute prohibitions which leaves the task of establishing the limits on their lawful exercise to congressional acts as reviewed by the federal courts. However, in continental European constitutions, and in international instruments such as the ECHR or in the EU Charter of Fundamental Rights, rights provisions are coupled with provisions setting out the grounds and criteria on which those rights may legitimately be restrained. This, naturally, does not fully dispose of the role of official interpreters (including constitutional courts) in assessing whether a statutory provision conforms to constitutional rights (as the guidelines regarding permissible limitations are not self-evident and are always subject to interpretation) but their role is correspondingly narrower.

Nevertheless, within the European model as adopted in CEE there are different formats for structuring the relationship between rights provisions and provisions on the limits to the rights, and it is not inconsequential which specific format is chosen. If we construct a field of possible solutions as a spectrum, one extreme pole of which is a constitution which constrains the legislator's choice of limiting measures to a very high degree, leaving only a narrowly specified set of cases

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<sup>1</sup> LAW No. 2002/14, at 1-4.

when rights-restrictions are acceptable, and, on the other hand, a constitution leaving a very broad discretion to the lawmakers to restrict rights whenever they deem fit, with only very general and easily malleable criteria for determining the constitutionality of such restrictions, then we can construct a typology of post-communist constitutional bills of rights according to their place alongside this spectrum. They will fall into three categories.

Constitutional charters of rights in the first category contain no general clause authorizing the legislators to restrict constitutional rights under certain conditions but, instead, mention in certain rights articles that those particular rights can be restricted on specific, named grounds. The four CEE constitutions which belong to this category<sup>2</sup> seem therefore to imply that the rights which are *not* accompanied by such permissions for legislative restrictions cannot be legislatively restricted at all. In turn, those articles which do mention rights capable of legislative restriction vary the list of permissible reasons for restrictions, in a similar way to the construction adopted in the German constitution.<sup>3</sup> For instance, the Georgian constitution states, in article 22(1), that there is a right to move freely. Then, in subsection (3) of that article, it goes on to say: “Restriction of these rights is permissible only in accordance with the law, in order to guarantee state and public security as necessary for the existence of a democratic society, public health, prevention of crime and fulfilment of justice.” But then, a provision on “the right to receive and disseminate information” (art. 24 (1)) comes with different grounds for restrictions attached to it: “state security, territorial integrity or public order, prevention of crime, protection of rights and dignity of others, prevention of disclosure of the information recognized as confidential, independence and impartiality of the court” (art. 24 (4)).

It should be added that, although the general rule in these constitutions is to state reasons for which restrictions are permissible, some articles say that a restriction can be made by law only, but give no substantive grounds justifying such restrictions. This arguably allows rights to be limited for any reason at all, and in effect relegates these specific rights to the category of unlimited legislative discretion, depriving them of strong constitutional entrenchment.<sup>4</sup>

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<sup>2</sup> Constitutions of Bosnia and Herzegovina, Georgia, Lithuania and Montenegro.

<sup>3</sup> Compare, *e.g.*, Basic Law of F.R.G. article 5 (freedom of expression can be subject to limitations by statutes “for the protection of youth” and for the protection of “personal honour) *with* article 10 (privacy of letters, posts and telecommunications may be restricted by statutes in order “to protect the free democratic order or the existence or security of the Federation) *and with* article 11 (freedom of movement may be restricted by statutes when necessary to protect the free democratic order, to combat the danger of epidemics, to deal with natural disasters or grave accidents, to protect young people or to prevent crime).

<sup>4</sup> As examples of such rights provisions in the first category of constitutions, consider a right to strike in the Constitution of Lithuania (Art. 51: “(1) Employees shall have the right to strike in order to protect their economic and social interests. (2) The restrictions of this right, and

The second category contains five other constitutions which, while containing a general clause for limiting rights, state that this clause applies only to the rights provisions which expressly allow for statutory restrictions.<sup>5</sup> Article 9 of the Yugoslav constitution is typical for this model: “The rights and freedoms of man and the citizen shall be restricted only by the equal rights and freedoms of others *and in instances provided for in the present Constitution.*” This, again, results in a situation where the individual articles offer specific justifications for and limitations on the restrictions permitted for the right in question. From the point of view of the scope of legislative discretion, the practical effect of these two categories of constitutional constructions of legislative restrictions is identical. The only difference is in the constitutional flexibility of tailoring the specific list of restricting grounds to a particular right.

A sixth constitution should be added to this group, namely, that of the Russian Federation. While its chapter on rights and liberties contains a general restricting clause (Art. 55 (3)) without the proviso as in the five above-mentioned constitutions, nevertheless there is another constitutional provision (Art. 56 (3)) which explicitly prohibits imposing any restrictions upon a number of exhaustively listed rights.<sup>6</sup> In effect, these rights acquire a status identical to those rights which do not allow for statutory restrictions in the five constitutions mentioned earlier in this category.

This prohibition on statutory (and other) restrictions of certain rights has been actually used by the Constitutional Court of Russia in an important 1996 decision regarding the rights of criminal defendants.<sup>7</sup> The Court was considering a provision of the State Secrets Act which stated that lawyers could be barred from participating as defence counsel in criminal proceedings connected with State secrets, on the grounds that they are not authorised to have access to state secrets. The Court found that this provision unlawfully restricts the right contained in article 48 of the Constitution (a right to qualified legal counsel) because the

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the conditions and procedures for the implementation thereof shall be established by law”), and also a right to vote in Lithuania (art. 20) and Georgia (art. 28).

<sup>5</sup> Yugoslavia (art.9) Macedonia (art 54), Slovenia (art 15), the Ukraine (art 64) and Serbia (art 11) [note that, hereinafter, a name of a country followed by a number of an article refers to the provision of the constitution of that country]. The same construction was envisaged by the abortive project of the charter of rights in Poland in 1992, see Draft of the Charter of Rights and Freedoms, *St. Louis-Warsaw Transatlantic L.J.* (1996) 73 (Stanislaw Frankowski trans.). That project explicitly stated: “The rights and liberties guaranteed by this Charter may be restricted only by statute and only when such a restriction is envisaged by this Charter”, *id.* art. 5.2

<sup>6</sup> These include the right to life (art. 20), to dignity and against torture (art. 21), to privacy (art. 23 (1)), etc.

<sup>7</sup> Decision of 27 March 1996, summarized at <http://ks.rfnet.ru/english/codicese.htm>, visited on 15 August 2001, and in the *Bull. Constit. Case Law* 1996 (2): 253-55.

effect of this provision would be to limit the defendant's choice of legal counsel to a limited number of lawyers (namely those who are authorized to have access to state secrets). In accordance with Article 56.3 of the Constitution, the Court declared that the right to legal counsel may not be restricted in any circumstances, and the Federal Assembly was thus ordered to make the necessary changes to the legislation.

The adopted technique of constitutional drafting makes a real difference between these first two categories, on the one hand, and, the third category of constitutions which clearly prevails in CEE, on the other, which includes all the constitutions except for the ten belonging to the first two categories. Permission for statutory restrictions of rights is contained in a general clause which lists the reasons under which *any* constitutional right provisions of the constitution can be limited. These clauses have typically the following form: "Restriction of personal rights and liberties shall be permitted only in the instances specified in law, in the interest of national security, public order, the protection of the morals and health of the population, as well as rights and liberties of other persons."<sup>8</sup> The list of grounds for restrictions vary somewhat from country to country: some lists are narrower;<sup>9</sup> others refer in addition to international human rights standards for restrictions of rights.<sup>10</sup> Certain constitutions belonging to this category also spell out a requirement that limitations must be proportionate to the aim for which they are imposed – a point to which we will return, in some detail, below.<sup>11</sup> In addition, even when specific constitutions in this group have explicitly stated that the list of permissible grounds of restrictions was exhaustive, some of the constitutional courts established this principle in their case law.<sup>12</sup>

The fact that all the constitutions belonging to the third category have general restricting clauses does not prevent them from also listing, in some specific rights provisions, the reasons why these particular rights can be limited. Such provisions which list grounds for restrictions of a particular right in the third category of constitutions are, however, an *addition* to, rather than an exception from, a general clause. Some of these particular articles simply repeat a criterion for restrictions from the general clause, restricting the limitation of that right to

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<sup>8</sup> Belarus, art. 23 (1). Other general clauses of this type are: Albania (art. 17); Belarus (art. 23); Croatia (art. 16), Czech Charter (Art. 4 (2, 3, 4)); Estonia (art. 11), Hungary (art. 8(2)); Latvia (art. 116), Moldova (art. 54), Poland (art. 31), Romania (art. 49); Slovakia (art. 13).

<sup>9</sup> For instance, the Estonian constitution mentions only the "necessity in a democratic society" and the requirement that the limits must not "distort the nature of rights and liberties", Art. 11.

<sup>10</sup> For instance, the Albanian constitution provides, inter alia, that the rights limitations may not exceed the limitations provided for in the ECHR, Art. 17 (2).

<sup>11</sup> Moldova Art. 54 (2); Romania art. 49 (2).

