

## **Balancing Security and Individual Liberties in the Constitution of Poland, Germany and the ECHR. A Comparative Perspective.**

**by Łukasz Lasek, Robert Rybski & Mona Klarkowska**

### **I. Foreword**

This paper is the contribution of the authors to the European Constitutionalism Seminar 2010 *European Integration: Enhanced Protection or a Threat to Individual Freedom and Liberty*<sup>1</sup>. We adopted a comparative perspective therefore we analyzed different jurisdictions in respect what are the conditions for limitation human rights. Then we tried to compare whether the requirements are similar or different. And last but not least we wanted to check what would happen in specific scenarios, how would the multilevel system of human rights protection work in Europe. We adopted a hypothetical case and we tried to challenge it before the Court of Justice of European Union, then before the European Court of Human Rights and finally before the national constitutional courts.

### **HYPOTHETICAL**

*The authors of this article believe that the best way to illustrate our legal standpoint is to conduct the reasoning on the basis of hypothetical facts. Therefore, let's suppose that the European Union was faced with a high threat of terrorism. Thank's to a close cooperation with the United States, which enabled to share the experience and to increase public safety, EU has introduced a regulation modeled on the 'USA Patriot Act'*<sup>2</sup>.

*The currently binding primary law enabled to adopt on the basis of Article 83 TFUE a Directive, which extended significantly range of 'terrorist crimes'. Changes were extensive - especially in banking and telecommunications, as both corporations and individuals which provide services for the terrorist organisations are recognized as crime offenders (as accessory).*

*At the same time on the basis of Article 88 TFUE a regulation shaping the competence of EUROPOL was issued. The previous one was repealed. The main idea of the new one was to strengthen domestic law enforcement agencies by transferring them to EUROPOL (in cases relating to terrorism). At the same time, EUROPOL gained the possibility to transfer and exchange recently collected for operational activities data about the EU citizens with their counterparts in the United States (on a reciprocal basis). Control of EUROPOL's activity by the European Parliament was established in the form of the possibility of interpellation by Members of the Parliament to the Head of Europol.*

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<sup>1</sup> The seminar was held at Warsaw University

<sup>2</sup> *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (H.R. 3162).

## II. Introduction (by Łukasz Lasek & Robert Rybski)

As Robert Alexy writes

"[t]he main problem of constitutional rights to protection stems from the fact that to protect the one side is to interfere with the other. This *dialectic of protection and interference* gives rise to the notion that there can always be only a single correct constitutional solution where both rights - the protective right and the defensive right - have to be optimized according to the rules of proportionality."<sup>3</sup>

After 11 September 2001 and subsequent terrorist attacks in Madrid and London it has become evident that the governments would try rebalance the current status between the security and liberty. D. Moeckli writing about the *Saadi* case reminds that after the London bombings the British Prime Minister announced that "let no-one be in any doubt, the rules of the game are changing" followed by the speech of his Home Secretary Charles Clarke who said on the forum of the European Parliament that

"on behalf of the UK Government I also want to say that we believe that it is necessary to look very carefully at the way in which the jurisprudence around application of the European Convention on Human Rights is developing. This Convention, established over 50 years ago in a quite different international climate, has led to great advances in human rights across the continent... But I believe that in developing these human rights it really is necessary to balance very important rights for individuals against the collective right for security against those who attack us through terrorist violence... The view of my Government is that this balance is not right for the circumstances which we now face - circumstances very different from those faced the founding fathers of the European Convention on Human Rights - and that it needs to be closely examined in that context."<sup>4</sup>

In the time of war with terror striking a proper balance between the national security and fundamental rights is of significant importance<sup>5</sup>.

In our work we are to focus on the constitutional mechanism of limiting rights and freedoms. A particular attention is paid to the proportionality adjudication. We are not to discuss in details the significance of the proportionality doctrine (see A. Sweet Stone ) or distinguish the defensive and protective human rights (R. Alexy)

## III. Limitation of Rights and Freedoms in Poland, Germany and under the ECHR and the EU Charter

### 1. General remarks

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<sup>3</sup> R. Alexy, *On Constitutional Rights to Protection*, *Legisprudence*, Vol III, No 1, p. 1

<sup>4</sup> Charles Clarke, Speech to the European Parliament on 7 September 2005, citation by D. Moeckli, *Saadi v Italy: The Rules of the Game Have Not Changed*, *HRLQ* 8:3 (2008), pp. 534-535

<sup>5</sup> See S. Sottiaux, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution*, Oxford 2008

Poland, Germany, the ECHR and the EU Charter on Fundamental Rights as a general idea allows to limit personal rights and freedoms.

In both countries, Poland and Germany, the national constitutions introduces general limitations clauses that constitute frames for introducing a particular measures interfering with the fundamental rights. L. Garlicki writes that if the constitution is to be realistic, it must determine to what extent and under what conditions guaranteed therein rights and freedoms can be limited<sup>6</sup>. The limitation clause regulates and functions as a guarantee. The limitation clause is to prohibit the establishment of other (more intrusive) restrictions than those permitted under the constitution.

#### **A. POLAND** (by *Lukasz Lasek*)

The Constitution of 1997 contains a general limitation clause that sets forth requirements to what extent and under what conditions constitutionally guaranteed rights and freedoms can be limited. As Art. 31(3) Constitution 1997 stipulates "[a]ny limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights." Some specific rights and freedoms contains limitation clauses. The Constitutional Court said that Article 31(3) of the Constitution solely can authorize limitation of rights and freedoms unless it is contrary international law.<sup>7</sup> Such a model (general limitation clause and some specific ones) is estimated in the theory of constitutional law as the best in terms of human rights protection.<sup>8</sup> However it is also noted that the specific clauses must be harmonized with the general clause.<sup>9</sup>

The drafters of the Constitution adopting Article 31(3) drew inspiration from the European Convention on Human Rights, particularly its Articles 8-11 and the first chapter of the German Basic Law.<sup>10</sup> The reception of European solutions that worked rather than seeking the "own" ones is positively evaluated. M. Wyrzykowski writes about the "salutary restraint".<sup>11</sup>

Before the entry into force of the Constitution 1997 the Constitutional Court had applied in review the same criteria that are included in the limitation clause.<sup>12</sup> The Constitutional Court in its judgment no. P 2/98 pointed out that to apply the principle of proportionality before 1997, the Court must have inferred this principle from the general formula of the rule of law. The Court also noted that a tremendous impact on the understanding of this principle had both doctrine and comparative studies.<sup>13</sup>

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<sup>6</sup> L. Garlicki, *Wolności i prawa jednostki w Konstytucji Rzeczypospolitej Polskiej z 1997 roku. Bilans pięciu lat*. [in:] *Pięć lat Konstytucji Rzeczypospolitej Polskiej. Materiały z konferencji na Zamku Królewskim w Warszawie 17 października 2002 r.*, Wydawnictwo Sejmowe, Warszawa 2002, p. 70

<sup>7</sup> M. Wyrzykowski, *Granice praw i wolności - granice władzy* (in:) *Obywatel - jego wolności i prawa*, B. Oliwa-Radzikowska (ed.), Warszawa 1998, pp. 55, 58.

<sup>8</sup> L. Garlicki, *uwagi do art. 31*, [w:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, L. Garlicki (red.), t. III, Warszawa 2003, p. 13.

<sup>9</sup> J. Zakolska, *Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego*, Warszawa 2008, p. 111.

<sup>10</sup> M. Wyrzykowski, *Granice praw i wolności - granice władzy* (w:) *Obywatel - jego wolności i prawa*, B. Oliwa-Radzikowska (red.), Warszawa 1998, s. 46.

<sup>11</sup> J. Zakolska, *Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego*, Warszawa 2008, p. 111.

<sup>12</sup> PCC judgment of 2 March 1994, no. W 3/93

<sup>13</sup> PCC judgment of 12 January 1999, no. P 2/98

### ***The Scope of Application of General Clause (Article 31(3) Constitution)***

Article 31(3) of the Constitution is applicable to the individuals. In principle, though not in all cases, it will also apply to legal persons. The Constitutional Court expressly excluded from its scope municipalities. Therefore, generally the limitation clause is not applicable to all local government bodies (municipality, district, province).

Article 31(3) contains the general limitation clause. There are some elements of the limitation clauses in specific rights and freedoms. For example, Article 21(2) (expropriation is permissible if it is for public purposes and for just compensation); Article 22 (restriction on freedom of economic activity imposed only by statute and only on grounds of overriding public interest); Article 37(2) (limiting constitutional rights and freedoms guaranteed for foreigners can be established only by statute); Article 51(2) (personal data may be collected, stored and made available by public authorities only in so far as is necessary in a democratic state of law), Article 51(3) (access to public documents and collections of data can be restricted by statute), Article 53(5) (restriction on the freedom of religion), Article 57 (restrictions on freedom of assembly may be made only by statute), Article 58 (2) (prohibition of freedom to association for the purposes or activities contrary to the Constitution or statutes), Article 61(3) (the conditions for restrictions on the right to obtain information on the activities of public authorities and persons exercising public functions); Article 64(3) (restriction on property rights can be introduced only by statute and without prejudice to the essence of the right); Article 228(5) (operations carried out due to a state of emergency must conform to the degree of threat).<sup>14</sup>

The doctrine and jurisprudence of the Constitutional Court is dominated by the view that the general limitation clause is *lex generalis* and is applicable to all rights and freedoms guaranteed under the Constitution, irrespectively whether the particular right of freedom contains a specific limitation clause.<sup>15</sup> L. Garlicki specifies saying that it is applicable to (i) the constitutional freedoms and rights that do not contain any limitation clause (eg Articles 47, 48(1), 54). In his opinion it can not be argued that these freedoms and rights are absolute, the general clause must be applied because of the constitutional scheme; (ii) constitutional freedoms and rights, which contain only parts of limitation requirements in comparison with the general limitation clause, (eg Articles 49, 50, 52). In his opinion, the general clause in these cases fully complementary; Article 31(3) is applicable to those elements that do not coincide with the scheme detailed or which have not been by these rules expressly excluded; (iii) constitutional freedoms and rights, for which specific limitation clause itself and globally regulates all the conditions of the limitation; generally it involves rights that substantially allows wider restrictions (Articles 22, 45(1)) or narrower (Article 53(5)) in comparison to the Article 31(3). According to the principle of *lex specialis derogat legi generali* detail regulation overlaps the general ones, but in relation to other elements the general clause applies.<sup>16</sup>

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<sup>14</sup> Compare A. Zołotar, *Zasada proporcjonalności* (in:) M. Zubik (ed.), *Konstytucja III RP w tezach orzeczniczych Trybunału Konstytucyjnego i wybranych sądów*, Warszawa 2008, p. XXVIII

<sup>15</sup> L. Garlicki, *uwagi do art. 31*, [w:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, L. Garlicki (red.), t. III, Warszawa 2003, s. 16-17; M. Wyrzykowski, K. Wojtyczek, A. Łabno. Differently: P. Winczorek and M. Piechowiak (P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Warszawa 2000, pp. 49-50; M. Piechowiak, *Regulacja nie wolna od wad*, "Rzeczpospolita" z 1997 r., no. 103, p. 18).

<sup>16</sup> L. Garlicki, *uwagi do art. 31*, [w:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, L. Garlicki (red.), t. III, Warszawa 2003.

The Constitutional Court is of the view that the general limitation clause will apply if the applicable standards would weaken the protection of the rights and freedoms.<sup>17</sup>

The limitation clause applies only to the rights and freedoms guaranteed in the Constitution. The clause therefore does not apply to the rights and freedoms guaranteed by statutes or international agreements<sup>18</sup>. However the legislative is bound by the international law and rule of law principle.<sup>19</sup> The Constitutional Court in its judgment of 10 July 2000, no. SK 21/99 pointed out that constitutional rights within the meaning of 31(3) of the Constitution are subjective rights which are based upon the constitution. In this case, the applicant lodged a complaint indicating that the some regulations of early conditional release in the new Penal Code 1997 are less favorable than under the Penal Code 1969).<sup>20</sup> This strict approach to the scope of the limitation clause is being criticized by some scholars<sup>21</sup>.

### ***The General Limitation Clause and Respect to the Human Dignity***

The limitation clause does not apply to Article 30 which protects human dignity. The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.<sup>22</sup> On the basis of Article 30 of the Constitution the concept of human dignity must be attributed to the nature of the constitutional value of central importance. Article 30 of the Constitution is crucial for the interpretation and application of all other rights, freedoms and responsibilities of the individual. This is underlined by the preamble to the Constitution which calls for care to preserve the inherent human dignity and also Article 233(1) which prohibits violation of human dignity during the state of emergency. The Constitutional Court warned against identifying in the each single violation of substantial rights and freedoms automatically the violation of human dignity. If so, the guarantee of protection of human dignity would be weakened. In fact, Article 30 covers the most important values that are not protected by other constitutional rights and freedoms. The human dignity touches the core of an individual's position in society, its relationship to other persons and public authorities.<sup>23</sup>

The wording of Article 30 precludes any attempt to impose any restrictions on human dignity. There are some scholars arguing that the human dignity should be subjected to the balancing

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<sup>17</sup> PCC judgment of 16 Februariu 1999, no. SK 11/98. See also: L. Garlicki, *Wolności i prawa jednostki w Konstytucji Rzeczypospolitej Polskiej z 1997 roku. Bilans pięciu lat*. [in:] *Pięć lat Konstytucji Rzeczypospolitej Polskiej. Materiały z konferencji na Zamku Królewskim w Warszawie 17 października 2002 r.*, Wydawnictwo Sejmowe, Warszawa 2002, p. 70

<sup>18</sup> L. Garlicki, *uwagi do art. 31*, [w:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, L. Garlicki (red.), t. III, Warszawa 2003, p. 15.

<sup>19</sup> L. Garlicki, *Przesłanki ograniczania konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)*, „Państwo i Prawo” 2001, nr 10, p. 7. The authors indicates international law and Article 2 of the Constitution (rule of law)

<sup>20</sup> Similarly in the PCC judgment of 6 July 1999, no. P 2/99. See also J. Oniszczyk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego na początku XXI w.*, Zakamycze 2004, pp. 392-293 and L. Garlicki, *Przesłanki ograniczania konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)*, „Państwo i Prawo” 2001, nr 10, p.7

<sup>21</sup> L. Wiśniewski, *Wolności i prawa jednostki oraz ich gwarancje w praktyce*, [in:] *Podstawowe problemy stosowania Konstytucji Rzeczypospolitej Polskiej. Raport wstępny*, K. Działocha (red.), Warszawa 2004, s. 97-98.

<sup>22</sup> Tak wyrok TK z 5 marca 2003 r., K 7/01 oraz wyrok TK z 24 października 2006 r., SK 41/05, a także wyrok TK z 30 września 2008 r., K 44/07.

<sup>23</sup> Wyrok TK z 5 marca 2003 r., K 7/01 (OTK ZU nr 3/A/2003, poz. 19)

mechanism however even then have no doubts that it would require amendment to the Constitution<sup>24</sup>. In the philosophy of law there is a discussion on this issue.<sup>25</sup>

The Constitution excluding human dignity does not provide any other absolute rights or freedoms. However the prohibition in limiting certain rights and freedoms may be the result of obligations under the international law. Article 9 of the constitution stipulates that Poland shall respect international law binding upon it. It is the case with Articles 3 and 4 of the ECHR. Furthermore the superior law of international agreements or law enacted by the international organization, when capable of direct applicability, may preclude the application of statutory or understatutory law pursuant to the principle *lex superior derogat legi inferiori*.

## **B. GERMANY** (by *Mona Klarkowska*)

Basic rights in Germany can be a subject to limitation. Fundamental rights can only be limited by a law or based upon a law (*Gesetzesvorbehalt*). Limitation of rights is an exclusive right of the Parliament. Only 'Bundestag' and state parliaments have the law-making purview. This competence cannot be transferred to the government, local authorities or courts. Limitations cannot interfere with the basic essence of a law.

German Constitution recognises one general regulation concerning the matter of limitation of basic rights. This regulation is the reservation of statutory powers (*Gesetzesvorbehalt*) and was a basis for similar Polish constitutional provisions. Those rights which are not mentioned in the Constitution to be of a kind that "can be limited through or because of law" can be limited in a broader manner. Rights cannot be limited without a statutory basis. The whole doctrine of the intervention in basic rights is based on the reservation of statutory powers.

Conception of "Respect for the essence of rights freedoms" (*Wesensgehaltsgarantie*) is stated by Art. 19 section 2 Grundgesetz, (translate Grundgesetz or explain what it is) which underlines that basic rights can not be affected in their essence. The general idea is that every basic law has an invulnerable "core" in which the state can not intervene. This absolute perspective supports the assumption, that human dignity is a part of every basic law. Due to the fact that human dignity is untouchable by Article 1 section I Grundgesetz, this extends to all other basic rights.

