The Necessity Test in the Practice of the Czech Constitutional Court: Between the Devil of Judicial Activism and the Deep Blue Sea of Judicial Resignation

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The Necessity Test in the Practice of the Czech Constitutional Court: Between the Devil of Judicial Activism and the Deep Blue Sea of Judicial Resignation. The proportionality analysis is the dominant method of constitutional review throughout the world, and this is also the case in the Czech Republic, where its application took hold not long after the re-establishment of the Constitutional Court in the early 1990s. This paper analyses the Czech Constitutional Court's jurisprudential approach to one of the sub-tests of the proportionality analysis, the necessity test. Building on comparative and theoretical foundations, the text first presents the general theoretical background of the necessity test before moving on to a summary of the variations of the abstract definition of the necessity test and its content in the practice of the Czech Constitutional Court. Subsequently, the application of the variants is compared and evaluated using case-studies of individual cases ruled upon by the Czech Constitutional Court. Finally, the paper concludes with a normative assessment of the variants of the necessity test which paves the path for judicial practice to evade the devil of judicial activism and the deep blue sea of judicial resignation, two structural pathologies that threaten its practical application.

Keywords: Proportionality Analysis; Necessity Test; Constitutional Review; Czech Constitutional Court

Introduction

Proportionality analysis is currently considered the default method for reviewing legal acts restricting fundamental rights.[1] It is routinely applied by courts throughout the world, and the Czech Republic is no exception in this regard. In the practice of our Constitutional Court (the CC), this method became established relatively soon after its re-establishment in the early 1990s.[2]

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[1] For the geographical expansion of proportionality, see, for example, BARAK, A.: *Proportionality: Constitutional Rights and Their Limitations.* Cambridge: Cambridge University Press, 2012, pp. 175-210. STONE SWEET, A., MATHEWS, J.: Proportionality, Judicial Review, and Global Constitutionalism. In: BONGIOVANNI, G. SARTOR, G. VALENTINI, Ch. (eds.): *Reasonableness and Law*. Dordrecht: Springer, 2009, pp. 173-214.

[2] See, for example, the paradigmatic judgment no. Pl. ÚS 4/94.

Proportionality analysis traditionally consists of four sub-tests which the act of the public authority under review is required to meet in order to be considered constitutionally compliant: the tests of legitimacy, suitability, necessity and balancing (proportionality in the narrow sense). The legitimacy test questions whether the reviewed legal act (or measure) pursues a constitutionally compliant goal (for example, the protection of another fundamental right or the public interest). The suitability test examines whether the measure under review (the means chosen by the public authorities) is in some way capable of achieving that goal. The necessity test queries if there are no alternative means that would be capable of achieving the pursued legitimate goal and which would at the same time be less restrictive in relation to the limited fundamental right (i.e., to restrict it to a lesser extent, or not at all). Finally, the balancing test is the last hurdle that the reviewed legal act is required to leap, and it is often referred to as the "*heart*" of the proportionality analysis.[3] Within this probe, courts assess conflicting constitutional values in terms of their relationship to each other and examine whether the challenged legal act has a disproportionate impact on the sphere protected by the fundamental rights of the individual. In other words, the balancing test attempts to determine whether there is a reasonable relationship between the harm caused to the affected fundamental right and the importance of the reasons supporting the measure which imposes these restrictions.[4]

The issue of balancing has been the subject of extensive academic attention due to the fact that it is considered to represent the heart of proportionality. In this respect, the doctrine reflects jurisprudence in which the threshold criteria are most often perceived as merely paving the way for balancing; while the main argumentative efforts of the courts are concentrated in the balancing, the other tests only examine whether a real conflict exists between constitutional values in a specific case.[5]

The necessity test, the aspect of the issue to which this article is devoted, has been largely neglected in academic literature to date. However, as this article will attempt to show, the necessity test is of fundamental importance from the point of view of the constitutional review. It plays a fundamental role in setting the overall intensity of the review which may range from complete resignation to effective review or even boundless judicial activism.

The main goal of this article is to define the necessity test in greater detail and to outline the individual ways in which it can be understood. At the same time, I will try to compare different approaches to the criterion of necessity and draw attention to their advantages and drawbacks. The study adopts a legal-theoretical approach, but the examination of the jurisprudential practice of the CC always serves as a starting point for my more general (theoretical) considerations. These two components, the theoretical and practical aspects, intertwine, supplement and move forward throughout the text, simultaneously providing critical reflections on the jurisprudence of the CC. This multi-

[3] BARAK, A.: *Proportionality,* pp. 338-339.

[4] ČERVÍNEK, Z.: Proporcionalita. In: SOBEK, T., HAPLA, M. et al. *Filosofie práva*. Brno: Nugis Finem Publishing, 2020, pp. 374-379.

[5] GRIMM, D.: *Proportionality in Canadian and German Constitutional Jurisprudence*, p. 388.

faceted approach should allow us to draw some conclusions about how the necessity test should be best applied in order to avoid the two extreme positions indicated above and to ensure that the CC is neither overly activist nor overly restrained.

General Remarks on the Necessity Test

As was indicated in the introduction, proportionality consists of a sequence of steps that a legal act under review is required to fulfil in order to be considered constitutionally compliant. Even if the reviewed legal act passes the tests of legitimacy and suitability, this does not mean that its "struggle" for constitutionality has already been won. Public authorities have a whole range of means or measures[6] at their disposal which are capable of achieving their objectives, and it may be the case that one or other of these measures are less restrictive to the rights of the individual than the measures under review in the proportionality test. In such a case, the public authority would have no reasonable grounds on which to choose the more "drastic" means to implement its goals if less restrictive alternatives are capable of fulfilling those goals to the same or similar extent. In such a case, the measure under review would not be considered necessary.[7]

The necessity test is intended to detect such excessively burdensome measures. According to this criterion, a measure is constitutionally acceptable only if there is no other measure that would be capable of achieving the pursued legitimate goal which would also be less restrictive with respect to the fundamental right in question. Public authorities should therefore select measures which cause the least possible harm to the individual with respect to their rights if it is a matter of regulating a certain human activity; similarly, if it is a measure that brings some benefit to the individual, then this should cause the least possible harm to society as a whole.[8]

The necessity test assumes the existence of a plurality of equally suitable means of achieving the objective in question. These measures are then compared, and an assessment is made as to whether any of them is less restrictive with respect to restricting a specific fundamental right than the measure under review.[9] If, however, there are no other measures which can achieve the objective, then the question of the existence of more moderate measures does not arise at all, and the necessity test would be considered to have been met.[10] Further to this topic, Möller adds that even the option of the complete

[6] For the sake of simplicity, I will continue to use these terms as synonyms.