<sup>12</sup> E.g., Polish Constitutional Tribunal, Decision K.23/98 of 25 February 1999.

the criteria which are relevant to the particular situation in which a restriction of a right may plausibly occur.<sup>13</sup> What, however, renders the third category of constitutions distinct from the first two categories is that, apart from particular grounds for restrictions applying to particular rights, there is also a general clause which operates in a blanket fashion to all constitutional rights and liberties.

## ***2. Constitutional review of statutory limits of rights***

Five criteria for acceptable legislative limitations of rights cut across the typology of constitutions suggested above, and deserve a special mention because they have played an important role in judicial review of statutes under the rights provision.

### **2.1. Proportionality**

#### **2.1.1. Theoretical excursus on proportionality**

The requirement that a restriction must remain in proper proportion to constitutionally mandated goals is perhaps the most powerful tool that the constitutions handed to constitutional courts, since the scope for employing complex judgments about the relative weight of competing social and individual interests is the greatest here. These judgments, in turn, involve evaluations of policy even if, on the face of it, it is only the “constitutionality” of legislative measures which is being considered. Such “constitutionality” entails judgments of the relationship of the means to the ends, of their effectiveness, and even of speculations about the availability of other, hypothetical, measures which could reach certain goals better. Naturally, such judgments cannot be made in isolation from making complex (and often controversial) policy judgments of anticipated efficiency, costs and benefits of proposed measures. This is what, normally, we expect from the legislatures: their role, in adopting new laws, is to decide about the proper balance of value of respective social and individual interests. A “balancing jurisprudence” is therefore an indirect admission of quasi-legislative function performed by constitutional courts. It is in this area where the question about the democratic legitimacy of those courts arises with particular force.

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<sup>13</sup> Consider these two examples. Article 29 of the Moldovan Constitution allows for the following grounds for restricting a right to the inviolability of the domicile: execution of an arrest warrant; preventing the threat to life, physical integrity or the property of a person, and preventing the spread of a disease. Art. 26 of the Albanian Constitution envisages the following grounds for limiting the right against forced labour: execution of a judicial decision, the performance of military service, or for service resulting from a state of war, a state of emergency, or a natural disaster. This is a way in which the Constitution fleshes out a vague general clause (art. 17) to specific fact situations in which the limits on a particular right may be relevant.

A number of constitutions in CEE explicitly include a “necessity” requirement for statutory restrictions on rights, for example, that such restrictions are legitimate only if necessary<sup>14</sup> or proportionate<sup>15</sup> (or both)<sup>16</sup> to achieve constitutionally spelled out goals. But even if proportionality is not explicitly required in constitutional texts, such a requirement has been established by the doctrine of Constitutional Courts, as is the case, for example, in Hungary, Slovenia<sup>17</sup> or pre-1997 Poland. This “necessity understood as proportionality” has been explicitly stated, for instance, in the Slovenian CC decision on bugging devices and privacy, when the Court said: “By the ‘necessity’ of the infringement, the principle of proportionality is explicitly built into the Constitution . . . . This demands of the legislator that in determining the conditions for an encroachment [on constitutional rights] it enables a judgement of whether the encroachment is necessary, such that the desired aim cannot be achieved by less extreme means.”<sup>18</sup>

The courts in CEE clearly followed the path of the proportionality doctrine as developed by their Western counter-parts, and in particular, by the European Court of Human Rights (ECtHR). In the jurisprudence of the ECtHR, the requirement of “necessity” contained in Articles 8-11 of the Convention (restrictions on these rights must be “necessary in a democratic society”)<sup>19</sup> has actually acquired a meaning synonymous with “proportionality” or, to be more precise, “proportionality” has been found to be one of the important criteria of the “necessity” requirement. In a number of its decisions, the ECHR established an authoritative interpretation of the Convention’s formula “necessary in a democratic society”: that the interference with a right must correspond to a “pressing social need” and be “proportionate to the legitimate aim pursued”.<sup>20</sup> As one commentator noted, “from ‘necessity’ to proportionality is but a small

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<sup>14</sup> See Poland Art. 31 (3), Estonia Art. 11, Russia Art. 55 (3), Slovenia Art. 15 (2).

<sup>15</sup> See Albania Art. 17 (1); Moldova Art. 54 (2); Romania Art. 49 (2).

<sup>16</sup> See Romania, Art. 49.

<sup>17</sup> The Slovenian Constitution has a “necessity” but not a “proportionality” requirement, Art. 15 (2).

<sup>18</sup> Decision U-I-25/95, of 27 November 1997, at <http://www.us-rs.si/en/casefr.html>, visited 10 May 2001, para. 47.

<sup>19</sup> More precisely, the requirement of necessity is present in Articles 8-11 of the Convention (Right to respect for privacy; freedom of thought, conscience and religion; freedom of expression, and freedom of association and assembly, respectively), Article 2 of Protocol No. 4 (liberty of movement within a state) and Article 1 of the Protocol No. 7 (right of an alien not to be expelled before certain conditions are met).

<sup>20</sup> See e.g. *Goodwin v. United Kingdom* 22 E.C.H.R. 123, 143-4 (1996); for discussion see Alastair Mowbray, *Cases and Materials on the European Convention of Human Rights* (Butterworths, London 2001) at 411-2, 448.

step”,<sup>21</sup> and this step has been repeatedly made; indeed, the notion of “pressing social need” has been authoritatively established as a test for “necessity”. Under this interpretation, “necessity” *qua* proportionality is a rather flexible notion which allows for a relatively broad range of measures to be found “necessary” – even if they are not “necessary” in the sense of being “indispensable”, or *sine quae non*. It is significant that, at times, the ECtHR jurisprudence analogized “necessity” to the requirement that the reasons for restriction be “relevant and sufficient”.<sup>22</sup>

The relationship between these various concepts: proportionality, necessity, relevance, etc., is a complex one, and some attention needs to be paid to the conceptual issues involved, before we can see more precisely what is at stake in the proportionality doctrine in CEE constitutionalism. Take the last point: necessity understood as “relevance and sufficiency”. On the face of it, there may be a measure which is *relevant* (i.e., related to achievement of an aim) and *sufficient* to achieve an asserted aim (that is, once the measure is applied, the aim will be achieved without any other means which need to be applied) and yet not *necessary* because that same aim can be achieved by using some other means. For instance, if we wish to make sure that children will not be assaulted in the streets in the evening we might impose a curfew upon minors at certain times: the measure will be “relevant” (there is a connection between the means and the aim) and “sufficient” (once you apply the means and enforce it strictly, it will be enough to achieve the goal) and yet hardly “necessary” in the sense of being *sine quae non*. In turn, if we find that a measure is necessary (under a “but for” test) then it is *ipso facto* proportionate: if a legislator is required to pursue a particular goal, and there is a measure which is “necessary” to achieve that goal, then this measure cannot be found disproportionate. To find any “necessary” measure disproportionate would amount to disabling the legislator from pursuing a goal which it is obliged to pursue. Initially, therefore, we may conclude that any measure which is necessary is *ipso facto* proportionate, but not every measure which is *unnecessary* is *ipso facto* disproportionate (because not every measure which is proportionate is necessary).

The test of “necessity” is more difficult to meet than the one of relevance, and therefore its use by a scrutinizer of a law reveals a lower deference, or a higher degree of distrust, towards a legislator. Such a test involves a counterfactual: an inquiry into whether there are any other measures, less intrusive than the proposed one, which would also lead to the constitutionally mandated goal. Theoretically, postulating the test of “necessity” as a criterion for the constitutionality of restrictions *must* result in an invalidation of any rights-

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<sup>21</sup> Marc-Andre Eissen, quoted by Mowbray, *id.* at 413.

<sup>22</sup> See P van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3<sup>rd</sup> ed. (Kluwer Law International: The Hague, 1998) at 81.

restricting measures if only we can plausibly think of some other measures which do not restrict the right (or which restrict it to a lesser extent, or which restrict a less important right) and which also lead to the attainment of the goal pursued by the measure under challenge. And since almost always one can think of some alternative means of achieving the same aim, the requirement of necessity may turn out to be, as one American scholar famously suggested in a similar context, “‘strict’ in theory and fatal in fact”.<sup>23</sup>

This, however, would be a pedantic approach to the “necessity” requirement, and ultimately a useless one. It does not take into account the “efficiency” of the attainment of the goal, understood as the degree of attainment of that goal reduced by the degree of negative side effects (defined in terms *other* than the failure to achieve fully the goal). Suppose that a measure under challenge, M-1, which restricts a constitutional right R-1, is adopted by the legislator to achieve goal G. Under a pedantic reading of the necessity test, M-1 is unconstitutional if we can plausibly think of another measure, M-2 which also is capable of achieving G but which does not restrict (or restricts to a lesser extent) R-1. But what if M-2 achieves G to a lesser extent than M-1 does, or/and produces higher negative side effects (in terms other than restriction of R-1) which are also constitutionally visible?