## **C. EUROPEAN CONVENTION ON HUMAN RIGHTS** (by *Łukasz Lasek*)

The European Convention on Human Rights contains express and internal limits on the rights and freedoms enshrined therein.

### ***The Scope of Application***

Torture or inhuman or degrading treatment or punishment and slavery are absolutely prohibited

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<sup>24</sup> A. Bałaban, *Ochrona życia człowieka: dwie propozycje zmian konstytucji*, "Rzeczpospolita" z dnia 3-4 lutego 2007 r.

<sup>25</sup> Alan M. Dershowitz, *Shouting Fire: Civil Liberties in a Turbulent Age*, 2002; Alan M. Dershowitz, *Torture Without Visibility and Accountability Is Worse Than With It*, 6 University of Pennsylvania Journal of Constitutional Law 326. W Polsce por. J. Zajadło, *Dyskusja na temat tortur w Stanach Zjednoczonych Ameryki*, Państwo i Prawo z 2006 r., nr 5, s. 32-47; J. Zajadło, *Guantanamo i Abu Ghraib — problemy etyczno-prawne*, „Wojskowy Przegląd Prawniczy” 2006, nr 3, s. 19-32; J. Zajadło, *Uniwersalizm praw człowieka w konstytucji — bezpieczne i niebezpieczne relatywizacje*, Przegląd Sejmowy z 2007 r., nr 4, s. 93 i n.; J. Zajadło *Tortury wysterylizowane*, (w:), J. Zajadło (red.) *Fascynujące ścieżki filozofii prawa*, Gdańsk 2008, 312-322.

(Article 3 and 4). Apart from these absolute non-derogable rights enshrined in Article 3 and 4 most of the ECHR rights are qualified. The right to life might be exceptionally restricted but it cannot be said that the limitation clause is applied. Rather the ECHR allows for certain exceptions under which the deprivation of life may be justified under (Article 2(2)(a-c)). Pursuant to Article 15(2) the right to life cannot be derogate unless the death result from lawful acts of war.

The right to liberty allows certain restriction in subparagraphs (a) to (f) of Article 5 § 1. This list contains an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds.<sup>26</sup> The restriction included in Article 5 are interpreted by the Court restrictively and they are narrower than those provided in Articles 8-11. The most important condition for any restriction is its procedural and substantive lawfulness.

The right to privacy and respect for family life, the freedom of thought, conscience, religion, the freedom of expression, assembly and association are subject to limitation if necessary in a democratic society to pursue a legitimate aim (Articles 8-11). These rights and freedoms are qualified by the necessity principle. The conditions upon which a state may interfere with the enjoyment of a protected right are set out in the second paragraphs of Articles 8-11. These paragraphs have a common structure but differ in detail.<sup>27</sup> Limitations are allowed only if they are: (i) 'in accordance with the law' or 'prescribed by law', (2) justified for the protection of at least one of the objectives set out in the second paragraph of particular provision (3) necessary in a democratic society. Under the first requirement the Court assess whether the restricting measure is either written or unwritten law and whether it satisfies certain substantial requirement typical to the rule of law values like accessibility and foreseeability. Under the second requirement the Court must assess whether the measure is capable of pursue the legitimate public interest exhaustively listed in the limitation clause<sup>28</sup>. As S. Gardbaum notes the these first two requirements are "in practice essentially pro forma" and consequently "the outcome of the case always turns on whether the measure is 'necessary in a democratic society' to pursuit of this legitimate objective".<sup>29</sup>

Article 17 stipulates that nothing in Article 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activities of aliens. In *Piermont v France (1995)* the Court found that

"The Court cannot accept the argument based on European citizenship, since the Community treaties did not at the time recognise any such citizenship. Nevertheless, it considers that Mrs Piermont's possession of the nationality of a member State of the European Union and, in addition to that, her status as a member of the European Parliament do not allow Article 16 (art. 16) of the Convention to be raised against her, especially as the people of the OTs take part in the European Parliament elections. In conclusion, this provision (art. 16) did not authorise the State to restrict the applicant's exercise of the right guaranteed in Article 10 (art. 10)."<sup>30</sup>

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<sup>26</sup> *Saadi v. the United Kingdom* [GC], application no. 13229/03, § 43

<sup>27</sup> Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, Oxford 2009, p. 344

<sup>28</sup> That the list is exhaustive see F. Jacobs, R. White, *The European Convention on Human Rights*, Oxford 1996, p. 304.

<sup>29</sup> S. Gardbaum, *Limiting Constitutional Rights*, 54 *UCLA Law Review* 789 (2007), p. 834

<sup>30</sup> *Piermont v France*, judgment of 27 April 1995, application no. 15773/89, 15774/98, § 64. See also joint party dissenting opinion of judges Ryssdal, Matscher, Freeland and Jungwert (the dissent is in respect of application of Article 16)

As Harris, O'Boyle, Warbrick speculate the situation is somewhat different now when the EU citizenship is recognized and being assigned to all EU member state's nationals. "today European Union citizens are not considered to be aliens for the purposes of Article 16, this will be an important re-reading of the text."<sup>31</sup>

Article 17 stipulates that nothing in the ECHR may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in the ECHR or at their limitation to a greater extent than is provided for in the Convention. This provision is considered to safeguard that any conventional rights will not be invoked to weaken or destroy the ideals and values of a democratic society. The Court found in *Lehideux and Isorni v France (1998)* that the application of Article 17 is legitimate if the action seeking protection under the ECHR is to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system or to pursue objectives that are racist or likely to destroy the rights and freedoms of others. Recently this safeguard is being used in cases involving racist and xenophobic groups, hate speech and Holocaust denial cases<sup>32</sup>.

Article 18 stipulates that the restrictions permitted under the ECHR to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed. The mere aim of this provision is to prohibit from interference for any purpose other than those prescribed.

#### ***Article 3 and 4***

The ECHR constitute firms prohibitions against restriction in these rights. The torture or inhuman or degrading treatment or punishment and slavery are absolutely prohibited. In *Soering v United Kingdom (1989)*<sup>33</sup> the Court found that a contracting party infringes the Article 3 if it exposes a person to the likelihood of treatment contrary to Article 3 also in a place outside its own jurisdiction. This principle was shortly expanded in *Cruz Varas and Others v Sweden (1992)*<sup>34</sup> on the cases concerning expulsion and deportation. In *Chahal v UK (1996)* the Court reiterated that:

"the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation. The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases... In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration."<sup>35</sup>

Similarly the Court ruled in the most recent cases *Saadi v Italy* and *A. and Others v UK (2009)*. These two cases are cited below. The absolute nature of these rights does not mean that the proportionality test cannot be applied auxiliary. The application of Article 3 or 4 may involve various forms of balancing, e.g. when delimiting the burden of proof or qualifying an act as ill-

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<sup>31</sup> Harris, O'Boyle, Warbrick, *Law of the European Convention...*, p. 648

<sup>32</sup> Harris, O'Boyle, Warbrick, *Law of the European Convention...*, p. 650

<sup>33</sup> *Doering v UK*, judgment of ....., application no.

<sup>34</sup> *Cruz Varas and Others v Sweden*, judgment of ....., application no. ....

<sup>35</sup> *Chahal v UK*, judgment of ....., application no. ...., § 79-80; note: seven judges dissented.



treatment."<sup>36</sup>

#### **D. EU CHARTER OF FUNDAMENTAL RIGHTS** (by Robert Rybski)

Charter contains a Limitation Clause in Art. 52 Section 1, which provides that "Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others. "

It can be observed, that different provisions of the CFR have some kind of specific character because of their normative content. Well, C. Mik shows that during works upon the Charter "will of the Member States was to maintain the status quo, under which only they [Member States] remain competent to regulate the fundamental rights"<sup>37</sup>. And as the author points out further, the EU even after the Lisbon Treaty reform "is not to be an organization whose mission is to protect individual rights"<sup>38</sup>. This means that, in accordance with Article. Paragraph 52. 2 and 3, the true meaning of particular provisions of the Charter is determined by the formation and understanding of the relevant provisions in the ECHR (or Protocols to the Convention)<sup>39</sup>. It is applied, in principle, to the width of legal protection granted upon a particular right or freedom. Only in the absence of an identical provision in the Convention, the Charter receives independent existence. Essential for the Charter's future will be development of Strasbourg standards. Second source of development will be the case-law issued on the basis of the Charter<sup>40</sup>. This genetic connection between the Charter and the Convention means also that the protection level guaranteed under the Charter shall be at no time lower than the conventional<sup>41</sup>. At the same time, standards introduced by the EU law may be higher than those coming from ECHR. Interestingly, C. Mik shows that the additional limitation clauses may appear in other acts of the EU law<sup>42</sup>.

The peculiarity of the Charter, in contrast to the EU's *acquis communautaire*, lies in the fact that there is no supremacy clause in the Charter, that would provide primacy of the Charter. J. Liisberg

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<sup>36</sup> H. Battjes, *In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR*, Leiden Journal of International Law Vol. 22 Issue 3, pp. 583-621

<sup>37</sup> C. Mik *Karta Praw Podstawowych: wyznaczniki standardów ochronnych* [w:] J. Barcz (red.) *Ochrona Praw Podstawowych w Unii Europejskiej*, Warszawa 2008 s. 64. Although the argument of a legalhistorical nature will be effective only in the first stage of applying the Charter. By comparison to the Convention, on the basis of the ECHR ECtHR reiterates that the Convention is a "living instrument". Drafters of the Convention chaired by Sir David Maxwell Fyfe would certainly be surprised at the scope of protection afforded by the Convention after 60 years in the judgement *Lautsi v. Italy* (complaint nr 30814/06).

<sup>38</sup> *op. cit.*

<sup>39</sup> The same C. Mik *Karta...* [w:] *op. cit.*, s. 76. For example Explanations to the Charter indicate that Art. 2 of the CFR corresponds to Article 2. 2 of the ECHR, Article 4 of the CFR corresponds to Article 4. 3 of the ECHR, Article. 5 Paragraph 1 and 2 corresponds to Article. 4 of the ECHR; Article 6 of the CFR corresponds to Article 5 of the ECHR; Article 7 of the CFR corresponds to Article 8 of the ECHR.

<sup>40</sup> This sequence shows only a much lower dynamic of the ECJ in the human rights matter.

<sup>41</sup> This kind of approach is in line with the requirement of the equivalence of the basic rights protection systems of the Council of Europe and the European Union that was established by the ECtHR in its judgement from 30 June 2005 in the case of *Bosphorus HAVA YOLLARI Turizm ve Ticaret Anonim ŞİRKETİ v Ireland* (application no 45036/98). Examples for wider protection, which the Explanations show, are: Art. 9 of the CFR, which covers the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if those are recognised by the national legislation; Article 14 Paragraph 1 corresponds with the Article 2 of the Additional Protocol to the ECHR, but its scope is extended to encompass access to vocational and continuing training.

<sup>42</sup> C. Mik *Karta...*, *op. cit.*, s. 76.

finds it as a serious violation of the principle of supremacy of EU law<sup>43</sup>. P. Craig and G. de Búrca do not share those fears<sup>44</sup>, with which we have to agree - especially in the close perspective of the European Union's accession to the ECHR.

By an attempt to reconstruct the whole limitation norm on the basis of the Charter, in accordance with Article 6 Paragraph 1 of the 3 TEU Article 52 Paragraph 1 of the CFR should be read in view of the "Explanations relating to the Charter of Fundamental Rights"<sup>45</sup>. Explanations at the very beginning refer to the judication of the ECJ. In the judgement judgment of 13 April 2000 in the case of *Kjell Karlsson and Others v Jordruksverket*<sup>46</sup> the Court pointed to the tenacious case-law<sup>47</sup> according to which " the exercise of fundamental rights, in particular in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights"<sup>48</sup>. It is this thesis which was then the basis for editorial of the CFR. The text of the Charter extended this

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<sup>43</sup> J. Liisberg *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?*, "Common Market Law Review" z 2001 r. nr 38, poz. 1171.

<sup>44</sup> P. Craig, G. de Búrca *EU Law. Text, Cases and Materials*. Oxford 2003, s. 361.

<sup>45</sup> Up-to-date version was published in the Official Journal of the European Union 2007/C 303/02.

<sup>46</sup> C-292/97, European Court Reports 2000 Page I-02737.

<sup>47</sup> The judiciary doctrine, that interests us was developed on the basis of the 18<sup>th</sup> thesis (... Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of His Labour and of His Investments in the tenanted holding would be incompatible with the requirements of the protection of the fundamental rights in the Community legal order. *Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements*) in the ECJ's judgement from 13<sup>th</sup> July 1989 in the case of *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* (publ. European Court reports 1989 Page 02609), which imposed also on the an Member States obligation to respect the principle of protection of fundamental rights during implementing the Community law (it already entailed in EU in its activities). The Court relied on this argument then: in its judgement of 18 June 1991 in the case of *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* (ECR 1991 Page I-02925, § 41 ); in the judgement from 24<sup>th</sup> March 1994 in the case of *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock* (ECR 1994 Page I-00955, § 16); in the judgement appeal of 15 February 1996 in the case of *Fintan Duff, Liam Finlay, Thomas Julian, James Lyons, Catherine Moloney, Michael McCarthy, Patrick McCarthy, James O'Regan, Patrick O'Donovan v. Minister for Agriculture and Food i Attorney General* (E.C.R. 1996 Strona I-00569, § 29); in the judgement from the 15<sup>th</sup> of April 1997 in the case of *The Irish Farmers Association i inni v. Minister for Agriculture, Food and Forestry, Ireland i Attorney General* (E.C.R. 1997 Strona I-01809, § 16). The '18<sup>th</sup> thesis' was reinterpreted in the judgement from the 10<sup>th</sup> of January 1992 in the case of *Walter Knüfer i Direktor der Landwirtschaftskammer Rheinland v. Walter Buchmann* (E.C.R. 1992 Strona I-06895, § 16), as the ECJ introduced the following judicial test: *Those rights [i.e. right to property and freedom of the producers to pursue an occupation], which are part of the fundamental rights the observance of which is ensured by the Court, are not absolute rights but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of the markets, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.* Such kind of understanding the 18<sup>th</sup> thesis from the *Wachauf*... in the *Walter Knüfer*... was then applied in: the ECJ judgement from 5<sup>th</sup> October 1994 in the case of *Germany v. Council of the European Union* (E.C.R. 1994 Strona I-04973, § 78); in the judgement from the 10<sup>th</sup> July 2003 in the cases of *Booker Aquacultur Ltd (C-20/00) and Hydro Seafood GSP Ltd (C-64/00) v. The Scottish Ministers* (E.C.R. 2003 Strona I-07411, § 68); in the judgement from the 30<sup>th</sup> June 2005 in the case of *Alessandrini Srl and Others v. Commission of the European Communities* (E.C.R. 2005 Page I-05673, § 86). In the ECJ judgement from 30<sup>th</sup> July 1996 in the case of *Bosphorus Hava Yollari Turizm ve Ticaret AS przeciwko Minister for Transport, Energy and Communications oraz inne* (E.C.R. 1996 Strona I-03953, § 21) Court stated only, that *the fundamental rights [...] are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community.*

<sup>48</sup> C-292/97, *op. cit.*, § 45.

thesis by adding that the limitations may be made only if they are necessary and genuinely meet objectives of the need to protect the rights and freedoms of others.

Reception of the limitation clause from the case-law to the primary law has this effect that ECJ's judiciary, that developed on the basis of the 18th thesis from *Wachauf...*, remains binding and can still be successfully invoked.

Worth considering are the effects of the different nature of particular substantive provisions of the Charter for the use of the Limitation Clause. A following classification has been proposed in the literature<sup>49</sup> for various provisions of the Charter: "1) the rights and freedoms, which can be directly invoked before courts, 2) the rights and freedoms, which depend on the substantive content of national or EU legislation, including: a) the rights and freedoms, normative content of which depends on national legislation and b) the rights and freedoms, normative content of which depends on the European Union law and practices, 3) principles, including a) independent principles and b) dependent principles; 4) the programmatic and aspirational provisions 5) the rights connected with EU citizenship"<sup>50</sup>. Provisions from the first, second and fifth groups can be directly before the courts invoked. The scope of limitation, that took place, would be each time checked withing the judicial review. However, doubtful is the possibility of even considering the limitation of rights from the two remaining categories. Of course, at the linguistic usage of the Limitation Clause in this case is excluded. But we believe, that without a different approach, in which the legislature will be not monitored about implementation of the remaining provisions of the Charter, those provisions will never actually become used. Therefore, during law-making process also usage of the Limitation Clause shall become a standard. Clause from the Article 52 of the CFR is a ready instrument, which would make the EU legislator (or Member State) to show the reasons for which those provisions if the Charter weren't sufficiently taken into account. An open question is, the ability to exercise the instrument of legislative omission, when a suitable provisions from those two remaining groups of the Charter was not applied or was subjected to an excessive limitation. By applying such a reasoning, it would be then become possible to extend the judicial review all provisions of the Charter.