[7] SCHLINK, B.: Proportionality (1). In: ROSENFELD, M., SAJÓ. A. (eds.).: *The Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford University Press, 2012, p. 724. BRADY, A. D. P.: *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach*. Cambridge: Cambridge University Press, p. 55.

[8] EMILIOU, N.: *The Principle of Proportionality in European Law: A Comparative Study*. London: Kluwer Law International, 1996, p. 29.

[9] MÖLLER, K.: *The Global Model of Constitutional Rights*. Oxford: Oxford University Press, 2012, p. 196.

[10] EMILIOU, N.: *The Principle of Proportionality in European Law,* p. 29. GERARDS, J.: How to improve the necessity test of the European Court of Human Rights. *ICON*, 2013, year 11, No. 2, p. 484. BARAK, A.: *Proportionality,* pp. 321 and 323.

absence of intervention (which would not be based on another measure capable of achieving the objective in question) cannot be considered as a relevant alternative.[11]

The necessity test is also based on the assumption that the goal pursued by the reviewed act of the public authority has been found to be legitimate and that the chosen means are capable of achieving their goal, and therefore the only relevant question at this stage is whether or not there are alternative means that are less restrictive to the restricted right. The necessity test optimizes the potential for resolving conflicts between constitutionally protected values, and this process of optimization has often been compared to the economic doctrine of Pareto efficiency. If we apply this theory to the concept of the necessity test, the resolution of a conflict between two constitutionally protected values would only be considered optimal if the improvement of the position of one party could only be carried out at the expense of the other party.[12] In other words, the measure under review is truly necessary if there is no alternative measure that could improve the position of the individual whose rights are affected by the measure under review, without at the same time reducing the degree of fulfilment of the conflicting constitutionally protected value. In contrast, if there was an alternative measure that would be capable of fulfilling the objective pursued to the same extent and which would also be less restrictive to the affected right, then the position of the individual guaranteed by their fundamental right could be improved without any harm to the value whose fulfilment is sought by the challenged measure. The necessity test is intended to prevent such unnecessary sacrifices of fundamental rights.[13]

The tests of both necessity and suitability are typically described as factual or empirical tests, as they involve an examination of the existence of alternative measures and a choice between them.[14] Nonetheless, it is often overlooked that the argumentation within this step is necessarily substantive as well as qualitative and thereby also requires value judgements. From the content of the necessity test already discussed above, we can conclude that it consists of two basic elements: the first is intended to determine the extent to which the legitimate aim pursued by the legal act under review has been achieved, while the second aims to assess the degree of infringement of a limited fundamental right by the measure under review in comparison with the available alternatives.[15] Both elements require a value judgement to be made. However, this one is not as comprehensive as in the case of balancing.[16]

[11] MÖLLER, K.: *The Global Model*, p. 196.

[12] ALEXY, R.: *A Theory of Constitutional Rights*. Oxford: Oxford University Press, 2004, p. 399. BARAK, A.: *Proportionality,* p. 320. RIVERS, J.: Proportionality and Variable Intensity of Review. *The Cambridge Law Journal*, 2006, year 65, no. 1, p. 198. SCHLINK, B.: *Proportionality (1)*, p. 724.

[13] ALEXY, R.: *A Theory of Constitutional Rights*, p. 399.

[14] KUMM, M.: Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement In: PAVLAKOS, G. (ed.): *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy.* Oxford: Hart Publishing, 2007, p. 137. BRADY, A. D. P.: *Proportionality and Deference*, pp. 55–56. GERARDS, J.: *How to improve the necessity test*, p. 483.

[15] EMILIOU, N.: *The Principle of Proportionality in European Law,* p. 30. BARAK, A.: *Proportionality,* p. 323. BRADY, A. D. P.: *Proportionality and Deference*, p. 56. BILCHITZ, D.: Necessity and Proportionality: Towards A Balanced Approach? In: LAZARUS, L., McCRUDDEN, C., BOWLES, N. (eds.): *Reasoning Rights: Comparative Judicial Engagement.* Oxford: Hart Publishing, 2014, p. 60.

[16] SCHLINK, B.: *Proportionality (1)*, p. 724.

The necessary degree of fulfilment of the objective is determined by the relevant decision-making body and it belongs to its discretion. The role of the Constitutional Court in performing the necessity test is to assess whether the alternative means of achieving this objective do so to approximately same extent while imposing fewer restrictions on the fundamental rights and freedoms of individuals; the Court cannot use this process to order public authorities to meet specific targets in achieving objectives.[17] If the alternative measure is less restrictive with respect to fundamental rights but will not achieve the objective to the same or similar extent, then the measure proposed by the public authority will easily pass the necessity test. This is also the case if the alternative measure entails other significant negative externalities, such as a significant increase in the budget[18] or the restriction of the fundamental rights of third parties.[19] Any alternatives which result in these undesirable consequences will not be deemed comparable to the measure under review as they do not represent a practical alternative. The primary consideration of alternative measures in the necessity test is the question of the degree to which they can fulfil the required goal, and the identification of practical alternatives capable of doing so is the first aspect of the necessity test.

In the second aspect of the necessity test, the Court focuses on whether any alternative measures are less restrictive to the limited fundamental rights from the perspective of the individual concerned.[20] If the Court has determined that the alternative measure is able to fulfil the legitimate goal to the same degree as the measure under review, the only thing that matters is the severity of the interference with the fundamental right.

In this regard, however, it should be noted that although the necessity test requires value judgements and substantive argumentation, neither the importance of the pursued goal nor the relative severity of the limitations imposed on the fundamental right play any role within this criterion. As with the evaluation of the positives and negatives of the measure in question, this question is reserved for the final step of the review, the balancing test. It should be stressed once again that the necessity is a threshold test; nothing is being weighed in the process.[21]

3. Abstract Definition of the Necessity Test in the Practice of the CC

In the practice of the CC, different terms are used for the necessity test. While the term "*necessity*"[22] is used most frequently, other terminology is found in judgements

[17] ALEXY, A.: *A Theory of Constitutional Rights*, p. 398.

[18] See, for example, the Judgement no. Pl. ÚS 27/16, §97.