These two aspects of the “efficiency” of attaining a right, merged together in the last sentence, should be treated separately because they implicate the test of necessity in somewhat different ways. Consider two scenarios, corresponding to the two aspects of “efficiency” just mentioned. Scenario 1: M-2 helps achieve G less efficiently in the sense that it will take more time, or more resources, or both, to achieve this goal compared to the situation in which we employ M-1. Everything else being equal, M-2 produces less of a goal G than M-1 does. This could perhaps be called a matter of “suitability”: the measure M-1 is not strictly “necessary” but is the most suitable to achieve G. But this should not result, *per se*, in the choice of M-1; this would render the “necessity” requirement redundant. Rather, we have to balance the degree of restrictions of R-1 (considered as losses, from the constitutional point of view) with the gains in terms of higher efficiency of achieving the aim G. If we conclude that the gains (in terms of a more efficient attainment of G) resulting from M-1 outweigh the losses (in terms of restricting R-1), and on that basis uphold M-1, then in fact we have not met the test of “necessity” but the one of suitability; that is, we have upheld the measure on the basis that it is “the most suitable” to achieve G. In other words, this requires the weighing and balancing between a right on the one hand and constitutionally meaningful *goals* on the other. Under a Dworkinian

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<sup>23</sup> Gerald Gunther, “The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection”, *Harvard Law Review* 86 (1972) 1, 8. These words applied to the so-called “strict scrutiny” of “suspect classifications” under the 14<sup>th</sup> Amendment to the US Constitution.

theory of rights, in such cases the rights should presumptively prevail, that is, goals may be decisive only if they are of particularly high urgency.

Now consider Scenario 2: the relative *inefficiency* of M-2 (compared to M-1) consists in its negative side effects (“externalities”) *other* than under-attainment of G. If these side effects can be characterized in terms of a negative impact upon other people’s constitutional rights (which, of course, is only one among a set of different categories of negative side-effects), then the balancing occurs *within* the realm of constitutional rights themselves. To choose M-1 over M-2 because the choice of M-2 would bring about reduction of other rights of other people is then based on a balancing of the degree of restriction of R-1 caused by M-1 as opposed to a negative impact on R-2, R-3 etc. produced by M-2. This calls for a judgment of the relative importance of R-1 compared to R-2, R-3 etc. and also for the comparison of the degrees of restrictions of these rights. Suppose that we conclude that the restriction of R-1 resulting from M-1 produces lesser harm than the externalities produced by M-2. We may then say that M-1 is “necessary”, and this notion of “necessity” of restriction should be more palatable than in Scenario 1 because it does not implicate the comparison of rights and (non-rights-related) goals.

At the same time, the argument under Scenario 1 is more deferential towards a legislator; it renders the legislator’s task of defending the statute easier. That is because it is harder to identify a specific “right” (R-2, R-3 etc) which can figure in the justification for a restriction of R-1 than to identify a constitutionally meaningful “goal” to play this role. Especially when the goals are defined in an extremely broad and vague way, as “public interest” etc, it is easy for the legislator to claim constitutional grounds for restriction of a right.

Either way, the “necessity” test calls for *a* balancing, under the both scenarios: either balancing of rights and constitutionally meaningful goals, or balancing among rights. It is the second scenario which is more palatable to those who “take rights seriously” because whatever choice is made, some rights will be affected. That is why the decisions of constitutional courts under the “necessity” test which can be analogized to the second scenario are less problematic for a defender of a robust conception of constitutional rights. The first scenario also uses the necessity test legitimately since the goals which figure in the rationale for rights restriction also have a constitutional value. There is no clear textual reason why they should be less appreciated than the constitutional rights in question. Such reason can be only provided by a doctrine, along the lines of the Dworkinian theory of rights as trumps over collective (even if constitutional) goals. For anyone accepting this theory, an idea that a social goal (irreducible to a clearly individuated right) may override a constitutional right, is deeply problematic, and so the threshold of argument justifying such an override should be placed appropriately higher than in the case of the second scenario.

### 2.1.2. Proportionality in courts

With this theoretical compass in hand, we can now consider some examples of proportionality-based decisions of constitutional courts in the region.

Consider first an example of a decision in which a restriction of a right is defended on the basis of a proportional relationship to a protection of other people's rights:

*The Polish Constitutional Tribunal (CT) has frequently considered the question of the “proportionality” of restrictions to the constitutional goals proclaimed as justifying those restrictions, and it has explicitly derived the proportionality principle from the constitutional requirement of “necessity in democratic society”.<sup>24</sup> In 1999 it considered the application of this requirement to the limits upon the constitutional right to ownership.<sup>25</sup> Under scrutiny was a provision of the Construction Act which provided for demolition by the state authorities of those buildings which were constructed without proper building permission (art. 48 of the statute). The proceedings were triggered by a “legal question” addressed to the CTI by the Supreme Administrative Court (SAC) who expressed doubts about the constitutionality of the provision under the proportionality requirement. The SAC expressed the opinion that the same goal – to stamp out the “anarchy” in the field of land development – could be achieved “by applying means . . . which are less restrictive and at the same time more effective”.<sup>26</sup> One of the arguments raised by the SAC was that this was a disproportionately grave response to a failure by the developer to secure a building permission because it affects equally both those developers who violate the “substantive” requirements of the development law (and hence would not have a chance of obtaining a permit in the first place) and also those who committed minor procedural faults by failing to secure all the necessary documentation. The Constitutional Tribunal rejected this argument and asserted that even purely procedural failures create a threat to the rights and liberties of the third parties because one important purpose of procedural requirements is to guarantee the procedures by which third parties may assert that their rights and interests are affected by a proposed development. In conclusion, the Tribunal found that the regulation of art. 48 was “closely related” to the protection of constitutional values determined by art. 31*

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<sup>24</sup> Art. 31 (3) of Constitution. Before the Constitution of 1997, under the so called “Little Constitution” which provided no textual basis for “necessity” or “proportionality” tests, the Constitutional Tribunal has read the requirement of proportionality into the general principle of the rule of law, see Jerzy Oniszczyk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego* (Zakamycze: Kraków, 2000) at 252.

<sup>25</sup> Decision no. P.2/98 of 12 January 1999.

<sup>26</sup> Decision no. P.2/98 of 12 January 1999, *Orzecznictwo Trybunału Konstytucyjnego w 1999 r. - część I* (Wydawnictwo Trybunału Konstytucyjnego: Warszawa 2000), poz. 2, p. 15.

(3) of the Constitution<sup>27</sup>, such as securing “public peace”, protection of the environment, and also avoiding threats to other people’s rights and liberties. In fact, the Tribunal drew a clear distinction between these two grounds for interfering with rights: according to the Tribunal, protecting constitutionally mandated public interests and protecting specific rights of other people are “qualitatively different” types of situations.<sup>28</sup>

In this decision, the Tribunal has not drawn the conclusions suggested above in this Working Paper (that the legislator should be treated less deferentially in the latter situation than in the former) but it seems that only a small step is needed to reach such a conclusion. It has characterized the proportionality principle (“found” by the Tribunal in the necessity requirement) as a “prohibition on an excessive legislative interference in the sphere of individual rights and liberties”.<sup>29</sup> The Tribunal announced that this requirement calls for scrutiny of (a) the existence of a “real need” to interfere with a given right or liberty, and (b) the efficiency of those means and their necessity in the sense of protecting certain (constitutional) values in a way, or to the degree, which cannot be achieved by any other means<sup>30</sup>. This immediately suggests the validity of our earlier analysis that “necessity” cannot be understood in a pedantic way but also needs to take into account the efficiency dimension. In the formula adopted by the CT, the textual, constitutional requirement of necessity entails the criteria of indispensability (no other means can achieve the goal to a similar degree), usefulness (there is a real need to interfere), and proportionality *sensu stricto* understood as a rational and adequate proportion of the interference to the goals which figure as justification for the restriction. In this, it largely tracks the German Constitutional Tribunal's proportionality analysis.<sup>31</sup>

For an example of a restriction of rights asserted on its relationship to a social goal (in this case, defined as protection of children from alcohol) consider this case from Estonia:

*Art 11 of the Estonian Constitution (on restrictions of rights) does not mention proportionality but does contain a necessity requirement, which has been transformed by the constitutional court into a proportionality condition. In its*

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<sup>27</sup> This article lists the grounds upon which the constitutional rights can be legitimately restricted by statutes.

<sup>28</sup> Decision no. P.2/98, at 26.

<sup>29</sup> *Id.* at 20.

<sup>30</sup> *Id.* at 23.

<sup>31</sup> See Dieter Grimm, “Human Rights and Judicial Review in Germany”, in David M. Beatty, ed., *Human Rights and Judicial Review: A Comparative Perspective* (Martinus Nijhoff: Dordrecht, 1994): 267-96.