## **2. IN ACCORDANCE WITH LAW**

### **A. POLAND** (by *Łukasz Lasek*)

The Polish Constitution of 1997 in its Article 2 (principle of a democratic state ruled by law), Article 7 (the principle of legality) and Article 31(3) sets a requirement that any action of a state must have a legal basis. The principle of rule of law means that public authorities can act only on the basis of law, which also implies the requirement to act solely in within the scope of given authorization. Exceeding the limits of given authorization (both conventional and factual acts) is equal to acting without a legal basis. It is also assumed that the given authorization must be of a prospective nature. In other words it is not permissible to retrospectively validate the action unlawfully carried out. This is not however tantamount to the principle of non-retroactivity, since it is possible to take action that will change the legal consequences of past events. The principle of rule of law retains a special significance for the protection of human rights.

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<sup>49</sup> A. Bodnar *Karta Praw Podstawowych: zróżnicowany charakter prawny postanowień Karty i ich skutki dla jednostek, sądów oraz ustawodawcy* [w:] J. Barcz (red.) *Ochrona Praw Podstawowych w Unii Europejskiej*, Warszawa 2008.

<sup>50</sup> *op. cit.*, s. 147-148.

Article 31(3) states that exclusively statute can regulate the status of an individual. The Constitutional Court found that the statutory basis of the restriction cannot itself justify the interference (...) whereas *a contrario* non-statutory basis of a restriction automatically means that the limitation is not in compliance with Article 31(3) and therefore must be declared unconstitutional.<sup>51</sup>

The concept of statutory requirement for regulating the legal status of individuals was recognized before the entry into force of the Constitution 1997. As noted by L. Garlicki it was confirmed by the jurisprudence of the Constitutional Court. An explicit introduction of this principle into the text of the Constitution 1997 was caused merely because of the influence of the ECHR onto the drafters. L. Garlicki observes that the genetics of this requirements sufficiently justify relying on the principles stemming from the case law of the ECtHR in this respect.<sup>52</sup>

### ***Sources of Law in Poland***

The Constitution 1997 adopts an exhaustive list of sources of universally binding law. Article 87 includes thereto constitution, statutes, ratified international agreements and regulations. The category of universally binding law includes the law issued by the local governments or local governmental administration bodies. The binding force of that law is however limited to the area wherein the issuing body is empowered to act. The secondary legislation of the European Union should be also included to this group<sup>53</sup>.

The list of sources of law which are not universally binding is not exhaustive. The Constitution lists the resolutions of the Council of Ministers, the orders of the Prime Minister and ministers themselves. However resolutions and orders apply only to the subordinated bodies or employees.

### ***Exclusivity of Statute***

Article 87 provides that "statute" is a source of universally binding law in Poland. The Constitution does not define the term "statute". It means that it refers to this concept of statute commonly affiliated thereto (*pojęcie zastane*). A statute is an act of parliament, having the highest position in the system of sources of national law apart from the Constitution, of the unlimited substantial scope, adopted in the special procedure regulated in the constitution.<sup>54</sup>

Lech Garlicki states that statutory requirement safeguards the participation of parliament in adopting law that may restrict human rights. The statutory requirement enables the transparency of

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<sup>51</sup> Wyrok TK z 19 maja 1998 r., U 5/97. Podobnie także w wyroku TK z 12 stycznia 1999 r., P 2/98; wyroku TK z dnia 12 stycznia 2000 r., P 11/98.

<sup>52</sup> L. Garlicki, *Przesłanki ograniczania konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)*, „Państwo i Prawo” 2001, nr 10, p.10

<sup>53</sup> Pursuant to Article 90 in conjunction with Article 91(3) of the Constitution. See also Article 10 TFEU.

<sup>54</sup> por. L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2007, s. 128; M. Wyrzykowski, *Granice praw i wolności - granice władzy (w:) Obywatel - jego wolności i prawa*, B. Oliwa-Radzikowska (red.), Warszawa 1998, s. 48-49, gdzie autor zaznacza ponadto istotną rolę kontrolną izby wyższej parlamentu, prezydenta, który może ustawę lub jej odpowiednie przepisy zawetować, a także skierować w trybie kontroli abstrakcyjnej do Trybunału Konstytucyjnego.

decision-making therefore protects against unreasonable and hasty limitations.<sup>55</sup> Mirosław Wyrzykowski emphasizes the public aspect of the legislative procedure. Because it is open for public, it allows the public to know the objectives of regulation, as well as to keep track of work on the final version of the law. This gives the public an opportunity to respond when at risk of exceeding the allowable limits occurs.<sup>56</sup>

### ***Exclusivity of Statute and Universally Non-Binding Normative Acts***

As a general principle the universally non-binding law cannot impose any limitation on the constitutional rights and freedoms. However the Court<sup>57</sup>.

### ***Exclusivity of Statute and Understatutory Law***

The principle of statutory exclusivity requires that any restriction that is to be imposed on the constitutional rights and freedoms must be completely regulated in the statute. It would be in fact impossible to regulate all of the matter including technicalities in the statutory act. Therefore it is permissible to delegate an authorization to establish the details of the restriction in the understatutory acts adopted by the executive bodies or local governments<sup>58</sup>. The Constitutional Court would review the scope of left authorization with a strict scrutiny. The Constitutional as well as the jurisprudence of the Constitutional Court formulated certain requirements in this issue.

The principle of completeness of statutory regulation requires that the statute itself must define the basic elements of restriction (stating which body can regulate, what shall be the content and boundaries). The scope of matters to be regulated in the regulation must be narrower than the general scope provided for statutory sub-delegation in Article 92 of the Constitution<sup>59</sup>. The situation is somewhat different in the case of local laws where the wider scope of authorization might be granted. The permissible scope depends on the subject matter. The more important rights and freedom in question the less power to regulate in understatutory law<sup>60</sup>.

### ***Penal & Tax Matters and Understatutory Law***

The requirement of exclusivity of the statutory form of restriction is of particular importance in the sphere of criminal responsibility and taxation. In relation to these areas and due to the additional

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<sup>55</sup> L. Garlicki, *Przesłanki ograniczania konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)*, „Państwo i Prawo” 2001, nr 10, s.10

<sup>56</sup> M. Wyrzykowski, *Granice praw i wolności - granice władzy (w:) Obywatel - jego wolności i prawa*, B. Oliwa-Radzikowska (red.), Warszawa 1999, p. 49; In Poland the government in November 2009 proposed the draft law on blocking access to certain internet websites. The draft law was criticized by the internet users and leading ngos in Poland on the grounds of freedom of expression. The government refused to enact this law.

<sup>57</sup> Tak K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, s. 117, P. Sarnecki, *Idee przewodnie Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r.*, Przegląd Sejmowy z 1997 r., nr 5, s. 17

<sup>58</sup> J. Oniszczyk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego na początku XXI w.*, Zakamycze 2004 s. 419

<sup>59</sup> Tak TK w wyroku z 10 kwietnia 2001 r., U 7/00

<sup>60</sup> Wyrok TK z 24 marca 1998 r.; por. także A. Łabno, *Ograniczenia wolności i praw człowieka na podstawie art. 31 Konstytucji III RP [The limitation of freedoms and rights under article 31 of the Polish Constitution]* [in:] Banaszak B., Preisner A., *Prawa i wolności obywatelskie w Konstytucji RP [The rights and freedoms under the Polish Constitution]*, C.H. Beck, Warszawa 2002, s. 702 oraz orzeczenia tam podane: orzeczenie TK K 4/95; orzeczenie TK K 19/95; orzeczenie TK K 1/87

specific constitutional provisions (Article 42(1), Article 217) the absolute exclusivity of statutes is required<sup>61</sup>. In other words, in this subject matters it is not permissible to subdelegate the legislative powers as a principle. The Constitutional Court in the judgment of 13 May 2008, no. P 50/07 found that the core of the penal provision must completely be stipulated in the statute. The addressee of the law as well as the court must not have any doubts in regards what kind of behaviour is prohibited. In the most recent judgment the Court found that it is unconstitutional to regulate in the regulation the coercive measures that may be used by officers of the Central Bureau of Anti-corruption.

The Constitutional Court in its judgment of 12 January 2000, no. P 11/98 held that Article 31(3)(1) requires that the restrictions imposed on constitutional rights and freedoms must be described in a complete manner in the statute in such a way that it precludes from any arbitrariness.

### ***Exclusivity of Statute and Overstatutory Law***

There are certain acts that may have a superior status than statutes. It includes namely international agreements ratified with prior consent granted by statute (Article 89(1) of the Constitution) and the law enacted by the international organization which Poland is a party to and authorized to enact law in certain field (Article 91(3) of the Constitution). The latter is important because of the Polish membership in the European Union.

The EU secondary legislation in accordance with Article 91(3) in the event of a conflict with the national legislation takes precedence over the statutory level. However it is limited to the extent where EU law is capable of being directly applicable. The concept of a direct effect and the principle of primacy of EU law is supported by jurisprudence of the Court of Justice<sup>62</sup> and the Polish Constitutional Court<sup>63</sup>. However, despite the existence of the principle of priority, not all EU legislations (primary and secondary) has direct effect (*direct effect*). Direct effect depends on the nature of the act and the entity against whom it is to be addressed. Without going into details, it may be said the the principles of direct effect are solely developed by the jurisprudence of the Court of Justice.

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<sup>61</sup> A. Łabno, *Ograniczenia wolności i praw człowieka na podstawie art. 31 Konstytucji III RP* [*The limitation of freedoms and rights under article 31 of the Polish Constitution*] [in:] Banaszak B., Preisner A., *Prawa i wolności obywatelskie w Konstytucji RP* [*The rights and freedoms under the Polish Constitution*], C.H. Beck, Warszawa 2002, pp. 702

<sup>62</sup> See judgment of the Court of Justice in cases 6/65 *Flamino Costa v ENEL* (1964), 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel* (1970), 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (1978). See also P. Craig, G. de Burca, *EU Law. Text, Cases and Materials*, Oxford 2008, p. 344 et seq.

<sup>63</sup> See decision of the Polish Const. Court of 19 grudnia 2006, no. P 37/05, wherein the Court found the the judge if have no doubts as to the applicable law and the judge determines that the national law is i conflit with the EU law, then the judge is obliged to apply the EU law. "Sędziowie w procesie stosowania prawa podlegają bezwzględnie Konstytucji oraz ustawom (...) Z tą zasadą związana jest norma kolizyjna wyrażona w art. 91 ust. 2 Konstytucji, nakładająca obowiązek odmowy stosowania ustawy w wypadku kolizji z umową międzynarodową ratyfikowaną w drodze ustawy. Zasada pierwszeństwa dotyczy prawa wspólnotowego (art. 91 ust. 3 Konstytucji). Jeśli sąd nie ma wątpliwości co do treści normy prawa wspólnotowego, powinien odmówić zastosowania sprzecznego z prawem wspólnotowym przepisu ustawy i zastosować bezpośrednio przepis prawa wspólnotowego (...) Zgodnie z art. 9 Konstytucji Polska przestrzega wiążącego ją prawa międzynarodowego, co *mutatis mutandis* odnosi się również do autonomicznego, aczkolwiek genetycznie opartego na prawie międzynarodowym, systemu prawa wspólnotowego. Artykuł 10 TWE nakłada na państwa członkowskie obowiązek podjęcia właściwych środków w celu zapewnienia wykonania zobowiązań wynikających z Traktatu i z aktów instytucji wspólnotowych."

The Court distinguishes between direct effect in the horizontal<sup>64</sup> and vertical<sup>65</sup> aspects. In addition, the norm which is to have a direct effect must be of certain quality, namely, it must be sufficiently clear, precise and unconditional (*Van Gend en Loos* test).<sup>66</sup> If the EU law satisfies these requirements it is an obligation of the national court to apply the EU law.

It might be also observed that the national courts are obliged to interpret as far as possible the national law in accordance with the EU law. The boundaries of such an extensive interpretation is a result *contra legem* (*indirect effect*). Certain constraints are imposed on the law concerning criminal liability. Furthermore national courts are required to ensure the effectiveness of European Union law.

It is therefore possible that the legal norm that restricts fundamental rights is constructed partly on the basis of the national law and partly on the basis of the EU law eg. directive. In such a case, we believe the constitutional requirement of statutory exclusivity has been fulfilled. More problems with the fulfillment of the principle of exclusivity of statute maybe caused if the restriction is basen on the principle stemming from the jurisprudence of the Court of Justice. Technically the court of justice is not a law-making body, however because its extensive interpretation of law in facts it is a serious law-making body within the institutions of the EU.

L. Garlicki believes that the agreements ratified with prior consent granted by statute and secondary EU legislation fall within the definition of "statute" in Article 31(3) of the Constitution. He indicates that in the case of ratified by prior consent international agreements indirectly there is a statute, simply because it is needed for ratification. In the case of the EU legislation, he raises a more pragmatic argument saying that if the EU legislation would not be qualified as a "statute" for purposes of Article 31(3), many Community legislations would be in a collision with Article 31(3) of the Constitution.<sup>67</sup>

K. Wojtyczek in his publication in 1999 (before the accession of Poland to the EU and before the entry into force the Treaty of Lisbon) considered this issue. He raised doubts whether EU legislation can meet the requirement of exclusivity of statute giving the argument of so called "democratic deficit" of the EU law-making.<sup>68</sup> However, this opinion seems to be out of date in connection with the entry into force of the Treaty of Lisbon. The Treaty of Lisbon significantly strengthened the role of national parliaments in EU lawmaking process.

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<sup>64</sup> Orzecznictwo TS UE dopuszcza horyzontalny skutek bezpośredni w przypadku postanowień traktatów, rozporządzeń, decyzji. Wertykalny skutek bezpośredni, przy bardzo szerokiej definicji państwa wyrażonej najpełniej w orzeczeniu *Foster Gas*, dopuszczalny jest ponadto dla dyrektyw. Orzecznictwo wyróżnia nadto tzw. incydentalny horyzontalny skutek bezpośredni dyrektyw (orzeczenie CIA, Unilver).

<sup>65</sup> In the Polish literature see M. Szpunar, *Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa wspólnotowego*, Warszawa 2008, in particular chapters II, III and IV. See also the the article why the directives should be granted the horizontal direct effect P. Craig, *The Legal Effect of Directives: Policy, Rules and Exceptions*, 34 *European Law Review* 349, 2009

<sup>66</sup> Initially *Van Gend en Loos* but the criteria were subsequently developed and contemporary criterias are established in the case C-128/92 *Banks v British Coal* (1994)

<sup>67</sup> L. Garlicki, *Przesłanki ograniczania konstytucyjnych praw i wolności (na tle orzecznictwa Trybunały Konstytucyjnego)*, „Państwo i Prawo” 2001, nr 10, p.11

<sup>68</sup> por. J. Barcz, *Unia Europejska na rozstajach. Traktat z Lizbony. Główne kierunki reformy ustrojowej*, Warszawa 2009, and the UKiE's brochure from 2009 - *Poznaj Traktat z Lizbony. Compare also judgment of GCC of 30 June 2009*. BVerfG 2 BvE 2/08

We have no doubts that the EU legislation must be treated as a statute for the purposes of Article 31(3) of the Constitution. The more interesting issue is, what if the restriction imposed on the human rights on the virtue of the EU legislation exceeds the constitutional limits. Can the national constitutional court review the conformity of the EU legislation with the national constitution. Can the national constitutional court review the validity of the EU legislation (e.g. whether it does comply with the EU Charter of Fundamental Rights or the general principles of law). Does the national constitutional court remain the jurisdiction over these issues.

In regards of that it may be noted that the Constitutional Court registered an individual constitutional complaint concerning the validity of the EU regulation with the provision of the national constitution (no. SK 45/09)<sup>69</sup>. The applicant claims that the certain provisions of Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and recognition of judgments in civil and commercial matters does not comply with Article 8, 32, 45, 78 and 176(1) of the Polish Constitution. The Court has not yet ruled in the merits. However it has already rejected the applicant's request for injunction (the PCC decision, February 2010). The court could have dismissed the complaint (acting in the full judge panel) but it did not. The outcome of this case will be very important. Would the Constitutional Court develop the doctrine of *Solange* or simply dismiss with the blur reasoning about no jurisdiction.