[19] ALEXY, A.: *A Theory of Constitutional Rights*, pp. 400–401. ALEXY, R.: Proportionality and Rationality. In: JACKSON, V. C., TUSHNET, M. (eds.): *Proportionality: New Frontiers, New Challenges*. Cambridge: Cambridge University Press, 2017, p. 15, marginally p. 7. BARAK, A.: *Proportionality,* p. 324. BUMKE, Ch. VOßKUHLE, A.: *German Constitutional Law. Introduction, Cases, and Principles.* Oxford: Oxford University Press, 2019, pp. 62–63. From the jurisprudence of the CC, see, for example, Judgement no. Pl. US 33/15, §72.

[20] SCHLINK, B.: *Proportionality (1)*, p. 724. GERARDS, J.: *How to improve the necessity test*, p. 485. BARAK, A.: *Proportionality,* p. 327. BILCHITZ, D.: *Necessity and Proportionality*, p. 58.

[21] BARAK, A.: *Proportionality,* p. 338. GRIMM, D.: *Proportionality in Canadian and German Constitutional Jurisprudence*, p. 390. PEARSON, M.: *Proportionality, Equality Laws and Religion: Conflicts in England, Canada and the USA*. Abingdon: Routledge, 2017, p. 67. For the opposite opinion, see BILCHITZ, D.: *Necessity and Proportionality*, p. 58.

[22] See, for example, Judgement nos. Pl. ÚS 40/08, §77; I. ÚS 668/15 §37; Pl. ÚS 2/17, §40; Pl. ÚS 18/17, §55.

including "*minimum impair stage*",[23] "*subsidiarity*"[24] or "*least-restrictive-means test*".[25] One notable example was the term "*minimization of infringement*", the meaning of which was shrouded by an "aura of the unknown" in early jurisprudence, but in terms of content, this criterion was also applied as substitute for a necessity test.[26] The CC sees all of these terms as synonymous, often using more than one within the framework of a single decision.

If we move from the semantics to the content of the necessity test, we find that the necessity test has been defined in the practice of the CC in two main ways, the first of which was predominant for much of the early history of the Court, with the second beginning to appear in the jurisprudence of the CC only in the second decade of the new millennium.

Let us therefore start with the traditional way in which the test was defined. Its foundations (and those of proportionality analysis as a whole) were laid out by the CC in the paradigmatic Judgement no. Pl. ÚS 4/94 in which the CC concluded that the necessity test consists in comparing "*legislative instrument limiting the fundamental right or freedom, with other measures allowing it to achieve the same goal, but not affecting fundamental rights and freedoms*".[27]

However, the CC did not consider the argument arising from the necessity to be conclusive - apparently due to its abstract definition, which it limited only to examining whether there is an alternative measure that would not limit fundamental rights at all - and thus left the question of its fulfilment or non-fulfilment open. As a result, once the balancing test had been carried out, the analysis was complemented by with the so-called minimization of infringement test, according to which it is the "*obligation of the legislator to also look for possibilities of minimization* […] *of infringement* [to a fundamental right] *and transform them into the appropriate legislative measures.*"[28] Only within the framework of this test did the CC assess the existing alternatives and determine whether they are also less restrictive with respect to the limited fundamental right. In short, then, the incomplete definition of the necessity test forced the CC to implement the minimization of infringement test.

However, this shortcoming was soon eliminated. In Judgement no. Pl. ÚS 15/96, the CC modified the content of the necessity test to ensure that it also included the question of whether alternative measures would not only eliminate any restriction of fundamental rights, but also whether the limitation would be to a lesser extent:

> The second criterion for mutual comparison of conflicting fundamental rights and freedoms is the criterion of necessity, which consists in comparing a legislative instrument that restricts the fundamental right or freedom, with other measures

[23] See, for example Judgement nos. I. ÚS 695/06; Pl. ÚS 40/08, §77; Pl. ÚS 22/09, §37; Pl. ÚS 3/16, §75.

[24] See, for example, the dissenting opinion of judges Holländer and Procházka on Judgement nos. Pl. ÚS 5/01 or Judgements no. III. ÚS 256/01 and IV. ÚS 3102/08, §34.

[25] See Judgement nos. Pl. ÚS 11/04; III. 309/16, §30.

[26] See the paradigmatic Judgement no. Pl. ÚS 4/94.

[27] See also e.g., Judgement nos. Pl. ÚS 15/01; Pl. ÚS 42/04, §29; II. ÚS 1375/11, §45 or I. ÚS 3859/13.

[28] See Judgement no. Pl. ÚS 4/94.

> enabling the achievement of the same goal, but not affecting fundamental rights and freedoms, or involving them in a lesser intensity.[29]

The early jurisprudence of the CC was characterized by relatively significant fluctuations in the content and structure of the proportionality analysis, and these rapid changes allow the development of the definition of the necessity test to be traced. Regarding the abstract definition of proportionality analysis, the CC frequently refers to Judgement no. Pl. ÚS 3/02[30] in which the CC formulated necessity by stating that the public authority "*is allowed to use only the least restrictive - in relation to the affected fundamental rights and freedoms - of several possible means*".[31]

Two years later, the CC offered a somewhat different redefinition of the necessity criterion:

> The assessment of simple law from the point of view of necessity, which follows the analysis of the plurality of possible normative means in relation to the intended purpose and their subsidiarity from the point of view of limiting the value protected by the constitution - a fundamental right or a public good, is the second step in the application of the principle of proportionality. If the purpose pursued by the legislator may be achieved by alternative normative means, then the one that limits the given constitutionally protected value to the smallest extent is constitutionally conforming.[32]

Typically, all of these definitions of the necessity test share a primary focus on whether or not the objective pursued cannot be achieved in terms of the fundamental right in question by less-restrictive or even the least-restrictive means. I would refer to these methods of definition as the traditional definition of the necessity.

However, in more recent jurisprudence dating from around 2015 onwards, we can discern a departure from the traditional ways of defining necessity, and we can see that the Court is beginning to require that the proposed alternatives to the measure under review be equally or at least similarly effective from the point of view of fulfilling its intended purpose. The pilot decision in this sense was the chamber[33] Judgement no. I. ÚS 668/15,[34] in which the CC stated that the necessity test demonstrates a "*need to examine whether the aim pursued* […] *could not be achieved in the same or similar degree by the alternative means, which would also limit the constitutional right of the complainant to a lesser extent*".[35]

The consequences of this line of thinking can also be traced in subsequent jurisprudence from the plenum of the CC, even though the approach taken by the plenum

[29] Judgement no. Pl. ÚS 15/96. Similarly, see Judgement no. Pl. ÚS 10/08, §124.

[30] See Judgement no. Pl. ÚS 3/02.