*decision on licenses for selling alcohol,<sup>32</sup> the Estonian Constitutional Review Chamber considered subsection 1(2) of section 19 of the Alcohol Act which provided that the licence must be revoked if its holder seriously violates the procedure for the handling of alcohol. The Chamber considered whether this limit upon the right to engage in commercial activities (art. 31) was consistent with the general clause of Art. 11 which provided that “Restrictions [on constitutional rights] may be implemented only insofar as they are necessary in a democratic society, and their imposition may not distort the nature of rights and liberties”. Thus, the Chamber concluded, restrictions must be proportionate to their desired aim.<sup>33</sup> The aim of the statutory restriction was characterized by the court as “protecting society against untrustworthy salespersons” and, in particular, making sure that alcohol is not sold to children.<sup>34</sup> The Court then noted that the Alcohol Act gave no choice to the issuer of activity licences as to the penalty for a serious breach of alcohol handling. There is no possibility for him to weigh whether a revocation of the license, constituting as it does a restriction of rights and freedoms, is necessary in a democratic society, in concrete cases before it: “The law does not allow to take into consideration the circumstances of breaching the procedure for the handling of alcohol, for example the age of the buyer, the quantity and strength of alcohol sold” etc.<sup>35</sup> This is not correct, the Chamber concluded: the legislator should give the executive the possibility of taking the circumstances of the case into consideration so that the infringement of people's rights can be justified. Thus, the Chamber stated that subsection 1(2) of section 19 of the Alcohol Act conflicts with Articles 31 (the right to engage in enterprise) and 11 of the Constitution, and thus was null and void.*

This decision nicely illustrates the interchangeability of “necessity” and “proportionality” requirements. This equivalence is also illustrated by the Hungarian decision on preventive custody pending trial where a restriction on one’s person liberty rights was asserted, based on the public interest in public safety, and the Court rejected this measure as disproportionate:

*This case<sup>36</sup> relates to Article 92(1)(c) of the Criminal Procedure Code. It allows custody pending trial to be ordered if the person is accused of committing a crime which can be punished with imprisonment, and there is a reasonable*

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<sup>32</sup> Decision of 28<sup>th</sup> April 2000, no. 3-4-1-6-2000, at <http://www.nc.ee/english/const/2000/3-4-1-6-00i.html>, visited 15 May 2001.

<sup>33</sup> Id., section 13 of the Decision.

<sup>34</sup> Id, section 16.

<sup>35</sup> Id. section 17.

<sup>36</sup> Decision no. 26/1999 of 8<sup>th</sup> September 1999, summarised in *Bull. Constit. Case-Law* 1999 (3) 392, HUN-1999-3-008.

*suspicion that they would commit another crime if released. The Hungarian Constitutional Court noted that custody pending trial is not in itself unconstitutional, since it is essential in some cases and, as a preventive measure, it does not violate the presumption of innocence (guaranteed in Article 57(1) of the Constitution). To place a person in custody pending trial also does not violate Article 55 of the Constitution (that anyone suspected of a crime be either promptly released or be brought before a judge who shall promptly decide whether the person shall be released or detained). However, allowing detention in order to prevent someone committing another crime is disproportionate to the aim involved in Article 92(1)(c) of the Criminal Procedure Code (namely, that of the public interest). Therefore, the provision was held to be unconstitutional.*

Note that this time, what is at work is the notion of “proportionality” which makes sense only if viewed through the lens of necessity, rather than the other way round. If the aim of a measure is defined as broadly as “public interest”, and the prevention of commission of another crime certainly qualifies as “public interest”, then the judgment that preventive custody is “disproportionate” to the aim is very questionable, especially since such custody is not mandatory, and it may be reasonable for the enforcers of the law to believe that the most effective measure (in terms of proportionality of means to ends) to take in order to prevent re-commission of crime is to place the accused in custody. But such a measure certainly does not meet the “necessity” test in the strict sense of the word: one can think of some other measures (arguably, less efficient and less economical) which may achieve the same aim; for instance, surveillance, monitoring, duty to report regularly to the authorities, etc.

The connection between necessity and proportionality suggested above can be tested by a case in which a CC *upheld* (rather than invalidated) a given restriction of a right arguing that a given restriction met the condition of proportionality. As an example, consider another decision of the Hungarian CC.

*This decision<sup>37</sup> concerned a provision of the Code of Criminal Procedure which stated that a document containing testimony could be used if the person who had testified refused to testify at trial. Such a restriction of the defendants’ rights, including the right to remain silent – the Constitutional Court said – can be justified if it is necessary and proportionate to the State’s duty to punish criminal offenders. The right to remain silent is not absolute: It is a safeguard aimed at ensuring fair trials, which can in certain circumstances be removed if other safeguards of fair trial are put in its place. The Court found that there were such other safeguards envisaged by the law on criminal procedure: for instance, the investigator is obliged to tell the accused at the pre-trial stage that he can refuse to make a statement. If he decides to make a statement nevertheless, it is*

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<sup>37</sup> Decision no. 793/B/1997 of 24<sup>th</sup> February 1998, summarised in *Bull. Constit. Case-Law* 1998 (1): 57-58, HUN-1998-1-002.

*reasonable that he cannot later decide that it cannot be used at trial. The Constitutional Court emphasized that this provision can only be used if it is the interests of clarifying the facts or in the interests of another accused or the victim. In addition, the judge should obtain evidence from other sources, even if the accused made a full confession. These elements protect the right to fair trial, despite the restriction of the accused person's right against self-incrimination.*

In this case, the Court found a particular restriction of a right proportionate to the purpose of the restriction (safeguarding apprehending the criminals) and used the “necessary and proportionate” formula, but obviously it would be very hard pressed if it had to show that such a restriction is “necessary” to achieve the aim. Reading the accused person’s earlier testimony may be useful (hence, proportionate) but it is an exaggeration to say that it is “necessary” in order to achieve the aim of effective crime control.

Another device for striking down the law under the proportionality condition is to note the defects of the *purpose* nominated by the legislator as justifying a restriction. It is clear that proportionality, as a relational concept, involves scrutiny of both the relationship between the restriction and its purpose, *and* the purpose itself. If the purpose is faulty (for vagueness or because, even if precise, it has no constitutional status), then further scrutiny of proportionality is pointless: the law is invalidated at the outset of the scrutiny.

*As an example, consider the Romanian Constitutional Court’s decision regarding the tax on foreign travel.<sup>38</sup> Under challenge here was the government ordinance of 12 August 1994 (subsequently approved by the Parliament) on the setting up of a tax for passing the frontier, the proclaimed purpose of which was to bring some additional resources for welfare purposes. The Court established first that the regulation clearly constituted an impediment on the exercise of the constitutional right of free movement within the country and abroad (Art. 25 (1)). Thus, to be upheld, the restriction must conform to Article 49 of the Constitution which contains the general conditions for restrictions of rights, including that such restrictions must be “absolutely unavoidable” to achieve a number of constitutional goals (such as a protection of citizens’ rights and freedoms) as well as the requirement of proportionality. The problem for the Constitutional Court was that an earlier Court decision<sup>39</sup> on a very similar issue – also concerning the constitutionality of a foreign travel tax – was deemed to conform to the Constitution. This time, however, the Court found a relevant difference in the degree of specificity of the asserted purpose for the regulation. In the earlier case, the tax was imposed (temporarily) for the specifically asserted purpose of*

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<sup>38</sup> Decision No 139 of 14<sup>th</sup> December 1994, [http://www.cecl.gr/RigasNetwork/databank/Jurisprudence/jurisprudence\\_main.htm](http://www.cecl.gr/RigasNetwork/databank/Jurisprudence/jurisprudence_main.htm), visited 11<sup>th</sup> May 2001.

<sup>39</sup> Decision No 71 of 1993.

*funding tenement heating assistance, during November 1993- April 1994. In the opinion of the Court, this was an exceptional situation resulting from the lack of funds necessary to guarantee a constitutional goal; namely, that "the State shall be bound to take measures of economic development and social protection, of a nature to ensure a decent standard of living for its citizens" (Art. 43 (1)). As the Court remarked, this measure was justified by an "exceptional situation resulting from the lack [sic] budget funds necessary for the institution of a measure for protection, on the grounds of Article 43 paragraph (1) of the Constitution".<sup>40</sup> However, the Court found that in the present case, the law in question was not specific at all. The government simply claimed to be protecting "social protection rights" generally. This was not sufficient for the Court: a specific right which figures in the rationale for a restriction of another right must be identified so that the proportionality of the restriction to its aim may be scrutinized. Further, the Court denied the constitutionality of extending what had initially been a special and temporary measure for an indefinite period of time: it would mean in effect that the right to travel would be restricted on a permanent basis. It is significant that both these decisions of the Court turned out to be popular with the general public and were generally approved: the decision upholding a special temporary measure (when the cost imposed upon the travellers to subsidize disadvantaged people in time of need was seen as socially just) and the decision rejecting an imposition of such redistributive transfers on a permanent basis.<sup>41</sup>*

However, the theoretical force of the decision is doubtful, and the problem goes back to the very issue of whether the goal of promoting a decent standard of living can be considered as a "right" and therefore whether the earlier regulation could be subsumed under the rubric of protecting other people's rights. (To be sure, article 43 concerning "living standards" is included in the chapter on "Fundamental Rights and Freedoms" of the Romanian Constitution but the wording of section 1 of the article, which constituted the basis for the temporary tax, is clearly in terms of a directive for a government policy). If it cannot, then it can hardly figure in the justification for a restriction of a right as the Romanian Constitution does not list any social goals as permissible rationales for rights restrictions.<sup>42</sup> No social goals listed in Art. 49(1) as justifying the rights restrictions<sup>43</sup> fit the rationale given for the temporary tax on foreign travel. But,

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<sup>40</sup> Decision No 139 of 14<sup>th</sup> December 1994, cited from the web site referred to above.