### ***Exclusivity of Statute and the Quality of Law. The Clarity and Precision***

The legality of restrictions can be assessed from the point of the quality of law, in particular its precision and clarity, and hence predictability. Thus the law using the indefinite terms cannot exceed a certain limit of rationality.

A requirement of the quality of law does not result from a wording of Article 31(3). However undoubtedly, the law that is to limit rights and freedoms must demonstrate a certain requirement of quality. This is mainly due to the democratic rule of law, in particular the principle of legal certainty and legitimate expectation that the state acts fairly.

The Constitutional Court found that the rule of law principle prohibits the formulation of vague and imprecise law (judgments of 16 January 2006, no. SK 30/05, of 15 September 1999, no. K 11/99).

The Constitutional Court held that the Constitution restricts the use of undefined phrases must be particularly rigorous in relation to provisions which may be used in the official actions of a public authority entering into the realm of constitutional rights and freedoms of individuals (Judgement of 23 March 2006, no. 4/06). As stated by the Constitutional Court, legislative can not by ambiguous wording of the law leave the excessive discretion for the applying body eg. the scope, content of restrictions on constitutional freedoms and rights individuals. (Judgment of 30 October 2001, no. K 33/00).

The Constitutional Court has repeatedly pointed out that the requirement of clarity means that the law must be clear and comprehensible to their recipients, raise no doubts as to the content of the imposed obligations and conferred rights. The law restricting constitutional freedoms or rights must be formulated in such a way that it clearly determines who and under what situations is subject to restrictions. The law furthermore should be so precise that is able for uniform interpretation and

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<sup>69</sup> Visit the web site for the outcome of the case: [www.trybunal.gov.pl](http://www.trybunal.gov.pl)



application. The Constitutional Court allows for certain, reasonable vagueness of the wording of the law, however the Court is concerned on the issue who is to apply such formulated law. The Constitutional Court observed that it will solely depends on the institutional guarantees of the body applying the law. If the body lacks guarantees of impartiality and independence, then there is no capability to allow it to apply such a law (judgment of 16 January 2006, no. SK 30/05). The Court will also assess whether the ambiguity of the law is admissible on the basis of the importance of rights and freedoms at issue. When the more important rights are in question, then the stricter wording of law must be guaranteed (judgment of 23 April 2008, no. SK 16/07). *Ultima ratio*, if the law is so ambiguous that it allows for unreasonable arbitrariness, the Constitutional Court is capable of declaring its unconstitutionality. Similar criteria concerning the quality of law are formulated by the doctrine. K. Wojtyczek in this respect concerns Articles 2 i 7 of the Constitution. In his opinion, legislation restricting the rights and freedoms must be characterized by a certain minimum degree of rationality and precision of the language (both the hypothesis and the disposition of the norm), so as to guarantee individuals some certainty as to the actions taken against them. He believes that the assessment of rationality of law should take into account two factors: first, the quality of the addressee and second, the importance of the rights and freedoms in issue (for example more precision would require laws concerning life, health and personal freedom, otherwise with social rights). Special requirement of precision and clarity of law should be required as to the penal and tax law.<sup>70</sup>

### ***Access to the Law***

Article 88 of the Constitution states that the entry into force of the act depends on its prior proper promulgation. The detailed conditions sets the statute of 20 July 2000 on the promulgation of statutes and certain other legislation (OJ of 2010, No. 17, pos. 95).

Because the EU secondary legislation constitute the national legal order, the EU perspective will be present. Similarly to Poland, the entry into force of the act issued by the European Union depends on its prior promulgation. Article 297 TFEU (*ex* 254 EC) stipulates that legislative acts are published in the Official Journal of the European Union.<sup>71</sup> This principle was confirmed by the Court of Justice in *Heinrich*<sup>72</sup>. The Court formulated the thesis, that a Community regulation (including the Annex to the Regulation) not published in the Official Journal of the European Union has no binding force to the extent that it imposes obligations on individuals. It is also necessary to publish the EU legislation in all official languages. In *Skoma Lux* the Court of Justice expressed the view that the Community legislation that have not been published in the language of the Member State can not be enforced against individuals in respective member State, despite the fact that individuals were able to access the law in other way.<sup>73</sup>

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<sup>70</sup> K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, p. 130.

<sup>71</sup> Therefore there is no need to publish the EU legislation in the national Official Journal.. See article 1(3) of the statute of 20 July 2000 r. on the promulgation of statutes and certain other legislation (OJ of 2010, No. 17, pos. 95).

<sup>72</sup> Judgment of 10 March 2009 r. in the case C-345/06 in *Gotfried Heinrich*

<sup>73</sup> Judgment of 11 December 2007 in the case C-161/06 in *Skoma-Lux sro*. The facts of this case are specific. The case raised shortly after the Republic of Czech accession to the EU. The accession required the translation and publication in the national language all of the *acquis communautaire*. Because of technical difficulties the translation was not finished in the accession day. However such situations may occur in the future. See: K. Lasiński-Sulecki, W. Morawski, *Late Publication of EC Law in Languages of New Member States and Its Effects: Obligations on Individuals Following the Court's Judgment in Skoma-Lux*, *Common Market Law Review* 45: 705–725, 2008

## **B. GERMANY** (by Mona Klarkowska)

Each limitation has to conform with one of the following doctrines.

### 1. Reservation of statutory powers (*Gesetzesvorbehalt*).

#### a) Reservation of statutory powers in a simple manner (*Einfacher Gesetzesvorbehalt*).

The Grundgesetz requires for the lawfulness of a limitation, that it should be made through or on the basis of law. For instance Article 2 II Grundgesetz provides that: “Every person shall have the right to life and physical integrity. [...] These rights may be interfered with only pursuant to a law.”

#### b) Qualified reservation of statutory powers.

Apart from the requirements set in a) limitation has to meet additional requirements. For instance Article 11 II Grundgesetz provides, that “This right may be restricted only by or pursuant to a law, and only in cases in which the absence of adequate means of support would result in a particular burden for the community, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or of a Land, to combat the danger of an epidemic, to respond to a grave accident or natural disaster, to protect young persons from serious neglect, or to prevent crime.”

#### c) Lack of a reservation of statutory powers

The German Constitution does not provide limitations through or because of a law, eg. Article 5 III 1 Grundgesetz, which says: “Art and scholarship, research, and teaching shall be free.” Nevertheless, limitation because of a colliding constitutional right is possible.

## 2. Barriers

### a) constitutional immanent barriers

Basic rights of third persons and other legal interests with a constitutional status, which are not explicitly provided as restriction mechanisms, but enable a intervention into basic rights (for instance the aim of the state of environmentalism vs. freedoms of religion).

### b) basic right immanent barriers

These barriers describe immediate limitations of a basic right directly in the normative text.

The Grundgesetz demands for the intervention only that this happens based on a simple regulation of law. For instance Articles 2 I:

“Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.”<sup>74</sup>

Article 5 II:

“These rights shall find their limits in the provisions of general laws, in provisions for the protection of minor persons, and in the right to personal honor.”

## 3. The barriers of barriers

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<sup>74</sup> <http://www.iuscomp.org/gla/statutes/GG.htm>

State authorities have the power to restrict basic rights. However, in order to secure the fundamental rights the intended restriction shall be subject to prior examination.

Article 19 provides the prerequisites for the application of the barriers of barriers.

A part of the barriers of barriers are:

- the principle of clarity in law
- the prohibition of restrictive laws of individual cases
- the guarantee of essence and
- the citation bid

Limitation through international law:

Due to the Article 25 international law is a primary component of the federal law and precede the other legal acts. This understanding of the role and position of the international law is quite similar to the Polish perspective.

Legal protection

Actions that intervene with the peaceful coexistence of nations, especially the preparation of the governance of a war of aggression is unconstitutional (Article 26 sec. I GG)

“Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be made a criminal offense.”

Article 25 and 26 GG gives the citizens entitlement to demand the omittance of actions performed by the state that violates those articles. This subject was especially revised by Prof. Dr. Andreas Fischer-Loscaro. He draws attention to the fact that the Parliamentary Council already articulated the individual entitlement of the citizens. Articles 25 and 26 GG reflect the reaction of the legislator on injustice in National Socialismus. By penalisation and subjectivization the legislator established the general rules of international law as an integral part of federal law<sup>75</sup>.

### **C. EUROPEAN CONVENTION ON HUMAN RIGHTS** *(by Łukasz Lasek)*

Article 8(2) ECHR uses a term “in accordance with the law” whereas articles 9(2)-11(2) include a slight different formula “*prescribed by law*”. *Prima facie* it might be considered to have a different notions<sup>76</sup> however the ECtHR had established that that both formulas are to be granted the same meaning.<sup>77</sup>

The European Court of Human Rights shows that in order to satisfy the requirement of 'in accordance with the law' or 'prescribed by law' the interference must have a legal basis, the law at issue must be sufficiently clear and precise and it must contain a measurer of protection against arbitrariness by public authorities. In *Segerstedt-Wiberg and Others v Sweden (2006)* the ECtHR stated

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<sup>75</sup> Article “Rechtsschutz gegen verfassungswidrige Kriegsführung” Dr. Peter Becker.

<sup>76</sup> In particular, as authors of Harris, O’Boyle & Warbrick, *Law of the European...* on page 344, the difference might have been of importance for the United Kingdom where lawfulness of action and authorization of action are being distinguished.

<sup>77</sup> *Malone v UK*, judgment of ....., application no. .... § 66

"the expression *in accordance with the law* not only requires the impugned measure to have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects (...) The law must be compatible with the rule of law, which means that it must provide a measure of legal protection against arbitrary interference by public authorities with the rights safeguarded in the [Convention]"<sup>78</sup>.

### **Legal basis**

The principle of legality requires that the interference act must have some specific legal rule or regime as its basis.<sup>79</sup> It includes not only statutory laws but also unwritten law (common-law countries). The ECtHR in *Sunday Times v UK (1979)* observed that

"the word *law* in the expression *prescribed by law* covers not only statute but also unwritten law. (...) It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not *prescribed by law* on the sole ground that it is not enunciated in legislation"<sup>80</sup>.

The concept of law under the ECHR covers also the law enacted by administrative or professional bodies, that were provided with law-making and disciplinary authorities. In *Barthold v Germany (1985)* the Court noted that

"the competence of the Veterinary Surgeons' Council in the sphere of professional conduct derives from the independent rule-making power that the veterinary profession - in company with other liberal professions - traditionally enjoys, by parliamentary delegation, in the Federal Republic of Germany (...). Furthermore, it is a competence exercised by the Council under the control of the State, which in particular satisfies itself as to observance of national legislation, and the Council is obliged to submit its rules of professional conduct to the Land Government for approval (...)"

The ECtHR also does not distinguish whether law in question must be solely a domestic law. The ECtHR found that international law or EU law is capable of satisfying the test of legality.<sup>81</sup> In *Bosphorus Airways (2005)* the Court accepted the EC regulation as being capable of fulfill the standard of law saying

"the Court finds that the impugned interference was not the result of an exercise of discretion by the Irish authorities, either under Community or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from Community law and, in particular, Article 8 of Regulation (EEC) no. 990/93"<sup>82</sup>

Similarly in respect of international law in *Slivenko v Latvia (2003)* the ECtHR noted

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<sup>78</sup> *Segerstedt-Wiberg and Others v Sweden*, judgment of 6 June 2006, application no. 62332/00, § 76

<sup>79</sup> Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, 2nd Edition, Oxford 2009, p. 344

<sup>80</sup> *Sunday Times v UK* (No 1) A 30 (1979); 2 EHRR 245, § 47

<sup>81</sup> See *Groppera Radio AG v Switzerland*, judgment of 28 March 1990, application no. 10890/84, § 65

<sup>82</sup> *Bosphorus Airways v Ireland*, judgment of §

"where international treaties are concerned; it is for the implementing party to interpret the treaty, and in this respect it is not the Court's task to substitute its own judgment for that of the domestic authorities, even less to settle a dispute between the parties to the treaty as to its correct interpretation. (...) As to the foreseeability of the combined application of the treaty provisions and domestic law in the applicants' case, the Court is also satisfied that the requirements of the Convention were met."<sup>83</sup>

The law in question cannot allow for unfettered discretion to the executive. In *Hasan and Chaush v Bulgaria (2000)* the Court found that

"the interference with the internal organization of the Muslim community and the applicant's freedom of religion was not prescribed by law in that it was arbitrary and was based on legal provision which allowed an unfettered discretion to the executive and did not meet the require standards of clarity and foreseeability"<sup>84</sup>

### ***The Quality of Law***

In its rich case-law the ECtHR said that the in accordance with law means that any interference with the individuals' rights and freedoms must apart for the requirement of a valid law that sufficiently accessible, precise and foreseeable. In *Sunday Times v UK*

"[a]ccording to the Court's case-law on this point, the interference must have some basis in domestic law, which itself must be adequately accessible and be formulated with sufficient precision to enable the individual to regulate his conduct, if need be with appropriate advice"

### ***Accessibility***

The principle of accessibility requires that the law must be available to the individual. A law in question that was not published serves no guarantees against substantively arbitrariness. In *Silver v UK (1983)* the ECtHR noted that unpublished prison orders and instructions do not satisfy the requirement of "law" under the ECHR.

Furthermore to fulfill the requirement of accessibility the law must be understandable to its addressee. The ECtHR distinguishes between the law directed to the every individual and the law directed to the group, usually better qualified (e.g. professionals). More precision is required for law applicable to everyone whereas the law targeted to the professionals may be less precise to satisfy the conventional requirement. The ECtHR also found that understanding a text may require access to a proper advice. In *Groppero Radio AG v Switzerland (1990)* the ECtHR noted

"[t]he scope of the concepts of foreseeability and accessibility depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. In the instant case the relevant provisions of international telecommunications law were highly technical and complex; furthermore, they were primarily intended for specialists, who knew, from the information given in the Official Collection, how they could be obtained. It could therefore be expected of a business company wishing to engage

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<sup>83</sup> Slivenko v Latvia, judgment of 9 October 2003, application no. 48321/99, § 105, 107

<sup>84</sup> *Hasan and Chaush v Bulgaria (2000)*, § 86

in broadcasting across a frontier - like Groppera Radio AG - that it would seek to inform itself fully about the rules applicable in Switzerland, if necessary with the help of advisers. As the 1983 Ordinance and the International Telecommunication Convention had been published in full, such a company had only to acquaint itself with the Radio Regulations, either by consulting them at the PTT's head office in Berne or by obtaining them from the International Telecommunication Union in Geneva. Nor can it be said that the various instruments considered above were lacking in the necessary clarity and precision. In short, the rules in issue were such as to enable the applicants and their advisers to regulate their conduct in the matter."<sup>85</sup>

Similarly in the *Autronic v Switzerland (1990)* the ECtHR found that even horrendously complicated law but targeted to the broadcasters is sufficiently accessible to pass the test of legality under the ECHR.

### ***Sufficient precision***

As Harris, O'Boyle and Warbrick notes "[w]holly general unfettered discretion will not satisfy the Convention, no matter what the formal validity of the delegating rule, the more particularly if the exercise of the delegated powers may be secret."<sup>86</sup> The ECtHR requires that the law is worded with a precision that will not leave any space for arbitrariness. In *Silver v UK (1983)* the ECtHR noted that if a law conferred a discretion, it must also indicate with sufficient clarity the limits of that discretion.

In *Kruslin v France* the ECtHR found that the quality of law providing powers for secret telephone-tapping by the police was insufficiently clear and precise. The ECtHR noted that

"[t]apping and other forms of interception of telephone conversations represent a serious interference with private life and must accordingly be based on a *law* that is particularly precise. It is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated."<sup>87</sup>

### ***Foreseeability***

The Court held in the *Sunday Times* that to fulfill the test of foreseeability the addressee of the law must be able to foresee, to a degree that is reasonable in the circumstances, a risk of application certain rule. In *Muller and Others v Switzerland (1988)* the Court defined the subtest of foreseeability as

"foreseeability is one of the requirements inherent in the phrase prescribed by law in Article 10§2 (...) A norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (...)"<sup>88</sup>

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<sup>85</sup> *Groppera Radio AG v Switzerland*, judgment of 28 March 1990, application no. 10890/84, § 68

<sup>86</sup> Harris, O'Boyle & Warbrick, *Law of the European Convention...*, p. 346

<sup>87</sup> *Kruslin v France*, § 33

<sup>88</sup> *Muller and Others v Switzerland*, judgment of ..., application no., § 29

The principle of foreseeability would require also that the legislative cannot exceed using indefinite legal terms. The Court is aware that ambiguity of the language may be a deliberate policy choice to provide the legislation with certain flexibility, especially in the areas being developed (competition law). The Court requires that in the case of criminal liability the margin for flexibility is lesser than in other areas of law. It is also because of the guarantees from Article 7 of the ECHR (see in particular *Karademirci v Turkey* where the Court found inconsistent with "prescribed by law" applying analogy in criminal matters)

#### *Procedural safeguard against arbitrariness*

The Court also would determine whether the procedural guarantees are safeguarded. The standard in this regard was set forth in the *Klass and Others v Germany*

### **D. EU CHARTER ON FUNDAMENTAL RIGHTS** (by Robert Rybski)

The Charter contains also requirement that restrictions shall be introduced only in the form of 'the law'. In this regard, the full application of the ECHR doctrine set out above will be possible. Of course, other requirements will be reconsidered if the limiting entity is the EU, and others when the limitation will be adopted by a Member States implementing EU law. In the second case not only the ECHR case-law, but also domestic doctrines will be the instruments of control.