[31] Judgement no. Pl. ÚS 3/02. Similarly, see also, for example, Judgement nos. Pl. ÚS 38/04, §27; Pl. ÚS 7/09, §32; Pl. ÚS 24/10, §37; II. ÚS 1774/14; Pl. ÚS 15/16, §73.

[32] See Judgement no. Pl. ÚS 41/02. Compare also, for example, Judgement nos. Pl. ÚS 2/06, §93; Pl. ÚS 51/06, §64; IV. ÚS 3102/08, §23; Pl. ÚS 9/07, §§ 31 and 39 et seq.; Pl. ÚS 22/09, §35; Pl. ÚS 2/06, §93.

[33] The CC is composed of 15 judges and operates either as plenum (a panel of all judges) or in four three-member chambers. The plenum traditionally rules on, among others, the review of the constitutionality of laws and regulations, while the chambers typically consider constitutional complaints.

[34] Judgement no. I. ÚS 668/15.

[35] Ibid, §33. Cf. also Judgement nos. II. ÚS 443/16, §§29 and 41, and II. ÚS 1837/16, §30.

regarding this matter is far less straightforward that that of the chamber judgments. Indeed, the plenary findings within the abstract definition of proportionality refer to the traditional definition of the necessity test specified above, according to which the necessity test allows public authorities to use only the least-restrictive means of several possible options.[36] However, later, when applying it on merits of a case, they put a different content of necessity test to practice. In recent jurisprudence, there have basically been two variants of the necessity. The first, in principle, corresponds to the above-mentioned pilot chamber judgments. In this approach the CC inquires

> whether the legislator could not choose a solution that would be less restrictive [with respect to the limited fundamental right]. However, such a less-restrictive solution would simultaneously have to achieve the pursued legitimate goals to the same or at least comparable extent. If it fulfils them only partially, then it cannot be considered a real alternative, which should lead to the conclusion that the challenged legal regulation is not necessary.[37]

According to the second approach, the CC examines whether there was a "*less-restrictive solution, which at the same time would be equally effective in achieving the aim*".[38]

As was mentioned above, these formulations are gradually replacing the traditional ways of defining necessity, but it should be stressed that they have not yet fully replaced the earlier approaches.[39] Both approaches currently coexist, and it is therefore questionable whether there is any qualitative difference between the versions. Is it possible to conclude that one approach is superior or are the two basically equivalent? As we will see in the following section, the same question may also be asked in relation to the two variants of necessity applied in recent jurisprudence.

4. The Traditional Definition of Necessity and Its Drawbacks

As was stated above, the criterion of necessity is traditionally defined in the jurisprudence of the CC in such a way that "*it is allowed to use only the least restrictive - in relation to the affected fundamental rights and freedoms - of several possible means*".[40]

However, this traditional concept of necessity has been subject to strong doctrinal criticism. If taken strictly according to its abstract definition, it would leave practically no discretion to the decision-making public authorities, a consequence which is potentially in conflict with the principle of the separation of powers, as it opens the door

[36] Judgement no. Pl. ÚS 3/02.

[37] Judgement no. Pl. ÚS 2/17, §42. Cf., e.g., Judgements no. Pl. ÚS 18/17, §57 and Pl. ÚS 27/16, §97.

[38] See Judgement no. Pl. ÚS 3/16, §§75, 85 and 88. Similarly, Judgement nos. Pl. ÚS 32/15, §§ 61-63; III. ÚS 309/16, §30; Pl. ÚS 6/17, §§131, 142-153 or Pl. ÚS 4/19 §§33 and 35.

[39] The traditional definition of the necessity may also be found in recent jurisprudence. See, for example, Judgement nos. II. ÚS 164/15, §38 or Pl. ÚS 15/16, §73.

[40] From the approaches discussed above, for the sake of clarity I will focus only on the influential Judgement no. Pl. ÚS 3/02.

to judicial activism.[41] In this regard, we might wish to bear in mind the famous statement of Justice Blackmun, according to which "[a] Judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike the legislation down".[42]

Wojciech Sadurski's criticism is also in a similar spirit. Sadurski specifically objects that the consistent application of the necessity defined in this way has fatal consequences for the measures under review.[43] On a theoretical level, the application of such a strictly set criterion of necessity always inevitably leads to the annulment of the contested measure limiting fundamental rights, as it is always possible to plausibly consider alternative measures that are capable of achieving the legitimate goal being pursued, and which do not limit fundamental rights at all or to a lesser extent or e.g. infringe some less significant right.[44] However, Sadurski considers such an approach to necessity to be "*pedantic*" and essentially impractical as it fails to take into account the degree to which the pursued goal is fulfilled. On this basis, Sadurski argues, it seems appropriate to modify the approach in this sense.[45]

However, let us address this issue and attempt to determine whether Sadurski's criticism is justified and if it also affects the practice of the CC. It should be stated at the outset that in the vast majority of cases, the application of the traditional definition of necessity is unproblematic and has enabled the CC to reach convincing and justifiable conclusions, even in politically sensitive cases such as those involving agricultural subsidies[46] or the restitution of expropriations carried out during the socialist era, two issues with far-reaching consequences for public budgets.[47] Nevertheless, it should be noted that in both of these cases the CC also implicitly assessed the extent to which compared measures are capable of fulfilling the objective pursued, and it might therefore seem that concerns about an activist application of the necessity are unfounded.

However, it is important not to jump to conclusions, as these concerns also arise in an example from the opposite side of the spectrum, namely that of a flawed application of the traditional definition of the necessity test. The Judgement no. Pl. ÚS 44/13 can serve us as a good example here. In this case the CC repealed some provisions of Act No. 311/2006 Coll. on Fuels and Fuel Filling Stations, as amended by Act No. 234/2013 Coll. for breaching the right to conduct a business guaranteed by Article 26 of the Czech Charter of Fundamental Rights and Freedoms. These provisions established a requirement on the part of fuel distributors to pay a deposit of CZK 20,000,000 (approximately 80,000

[41] BILCHITZ, D.: *Necessity and Proportionality*, p. 44.

[42] *Illinois State Board of Elections v Socialist Workers Party et al*, 440 US 173, 188-189 (1979).

[43] He refers to Gerald Gunter's famous statement about the application of the American *strict scrutiny*, according to which this standard is "*strict in theory and fatal in fact*". Cf. WINKLER, A.: Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts. *Vanderbilt Law Review*, year 59, 2006, p. 795.

[44] SADURSKI, W.: *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. 2nd ed. Dordrecht: Springer, 2014, pp. 390-391.

[45] Ibid, p. 391.

[46] Judgement no. Pl. ÚS 38/04.

[47] Judgement no. Pl. ÚS 9/07.