<sup>41</sup> Conversation with Mr Horatiu Dumitru in Bucharest, 10 March 2001. Mr Dumitru, a private lawyer at the time of the interview, had worked as lawyer for the Government at the time of the Constitutional Court's decision discussed in the main text.

<sup>42</sup> This is reinforced by a contrast with section (2) which is worded in characteristically right-oriented terms: "Citizens have the right to pensions, paid maternity leave...", etc.

<sup>43</sup> Namely, the defence of national security, public order, health or morals, the prevention of a natural calamity or extremely grave disaster.

regardless of the force of a distinction between an earlier and the current case, the argument in the current case can easily be read as an objection to undue vagueness of the asserted purpose of a regulation. It is the purpose which is faulty, and so the examination of the means-ends “proportionality” is no longer necessary.

From this point of view, a decision of the Polish Constitutional Tribunal concerning the right to ownership of apartments belongs to the same category.

*This decision of Polish Constitutional Tribunal<sup>44</sup> concerned certain restrictions upon the rights to inheritance. The 1982 law on cooperatives imposed certain requirements upon inheritors: unless they produced within one year of the owner’s death a court decision, or at least proof that they had initiated court proceedings aimed at declaring their right to a “cooperative apartment”, they lost the right to inherit it. This, the Tribunal stated, constituted a restriction of constitutional rights to property and inheritance (art. 21 (1) and 64 of the Constitution), and therefore could be upheld only if matching any of the constitutional grounds for permissible restrictions on rights. The Tribunal emphasized that the grounds for permissible restrictions of rights were enumerated in the Constitution exhaustively, and could not be interpreted in an expansive manner. The statutory restrictions under challenge were established for reasons which – according to the Court – cannot be characterized as constitutionally mandated goals: not for the sake of public safety or public order, protection of environment, health or public morals, nor for the sake of protection of other people’s rights and liberties. The only plausible purpose which triggered the legislative action was concern for the convenience and the orderly functioning of cooperatives of apartment owners – a goal arguably outside the catalogue of constitutionally mandated goals. For this reason, the provision under challenge was found unconstitutional.*

The last example of proportionality-based decisions raises slightly different issues:

*This decision of the Hungarian constitutional court concerned children’s membership in associations of homosexuals.<sup>45</sup> It was issued as an advisory opinion at the request of the President of the Supreme Court, and it was triggered by a court refusal to register an association for the rights of homosexuals because it had not excluded minors from its membership. The Court characterized the dilemma as a conflict between two constitutional rights: the*

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<sup>44</sup> Decision K.23/98 of 25 February 1999; Polish text: *Orzecznictwo Trybunalu Konstytucyjnego w 1999 r. – czesc I* (Wydawnictwo Trybunalu Konstytucyjnego: Warszawa 2000), poz. 8, pp. 137-56.

<sup>45</sup> Decision of 17 May 1996, no. 21/1996, reprinted in László Sólyom & Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press: Ann Arbor, 2000) at 333-45.

*right of a child to protection (art. 67) and to freely join associations (art. 63(1)). In this context, the proportionality of a limit on the latter right (in the context of an age limit on joining an association for homosexual protection) was considered. The Constitutional Court noted that the question was not about the constitutionality of the aim of an association (namely the protection of homosexuality) but rather about the restriction of the rights (of association) of the children justified by their own interests. Rights may be restricted if this is necessary to protect another constitutional right and if the extent of the restriction is proportionate to the desired aim. Here, the other right was identified as the right of a child to be protected. The Constitutional Court interpreted Article 67 of the Constitution as including both protection against clearly harmful effects and also avoidance of serious risks to the child's personality. The Court concluded in this case that the state must prevent the child from taking risks which, because of their age, they are not able to evaluate. The Court was careful not to say that becoming a homosexual would endanger the "moral development" of the child: this would amount to making a moral judgement about homosexuality. However, the Court asserted that the Constitution did protect the child's right to decide with full knowledge of the possibilities and the consequences. Further, there is a theme in the Court's decision which suggests that declaring oneself to be gay in Hungarian society may harm a child because of the current views which that society has towards this. Joining such an association would increase the possibility that a child who is unsure about his or her sexuality would pre-empt his or her future, more mature decision. For these reasons, the Court decided that an age limit could be imposed on such associations, and that such limit was not unconstitutional.*

Note that this is a special case of the "proportionality" argument which does not fit clearly either of the two "scenarios" identified above: it is neither about the restriction of a right for the sake of the promotion of constitutionally mandated "goals" (as the purpose of the restriction is defined in terms of children's "rights" to protection), nor for the sake of protection of other people's rights.<sup>46</sup> Rather, it is about a typical paternalistic interference even if the Court admits it only indirectly:<sup>47</sup> the restriction of a right is justified by the interests of those whose rights are being restricted. It is also a case of "direct" paternalism: the very person who is denied a particular liberty-right is the one whose interests are alleged to be protected.<sup>48</sup> For this reason, the language of proportionality

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<sup>46</sup> Puzzlingly, the Court justifies its decision by recalling the principle that "[r]estricting the right of association in the interest of *protecting third persons* from the infringement of 'their rights and liberties' is constitutional if the restriction is made necessary by the other right and the extent of restriction is proportionate to the desired aim", *id.* at 337, emphasis added.

<sup>47</sup> *Id.* at 339

<sup>48</sup> In Joel Feinberg's language, it is a "single-party paternalism", see *The Moral Limits of the Criminal Law*, vol. 3: *Harm to Self* (Oxford University Press: New York, 1986) at 9.

(normally triggered by a conflict between a right and a general social goal, or a right and another person's right) seems to be inadequate here: it is rather about the suitability of a paternalistic measure to an asserted aim. Typically, such a direct paternalistic measure would be anathema to anyone endorsing a liberal conception of rights but here the problem is mitigated by the fact that the putative right-holders are minors – and so paternalistic measures, in principle, are applicable to them.

As this quick survey suggests, the proportionality scrutiny has been a frequent, and powerful, device to control and sometimes displace legislative choices by constitutional courts. It has been applied regardless of whether there are explicit grounds in the constitution of a given country for such a scrutiny, i.e., regardless of whether the constitution requires rights restrictions to be proportional to constitutional aims. This is an inevitable consequence of entrusting constitutional courts with the role of checking legislation for constitutionality when explicit grounds for permissible statutory restrictions are spelled out. Under such a constitutional design, the negative impact of the exercise of one right upon the exercise of another (or upon constitutionally recognized goals) means that the rights have to be compared to each other, and this calls for the balancing of respective interests. But arguably no such balancing is inevitable when the constitution does not provide the grounds on which rights may be restricted, as in the case of the United States. The Supreme Court can, and often does, conduct a balancing operation, but it is not inevitable, and it has not always been so, as T. Alexander Aleinikoff showed in his classic article.<sup>49</sup> However, the continental European tradition, notably exemplified by the European Convention of Human Rights and, most recently, and even more explicitly, by the EU Charter of Fundamental Rights,<sup>50</sup> mandates the constitutional scrutinizers of statutes to engage in balancing of the sort described above.

Inevitable or not, the application of the doctrine of proportionality shows what a broad scope there is for the constitutional courts to play a role in legislation: proportionality requires balancing, and balancing relies on judgments on which reasonable people – equally committed to constitutional fidelity – may disagree. As Aleinikoff correctly points out, a balancing methodology expresses "the activist, policy-oriented approach to constitutional law".<sup>51</sup> If the balancing

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<sup>49</sup> T. Alexander Aleinikoff, "Constitutional Law in the Age of Balancing", *Yale Law Journal* 16 (1987): 943-1005.

<sup>50</sup> The Charter of Fundamental Rights of the European Union, "solemnly proclaimed" by the European Council in Nice in December 2000 spells out expressly the principle of proportionality and the requirement of necessity (Art. 52.2), in contrast to the European Convention on Human Rights which "acquired" the principle of proportionality through the doctrine of the Strasbourg Court.

<sup>51</sup> Aleinikoff, *supra* note 49, at 962.

consists of comparing the costs of restricting a given right with the costs to other people's enjoyment of their rights, the argument is more palatable than when the balancing entails comparing a right with social goals, even if constitutionally proclaimed. But this distinction has been rarely acknowledged, and drawn upon, in the proportionality-based decisions of constitutional courts. In any case, balancing offers the illusion of a "scientific" assessment: a metaphor of mathematical operation in which some commensurable goods are put on scales, and compared. The fact that this is not the case, that no such "objective" measure is available to us (and to the courts) is not, per se, an argument against balancing: we engage in decision-making based on comparing incommensurable values all the time. But it is an indication of how close this type of methodology applied by constitutional courts comes to the realm of legislation, and how carefully it should be handled.

## **2.2. Non-infringement of the essence**

Among the criteria listed by general clauses, the requirement that a limit must not strip away the essential quality of the right has a special character. This "essential quality" may be constitutionally described as "the essence" of a right,<sup>52</sup> "the essence and significance" of the right;<sup>53</sup> "the existence" of that right or liberty;<sup>54</sup> or the "nature" of the right which must not be distorted.<sup>55</sup> If one allows for the vagaries of translations into English, the differences of wording are insignificant. What is important is the very idea, influenced by German approach, that there is a "core" of a right which must not be affected even if the criteria for constitutionally permissible limitations are scrupulously observed. None of the constitutions spells out any further criteria for what the "essence" consists of, and the task of fleshing out this notion is left to the official interpreters, and in particular, to constitutional courts.