#### **4. The Aim of the Interference. National Security.**

##### **A. POLAND** (by Łukasz Lasek)

Article 31(3) in a comprehensive manner indicates the values that are capable for justifying the restrictions imposed on the rights and freedoms of individuals<sup>89</sup>. It stipulates that any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of **its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons**. In other words, only values listed in article 31(3) can justify interference with the constitutional rights and freedoms, unless a specific provision of the constitution provides additional reasons that might be taken into account<sup>90</sup>. The language which is used in article 31(3) in respect of values being capable to justify the interference is so general that it covers almost all possible situations when the limitation may be necessary.<sup>91</sup> *De facto* listed objectives constitute a value of public interest and the interest of other individuals.<sup>92</sup> The way these interest were listed and

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<sup>89</sup> L. Garlicki, *Przesłanki ograniczania konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)*, „Państwo i Prawo” 2001, nr 10, s.13; and cited there P. Tuleja [in:] *Ustrój konstytucyjny RP*, R. Mojak (eds.), Lublin 2000, p. 81

<sup>90</sup> For analysis from these reasons for example M. Wyrzykowski, *Granice praw i wolności - granice władzy (w:) Obywatel - jego wolności i prawa*, B. Oliwa-Radzikowska (red.), Warszawa 1999, p. 49; L. Garlicki, *Przesłanki ograniczania konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)*, „Państwo i Prawo” 2001, nr 10

<sup>91</sup> K. Wojtyczek, *Zasada proporcjonalności [The rule of proportionality]* [in:] Banaszak B., Preisner A. (ed.), *Prawa i wolności obywatelskie w Konstytucji RP [The rights and freedoms under the Polish Constitution]*, C.H. Beck, Warszawa 2002, s. 201; similarly earlier in: K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, p. 202. The author writes that some of the terms being used in Article 31(3) and unclear and not precise.

<sup>92</sup> L. Garlicki, *uwagi do art. 31*, [w:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, L. Garlicki (red.), t. III, Warszawa 2003, p. 22.

named justifies the thesis that were inspired by the ECHR language.<sup>93</sup>

It appears that article 31(3) does not create a hierarchy of values, and therefore it is reasonable to state that interests specified therein are of equal importance<sup>94</sup>. This argument is supported by L. Garlicki who indicates that the Constitutional Court undertook only few attempts to define the material basis for the limitations of rights and freedoms devoting much more attention to the other elements of the limitation clause. However, analyzing the recent case-law of the Constitutional Court, it seems clear that the Constitutional Court allows some relativization of the value being capable to justify interference with the rights and freedoms of individuals. In particular, in the judgment of 3 July 2001, no. K 3/01 the Constitutional Court clearly stated that the first reason why individuals' rights and freedoms may be restricted is the protection of common good, and in particular the sake of security. And further in this judgment the Court found that because of the fundamental nature of the right to live in the constitutional axiology, not all of the values mentioned in article 31(3) of the Constitution can justify an interference therewith. More on this subject matter see the chapter on proportionality.

In our work we are to focus on the value of **national security** (*bezpieczeństwo państwa*).

The Constitution of 1997 does not define the term 'national security', however, in addition to article 31(3), this phrased is used in the other constitutional provisions of the Constitution. Several specific provisions of the Constitution stipulates expressly that these rights and freedoms may be restricted on grounds of the national security. Article 45(2) allows to make a trial not public, Article 53(5) allows to put some limits on the freedom of religion, Article 61(3) allows to limit the right to access to information about the activities of the public authorities. In addition, the Constitution uses the notion of national security in the provisions on rules of the state, tasks of the Armed Forces and the executive power. In order to reconstruct the meaning of this term it is essential to take into account these provisions as well as the the concept of a democratic state. The obligations imposed by the international commitments must be also observed<sup>95</sup>.

Article 26 of the Constitution provides that the Polish Armed Forces serve to protect the country's independence and integrity of its territory ensuring the security and inviolability of its borders. Article 136 provides that the President of the Republic of Poland shall safeguard the sovereignty and national security and the inviolability and integrity of its territory. Article 146 provides that the Council of Ministers is to ensure external and internal security.

The jurisprudence of the Constitutional Court rarely took a concept of national security. In the judgment of 21 June 2005, no. P 25/02 the Court found that the term "national security" shall be understand as an obligation to protect the state against both external and internal threats to its

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<sup>93</sup> L. Garlicki, *uwagi do art. 31*, [w:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, L. Garlicki (red.), t. III, Warszawa 2003, s. 22-23. Differently: M. Piechowiak, *Klauzula limitacyjna a nienaruszalność praw i godności*, *Przegląd Sejmowy* no. 2 (2009), pp.. 56-57.

<sup>94</sup> L. Garlicki, *Przesłanki ograniczania konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)*, „*Państwo i Prawo*” 2001, nr 10, s.13 and D. Dudek, *Konstytucyjna wolność człowieka a tymczasowe aresztowanie*, Lublin 1999, p. 116.

<sup>95</sup> K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, s. 181. Autor odwołuje się do *Zasad z Syrakuz* dotyczących przepisów o ograniczaniu i zawieszaniu praw w Międzynarodowym Pakcie Praw Obywatelskich i Politycznych, a także orzecznictwa strasburskiego m.in. w sprawach *Klass przeciwko Niemcy*, *Arrowsmith przeciwko Zjednoczonemu Królestwu*.



democratic existence<sup>96</sup>. In the judgment of 3 July 2001, no. K 3/01<sup>97</sup> the Constitutional Court acknowledged 'that doubtlessly the fact that the first reason why individual rights may be restricted is a protection of the common good, in particular the sake of security and national defense. This argumentation has its basis in article 5 of the Constitution, which stipulates that one of the main tasks of the Republic of Polish is to safeguard its independence and the integrity of its territory. In the light of this provision, which has been given the highest rank (it is included in the chapter I of the Constitution among other political principles), it is beyond any doubt that the protection of national security is capable to justify any interference with the rights and freedoms. The Constitutional Court had already found that the protection of national security is a particular value in the collision which individual rights, even fundamental rights may be - to the necessary extent - limited. The mere existence of such restrictions is commonly accepted in the democratic countries. The Constitutional Court considered that the introduction and ongoing maintenance of restrictions on property rights and some civil liberties due to the needs of national defense, also in the time of peace, may be necessary. The Constitutional Court stressed that the wording '*need for national defense*' does not refer merely to an actual threat to the national security which constitutes an extraordinary situation. This concept justify maintaining specific technical undertakings regardless of the existence of any threat. The functioning of such undertakings, e.g. certain military equipment may create on daily basis a risk for people living in the vicinity. The provisions relating to strategic areas constituting restrictions on certain civil rights are thus not only to the interests of the armed forces, but - equally - the safety of persons whose rights are restricted. In another judgment of 16 February 1999, no. SK 11/98<sup>98</sup> the Constitutional Court stated that the unfettered opportunity granted to the professional soldiers to leave the army because of the religious beliefs stays in clear opposition to the very substance of soldiers' duty. Therefore in the view of the Court it is permissible to make a leave because of religious beliefs conditional upon prior financial payback of the expenses incurred by the state in soldier's training.

The Constitutional Court occasionally defines what it understands under the notions listed in Article 31(3). Having analyzed the case law of the Court the global approach to these values may be observed. The Court usually refers to the public interest as a general notion instead of defining the particular interest and its relevance in the cases in question<sup>99</sup>. This practice is negatively evaluated in the doctrine. K. Wojtyczek notes that if the Court's reasoning is to be persuasive, it must carefully identify the particular interest and give reasons in favour of.<sup>100</sup>

The theory of law provides some more characteristic of the national security. K. Wojtyczek points out that the protection of national security justify measures that are targeted in achieving a state of non-threat. He writes that a state security is then, when there is no threat to the existence of the state as a whole and for its democratic development. It does not preclude acts undertaken in order to secure the national security in the time of peace e.g. maintaining the necessary military

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<sup>96</sup> PCC judgment of 21 June 2005, no. P 25/02

<sup>97</sup> W tej sprawie chodziło o zbadanie zgodności z konstytucją dwóch aktów prawnych, dekretu z 1951 r. oraz rozporządzenia Rady Ministrów z 1949 r., wprowadzających ograniczenia w prowadzeniu działalności gospodarczej oraz wznoszeniu budynków bez zezwolenia władz wojskowych na terenach szczególnie ważnych z punktu widzenia obronności kraju.

<sup>98</sup> W tej sprawie chodziło o zbadanie zgodności z konstytucją przepisów nakazujących zwrot kosztów na szkolenie wojskowego żołnierza służby zawodowej rezygnującego ze służby ze względu na przekonania religijne tzw. objector.

<sup>99</sup> See M. Wyrzykowski, *Pojęcie interesu publicznego ...*

<sup>100</sup> K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, p. 202

infrastructure<sup>101</sup> This corresponds with the Court's jurisprudence, in particular herabove mentioned judgment. K. Wołpiuk is in the position that the state of national security means a state of non-threat enabling the country to safe existence and development.<sup>102</sup> L. Garlicki observes that it is not possible to formulate a precise definition of the term "national security". Instead he gives some guidance which elements might be recognized. First, the national security refers to a situation of external threat (aggressive actions or intentions of other countries) as well as internal threats affecting the basis of existence of state, the integrity of its territory, the fate of its inhabitants, or the substance of governance. Second, the threat to national security is not just a situation where the risk has already occurred but also where the threat is real and there is a need to adopt and exercise a preventive measures (in order to avoid risk or to prepare the state of its occurrence). And third, the protection of national security covers also a situation where an attempts to seize power in an undemocratic manner are undertaken (changing the existing constitutional system by force).<sup>103</sup>

## **B. GERMANY** (by Mona Klarkowska)

The term of state security was introduced to the German constitutional system by the Weimar Republic. The term state security (*Staatschutz*) indicates the security of a state (especially from the situations which threaten a state within the scope of police- and authority measures). In this historical context, worth noting is the excessive form of understanding the state security which despises basic rights, that reigned in the German Democratic Republic (1949-1990).

The responsible for the state safety authorities in Germany are: the Federal Office for the Protection of the Constitution, the Office of Protection of the Constitution for the federal states- in the scope of internal security, the Military Counter-Intelligence Service- in the scope of the Federal Armed Forces, the Federal Intelligence Service<sup>104</sup>- external security, together with the local police stations of the criminal investigation department. One of the most important statutes that regulates the state security is the statute about the protection of the federal constitution (*Bundesverfassungsschutzgesetz*<sup>105</sup>). This federal statute regulates competences of the Federal Office for the Protection of the Constitution and arranges cooperation between the Office and the

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<sup>101</sup> K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, pp. 183-184

<sup>102</sup> W. Wołpiuk, *Siły zbrojne w regulacjach Konstytucji RP*, Warszawa 1998, p. 47

<sup>103</sup> L. Garlicki, *Przesłanki ograniczania konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)*, „Państwo i Prawo” 2001, nr 10, p.14

<sup>104</sup> Federal Constitutional Courts in its judgement from the 14<sup>th</sup> of July 1999 (signatur 1 BvR 2226/94, known as ‘*Verbrechensbekaempfungsgesetz/G10*’) noted that: “Article 73 no. 1 of the Basic Law grants the Federal government the competence to regulate the screening, utilisation and transfer of telecommunications data by the *Bundesnachrichtendienst* (Federal Intelligence Service). On the other hand, Article 73 no. 1 of the Basic Law does not entitle the Federal parliament to grant the Federal Intelligence Service powers that are aimed at the prevention or prosecution of criminal offences as such.” And in further part: “Whereas the parliament empowers the Federal Intelligence Service to conduct telecommunications monitoring that encroaches upon telecommunications privacy, Article 10 of the Basic Law obliges the Federal Intelligence Service to take precautionary measures against the dangers which result from the collection and utilisation of personal data. These precautionary measures include, in particular, that the use of obtained knowledge be bound to the objective that justified the collection of the data in the first place.” Finally, the FCC ruled, that the competence of the Federal Intelligence Service under § 1 and § 3 of the G 10 Act to monitor, record and evaluate the telecommunications traffic for the timely recognition of specified serious threats to the Federal Republic of Germany from abroad and for the information of the Federal government is, in principle, consistent with Article 10 of the Basic Law.

<sup>105</sup> Bundesverfassungsschutzgesetz vom 20. Dezember 1990 (BGBl. I S. 2954, 2970), zuletzt geaendert durch Artikel 1a des Gesetzes vom 31. Juli 2009 (BGBl. I S. 2499).

states. The basic aim of this statute is the protection of the liberal, democratic constitutional order, and to maintain the security of the federation and the states.

### **C. EUROPEAN CONVENTION ON HUMAN RIGHTS** (by *Łukasz Lasek*)

When the Court determines that the interference is prescribed by law, examines whether the infringement is justified by at least one of the purposes sets out in the Convention. The Court pointed out in the judgments that the list contained in the Convention is closed and should be interpreted narrowly. The state against whom the complaint is made shall bear the burden of demonstrating that the infringement is justified by one of the objectives stipulated in the Convention. The closer analysis of the Court's case-law in this regard shows that the Court rarely specifically addresses this issue. Typically, the justification comes down to the Court found that the infringement was justified by one or more of the grounds invoked by the state. In some judgments, the Court stop at this point not even showing in detail what specific interests is recognized as legitimate in the case in question. As *Harris, O'Boyle and Warbrick* writes "states have nearly always been able to convince the Court they were acting for a proper purpose, even where this has been disputed by the applicant"<sup>106</sup>

For our purposes we will focus on the national security<sup>107</sup>. However we cannot omit taking into account the close connected objectives like territorial integrity safeguarded in Article 9 or prevention of crime or protection of public order.

The protection of national security belong to the objectives set out in Articles 8, 10 and 11. Article 9 literally does not allow restriction in order to protect national security. However in the jurisprudence the omission of this condition is treated as overlook by drafters of the Convention<sup>108</sup>. The national security interest constitutes one of the most solid grounds that may justify the interference. In cases where the state is raising the argument of national security the Court seems to be more reluctant to examine whether or not the objective is legitimate rather than the Court shifts to determine whether the interference satisfies the test of proportionality.

The Court would assess whether the objective of national security is real. Sometimes the national security objective could have been legitimate while because of some events it becomes no longer a matter of national security. Once the confidentiality of information is lost, there is no national security issue at stake. In *Sunday Times v UK* the ECtHR found that

"As regards the interests of national security relied on, the Court observes that in this respect the Attorney General's case underwent, to adopt the words of Mr Justice Scott, "a curious metamorphosis" (...). As emerges from Sir Robert Armstrong's evidence (...), injunctions were sought at the outset, inter alia, to preserve the secret character of information that ought to be kept secret. By 30 July 1987, however, the information had lost that character and, as was observed by Lord Brandon of Oakbrook (...), the major part of the potential damage averted to by Sir Robert Armstrong had already been done. By then, the purpose of the injunctions had thus become confined to the promotion of the efficiency and reputation of the Security Service,

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<sup>106</sup> Harris, O'Boyle & Warbrick, *Law of the European Convention...*, p. 407. Authors indicate on judgment in *Andersson (Margareta and Roger) v Sweden (1992)* and as a rare exception *Nowicka v Poland (2002)*.

<sup>107</sup> See: Iain Cameron, *National Security and the European Convention on Human Rights*, Kluwer 2000.