Euro) which should either be returned to them as an overpayment or used as a guarantee of the fulfilment of the distributor's taxes, fees or other financial obligations to the state upon the termination or cancellation of the distributor's registration.

In this case, the CC stated that the disputed provisions were intended "*to limit the creation and abuse of companies set up for special purpose, which play a vital role in all known violations of law or right in the fuel market*",[48] concluding that they were also capable of achieving this goal.[49] However, the CC considered the result of the necessity test to be the key one: "*i.e. whether there are no alternative ways of achieving the goal, the use of which would make the interference with the fundamental right less intense, or ruled it out completely. The Constitutional Court concluded that* [the challenged provisions] *fail at this step of the proportionality test.*"[50] In its reasoning, the CC referred to the pilot Judgement no. Pl. ÚS 3/02, in which it ruled on the unconstitutionality of fines with liquidation character: "*the fine exceeds the possible returns to such an extent that the business activity essentially becomes 'pointless' (i.e., aimed only at paying the imposed fine for a considerable period of time).*"[51] According to the CC, these conclusions could (sic!) also be applied to the current case of provisions establishing a uniform (in the sense of undifferentiated) deposit for all distributors without difference. Based on these considerations, it then reached the conclusion that:

> the method of setting a uniform deposit [cannot be considered] the only possible and, above all, the most economical one in relation to all fuel distributors. In addition to this method, the option of legal regulation of the conditions for determining the amount of the deposit, which would be reasonably graduated by the legislator, would otherwise come into consideration. At the same time, the option that the deposit would be established only for those distributors who enter the fuel market and for a limited period of time, is not ruled out. Even because the contested legislation may have [sic!] a so-called choking effect on smaller fuel distributors, consisting, for example, in the very difficulty of obtaining the required deposit amount, the Constitutional Court found it, apart from the listed alternatives, to be the seemingly most restrictive option in relation to the right guaranteed by Article 26 of the Charter.[52]

First of all, I would like to point out that it is perhaps beyond the scope of this article to deal with all of the misunderstandings and inconsistencies that the CC addresses in just six paragraphs of the argumentation establishing the repeal of the legal provisions in question. I will therefore focus only on the application of the necessity test. The majority of the bench concluded that the contested deposit was unconstitutional due to its flat and undifferentiated nature which could have exerted a "choking effect" on smaller distributors who might not be able to procure the required sum for the deposit.

[48] Judgement no. Pl. ÚS 44/13, §20.
[49] Ibid, §21.
[50] Ibid, §22.
[51] Ibid, §23.
[52] Judgement no. Pl. ÚS 44/13, §24.

It is also necessary to draw attention to the formulation of the legitimate objective on which the assessment of necessity is based. I believe that the majority of the Justices of the CC defined the objective here too narrowly. As is apparent from the Government's statement, the deposit in question pursued several goals and was not only intended to limit the creation and abuse of companies set up for a special purpose in tax delicts, as was stated in the reasoning of the majority. The introduction of the deposit in question had further implications, more specifically to:

> [r]estrict […] the "black market" in fuel, the extent of which is […] "*from a long-term perspective extremely large and represents not only a threat to the fiscal interests of the state, but also a threat to the interests of consumers and with regard to the organized nature of criminal activity in this area, it also poses a risk to the internal order and security of the Czech Republic*". A legitimate part of this effort may certainly be "*an effort to provide the customs office and other tax administrators with the possibility to pay any arrears of fines and other monetary payments related to the activities of the fuel distributor using a deposit*", respectively "*an effort to ensure a certain minimum economic standard of entities operating in the fuel market*", because the fuel distribution business is "*with regard to the increased possibility of tax evasion* […] *highly susceptible to the emergence of a black market and to violations of legal regulations*".[53]

In this regard, it is important to note that the primary purpose of introducing the deposit was to regulate a strategic sector of the economy which has long been prone to black market practices and tax evasion. The deposit was supposed, among other things, to guarantee the minimum economic "condition" of entities doing business in the fuel distribution sector while ensuring that the customs and tax authorities were able to recover any arrears of taxes, fees and other monetary obligations which distributors owed to the state. Unfortunately, neither of the alternative measures referred to by the majority of the CC, namely a different deposit sum or the introduction of a deposit only for distributors who are entering the market, were capable of meeting these objectives, and they cannot therefore be considered as genuine alternatives to the measure under review.

Furthermore, the line of reasoning taken by the majority of the CC for the so-called "choking effect" of the contested deposit can also be dismissed. On the one hand, this question falls under the balancing criterion and therefore should not have been examined within the framework of the necessity criterion at all. At the same time, the factual circumstances of the case supplemented by the dissenting judges suggests that the choking effect could not have been fulfilled. The reference to case law regarding fines with liquidation effects is equally inappropriate, as the deposit in question is not punitive in nature and would be returned to the distributor after the end or termination of their registration with any unpaid tax, fees and other financial obligations towards the state having been deducted.[54]

[53] Dissenting opinion of Judges Suchánek and Musil, §5.

[54] See the dissenting opinion of Judge Janů and also §8 of the dissenting opinion of Judges Suchánek and Musil.

When we examine the issue of the amount of the deposit in question, I believe that even in this case, it cannot be said to have been determined inconsiderately. In the proceedings, it became clear that the Government and the Parliament had carefully considered the amount of the deposit, taking into account the potential levels of tax evasion, the strategic nature of the business activity in question and also the significant financial demands of its operation. In view of these circumstances, the amount of the deposit in question can be considered as acceptable, albeit somewhat negligible. The Government and Parliament then also considered alternative measures, including those mentioned in the opinion of the majority, but ultimately concluded that these were not equally capable of achieving the legitimate aim of preventing tax evasion. At the same time, as I stated above, it is apparent that the contested deposit was aimed at achieving several legitimate goals which none of the proposed alternative means were capable of fulfilling. In this regard, it can be concluded that while the deposit in question represented a general or flat-rate measure regulating a strategic sector of the economy, it was justified by the legitimacy of its objectives, and neither the petitioner nor the CC were able to identify any feasible and less restrictive alternative. On these grounds, it is clear that the measure should have passed the necessity test.

Additionally, this case also reveals one of the inherent drawbacks of the traditional definition of necessity. In this case, the CC was following the literal wording of the traditional definition of necessity and only queried whether any less-restrictive alternatives were available rather than inquiring into the degree to which they were capable of fulfilling the legitimate goals. In doing so, the CC narrowed its perspective and thereby permitted itself to strike down the relevant piece of legislation. This ruling clearly confirms the afore-mentioned concerns about the potential excessive strictness of the traditional definition of necessity which can justify the annulment of the reviewed act at virtually any time, given the fact that we can always think of alternative and slightly less restrictive measures. In the case under study, the result is all the more surprising, because the provisions in question were meticulously justified by the Government, while the proposal of a group of senators to annul the challenged provisions contained practically no relevant argumentation which would justify striking down the deposit.