Significantly, there is a partial overlap between the countries which have activist, strong constitutional courts and countries whose constitutions have a "non-infringement of the essence of a right" clause. If one puts some exceptions to one side,<sup>56</sup> one has to acknowledge that the "essence" clause has been a significant constitutional device in checking legislative discretion in restricting the constitutional rights.<sup>57</sup>

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<sup>52</sup> Poland Art. 31 (3), Albania art. 17 (2).

<sup>53</sup> Art 4 (4) of Czech Charter, Slovakia art 13 (4); Hungary art 8 (2).

<sup>54</sup> Moldova Art. 54 (2); Romania Art. 49 (2).

<sup>55</sup> Estonia Art. 11.

<sup>56</sup> E.g., Albania, which has an "essence" proviso, art. 17 (1), but a relatively weak constitutional court.

<sup>57</sup> E.g., one of the most important decisions of the Hungarian Constitutional Court, the one in

As an example, consider an important decision of the CC of Czech Republic on conscientious objection.<sup>58</sup> *The Court struck down a provision of the Act on Civilian Service which established that declarations of refusal to perform military service submitted after the deadline of 30 days after the date of conscription would not be taken into consideration. The case was brought to the Constitutional Court by a conscientious objector whose request for an alternative service was not taken into account because he had let the time limit of 30 days pass. He was subsequently prosecuted for his refusal to report to military service. The Court acknowledged that there is a legitimate aim to restrict the right to conscientious objection and to alternative civilian service: the army needs to have reasonable certainty as to the number of soldiers it will enlist. However, the Court further found that the provision under challenge totally precluded there being any possibility of exceptions to the 30-day rule, and this violated the very essence of the right, as it provides for the total extinction of the right to conscientious objection after a passage of a certain amount of time.*

As another example, consider the 1999 decision by Polish Constitutional Tribunal on the right of ownership.<sup>59</sup> *One aspect of the decision was the question whether a particular regulation of the Building Law (which authorized the state to demolish those buildings which were constructed without an appropriate permit) affected the essence of the right to ownership. In explaining the constitutional prohibition on affecting the “essence” of a right the Tribunal said that it calls for identification of a certain inalienable core of a given right which should be free of legislative interference even if such an interference was motivated by the promotion of specifically mandated constitutional values. The Tribunal tried to spell out what actually would amount to an infringement of the essence but, reading the Court’s opinion, one has an impression that it kept simply accumulating various synonyms of the word. It said, for example, that such an infringement would take place if the legislative restrictions concerned the fundamental entitlements which, put together, establish the substance of a given right, and if they prevented the right from performing its functions as envisaged by a legal system based on the principles established by the Constitution.<sup>60</sup> This is very much an idem per idem explanation. On the basis of this explanation, the Tribunal concluded in this particular case that the core of the right to ownership was not affected by the regulation under challenge: the demolition order does not*

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which death penalty was declared unconstitutional, was based, inter alia, on the argument that such a penalty necessarily intrudes upon the essential content of the right to life; see Decision 23/1990 of 31 October 1990, reprinted in Sólyom & Brunner, supra note 45 at 118-38.

<sup>58</sup> Decision no 18/98, of 2 June 1999, *Bull. Constit. Case-Law* 1999 (1): 44-45, CZE-1999-007.

<sup>59</sup> Decision P.2/98, of 12 January 1999, supra note 26.

<sup>60</sup> *Id.* at 27.

*deprive the owner of a right to real estate upon which the building has been constructed, or of a right to apply for a building permit in future. The Tribunal added that the essence of the right would have been affected if, for example, the requirements for obtaining building permits were so rigorous as to actually render it impossible to undertake the construction legally.*

### **2.3. Non-discriminatory character of restrictions**

Some constitutions state that limitations on rights and freedoms must be non-discriminatory, and therefore must “apply in the same way to all cases that meet the specified condition”.<sup>61</sup> This, one might think at first glance, is a redundant proviso as all the constitutions have general prohibitions on discrimination anyway, and any statutory regulation which can be characterized as restricting a constitutional right in a discriminatory fashion violates *ipso facto* a constitutional ban on discrimination. The difference is that the constitutional bans on discrimination in these constitutions usually list a number of banned grounds of discrimination, that is, list a number of properties of individuals which cannot be the grounds for invidious classifications.<sup>62</sup> By contrast, the provision now under discussion is open-ended: any improper classification may be found discriminatory when figuring in the provisions about rights restrictions.

*As an example of a constitutional court decision implementing such a rule, consider the decision of the Czech Constitutional Court of 26 November 1992 regarding those who collaborated with the old regime.<sup>63</sup> The “lustration” law of 1991 established that clandestine collaborators with the old regime may not hold certain positions in governmental bodies and organisations. A group of 99 members of the Federal Assembly challenged this provision. The Constitutional Court found this law to be in principle valid: the Court declared that, in the light of the violations of human rights by a totalitarian regime, the state had the right to apply legal measures to protect democracy and avert the risk of a relapse into totalitarianism. There was a danger, according to the Court, that some people would try to place themselves in positions of power in the new democratic state solely in order to be able to maintain the power of the earlier ruling section of society. Further, the Court pronounced that in establishing the criteria for filling certain top offices and administrative positions, the state should take into account “its own safety, the safety of its citizens, and . . . further democratic developments”.<sup>64</sup> The legal restrictions under challenge were thus seen as reasonable, on the basis that they protected the constitutional system. However,*

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<sup>61</sup> Czech Charter art. 4 (3); Macedonia art. 54 (3); Slovakia art. 13 (3).

<sup>62</sup> See Working Paper no. 3 in this series.

<sup>63</sup> Decision Pl. US 1/92 of 26<sup>th</sup> November 1992, [http://www.concourt.cz/angl\\_ver/decisions/doc/list.html](http://www.concourt.cz/angl_ver/decisions/doc/list.html), visited on 15<sup>th</sup> May 2001.

<sup>64</sup> *Id.*, at 8.

*certain details of the statute were found to be unconstitutional. One provision included restrictions on persons who were classified as “confidential affiliates”, “candidates for clandestine collaboration”, or “clandestine collaborators in confidential contact”. The details of what this category of persons did were never kept on file (for secrecy reasons) and many of them were merely being sounded out to find out whether they would be willing to provide information. The Court found that they may have had their names in the files without any written commitment on their part, and even without their knowledge. For this reason, it is impossible to ascertain reliably whether they were actually conscious collaborators. The situation of these people was different from the situation of those to whom other articles of the statute applied and who had knowingly, and unquestionably, collaborated with the former regime’s security services. For these reasons, the Constitutional Court found this provision contrary to Article 4 (3) of the Charter on Fundamental Rights, which states that “any statutory limitation upon the fundamental rights and basic freedoms must apply in the same way to all cases which meet the specified conditions.”*

#### **2.4. Restrictions established by law**

The fourth requirement, that restrictions of rights can be established only by statute, thus excluding the possibility of restricting constitutional rights by executive action is widely present in CEE constitutions<sup>65</sup> and served as an important ground for many constitutional court decisions.

*The Constitutional Court in Croatia invalidated in 1998 a provision on the Law on Railroads which gave the Minister of Transport a right to determine whether, in the case of a strike, the workers had to work during the strike; the Court found this provision contrary to the principle that restrictions on the right to strike must be specified by a statute.<sup>66</sup> The Constitution (article 60(2)) states that “The right to strike may be restricted in the armed forces, the police, government administration, and the public services specified by law.” The Constitutional Court interpreted this to mean that it is the law that must be the instrument to limit the constitutional right to strike. Therefore, a Minister's decision cannot state what the vital interests of the state and other legal person etc are, only the law can do so. Indeed, the law must also determine who else is necessary in the decision making process concerning a strike (e.g. trade unions) and also what the legal remedy against a Minister's decision is. It also noted that restrictions by law cannot lead to a total prohibition on the right to strike.*

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<sup>65</sup> E.g. Albania Art. 17; Czech Charter Art. 4 (1); Moldova art. 54 (1); Poland Art. 31 (3); Romania Art. 49 (1); Slovakia Art. 13 (2).

<sup>66</sup> Decision no. U-I-920/1995 and U-I-950/1996 of 15 July 1998, *Bull. Constit. Case-Law* 1998 (3): 401-402, CRO-1988-3-015.