<sup>108</sup> P. Kempees, "Legitimate aims" in the Case-law of the European Cour of Human Rights, [in:] P. Mahoney, H. Petzold, L. Wildhaber (ed.), *Protecting Human Rights...*, p. 659.

notably by: preserving confidence in that Service on the part of third parties; making it clear that the unauthorised publication of memoirs by its former members would not be countenanced; and deterring others who might be tempted to follow in Mr Wright's footsteps".<sup>109</sup>

This principle is valid even when the confidential information is disclosed illegally (see *Vereiniging Weekblad Bluf! v Netherlands (1995, § 44)*)

For example the Court found in *Leander v Sweden (1987)* that the protection of national security justifies the collection of information about an individual. The court found that the national security means the protection of territorial integrity and thus the preservation of "national security"<sup>110</sup>

#### **D. EU CHARTER ON FUNDAMENTAL RIGHTS** (by Robert Rybski)

The basic requirement on the basis of the Charter for the limitation is to demonstrate the proper aim of limitation. The term "objectives of general interest" due to the Explanations ought to cover the objectives set out in Article 3 TFEU (among other things: providing the EU citizens with an area of freedom, security and justice without internal borders, promotion of economic, social and territorial cohesion, promotion by the Union in its relations with its values and interests), as well as those interests that are protected by various provisions of the TFUE such as Articles 4 Paragraph 1, Art. 36 and Art. 346 TFEU.

#### **4. The Boundaries of Restrictions. The Principle of Proportionality and the Respect of the Essence of Rights and Freedoms**

##### **A. POLAND** (by Łukasz Lasek)

##### ***The Boundaries of Restrictions***

The statutory restriction of constitutional rights and freedoms for the protection of one or more of values listed in article 31(3) is subject to the constitutional boundaries. Under article 31(3)(1) any limitation must satisfy the test of proportionality and in accordance with article 31(3)(2) it must not affect the "essence" of the rights and freedoms.

##### ***The Principle of Proportionality***

Articles 31(3) of the Constitution stipulates any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights. Before the entry into force of the Constitution 1997, the Constitutional Court applied the principle of proportionality, inferring it from the general principle of the rule of law.

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<sup>109</sup> *Sunday Times v UK*, judgment of , § 55

<sup>110</sup> *Freedom and Democracy Party (ÖZDEP) v. Turkey*, 8 December 1999, application no. 23885/94, §§ 32-33)

The principle of proportionality, as defined in the formula, "the order to take measures adequate to the objectives pursued" is not expressed in this wording of the Constitution of 1997. However there is no doubt that article 31(3) by the phrase "necessary in a democratic state" introduces the principle of proportionality. Additionally to the article 31(3), the principle of proportionality is included in few specific constitutional rights and freedoms. The Constitutional Court stated that the principle of proportionality expressed in article 31(3) has a fully independent and comprehensive nature. Thus these provisions should not constitute a *lex specialis* and to exclude the general rule, but these provisions confirm the general condition stipulated in the article 31(3).

The Constitutional Court formulated a three-step test of proportionality, which is contemporary the classic formula of the principle of proportionality. In its judgment of 26 June 1995 the Constitutional Court pointed out that " (...) to assess whether there was a breach of the principle of proportionality (prohibition of excessive interference), it is necessary to answer three questions: 1) whether the legislative regulation is in a position to achieve its intended effects, 2) whether the regulation is necessary for the protection of public interest, which is linked to, 3) whether the effects of regulations are introduced in proportion to the burden imposed by it on the citizen. However it should be noted that Article 31(3)(1) of the Constitution emphasised the criterion of *necessary in a democratic state*." The principle of proportionality *sensu largo* requires consideration, whether the adjustment is suitability, necessary and proportional *in the narrow sense*<sup>111</sup>.

### *Suitability*

*(whether the legislative regulation is in a position to achieve its intended effects)*

Due to the lack of normative criteria for the application of suitability principle, it is necessary to examine the views in this issue expressed by the theory of law and the jurisprudence of the Constitutional Court. The principle of suitability has been characterized fairly well in the Polish legal literature. The authors often refer to the achievements of German legal jurisprudence.

The test of suitability requires that the restriction in question must be evaluated in terms of its praxeological rationality. The test of suitability should consist of two stages. First, the purpose of the act imposing the limitation should be determined. It often causes difficulties. The main purpose of the act should be understood as an objective that could be assign to the legislator by an external observer regardless of the actual reasons underlying the legislator's motivation. Then the answer of the effectiveness of measures to achieve the goal should be given. The principle of suitability only precludes the implementation of these objectives, for which there are no effective measures. In other words, if according to the available knowledge and gained experience a particular measure is incapable to achieve the intended objective, the act automatically fails to pass a test of suitability. The theory of law underlines the need in all cases to take into account the social context of such measures. K. Wojtyczek points out that the measures effective in certain circumstances may be not effective in other social conditions. It may also happen that measures effective at the time of their introduction, as a result of changes in the society, becomes, in terms of effectiveness, useless.<sup>112</sup>

The test of suitability is difficult to perform in practice. In particular, it appears difficult to

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<sup>111</sup> On the theory of this concept see *inter alia*: R. Alexy, *A Theory of Constitutional Rights*, J. Rivers (tr), Oxford 2002, pp. 66-69. R. Alexy writes that all three principles express the idea of optimization. "To apply the principle of proportionality to constitutional rights means to treat them as optimization requirements, that is, as principles.

<sup>112</sup> K. Wojtyczek, *Zasada proporcjonalności* [in:] Banaszak B., Preisner A., *Prawa i wolności obywatelskie w Konstytucji RP* [The rights and freedoms under the Polish Constitution], Warszawa 2002, p. 683

determine whether the act is effective. This is connected with the absence of sufficient scientific methods, which can serve as reference points.<sup>113</sup> Therefore, the question of effectiveness is burdened with high risk of error and in fact there is no practical possibility of proving ineffectiveness of the measure. Only *prima facie* evidence that there is a possibility of ineffectiveness can be evicted.

The Constitutional Court rarely refers in detail to the test of suitability. A detailed reference would involve: a determination of act's purpose and giving arguments in favour of a finding that the measure is not able to achieve the purposes for which it adopted. Such recognition would require relying on expertise in law and economics, sociology of law etc.

The Constitutional Court understand the principle of suitability similarly as the doctrine does. The Court found in the judgement of 23 November 2009, no. P 61/08 that suitability is a test of instrumental rationality, whether according to the available knowledge the regulation in question is capable to achieve the intended effects. It is assumed that these conditions are not met only when the provisions in question hinder the achievement of goals or have no link with these objectives (are irrelevant). The objectives of the regulation should be determined primarily on the basis of legislative history or on the basis of declared intention by the legislature prior to their adoption, and not on the basis of their actual effects. For example, the Court when assessing the proportionality of the statutory regulation which allowed to suspend the driving licence of the alimentary debtors came to the conclusion that such action is counter-productive to its objective. The Court noted that the confiscation of driving license of the alimentary debtors must serve the basic purpose of this law, which is to ensure effectiveness in enforcing alimentary duties. In principle it can not be achieved when the debtor, whose professional activity (potential or real) is associated with the possession of the driving license. (PCC judgement of 22 September 2009, no. P 46/07)

### *Necessity*

*(weather regulation is necessary to protect the public interest, which is linked)*

The test of necessity requires that the restriction in question must be evaluated in terms of its axiological rationality. The principle of necessity requires that from a group of equally effective measures the least disruptive for individuals will be adopted. R. Alexy writes that the principle of necessity "requires that of two means promoting the protective right that are, broadly speaking, equally suitable, the one that interferes less intensively with the defensive right ought to be chosen. The same applies when the two means are equally suitable for any other goal or a collective good."<sup>114</sup>

This means that "any restriction of rights and freedoms of individuals must be assessed first whether it was *necessary*; in other words, whether the same goal (effect) could not be achieved by other means less burdensome for the citizen, less (more shallow) interfering with the sphere of rights and freedoms." The principle of having to suffer the infringement in circumstances where there are feasible and equally effective alternative, while being less burdensome for the individuals.

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<sup>113</sup> Eg law and economics, sociology of law. See for example R. Cotter, T. Ulen, *Ekonomiczna analiza prawa [Law and Economics]*, Warszawa 2009, where the authors writes on the page 5 "[o]pócz naukowej teorii zachowań ekonomia dostarcza użytecznych wzorców normatywnych do oceny prawa i polityki. Prawa nie sprowadzają się tylko do sekretnych argumentów technicznych, lecz są to narzędzia służące do osiągnięcia ważnych celów społecznych. Aby poznać oddziaływania praw na te cele, sędziowie i inni prawodawcy muszą dysponować odpowiednimi metodami oceny tych oddziaływań"

<sup>114</sup> R. Alexy, *On Constitutional Rights to Protection*, Legisprudence, Vol. III, No 1, p. 6

The Constitutional Court noted that evaluation [whether the protection of particular right is sufficient - L.L.] requires a comprehensive analysis of all legal remedies provided by the system of law for the protection of certain rights.<sup>115</sup>

The test of necessity may cause practical difficulties such as determining whether the measure should be the least burdensome for all entities generally or to the smallest number of entities. K. Wojtyczek notes that the Constitutional Court while evaluating whether an act satisfies a test of necessity often refers to the comparative law studies. The solutions adopted in other jurisdictions may constitute an important clue in particular when assessing the necessity of such measures. The fact that in other jurisdictions less interfering measure is being effective may constitute an argument against the measure in question.<sup>116</sup>

This understanding of the principles of necessity is confirmed by the Constitutional Court case law. The Court in the judgment of 23 November 2009, no. P 61/08 stated that the application of the principles of necessity requires a more complex reasoning. It is necessary to prove that the law in question is not only necessary to protect the objectives from the Article 31(3) but moreover, that among the measures that effectively protect these values, the least intrusive means is adopted. The application of this principle, therefore, require consideration of possible alternative measures as well as determination of their effectiveness. This is complicated because provisions in question may affect the different entities in different ways, some of them substantially whereas others not at all. As a result, the Court must decide whether the optimized solution is allow for more intrusive restriction but affecting a smaller group of recipients, or less intrusive restriction but affecting a wider range of recipients.

#### *Proportionality stricte sensu*

*(or the effects of regulations are introduced in proportion to the burden imposed by it on the citizen)*

It is not possible to generalise the proportionality *stricto sensu* in abstracto. Establishing a proper balance between protected values may occur only in the circumstances of the case in question.<sup>117</sup> Proportionality *stricto sensu* involves weighing and maintaining an appropriate proportion between conflicting two or more legally protected values, whereas the simultaneous realization of each of them in full is not possible. The doctrine indicates that the proportionality in the narrow sense requires to the state of optimization.<sup>118</sup>

Because the Constitution does not provide any formal hierarchy of values, a proper balancing (weighing) requires a reference to the value system characteristic to the given society and the axiology of the constitution and other legal acts. K. Wojtyczek notes that a good judicial justification of a decision, based on the principle of proportionality *stricto sensu*, requires a description of conflicting goods, determination of their status and the extent to which they are realized (affected), and then answering the question whether the degree of exercising a particular

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<sup>115</sup> Judgment of ....., no. K 26/96

<sup>116</sup> K. Wojtyczek, *Zasada proporcjonalności* [in:] Banaszak B., Preisner A., *Prawa i wolności obywatelskie w Konstytucji RP* [The rights and freedoms under the Polish Constitution], Warszawa 2002, p. 685

<sup>117</sup> J. Zakolska, *Zasada...*, p. 29;

<sup>118</sup> (J. Zakolska, *Zasada...*, s. 28; K. Wojtyczek, *Zasada...*, s. 305.

good justifies a certain degree of sacrifice of other goods.<sup>119</sup>

The Constitutional Court understands not only as an actual conflict between two or more values, but also as the situation when the legal capacity to exercise one right is causing a mere danger of infringement to another one (so called *chilling effect*).<sup>120</sup> The Constitutional Court carefully considers the conflict of values. The Court would list the values in the collision, and then give arguments justifying their *vis-a-vis* mutual location. The Constitutional Court in its judgment of 23 November 2009, no. P 61/08, noted that the proportionality test in the narrow sense is to determine whether the effects of the contested law remain in proportion to the burden imposed by it on the citizens. For these purposes the Court must apply the axiological account, checking whether the advantages of the law outweigh its drawbacks. This assessment should take into account the importance of values protected by the contested law as well as an axiology of the Constitution as a whole. Simplifying, the more valuable the right is and/or the more intensive interference is, the more valuable the objective justifying the interference must be.

In the judgment no. K 44/07 concerning possibility of shooting down a hijacked civil airplane the Constitutional Court pointed out that the constitutional problem affects one of the most difficult issues that can stand before the authorities - the admissibility and boundaries according to the scheme of *life for life*. The drama of this dilemma is exacerbated by the conflicting values which are (or can be) on one side - the life and safety of people located on the ground, likely to be targeted by the terrorist attack, and on the other - the life of terrorists and inseparable joined the life of innocent people on board. Therefore, the direction of resolution of this case depends on the answers to several fundamental questions, including questions about the purpose of existence of the state and laws, the hierarchy of values that lie at its root, the relation of the individual to the state and the scope of state's arbitrary power. The balancing of values in the case like that is necessarily associated with the rudimentary ethical and philosophical questions, in particular the question of the value of human life. At the outset, it should be emphasized that the answers to these questions are (and probably always will) vary across cultures. This is not surprising if we understand that the constitution is composed not only of a set of formally established rules, but it consists of axiologically related principles, which are the product of cultural and historical experience rooted in the community and build on the common system of values.<sup>121</sup>

This judgment clearly corresponds with Alexy's understanding of the principle of proportionality in the narrow sense. R. Alexy understands it as rule Law of Balancing which refers to constitutional rights as principles. The author writes:

"[t]he greater degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other. The Law of Balancing expresses the most important aspect of the complex structure of balancing. A complete description of what balancing between two principles means is found in the Weight Formula (...)"<sup>122</sup>

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<sup>119</sup> K. Wojtyczek, *Zasada proporcjonalności* [in:] Banaszak B., Preisner A., *Prawa i wolności obywatelskie w Konstytucji RP* [The rights and freedoms under the Polish Constitution], Warszawa 2002, p. 686

<sup>120</sup> Judgment of 21 June 2005, no. P 25/02 and judgment of 12 May 2008, no. SK 43/05; see also K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999.

<sup>121</sup> Judgment of 30 September 2008, no. K 44/07

<sup>122</sup> R. Alexy, *On Constitutional Rights to Protection*, *Legisprudence*, Vol. III, No 1, p. 7



R. Alexy is the author of the mathematical formula that should help to apply the proportionality principle in the narrow sense. Because of the scope of this paper we do not refer to it in details<sup>123</sup>.

## **B. GERMANY** (by *Mona Klarkowska*)

### **Necessary in the democratic society (proportionality sensu stricto)**

*(Verhältnismäßigkeit im strengen Sinne)*

The purpose of the principle of proportionality is the protection from excessive intervention of the state in basic rights. The principle of proportionality describes two concepts that are linked with each other. Proportionality in its larger sense requires from every measure that interferes with basic laws that it follows a legitimate purpose and moreover is appropriate, necessary, and proportional in a strict sense.

The principle of proportionality is a general principle everywhere, where arguing interests need to be settled by a balancing decision.

It applies to: constitutional law, public law, some sections of criminal law (self-defence), and consumer protection laws.

Principle of proportionality by the Federal Constitutional Court:

“In the Federal Republic of Germany the principle of proportionality has a constitutional rank. It arises from the rule of law (the principle of a constitutional state), basically even from the bottom of fundamental rights that as the expression of the general right to freedom of the citizens as opposed to the state of the public authority may be limited in each case only so far as it is indispensable for the security of public interests. For the fundamental right of personal liberty this follows also from the special sense of this fundamental freedom that relates to the citizens as a general legal position and scope and the Constitution recognises the fact that it declares the freedoms of a person in Article 2 II “inviolable”.”<sup>124</sup>

The principle of proportionality originally derives from the police laws. The main purpose is to oblige all police authorities and regulatory agencies to take those several and appropriate measures against individuals and the community which affect and harm the less, which stands not proportional to the aspired aim. The principle makes clear that a police measure is acceptable as long as its goal is achieved or when it becomes clear that the goal can not be achieved. The foundation of the principle of proportionality is the rule of law and the basic rights.

The principle of proportionality has a constitutional status. It applies to all governmental measures. These measures are subject to an examination containing of four steps. Initially it has to be asked, if the aim pursued by the state and the applied methods are legitimate. That is the case when the legislator or the administration moves within a scope of its allocated task.

In the second step it is examined, if the legitimate measure used by the legislator or administration is appropriate to achieve the intended aim. In summary, the measure has to promote the aim.