Another negative effect of the traditional definition of necessity lies in the fact that if the CC becomes aware of the strictness of its literal wording, then this necessarily leads it to the situation in which almost no measure of public authority can survive such a review. It eliminates the possibility of any leeway in consideration by the decision-making public authorities and, in principle, enables the adoption of a single constitutionally compliant solution. This finding then necessarily led the CC to introduce *ad hoc* modifications of its established constitutional review standards. In cases where the application of the traditional definition of the necessity test seemed too strict, the CC omitted this criterion from the review because the measure under review would not pass it. In this regard, reference may be made to the Judgement no. Pl. ÚS 8/09, in which the CC reviewed the legal regulation of so-called compensation licenses for the operation of digital television broadcasting. The CC justified the omission of the necessity test as follows:

> The Constitutional Court [did not find] the legislator's procedure to be arbitrary and considers the goal pursued by the challenged provisions leading to the averting of possible negative socio-economic impacts to be legitimate. The means that have been chosen to achieve this goal appear reasonable and proportionate from that point of view. The examined procedure of the legislator may therefore be considered constitutionally compatible. However, the Constitutional Court admits that the matter is very borderline and in other circumstances, a similar solution could cross the line of constitutionality. Precisely with regard to the specific circumstances of the case explained above, the Constitutional Court also did not weigh the legislation in question by the means of a detailed and completely strict three-step test of proportionality, which assumes, among other things, that if the purpose pursued by the legislator may be achieved using the alternative normative means, then the constitutionally conforming one is the one that restricts the protected value to the smallest extent. In this matter, the Constitutional Court does not intend to instruct the legislator, acting, among other things, under time pressure, about possible, theoretically perhaps more suitable options for solving the situation.[55]

The traditional definition of the necessity may give the impression that it is too strict and could therefore tempt judges to purposeful and *ad-hoc* modifications of the methodology. Simply put, the criterion of necessity will be the first "to be shot down" if the judge wants to "withhold" the reviewed act of public authority. The CC must avoid taking such as a step, as it cannot purposefully modify the methodology that it has introduced itself just because it prevents the Court from reaching an intuitive conclusion formulated in advance in a single specific case. The entire purpose of the proportionality analysis is precisely the opposite; it should lead the Judges to explain their reasoning about the constitutionality of the act under review in a fully transparent manner or, alternatively, to correct their intuitively formulated conclusions if they discover that it does not correspond to the principal legal grounds.

Although this approach should be rejected, it also reveals another aspect of the issue. The approach of the CC outlined above seems to be motivated by a structural deficiency of traditional formulation of the necessity test (its strict abstract formulation). In principle, this definition allows for the one constitutionally conforming solution to a specific question, namely the least-restrictive one. The definition of necessity which we have referred to as traditional thus places unreasonable and unachievable demands on public authorities while simultaneously pushing the CC into a role for which the institution is neither suited nor mandated. With the approach described above, the CC essentially "extinguished" only the *consequences*, in the form of a potential violation of the principle of separation of powers, but not the *cause*, the inappropriately formulated necessity test. The Constitutional Court adopted a restrained position towards the legislator and, in principle, either fully or partially withdrew from reviewing the contested measure, rather than removing the cause of this unsettled state-of-affairs by effectively "rationalizing" the formulation of the necessity test.

[55] Judgement no. Pl. ÚS 8/09, §59. The CC also resorted to a similar procedure in Judgement nos. Pl. ÚS 25/07, §73 and Pl. ÚS 8/16, §66.

These considerations were subsequently reflected upon by the CC and integrated into its methodology in two ways. Primarily the CC introduced two new standards of constitutional review which differed from the existing proportionality test: a test for the exclusion of extreme disproportionality, which is used in reviews of taxes, fees and property sanctions, and the rationality test, which serves as a review of limitations of social rights. These new methodologies were intended to enable the CC to take a more restrained position towards other branches of government, and the CC explicitly excluded a necessity text from both.[56] The second way in which the above considerations are reflected is the gradual modification of the content of the necessity test within the proportionality analysis, which has taken place in recent jurisprudence and to which we will now turn our attention.

5. "Corrected" Definitions of the Necessity Test

As I mentioned above, in recent jurisprudence, the CC gradually replaced the traditional definition of the necessity with a different formulation. Newly, within the framework of this test, the CC investigates, "*whether there was no alternative to the contested intervention that would fulfil the objective to a similar extent and be less restrictive with regard to the constitutionally guaranteed right in question*".[57] The more specific aim was to identify the possibility of a "*more considerate solution, which at the same time would be just as effective in achieving the aim as the original one*".[58]

Although both of these formulations of the necessity test point in the same direction, there are in fact some differences between them, at the very least at the semantic level. The first formulation requires that the alternative fulfil the objective to the same or a similar extent, but the second formulation requires that the objective be achieved equally effectively. Therefore, while both formulations are based on the degree to which the alternative measure achieves the objective, we can see that the second formulation goes somewhat further than the first. At the same time, both variants appear side by side in the jurisprudence of the CC, and this means that it is possible to assess whether there is any qualitative difference between the two interpretations. In the following passage, we will examine what could be considered "equally effective" in fulfilling a particular goal.

5.1 Requirement of Equal Efficiency in the Fulfilment of the Objective

The formulation of the necessity tests which requires that the alternative measure be equally effective in fulfilling the pursued objective is based on the formulation of this

[56] For details on the rationality test, see, for example, Judgement no. Pl. ÚS 54/10; for more on the test for the exclusion of extreme disproportionality, see, for example, Judgement no. Pl. ÚS 29/08.

[57] See Judgement no. II. ÚS 443/16, §§29 and 41. For an identical definition, see also Judgement nos. I. ÚS 668/15, §33; II. ÚS 1837/16, §30; Pl. ÚS 33/15, §72; Pl. ÚS 2/17, §42; Pl. ÚS 18/17, §57; Pl. ÚS 27/16, §97.