*The Croatian Court took similar decisions with regard to analogous provisions on strikes in postal and telecommunications services<sup>67</sup> and in electrical enterprises.<sup>68</sup> The same Court decided in 1999 that a provision of the Law on Public Assembly which allowed local self-government bodies to designate places where public assembly could be held was unconstitutional because only the national legislator could restrict the constitutional right to public assembly.<sup>69</sup> Local self-government bodies could designate inconvenient places as being the ones where public assembly could occur. This, in effect, would restrict the Constitutional right to public assembly. The Constitutional Court accepted that the legislator may restrict the places allowed for such assembly. However, this must be done by a law containing clear and objective criteria for the determination of places where public assembly may not be held, having in mind the protection of the rights and freedoms of others, public order, morals and health. The legislator may not delegate such competencies which, according to the Constitution, must be regulated by national laws.*

*The Constitutional Court of Lithuania invalidated a number of statutory provisions on the basis that they would allow for restrictions of constitutional rights by other legal means than statutes. The Court struck down the law on restoration of property which would mandate the government to establish conditions for the restoration of the ownership of land;<sup>70</sup> the law on state secrets which would allow the government to approve the list of state secrets,<sup>71</sup> and the laws on tobacco control and on alcohol control.<sup>72</sup> In this last decision,<sup>73</sup> the statute in question banned tobacco and alcohol advertising, as well as advertising of the products only indirectly linked to alcohol and tobacco. As the criteria for determining the list of such products were to be established by the government, the Court found that such a restriction on the right to free dissemination of information would not result from a statute but from an administrative action; hence, the provision allowing for such a possibility was unconstitutional.*

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<sup>67</sup> Decision no. U-I-262/1998 and U-I-322/1998 of 15 July 1998, published (in Croatian) in *Narodne novine*, 98/1998, 2434-2437, see *Bull. Constit. Case-Law* 1998 (3): 401-402.

<sup>68</sup> Decision no. U-I-58/1995 and U-I-772/1998, of 5 October 1999, *Bull. Constit. Case-Law* 1999 (3): 366-367, CRO-1999-3-014.

<sup>69</sup> Decision no. U-I-241/1998 of 31 March 1999, *Bull. Constit. Case-Law* 1999 (1): 33, CRO-1999-1-004.

<sup>70</sup> Decision of 26 October 1995, <http://www.lrkt.lt/1995/n5a1026a.htm>, visited August 7, 2001.

<sup>71</sup> Decision of 19 December 1996, <http://www.lrkt.lt/1996/n6a1219a.htm>, visited August 7, 2001.

<sup>72</sup> Decision of 13 February 1997, <http://www.lrkt.lt/1997/n7a0213a.htm>, visited August 7, 2001.

<sup>73</sup> Discussed also in Working Paper no. 2 in this series.

*For similar reasons, the Lithuanian CC struck down a section from the Law on State Pensions.<sup>74</sup> This law gave extra pensions to victims of World War II or of the Soviet regime. However, Part 4 of Article 11 provided an exception, saying that even those who were victims of aggression perpetrated during 11-13 January 1991, or were political prisoners or deportees, will not get this extra State pension if between 1939 and 1990 they worked in any structure whose activity was devoted to combat the resistance movement in Lithuania. The Government was given the task of approving the list of institutions and structures to which this provision would apply. The Constitutional Court held that this gave the Government the power to establish to which persons state pensions would not be awarded. This was found inconsistent with the requirement of Art. 52 that the pension rights must be regulated by laws. Thus, since it was the government rather than laws that decides about this exception to pension rights, this Article conflicted with the Constitution.*

*Another example from Lithuania is provided by the Constitutional Court's decision of 4 March 1999 about the "lustration" law of 16 July 1998 which provided for the restrictions of employment for former KGB employees.<sup>75</sup> They were denied the right to be employed in (and if already employed, were to be dismissed from) virtually all State institutions as well as in a number of types of private institutions (state and credit unions, security services, as private lawyers, notary, etc) for ten years. The Court upheld the most important provisions of the law arguing, among other things, that a restriction in employment for an ex-KGB did not constitute a criminal punishment and therefore that the charge that only a court was competent to decide about it, and also that the presumption of innocence should be observed, did not apply to this particular measure.<sup>76</sup> However, the Court invalidated a provision of the statute (Article 3, Part 2) which provided for a procedure allowing a suspension of this lustration measure towards some of the ex-KGB employees under certain conditions: in particular, if they revealed all the information about their former links with KGB. In such a case, the law designed a procedure whereby the Centre for Research into People's Genocide and Resistance of Lithuania and the State Security Department would jointly adopt a recommendation for suspension of lustration measures towards a particular person. Such recommendation would be then considered, and the decision taken, by a three-persons commission appointed by the President of the Republic; its decisions would be subject to confirmation by the President. The Constitutional Court found this procedure unconstitutional because this provision effectively allowed the President "to form a commission which could decide whether to apply the restrictions to the right to choose an*

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<sup>74</sup> Decision of 10 February 2000, <http://www.lrkt.lt/2000/r000210.htm>, visited 15-8-2001.

<sup>75</sup> Decision of 4 March 1999, <http://www.lrkt.lt/1999/n9a0304a.htm>, visited 15-5-2001.

<sup>76</sup> Id., Section 4 of the Court's decision.

occupation” while “[t]he Constitution . . . does not provide that the President of the Republic may decide the questions of restriction of human rights and freedoms. . . .”<sup>77</sup> This was in contravention of the constitutional requirement that the issue of restrictions of constitutional rights must be decided by statutes.

This type of general clauses has been sometimes also used against vague restrictions of rights, on the basis that vagueness in fact empowers an administrative agency to establish the actual content of the statutory restriction.

*The Lithuanian Constitutional Court considered, and invalidated, a provision of the Law on Officials which would restrict public officials’ right to criticism.*<sup>78</sup> *This decision is discussed in more detail elsewhere in this series;*<sup>79</sup> *the only aspect relevant here is that what the Court found particularly problematic in this statute was that it was formulated in such a vague way that the precise definition of criticism and disagreement were not given (no distinction was even made between constructive and destructive criticism). This contradicts the balancing requirement which has to be present in any restriction of a fundamental right (such as that of freedom of expression, or the right to criticize). This lack of clarity meant the administrative body, when applying the norm, established the actual content of the norm itself- this is particularly problematic because the sanction is imperative, and harsh (resignation or dismissal). As the Court said: “Such imprecise legal regulation creates preconditions for such cases when an administrative body, in applying this norm, establishes the content of the norm by itself”.*<sup>80</sup>

## **2.5. Non-restriction of rights because of lawful exercise of another right**

One other criterion which limits legislative discretion in regulating about the limits of constitutional rights is that rights must not be restricted because of a lawful exercise of another right.<sup>81</sup>

*The Slovak CC established that the exercise of a (constitutional) right to conscientious objection must not result in a denial of the (sub-constitutional) right to obtain a gun license.*<sup>82</sup> *Certain provisions of the 1995 Law on Weapons were challenged by a group of MPs: these articles stated that persons applying*

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<sup>77</sup> Id., Section 6.1 of the Court’s decision.

<sup>78</sup> Decision of 10 March 1998, no. 14/97, <http://www.lrkt.lt/1998/n8a0310a.htm>, visited 15-8-2001.

<sup>79</sup> See Working Paper No. 2 in this series.

<sup>80</sup> Section 6 (5) of the judgment.

<sup>81</sup> E.g. Czech Charter art. 3 (3); Slovak Const. Art. 12 (4).

<sup>82</sup> Decision no. PL.ÚS 18/97 of 28<sup>th</sup> May 1998, summarised in *Bull. Constit. Case-Law* 1998(2): 299-300; SVK-1998-2-005.

*for a gun licence are obliged to give evidence that they have not refused to perform military service. If they later refuse to perform military service, the gun licence can be revoked. The Constitutional Court noted that the Constitution gives the right to refuse military service;<sup>83</sup> the Constitution also proclaims that "No person shall suffer injury on his or her rights just because of exercising his or her fundamental right or freedom."<sup>84</sup> The law in question here lays down that a person can only receive a gun licence if they have refused to exercise their constitutional right not to perform military service but it is constitutionally impermissible to exclude a person from obtaining some right only because of the previous exercise of some other fundamental right or freedom by that same person.*

*The Bulgarian CC established that the right to social security cannot be affected by one's exercise of the right to work.<sup>85</sup> In this case, two articles of the Pension Act were challenged which stated that pension entitlement would be withdrawn from all pensioners that had an earned income. The Constitutional Court held that this was contrary to the right to social security, which is a totally separate right from the right to work. Thus, the right to social security cannot be made dependent on whether the right to work is being exercised or not. This is so even though retirement legislation may affect the labour market, as such facts have no direct Constitutional relevance. For these reasons, the section of the law challenged was held to be unconstitutional.*

As one can see, the constitutional principle at work here is substantially the equivalent of the U.S. doctrine of "unconstitutional conditions" which says that the government must not make the enjoyment of a benefit conditional on a sacrifice of a constitutional right. But the doctrine itself in the US has been eroded lately,<sup>86</sup> largely on the basis of the ambiguity of the distinction between penalty and non-subsidy: it is one thing (relatively uncontroversial) to say that the government must not penalize a person for an exercise of her or his right, and another (more controversial) to say that a government must not withhold a subsidy from those who exercise their specific rights which may be relevant to the subsidy in question. The difference between these two situations is well illustrated by two leading cases in CEE on the doctrine of non-restricting a right due to an exercise of another right: if we translate the constitutional language of

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<sup>83</sup> Article 25(2): "No person may be forced to perform military duties if it is contrary to his or her conscience or religious faith or conviction".