The third step is the examination of necessity. In this case it is questioned, if the aim can be achieved with measures of the same efficiency, but with less interference into basic rights. In this

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<sup>123</sup> See R. Alexy, *Ob Balancing and Subsumption. A Structural Comparison*, 2003, *Ratio Juris* 433, 446; R. Alexy, *The Weight Formula* [in:] J. Stelmach, B. Brożek, W. Załuski (eds.), *Studies in the Philosophy of Law*, vol 3, Cracow 2007, pp. 20-27

<sup>124</sup> 1 BvR 513/65, Press release

case the legislator or administration are allowed a prerogative assessment. This is the right of the legislator to classify rights accordingly to their own assessment of the current conditions.

Finally in the fourth step it is examined, if the intervention taken with the introduced measures and the aim linked with the intervention are in an appropriate relation to each other. This step is also described as proportionality *sensu stricto* or appropriateness, that is to say reasonableness. At this point a weighting takes place. The terms of reference of this weighting are stated by the Grundgesetz, particularly the basic rights. That is Article 5 II which imposes the protection of the youth more weight than the freedom of expression of opinion. In the wording of Article 12 I the assumption can be made that the choice of profession has more weight than the actual professional conduct.

That is the reason why the Bundesverfassungsgericht- the Federal Constitutional Court of Germany, decided between important, particularly important, and superior important community goods. The more substantial the intervention is the more important the community goods have to be.<sup>125</sup>

“(...) the principle of proportionality and the principle of the excess prohibition that arise as a principles of governmental actions from the rule of law and therefore have constitutional status.”<sup>126</sup>

### **C. EUROPEAN CONVENTION ON HUMAN RIGHTS<sup>127</sup> (by Łukasz Lasek)**

The Court subjects all Convention rights to balancing and has developed a German-style proportionality approach to Articles 8-11 and Article 14. As A. Sweet Stone writes “[t]he Court's turn to proportionality was heavily conditioned by its confrontation with cases coming from the UK, where the *Wednesbury reasonableness* test - a type of highly deferential, rational basis standard-governed applications or judicial review of government acts (...) the UK's accession to the EC led judges to create exceptions to certain core precepts of parliamentary sovereignty (...)”<sup>128</sup> Nowadays the Court is applying the proportionality test of daily basis however the Court perceiving its role a subsidiary would apply a doctrine of "margin of appreciation".

Harris, O'Boyle and Warbrick writes that the Court on the final stage of dealing with the application would examine whether "the interference is necessary in a democratic society, ie whether the state gives, and gives evidence for, relevant and sufficient reasons for the interference and those reasons are proportionate to the limitation of the applicant's enjoyment of his right, in which connection the margin of appreciation is most important".

The Convention operates with the term "necessary in a democratic society". The ECtHR formulated on the basis of this formula two-step test. In *Olsson v Sweden (1988)* the ECtHR stated

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<sup>125</sup> Günter Frankenberg, Grundgesetz, Fischer Verlag, Frankfurt 2004.

<sup>126</sup> 1 BvR 579/67

<sup>127</sup> The most comprehensive work considered on this issue: S. van Drooghenbroeck, *La proportionnalité dans le droit de la convention européenne des droits de l'Homme*, Bruxelles 2001

<sup>128</sup> A. Stone Sweet, J. Mathews, Proportionality and Global Constitutionalism, 74 Columbia Journal of Transnational Law 47:73 p. 73

"[a]ccording to the Court's established case-law, the notion of necessity implies that an interference corresponds to a **pressing social need** and, in particular, that it is **proportionate to the legitimate aim pursued**."

### ***Pressing social need***

#### *The Margin of Appreciation*<sup>129</sup>

The doctrine of margin of appreciation defines the scope of the ECtHR control over national legislation and practice. The Court would consider several factors when applying this doctrine (existence of a common cultural or moral consensus, )

In *Leander v Sweden (1978)* the Court noted that

"the safeguards contained in the Swedish personnel control system meet the requirements of paragraph 2 of Article 8 (art. 8-2). Having regard to the wide margin of appreciation available to it, the respondent State was entitled to consider that in the present case the interests of national security prevailed over the individual interests of the applicant (...). The interference to which Mr. Leander was subjected cannot therefore be said to have been disproportionate to the legitimate aim pursued."<sup>130</sup>

### ***Proportionate to the legitimate aim pursued***

If the Court finds that the interference might be necessary in a democratic society, it will turn to examine whether the interference in question is proportionate to the interest sought to be protected.

Sunday Times, § 67

The Court may find the imposed measure to be inproportionate of different grounds. First, the Court may find that the measure is nor necessary. Second, the Court may find that there is an alternative, less intrusive way of protecting the public interest. Third, when the Court finds that the adopted measure is not capable of achieving the intended purpose. Fourth, the court will also declare the measure not proportionate when the responding state cannot provide evidence that it considered the measure from the proportionality perspective. Fifth, the Court *ultima ratio* will balance the measure in question and the objective. The Court is rather reluctant to adopt this stage of the proportionality test, particularly when the national courts has done so previously. However the ECtHR is capable of adopting the proportionality in the narrow sense irrespectively of how careful the review on the national level was made

*Beldjoudi v France (1992)*

"the court that moves to balancing *stricto sensu* is stating, in effect, that each side has some significant constitutional right on its side, but that the court must, nevertheless, take a decision" p.

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<sup>129</sup> See more: Harris, O'Boyle, Warbrick, *Law of the European...*, pp. 11-14; L. Garlicki, *Wartości lokalne a orzecznictwo ponadnarodowe - "kulturowy margines oceny" w orzecznictwie strasburskim?* [Local values and supranational adjudication - is there a "cultural margin of appreciation" in the Strasbourg case-law?], *EPS* April (2008), pp. 4-13

<sup>130</sup> *Leander v Sweden*, judgment of 26 May 1987, application no. 9248/81, § 67

The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.

#### **D. EU CHARTER ON FUNDAMENTAL RIGHTS** *(by Robert Rybski)*

The Charter establishes a requirement of respecting the proportionality principle when introducing any restrictions. The important point is the requirement of necessity. Examining the proportionality of the regulatory test will check whether in a democratic state of law (or in a democratic society – those both concepts should be extended to the European Union), it is necessary to implement such restrictions. The second element is the actual realization of the purposes for which the introduction of the restrictions was set up. It is the minimum legal requirement, and is very close to the sociological sciences.

#### **Conclusions**

The principle of proportionality constructed in Germany spread across Europe and beyond relatively very quickly. In post-1989 Central and Eastern European Constitutional Courts has adopted the principle of proportionality on the German model<sup>131</sup>. Wojciech Sadurski noted that

"[t]he Courts in Central and Eastern Europe have clearly followed the path of the proportionality doctrine as developed by their Western counterparts, and in particular, by the European Court of Human Rights."<sup>132</sup>

The proportionality test is applicable in three analyzed systems but subject to certain differences. In this part we are to analyze how the test of proportionality *sensu stricto* is understood by each of the constitutional courts and the ECtHR as well as how the practical application looks like.

### **5. The Respect of the Essence of Rights and Freedoms**

#### **A. POLAND** *(by Łukasz Lasek)*

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<sup>131</sup> A. Stone Sweet, J. Mathews, *Proportionality and Global Constitutionalism*, 74 *Columbia Journal of Transnational Law* 47:73 p. 113

<sup>132</sup> W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Post-Communist States of Central and Eastern Europe* (2005), p. 287. Citation by A. Stone Sweet, J. Mathews, *ibid.* p. 113.

Article 31(3)(2) of the Constitution 1997 stipulates that limitations shall not violate the essence of freedoms and rights. The respect of the essence of constitutional rights and freedoms together with the principle of proportionality constitutes a substantial boundary for any limitation. The concept of respect of the essence was recognized in the jurisprudence of the Constitutional Court before the entry into force of the Constitution 1997<sup>133</sup> despite the absence of an *explicit* legal basis<sup>134</sup>.

In accordance with Article 31(3)(2) restriction on constitutional rights and freedoms (or the sum of such restrictions<sup>135</sup>) cannot interfere with the "essence" of individual rights and freedoms. As a general rule it is applicable to all constitutional rights and freedoms<sup>136</sup>.

The protection of the essence of rights and freedoms is explained in the Constitutional Court's case law. The concept of the essence is based on the assumption that within each specific right and freedom there are certain fundamental elements (*core*), without which such a right or freedom cannot exist, and some additional elements (*shell*) that can be restricted without losing the identity of the right or freedom<sup>137</sup>. The Court also stated that the interpretation of protection of the essence should not be reduced solely to the negative aspect but its positive aspect should be noted. The Court found that the protection of the essence requires identification a core of the right or freedom, which should remain free from any interference irrespectively whether the interference is justifiable on the grounds provided by the constitution.<sup>138</sup>

The theory of law is in the position that each of the fundamental rights and freedoms consists of a minimal substantial content that must be unconditionally protected. Removal of that content would cause that the particular right or freedom would be ineffective and of the illusory importance<sup>139</sup>. Notwithstanding there are two competing concepts of the essence of rights and freedoms. The concept of absolute and relevant essence of human rights<sup>140</sup>. The absolute theory states that the essence of the right or freedom is constant regardless of the social and economical context. In turn, the relative theory states that the essence of the rights and freedoms is depended on the circumstances of the situation in question<sup>141</sup>. It is said that by accepting the relative concept the

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<sup>133</sup> J. Oniszczyk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego na początku XXI w.*, [The Constitution in the Polish Constitutional Court's case law at the beginning of the XXI century] Zakamycze 2004 p. 385 and cited therein judgments *inter alia* judgment of 2 March 1994, no. W 3/93 (cenzura prewencyjna stanowi naruszenie istoty wolności słowa); judgment of 16 March 1994, no. W 8/93; judgment of 2 August 1990, no. K 7/90; judgment of 19 October 1993, no. K 14/92; L. Garlicki, *Przesłanki ograniczania konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)*, „Państwo i Prawo” 2001, no 10, p. 22.

<sup>134</sup> It is pointed out by J. Oniszczyk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie...*, p. 385

<sup>135</sup> Judgment of ..., no. W 3/93 stating that neither each of a statutory restriction nor the sum of statutory restrictions must not affect the essence of human rights

<sup>136</sup> M. Wyrzykowski, *Granice praw i wolności - granice władzy (w:) Obywatel - jego wolności i prawa*, B. Oliwa-Radzikowska (red.), Warszawa 1998, p.51. The "respect for the essence" was added when the draft was in the Parliament. (Ochrona istoty wolności i praw pojawiła się w tekście konstytucji w wyniku poprawki zgłoszonej przez posel Irenę Lipowicz dopiero podczas drugiego czytania projektu konstytucji w Zgromadzeniu Narodowym.)

<sup>137</sup> Judgment of 12 January 2000, no. P 11/98; also in the subsequent judgments of 3 October 2000, no. K 33/99 and of 10 April 2002, no. K 26/00.

<sup>138</sup> Judgment of ....., no. P 2/98

<sup>139</sup> In particular see L. Garlicki, *Przesłanki ograniczania konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)*, „Państwo i Prawo” 2001, nr 10, p. 22.

<sup>140</sup> In Poland see K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, p. 203 et seq. and B. Banaszak, *Prawo konstytucyjne*, Warszawa 1999, p. 382

<sup>141</sup> See B. Banaszak, *Prawo konstytucyjne*, Warszawa 1999, p. 382;

substantial distinction between the protection of the essence and the principle of proportionality would be blurred. K. Wojtyczek notes that if the respect of the essence of human rights is to have any practical significance, the content of this principle should be determined in accordance with the absolute theory. L. Garlicki writes that the mere sense of the principle of the protection of the essence is to introduce a rigid boundary beyond which the legislature can never step in when imposing restrictions on the rights and freedoms. Unless this limit is not exceeded, the admissibility of restrictions must be assessed on the ground of the principle of proportionality. If, however, the limitation or the sum of already existing limitations affects the essence of the right or freedom, there is no floor for the principle of proportionality and the Court must declare unconstitutionality solely because of the infringement of the essence of a right or freedom.<sup>142</sup>

For these reasons the absolute theory seems to be accepted.<sup>143</sup> However it does not automatically mean that along with changing social conditions and development of human rights our understanding of the essence of particular right and freedom will not be subject to changes<sup>144</sup>.

After 1997, the Constitutional Court has repeatedly ruled in general pointing what the essence of the rights and freedoms is. Occasionally the Court considered the concept of the essence in relation to specific rights and freedoms. Exceptionally the court held unconstitutionality due to the infringement of the essence of rights or freedoms<sup>145</sup>. If would have so doing, the Court would delimitate the core of each of the fundamental rights and the same time becoming bound by its prior case-law in this respect. L. Garlicki points out that by applying the principle of proportionality the equal result as with the application of the principle of respect of of the essence can be achieved. However he also notes that the application of the principle of proportionality leaves for the court a greater flexibility in the future. Because of the application of the proportionality principle the court remains not bound by its prior case-law. Therefore it seems that the court would apply the principle of the protection of the essence only *ultima ratio* when the protection of the essence could have not be achieved by the operation of the proportionality principle<sup>146</sup>.

## **B. GERMANY** (by Mona Klarkowska)

Conception of "Respect for the essence of rights freedoms" (*Wesensgehaltsgarantie*) is stated by Art. 19 section 2 Grundgesetz, (translate Grundgesetz or explain what it is) which underlines that basic rights can not be affected in their essence. The general idea is that every basic law has an invulnerable "core" in which the state can not intervene. This absolute perspective supports the assumption, that human dignity is a part of every basic law. Because of (Due to the fact that) the fact that human dignity is untouchable by Article 1 section I Grundgesetz, this extends to all other basic rights.

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<sup>142</sup> L. Garlicki, *Przesłanki ograniczania...*, „Państwo i Prawo” 2001, no 10, p. 24.

<sup>143</sup> K. Wojtyczek, *Granice ingerencji ustawodawczej...*, p. 208; A. Łabno, *Ograniczenie wolności i praw...*, pp. 708-709.

<sup>144</sup> K. Wojtyczek, *Granice ingerencji ustawodawczej...*, p. 212. In this regard, the author points out that the essence of human rights may be subject to extension and narrowance. In his opinion it was a case with the understanding of the essence of the property rights in conjunction with the preferential treatment of social rights and environmental protection.

<sup>145</sup> see A. Łabno, *Ograniczenie wolności i praw człowieka...*, p. 706

<sup>146</sup> Compare judgment of ....., no. P 11/98

### C. European Convention on Human Rights (by Łukasz Lasek)

The text of the European Convention on Human Rights does not explicitly provide any protection of the essence of fundamental freedoms and rights enshrined in the ECHR. Similarly, the absence of such protection characterizes the International Covenant on Civil and Political Rights<sup>147</sup>.

However, the case law of the ECtHR indicates that the Court recognizes the concept of an essence (core) of rights and freedoms. The very essence of each right or freedom constitute an absolute boundary for any limitation imposed by a state<sup>148</sup> In the *Belgian Linguistic Case (1968)* the Court noted that

"the right to education guaranteed by the first sentence of Article 2 of the Protocol (P1-2) by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention."<sup>149</sup>

In the next judgments this principle was confirmed. In *Golder v UK (1975)* the Court found that

"accepting the views of the Commission and the alternative submission of the Government, that the right of access to the courts is not absolute. As this is a right which the Convention sets forth (see Articles 13, 14, 17 and 25) (art. 13, art. 14, art. 17, art. 25) without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication."<sup>150</sup>

In *Ashingdane v UK (1985)* the Court found that "the limitations applied must not restrict or reduce (...) in such a way or to such an extent that the very essence of the right is impaired."<sup>151</sup>

The respect of the essence can be anchored in the principle of the effective interpretation of the ECHR. In *Artico v Italy (1980)* the Court underlined that "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective"<sup>152</sup>.

However it is not legitimate to state that the protection of the essence is an established principle taken into account in every case. The Court relies on this principle very rarely<sup>153</sup>.

### D. EU Charter

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<sup>147</sup> However in the *Rules of Syracuse* it is stated that limitations of rights and freedoms guaranteed in the ICCPR can not be interpreted in a manner that would result in an infringement of the essence of the law

<sup>148</sup> Harris, O'Boyle, Warbrick, *Law of the European...*, p. 10-11.

<sup>149</sup> "*Belgian Linguistic Case*", judgment of 23 July 1968, applications no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, § 5

<sup>150</sup> *Golder v UK*, judgment of 21 February 1975, application no. 4451/70, § 38

<sup>151</sup> *Ashingdane v UK*, judgment of 28 May 1985, application no. 8225/78, § 57

<sup>152</sup> *Airey v Ireland*, judgment of 9 October 1979, application no. 6289/73, § 24; *Artico v Italy*, judgment of 13 May 1980, application no. 6694/74, § 33

<sup>153</sup> B. Latos, *Klauzula derogacyjna i limitacyjna w Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności [Derogation and Limitation Clause in the European Convention on Human Rights]*, Warszawa 2009, p. 44

#### **IV. STATE OF EMERGENCY (derogation)**

##### **A. POLAND** (by *Łukasz Lasek*)

Some specific restrictions on the rights and freedoms might be introduced during the states of emergency.<sup>154</sup> The Constitution of 1997 regulates the types of extraordinary measures, conditions and procedure for the introduction of each of them, as well as legal consequences, in particular the implications for human rights and freedoms.