[58] See Judgement no. Pl. ÚS 3/16, §§75, 85 and 88. Likewise, see Judgement no. Pl. ÚS 32/15, §§61-63; Pl. ÚS 27/16, §§94 and 97; Pl. ÚS 18/17, §§55–57; Pl. ÚS 6/17, §§131, 142-153.

criterion in the practice of the Federal Constitutional Court.[59] Aharon Barak analysed this topic in great detail and concluded that the necessity test consists of two elements. The first is to identify the existence of alternative means that are capable of fulfilling the purpose of the reviewed law equally or better than the means chosen by this law, while the second element is to determine that these hypothetical alternative means restrict fundamental rights less than the law under review.[60] Barak then elaborates further on these two aspects:

> The first element of the necessity test examines the question of whether alternative means can fulfil the law's purpose at the same level of intensity and efficiency as the means determined by the limiting law. If such an alternative does not exist, the law is necessary, and the necessity test is met. An alternative exists only if the (hypothetical) means would advance the law's purpose at the same level of intensity as those determined in the limiting law. It is therefore required that the alternative means fulfil the law's purpose quantitatively, qualitatively, and probability-wise – equally to the means determined by the limiting law itself. The alternative [then] exists only when the [hypothetical] measures fulfil the purpose pursued by the law with the same degree of intensity as that chosen by the law under review.[61]

In the case that all of these factors are fulfilled by the alternative measure to the same (or better) extant than the reviewed measure, Barak argues, the only relevant change to be considered within the scope of the necessity test is whether the alternative measure limits the fundamental right to a lesser extent.[62]

However, there is one major risk associated with this formulation. If we perceive the requirement of equal effectiveness too narrowly, the criterion of necessity will not make any reasonable sense in the context of the review. If all the above-mentioned factors are met by the considered alternative to the same (or to an even greater) extent as the reviewed measure, then it is difficult to conceive of such an alternative existing at all, let alone one which is less restrictive with respect to the limited right. If the formulation was applied in this way, it would never be possible to question the constitutionality of a challenged act; indeed, it would always be possible to argue that a proposed alternative is deficient in one of the above-mentioned aspects. Within the framework of the review, a necessity test would therefore be pointless.[63]

However, we should not be so hasty to dismiss Barak's concept, and it is possible to modify the strict formulation of the necessity test or the requirement of equal effectiveness if we accept that the goal or purpose pursued by the measure under review can be reformulated with a different degree of abstraction. In this respect, above all, the degree of abstraction in the formulation of the legitimate goal will be of fundamental importance

[59] See, for example, EMILIOU, N.: *The Principle of Proportionality in European Law*, pp. 29–31. BUMKE, Ch., VOßKUHLE, A.: *German Constitutional Law*, pp. 62-64.

[60] BARAK, A.: *Proportionality,* p. 323.

[61] Ibid, pp. 323-324.

[62] Ibid, p. 325.

[63] BILCHITZ, D.: *Necessity and Proportionality*, p. 50 and 53.

for the purposes of assessing the question of the effectiveness of alternative means.[64] As Barak notes, "*the higher the purpose's level of abstraction, the more likely it is to find alternative means which limit the right to a lesser extent and which can fulfil the goal at the same level of efficiency. In contrast, the lower the level of abstraction, the harder it would be to render the means chosen by the legislator unnecessary*".[65] This conclusion seems to be eminently reasonable, but it would be prudent to investigate whether this connection can be realistically reflected in the application of the necessity test in specific cases.

Therefore, let us now take a look at a well-known example of the application of the necessity from the practice of the Federal Constitutional Court through Barak's lens, more specifically the ruling concerning the ban on the sale of puffed rice confectionery products.[66] This confectionery was not considered to be a genuine chocolate product, but the manufacturers argued that it was interchangeable with chocolate products because it consisted mainly of puffed rice with cocoa powder and challenged the regulation claiming that it violated their right to conduct business. Although the Federal Constitutional Court considered that the regulation in question pursued the legitimate goal of protecting the consumer from unfair business practices, particularly from the risk of mistaking a substitute product for real chocolate, it concluded that the regulation did not meet the necessity test as the ban was the most invasive means possible of achieving this objective given that less invasive alternative measures, such as the requirement for proper labelling, were available that fulfilled this aim with the same effectiveness.

David Bilchitz argues that if we were to accept Barak's strict interpretation of the requirement of the equal effectiveness of alternative measures, then the decision of the Federal Constitutional Court would have to be considered as incorrect, as it could not reach a conclusion about the lack of necessity.[67] Indeed, a ban on sales would certainly be a more effective means of achieving consumer protection against unfair business practices and preventing the confusion of one product for another than the establishment of a requirement for the appropriate labelling of the product; some consumers do not read labels, while others may not be able to read them at all. In this respect, this is clearly not the same degree of fulfilment of the pursued legitimate goal and thus the Court should have "lowered the bar" of the degree of its fulfilment if it wished to state that the challenged regulation did not pass the necessity test.[68]

The same conclusion was also reached by Robert Alexy in his analysis of the case; Alexy noted that "[t]*he principle of consumer protection (P2) is broadly equally well satisfied by a duty to label (M1) as by a trade prohibition (M2). So for P2 it is irrelevant whether M1 or M2 is adopted. From the point of view of P2, it is therefore undecided*

[64] BARAK, A.: *Proportionality,* pp. 331-333. For a commentary on Barak's approach, see BILCHITZ, D.: *Necessity and Proportionality*, pp. 50 and 54-55. See also BUMKE, Ch., VOßKUHLE, A.: *German Constitutional Law*, p. 62.

[65] BARAK, A.: *Proportionality,* p. 332.

[66] See Judgement of the Federal Constitutional Court BVerfGE 53, 135.

[67] BILCHITZ, D.: *Necessity and Proportionality*, p. 50.

[68] Ibid.

whether M1 or M2 will be accepted."[69] From the formulation used by Alexy ("*broadly equally well*"), it is evident that he realizes that both means are not truly equally effective, and that a complete ban implements the intended purpose to a greater extent than the obligation to label the product properly. His argumentation thus implicitly admits that the criterion of necessity should – if it is to have meaningful content – contain a certain degree of flexibility to ensure the comparison of several alternative measures.[70]

In this sense, therefore, we may choose to agree with Bilchitz in his argument that the requirement of equal effectiveness might ultimately render the necessity test completely unnecessary. At the same time, it opens up some leeway for arbitrariness on the part of a court, as a court could vary the strictness of this requirement as it sees fit. If the court wants the challenged measure to pass the necessity, it will choose a strict approach; alternatively, if it wants to strike down the measure, it will choose a more flexible approach.[71] Therefore, it would be better to clearly define the content of this test, so that it is clear what follows from it and what requirements shall be met by acts of public authority.