<sup>84</sup> Art. 12 (4).

<sup>85</sup> Decision no. 12/97 of 25<sup>th</sup> September 1997, *Bull. Constit. Case-Law* 1997 (3): 357; BUL-1997-3-003. This Decision is discussed in more detail in Working Paper No. 1 in this series.

<sup>86</sup> See Laurence H. Tribe, *American Constitutional Law* (Foundation Press: Mineola, 1988, 2nd ed.) at 681-82.

CEE into that of the United States, we may say that the first decision (the Slovak one) illustrates the imposition of a penalty for the exercise of one's constitutional right, while the second, the withdrawal of an economic subsidy (pension) in the case of an exercise of the right (earning salary from work) substantially related to the benefit in question. The reason why the latter case is less controversial has to do with the scarcity of an object of the benefit, and in circumstances of scarcity *some* non-arbitrary criteria of elimination of beneficiaries must be chosen. In abstract terms, it certainly sounds objectionable to suggest that these criteria may include a waiver of an exercise of a right. And yet, where the public sector is as large as it is in post-communist states, and the range of constitutional rights is very broad, the possibility of conflict with a right grows enormously whenever the government wants to regulate access to socially scarce goods; as Kathleen Sullivan wrote, "The larger the public sector in relation to the private, the more conditions on benefits tend toward equivalence with regulation".<sup>87</sup>

### 3. Conclusions

What conclusions can be drawn from our classification of constitutional approaches to statutory restrictions of constitutional rights? Offhand, a purely textual analysis might suggest that constitutions in the first category (specific grounds for restrictions attached to particular rights; no general clause of restrictions) and in the second category (a general clause of restrictions applies only to those particular rights which explicitly allow for such a restriction) are preferable, from the point of view of the standards of protection of citizens' rights, to constitutions in the third category (a general clause specifying the grounds for restrictions which apply to all constitutional rights). This is because legislative discretion – seen usually as an important threat to individual rights, *ceteris paribus* – is more restricted in the first two types of constitutions than in the third one.<sup>88</sup> It *may* be claimed that when a legislator has a constitutional mandate to restrict any constitutional rights under the generally and (of necessity) vaguely formulated grounds for restrictions, the entrenchment value of constitutional rights is largely illusory, creating merely a set of general guidelines, subject to further legislative elaboration based solely on the legislature's views concerning the requirements of national security, public morals, etc. Moreover, it can be claimed that, *ceteris paribus*, the first category offers a superior protection of citizens' rights than the second category because in the former, the list of grounds upon which those rights can be statutorily

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<sup>87</sup> Kathleen M. Sullivan, "Categorization, Balancing, and Government Interests", in Stephen E. Gottlieb, ed., *Public Values in Constitutional Law* (Ann Arbor: University of Michigan Press, 1993): 241-68, at 256.

<sup>88</sup> For such an argument see Wiktor Osiatynski, "Rights in New Constitutions of East Central Europe", *Columbia Human Rights Law Review* 26 (1994): 111-166 at 152-55.

restricted is narrowly tailored to a specific subject-matter of a given right thus limiting the risk of arbitrary and excessive restrictions of rights.

Not surprisingly, a model of constitutional design of rights restrictions which corresponds to our third category has been often deplored by liberally-minded scholars. For example, the Polish constitution has been criticized, in this respect, as containing “a mechanism of limits on the application of human rights ... [which] is misguided, defective and [able to] lead to deep uncertainties and even to a threat to . . . the effectiveness of constitutionally protected rights”.<sup>89</sup> The author, Professor Tadeusz Jasudowicz, traces these “defects” largely to the fact that a single general list of grounds for constitutional restrictions of a right applies to all the rights. As one specific negative consequence of this approach he cites the protection of environment as one of the goals which constitutionally justify rights restrictions. While recognizing the great importance of this goal, he expresses strong reservations as to the listing of that goal as a “justification for limiting each and every constitutional human right”, and asks rhetorically: “What if there is a conflict between a human right to life and an environmental need – should the life be defeated?”<sup>90</sup>

Strangely enough, our *a priori* speculation that the third model leads to the least rights-protective constitutional regime is not confirmed by the constitutional reality of post-communist democracies in CEE. There is no discernible correlation between the typology of constitutions offered here and the level of rights protection under different constitutional regimes of mandating legislative limitations of rights. The first and second categories of constitutions are found both in states which have a reasonably high level of legislative protection of rights (Slovenia and Lithuania) and in those which have a much less enviable legislative record (Serbia, Georgia). The same can be said about the third category in which we find countries of widely differing standards of legislative rights protection. Overall, they are not significantly inferior to the standards in countries belonging to the first category.

There are two explanations of this apparent anomaly. One is that the correlation *would* occur if all other things (other, that is, than the constitutional design of rights limitations) were equal, but obviously they are not, and those *other* factors are more significant for the standards of rights protection than the structure of the constitution. These other factors include both the formal institutional mechanisms (the powers and modes of activating the constitutional court), and the legal and political culture of the community. What is clear is that this particular constitutional variable (the design of permissible statutory restrictions of

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<sup>89</sup> Tadeusz Jasudowicz, “Granice korzystania z praw człowieka - rozwiązania Konstytucji RP na tle standartów europejskich”, in: Cezary Mik, ed., *Konstytucja Rzeczypospolitej Polskiej z 1997 roku a członkostwo Polski w Unii Europejskiej* (TNOiK: Torun, 1999): 33-73, at 50.

<sup>90</sup> *Id* at 54.

constitutional rights) turns out to be relatively insignificant in affecting the shape of the system of legislative protection of rights.

The second explanation is more complex. Consider the first category of constitutions again: some particular rights are accompanied by clauses about their statutory limitations; others not. It *might* appear that those rights which are framed as “absolute” must never be subject to statutory limitations. But this is obviously not the case; not any more than the rights in the U.S. Bill of Rights (which, after all, do not have their grounds for permissible restrictions spelled out in the constitutional text) are “absolute”. Scrutiny of a statutory limitation of a right which is formulated in an absolutist manner cannot appeal to constitutional grounds of restrictions but it does not follow that such scrutiny can never be undertaken, or that it can never conclude with the upholding of a statutory limitation. For instance, statutory restriction on speech may be interpreted as not restricting the right to *freedom* of speech because the freedom will be constructed in a narrower sense than a license to speak what one wishes without any restraints. The more general an “unrestrictable” right is, the more obvious it becomes that it will need to be subject to some sort of restriction, and that reasonable people will disagree whether a particular regulation constitutes a restriction in the first place. Consider a list of the rights which are solemnly declared to be beyond any restrictions whatsoever in the Russian Federation.<sup>91</sup> On the one hand, there are some specific rights which can be clearly declared unrestrictable, and in the case of which it is reasonably uncontroversial to establish whether a particular regulation constitutes a restriction; for example, a right to freedom from torture<sup>92</sup> or a right to legal counsel.<sup>93</sup> But some other rights, also covered by the “no restrictions” clause, raise much some fundamental disagreement about what actually constitutes their restriction: consider a right to “the dignity of the person”,<sup>94</sup> “the right to privacy, to personal and family secrets, and to protection of one’s honor and good name”,<sup>95</sup> or the right to freedom of conscience and religion.<sup>96</sup> It is simply unthinkable to consider these rights unrestrictable, unless that is, we conceptualize them in a narrow fashion, so that certain exercises of a right to freedom of religion will be seen as falling outside the narrowly understood freedom of religion. “Absoluteness” of these rights is made possible only by the narrowness of their scope.<sup>97</sup> But since reasonable

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<sup>91</sup> Art. 56 (3).

<sup>92</sup> Art. 21 (2).

<sup>93</sup> Art. 48.

<sup>94</sup> Art. 21 (1).

<sup>95</sup> Art. 23 (1).

<sup>96</sup> Art. 28.

<sup>97</sup> On a distinction between the strength and the scope of rights, see James W. Nickel, *Making Sense of Human Rights* (University of California Press: Berkeley, 1987) at 48-50.

people will disagree about the reasonable scope of any such right, the characterization of a particular regulation as “restriction” will be eminently controversial in itself.

It does not follow that it is irrelevant which of the constructions of statutory limits on rights a constitution opts for. But the significance is not in the degree of protection for a right but rather in the modality of arguing about the consistency (or otherwise) of a statutory limitation with a constitutional right. The reasoning of legislators, and/or of constitutional courts, is more structured by constitution-makers when any limitation of a right must be matched to a standard provided by the constitution itself, such as “public security”, public health, etc, with additional requirements of proportionality, non-discrimination, non-infringement of the “essence”, etc. If a constitution does not supply these yardsticks, much depends on the power of constitutional court: when the constitutional court is weak and deferential, legislators have more discretion in deciding about what restrictions on rights are appropriate than in the system where these standards are constitutionally determined. Where constitutional courts are activist and robust, the construction as in categories 1 and 2 empowers the courts to a higher degree than is the case of category 3: namely, they are not bound by constitutional guidelines about how to reason about the plausibility of statutory restrictions on rights. Either way, the ultimate strength of protection of rights is only indirectly affected by a chosen model of constitutional construction of statutory limits on constitutional rights.