The Constitution lays down six principles, which are directly related to the introduction of three types of extraordinary measures. In Article 228 it provides that, in situations of particular danger and if ordinary constitutional measures are inadequate, appropriate extraordinary measures may be introduced (martial law, a state of emergency or a state of natural disaster). Extraordinary measures may be introduced only by regulation, issued upon the basis of statute, and which shall additionally require to be publicized (the principle of legality). Actions undertaken as a result of the introduction of any extraordinary measure shall be proportionate to the degree of threat (the principle of proportionality) and shall be intended to achieve the swiftest restoration of conditions allowing for the normal functioning of the State (the principle of extraordinariness).

In accordance with Article 229 the President may on request of the Council of Ministers declare a state of martial law in a part of or upon the whole territory in the case of external threats to the State, acts of armed aggression against the territory of Poland or when an obligation of common defence against aggression arises by virtue of international agreement. According to Article 230(1) In the case of threats to the constitutional order of the State, to security of the citizenry or public order, the President of the Republic may, on request of the Council of Ministers, introduce for a definite period no longer than 90 days, a state of emergency in a part of or upon the whole territory of the State. Extension of a state of emergency may be made once only for a period no longer than 60 days and with the consent of the Parliamentary Lower Chamber.

It is essential to regulate the normative content of states of emergency. It means that during the states of emergency the state is capable of introducing more restrictive measures but the character and the scope of these measures must be regulated in the respective statute<sup>155</sup> and the principle of proportionality must be observed<sup>156</sup>. The governing statute must not be repealed or amended during the state of emergency. It is an important safeguard for the constitutional basis of the state.

From our perspective however it is important to examine the capability to restrict rights and freedoms. Article 233 Constitution introduces a general framework for the status of individuals during states of emergency. The statute specifying the scope of limitation of the freedoms and rights

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<sup>154</sup> Na ten temat K. Wojtyczek, *Granice ingerencji ustawodawcze w sferę praw człowieka w Konstytucji RP*, Kraków 1999; J. Jasudowicz (red.), *Prawa człowieka w sytuacjach nadzwyczajnych*, Toruń 1997; A. Cieszyński, *Stany nadzwyczajne w Konstytucji RP z 1997 r.*, [w:] *Wejście w życie nowej Konstytucji RP*, Z. Witkowski (red.), Toruń 1998; M. Brzeziński, *Stany nadzwyczajne w polskich konstytucjach*, Warszawa 2007.

<sup>155</sup> L. Garlicki, *Polskie prawo konstytucyjne - zarys wykładu*, Warszawa 2007, p. 401.

<sup>156</sup> Tamże, s. 401. L. Garlicki zauważa, że do zasady proporcjonalności wyrażonej w art. 228 ust. 5 Konstytucji RP należałoby odpowiednio stosować standardy wypracowane przez TK i NSA na gruncie zasady proporcjonalności z art. 31 ust. 3 Konstytucji RP.



of persons and citizens in times of martial law and states of emergency shall not limit (extensiver than ordinarily admissible) the freedoms and rights specified in Article 30 (the dignity of the person), Article 34 and Article 36 (citizenship), Article 38 (protection of life), Article 39, Article 40 and Article 41(4) (humane treatment), Article 42 (ascription of criminal responsibility), Article 45 (access to a court), Article 47 (personal rights), Article 53 (conscience and religion), Article 63 (petitions), as well as Article 48 and Article 72 (family and children). Article 233 includes also a special guarantee under which the limitation of the freedoms and rights only by reason of race, gender, language, faith or lack of it, social origin, ancestry or property shall be prohibited. Differently in respect of the state of natural disaster. The statute specifying the scope of limitation of the freedoms and rights of persons and citizens during states of natural disasters may limit the freedoms and rights specified in Article 22 (freedom of economic activity), Article 41(1) and (3) and (5) (personal freedom), Article 50 (inviolability of the home), Article 52(1) (freedom of movement and sojourn on the territory of the Republic of Poland), Article 59(3) (the right to strike), Article 64 (the right of ownership), Article 65(1) (freedom to work), Article 66(1) (the right to safe and hygienic conditions of work) as well as Article 66(2) (the right to rest).

The restrictions on the rights and freedoms in respect of each state of emergency are governed by the following laws: the statute of 29 August 2002 on martial law and the powers of the High Command of the Armed Forces and the principle of its subordination to the constitutional authorities of the Republic of Poland (OJ 2002, No. 156 pos. 1301); the statute of 21 June 2002 on state of emergency (OJ 2002, No. 113, pos. 985) and the statute of 19 April 2002 on the state of natural disaster (OJ 2002, No. 62, pos. 558).

A state of emergency enables the state to restrict rights and freedoms however within the boundaries framed by the Constitution in article 233 but in more extent than Article 31(3) does. However the doctrine states whatsoever the essence of the rights must be respected<sup>157</sup>. Furthermore it must be observed that certain boundaries against the state uncontrolled competence are imposed by the international law, in particular Article 15 ECHR<sup>158</sup>.

Konstytucja RP nie wprowadza szczególnego unormowania ograniczania praw i wolności podczas stanów nadzwyczajnych. W związku z tym również w czasie stanów nadzwyczajnych stosowana powinna być ogólna klauzula limitacyjna z art. 31 ust. 3<sup>159</sup>, z jednakowoż uwzględnieniem art. 233 Konstytucji RP.

### **C. European Convention on Human Rights** (by *Łukasz Lasek*)

Article 15 enables states to derogate from its obligation under the ECHR in the time of emergency. Article 15 sets forth the conditions that must be satisfied for lawful derogation. First, a state must notify the Secretary General of the Council of Europe about the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed. Second a state may only unilaterally derogate rights and freedom guaranteed under the

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<sup>157</sup> M. Wyrzykowski, *Granice praw i wolności - granice władzy...*, p. 58.

<sup>158</sup> See for example B. Banaszak, *Porównawcze prawo konstytucyjne współczesnych państw demokratycznych*, Oficyna a Wolters Kluwer 2007.

<sup>159</sup> L. Garlicki, *Polskie prawo konstytucyjne - zarys wykładu*, Warszawa 2007, p. 401

ECHR in time of war or other public emergency threatening the life of the nation. A state may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. Third, a state must not derogate from Article 2, except in respect of deaths resulting from lawful acts of war, from Articles 3, 4 (paragraph 1)<sup>7</sup> and Protocols No 6 and 13.<sup>160</sup>

It is up to the Strasbourg Court to assess whether there is a public emergency. Usually the Court is to confer member states a wide margin of appreciation in this respect. Only once so far the Court disagreed with the contracting state.

Recently only the United Kingdom made some attempts to derogate from certain human rights. In *A and Others v Secretary of State for the Home Department* [2004] UKHL 56 the UK tried to derogate from Article 5(1)(f). In this case the House of Lords ruled that such detention was incompatible with Article 5 and 14 as they were disproportionate and permitted the detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status. The previous counter-terrorism act that gave rise to the case *A and Others* was replaced by the The Prevention of Terrorism Act 2005. The PTA 2005 allows the Home Secretary to impose "control orders" on people who are suspected of involvement in terrorism, which in some cases may derogate from human rights laws. The act raises certain doubts in the UK.

## **V. BALANCING ON EXAMPLES**

### **1. COUNTER-TERRORISM AND TORTURE (extradition) (by *Lukasz Lasek*)**

Under neither the German nor the Polish constitution the freedom from torture or inhuman or degrading treatment or punishment is considered not to be absolute and therefore from the national constitutional perspectives is capable of being subject to general conditions of limitation. The Polish Constitution in Article 40 stipulates that no one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited. This article does not include any express limitation clause but it is considered that the general limitation clause would apply apart from the corporal punishment that is absolutely prohibited. As it was noted in the chapter on Poland the prohibition of torture and inhuman, or degrading treatment and punishment has in Poland an absolute character because of the direct application of the ECHR (ECHR is a part of the national legal order and retains superiority over all legislations including statutory acts) rather than guarantees under the Polish Constitution<sup>161</sup>. One may say that the respect of human dignity prohibits torture and inhuman or degrading treatment. One may say that *ex definitione* torture and inhuman treatment infringe the human dignity. It is not however that obvious when it comes to evaluation whether the extradition may violate the human dignity if the person in question may be subject to tortures in the country of destination. After September 11 more and more people openly offered that the approach to persons suspected of terrorism should be different. Even in Poland some scholars proposed that the principle of human

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<sup>160</sup> See more Harris, O'Boyle, Warbrick, *Law of the European Convention...*, pp. 617-645; A. Mokhatar, *Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights*, *International Journal of Human Rights*, Vol. 8, No. 1, 65-87, (2004)

<sup>161</sup> It might be argued that the respect to human dignity prohibits torture, inhuman or degrading treatment or punishment but this statement is not doubtless. See M. Piechowiak,

dignity shall be also subject to balancing<sup>162</sup>. Probably the necessary changes in the text of the Constitution should be performed however if we take a closer look on the surveys the vast majority of the society is for harshening the rules against terrorist-suspects and the necessary majority could be found.<sup>163</sup> Differently under the ECHR where the guarantees enshrined in Article 3 are considered to have an absolute nature. It is supported by the wording of Article 15 ECHR that explicitly precludes Article 3 ECHR from derogations. Therefore the state even in the state of emergency has to fulfill its obligations under Article 3 ECHR. It means also in the counter-terrorism prevention. In *Saadi v Italy (2008)* the ECtHR uphold its prior case law concerning Article 3. The importance of this judgment is primarily because shortly before the judgment there was a strong pressure after the London and Madrid terrorist attacks to reestablish the approach to the Article 3. The ECtHR however irrespectively of this pressure repeated its settled case-law in this subject matter stating that

"(...) the nature of the offence allegedly committed by the applicant is (...) irrelevant for the purposes of Article 3"<sup>164</sup>

As D. Moeckli describing challenges of the UK to restrict some rights under the Article 3 noted

"[i]n the current climate, where the consensus against torture is being challenged by governments and academics alike, the unequivocal reaffirmation of the absolute nature of the prohibition of torture and inhuman treatment by the most influential regional human rights body is indeed welcome and timely. Whereas, for instance, the Canadian Supreme Court [in *Suresh v Canada (Minister of Citizenship and Immigration)* 2002, 1 S.C.R. 3 at para 78 - L.L.] has not 'exclude[d] possibility that in exceptional circumstance, deportation to face torture' might be compatible with the Canadian Charter of Rights and Freedoms, the ECtHR has decisively rejected the British-led attempt to imply, in the deportation context, a balancing requirement into Article 3 of the ECHR."<sup>165</sup>

In the most recent case concerning this issue *A. and Others v UK (2009)* the Court said:

"[t]he Court is acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence. This makes it all the more important to stress that Article 3 enshrines one of the most fundamental values of democratic societies. (...) Even in the most difficult of circumstances, such as the fight against terrorism, and irrespectively of the conduct of the person

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<sup>162</sup> A. Bałaban, *Ochrona życia człowieka: dwie propozycje zmian konstytucji*, "Rzeczpospolita" z dnia 3-4 lutego 2007 r.

<sup>163</sup> Chodzi głównie o debatę dot. legalizacji stosowania tortur pod pewnymi warunkami w warunkach tzw. *ticking bomb scenario*. Alan M. Dershowitz, *Shouting Fire: Civil Liberties in a Turbulent Age*, 2002; Alan M. Dershowitz, *Torture Without Visibility and Accountability Is Worse Than With It*, 6 University of Pennsylvania Journal of Constitutional Law 326. W Polsce por. J. Zajadło, *Dyskusja na temat tortur w Stanach Zjednoczonych Ameryki*, Państwo i Prawo z 2006 r., nr 5, s. 32-47; J. Zajadło, *Guantanamo i Abu Ghraib — problemy etyczno-prawne*, „Wojskowy Przegląd Prawniczy” 2006, nr 3, s. 19-32; J. Zajadło, *Uniwersalizm praw człowieka w konstytucji — bezpieczne i niebezpieczne relatywizacje*, Przegląd Sejmowy z 2007 r., nr 4, s. 93 i n.; J. Zajadło *Tortury wysterylizowane*, (w:), J. Zajadło (red.) *Fascynujące ścieżki filozofii prawa*, Gdańsk 2008, 312-322.

<sup>164</sup> *Saadi v Italy*, judgment of 28 February 2008, application no. 37201/06, § 127

<sup>165</sup> D. Moeckli, *Saadi v Italy: The Rules of the Game Have Not Changed*, HRLQ 8:3 (2008), pp. 547-548

concerned, the Convention prohibits in absolute terms torture and inhuman or degrading treatment and punishment."<sup>166</sup>

## **2. FREEDOM OF ASSEMBLY AND ASSOCIATION** (by Robert Rybski)

Freedom of assembly is a very good example to illustrate problems of balancing between individual liberties and the scope of its limitation due to national security. Four elements form the core of this freedom: 1) the expression of views by meeting participants to freely use, 2) build-up to express those opinions, 3) peaceful in nature, 4) "by the influence on the course of public affairs in the country."

At the same time one can distinguish four types of assemblies. First group consists of those assemblies, which received permission from the appropriate authorities and for the whole time of its lasting the assembly accomplished all four-above mentioned conditions. The second group consists of so called 'spontaneous assemblies'. These are those assemblies, which fully correspond with characteristics of a common assembly (from the 1st group). However, the decision on organizing was taken in such a short period of time that there was no possibility for the administrative authorities to give a permission. The third group consists of the meetings that weren't notified to the appropriate administrative authorities (or were notified but in a wrong manner), but there are still conditions and reasons for the participants to benefit from the freedom of assembly. The fourth group consists of illegal meetings, which do not meet the requirements of assemblies and the public authorities may take measures of restraint against the participants of this meeting.

Finding the right balance between appropriate treatment of assemblies from third and fourth category is the essence of the problem. Article 11 paragraph 2 of the ECHR allows to limit freedom of assembly only by law in situations where this is necessary in a democratic society in the interests of national security or public, prevention of disorder or crime, protection of health or morals or the protection of the rights and freedoms of others. Peaceful assembly from the third category shall not be liquidated, although the appropriate public authorities were not informed about it beforehand. In the case of *Bukta v. Hungary* ECHR confirmed that the negligence of duty of an administrative nature (duty to notify the authorities about the assembly in advance) does not constitute grounds for acknowledging the assembly as illegal. This makes us read the conditions from paragraph 2 Article 11 ECHR much more narrowly than, it might have seem at first.

Thus, violation of existing law by meeting participants (condition of public safety) must be allocated to the infringements of a criminal nature, and others. Criminal violation must be a violation of criminal laws, which do not only protect the standards of legality of administrative acts, but serves to protect the commonly regonized values (such as freedom from torture and slave labor, protection of life and health). At the same time violation of the criminal provisions shall not be the result of exercising freedom of assembly (eg. bringing threat to motor vehicle traffic due to the demonstrations on the highway) and it will be so intensive that public authorities in other

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<sup>166</sup> *A. and Others v UK*, judgment of 19 February 2009, application no. 3455/05. See also national courts judgments indicated in the Polish Const. Court's judgments *inter alia House of Lords, Judgments – A (FC) and others (FC) v. Secretary of State for the Home Department* [2005] UKHL 71; *House of Lords Judgments – A (FC) and others (FC) v. Secretary of State for the Home Department* [2004] UKHL 65; *Bundesverfassungsgericht* [2006] 1 BvR 357/05; *Israeli Supreme Court, Public Committee Against Torture on Israel v. The State of Israel et al.*, Case HCJ 5100/94; *Israeli Supreme Court, The Center for the Defence of the Individual v. The Commander of IDF Forces in the West Bank*, Case HCJ 3278/02; *Israeli Supreme Court, Marab v. The Commander of IDF Forces in the West Bank*, Case HCJ 3239/02; *US Supreme Court, Rasul v. Bush*, Case No. 03-334, 542 US 466 (2004) 321 F. 3d 1134).

circumstances, would undertake effective criminal proceedings ex officio. If none of these conditions is met, than the assembly shall not be disbanded.

Presented test is universal and applies to both national security grounds, public safety and public order. Thereby protecting the safety only after completing such a test could prevail over the freedom of assembly. At the same time it seems that it is possible to formulate other tests.