These conclusions are also confirmed through a closer analysis of the cases analysed by Barak, one of which is the consumer protection case discussed above. Barak does not contradict the conclusions of the Federal Constitutional Court in this case, but actually cites the ruling as a positive example.[72] He implicitly admits that the demand for equal efficiency requires some degree of flexibility.

Barak very often refers to the famous *Beit Sourik* case[73] in which the Supreme Court of Israel ruled on the constitutionality of the construction of a fence between Israel and the Palestinian Territories which was intended to ensure the safety of the people of Israel by preventing the infiltration of terrorists from the Palestinian Territories.[74] However, as the Court determined, the route along which the fence led had affected the lives of more than 13,000 farmers living in the Palestinian Territories by depriving them of access to their land.[75] In their filing, the petitioners submitted alternative routes for the wall to the Court, all of which would allow the inhabitants of the Palestinian Territories to access their lands while still fulfilling the protective objective to the same extent. However, the Court accepted the opinion of the military commander who argued that the alternative routes would have been a less effective means of fulfilling the objective, accepting that the conditions of the necessity test had been met.[76]

Eventually, the Court found that the rights of the farmers had been violated through an analysis based on the balancing test, although the conclusion was supported by

[69] ALEXY, A.: *A Theory of Constitutional Rights*, p. 399.

[70] BILCHITZ, D.: *Necessity and Proportionality*, p. 50.

[71] Ibid, pp. 50-51.

[72] BARAK, A.: *Proportionality,* p. 319.

[73] Decision of the Supreme Court of Israel in HJC 2056/04, *Beit Sourik Village Council v Government of Israel*.

[74] Ibid, §3.

[75] Ibid, §60.

[76] Ibid, §58.

arguments that fall more under scope of necessity. While the Court stated that in comparison to the proposed route, the intervention "*does not stand in any reasonable proportion to the injury to the local inhabitants caused by this route*",[77] it further stated that the difference between the presented alternative route variants and the original variant consisted only in a "*minute*" reduction of the fulfilment of the pursued legitimate goal of ensuring the safety of the citizens of Israel. Alternative routes, however, were significantly less restrictive with respect to the basic rights of the persons concerned.[78]

The Court's decision[79] and Barak's analysis of this case[80] is then clearly based on the strict requirement of equal efficiency. Indeed, they both reached the same conclusion about the unconstitutionality of the measure in question (the route along which the fence led and which deprived the Palestinians of access to their land), but, as was already noted, this decision was formed through the balancing test rather than the necessity test.[81] Therefore, this situation – as ridiculous as this may sound - is essentially the same as the confectionery case discussed above, albeit that one case is dealt with under necessity and the other under balancing. From the perspective of the Court's strategy, this approach is all the more surprising, since the balancing criterion is often criticised for being subjective and non-objective. On this basis, then, if the Court - especially in such a delicate matter as that relating to public safety - wanted to show a certain degree of self-restraint, it can be assumed that the case would be decided within the necessity test, an approach which is perceived as more objective given its reliance on empirical criteria.[82] Here, however, Barak's personal preference and the tendency to decide all relevant substantive questions in the "heart" of the proportionality method, at balancing stage, were more apparent.[83]

Barak's interpretation of the *Beit Sourik* case is also striking through his failure to connect it in any way with the doctrine discussed above, according to which the number of alternative measures that come into consideration should increase with the increasing degree of abstraction in the formulation of a legitimate goal. As the above case summary suggests, the doctrine did not "blunt" the strict formulation of the necessity criterion in the case presented by Barak, even though the legitimate aim was formulated with the same degree of abstraction or perhaps even in a more abstract manner (ensuring the safety of the people of Israel from terrorist infiltration) than in the confectionery case (protecting the consumer from confusing products made from chocolate substitutes), in which it admitted (albeit implicitly) the comparability of the alternatives with the

[77] Ibid, §61.

[78] Ibid.

[79] Ibid, §58.

[80] BARAK, A.: *Proportionality,* pp. 353–354. It is not without relevance that the judge-rapporteur in this case was Barak himself.

[81] See the decision of the Supreme Court of Israel in HJC 2056/04, *Beit Sourik Village Council v Government of Israel*, §61. Cf. BILCHITZ, D.: *Necessity and Proportionality*, pp. 56-57.

[82] However, both of these views on necessity and balancing are basically stereotypical. This stereotype in relation to the necessity criterion, for example, undermines a greater understanding of its real content, i.e., that it is not a purely empirical test but also requires substantive and qualitative argumentation.

[83] BARAK, A.: *Proportionality,* pp. 338-339.

measure under review. Therefore, in my opinion, this only further confirms the possibility of arbitrary applications of the strictly set standard of equal effectiveness.

We have addressed these cases in such detail because the requirement of the equal effectiveness of alternative measures has also gradually become established in the practice of the CC, and it would be interesting to examine how the CC applies this. It should be pointed out here that the number of decisions in which this definition of the necessity has been applied to date is very small, and it is therefore difficult to make any generalizations. However, one example of this approach is found in Judgement no. Pl. ÚS 3/16, in which the CC reviewed the constitutionality of a provision of the Savings and Credit Cooperatives Act. This provision introduced the so-called tenfold rule, one consequence of which was that one eleventh of the total volume of funds deposited in credit unions was not insured within the framework of the deposit insurance system. This provision was intended to stabilize the credit union sector by strengthening the financial interests of its members or ensuring a more consistent fulfilment of the membership principle in such a way that credit union members would be motivated to take a real interest in their healthy management.[84]

At the same time, the CC considered that the regulation in question was in the public interest, as the credit union sector had long exhibited signs of systemic instability and had repeatedly required "*massive*" payments from the Deposit Insurance Fund, thereby placing a disproportionate burden on the supervisory capacities of the Czech National Bank ("CNB").[85] According to the CC, the measure aimed at strengthening the membership principle was both capable of achieving the pursued legitimate goal and also justified the continued existence of "*credit unions as specific – and therefore regulated by special legislation – credit (non-bank) institutions*".[86] It was intended to emphasize the differences in the functioning of credit unions in comparison to banks and at the same time to prevent the repetition of damages caused by the inconsistent management of credit unions which the state would ultimately be obliged to cover.[87]

As part of the necessity test, the CC rejected the complainant's claim that the objective pursued could also be achieved "*also by other – less invasive – means*", more specifically by strengthening the supervision of the CNB over the credit union segment.[88] Somewhat unsystematically, the CC considered this alternative as falling within the criterion of legitimacy. Drawing from the annual report of the CNB, the CC noted that the supervision of the credit union sector required the CNB to devote "*a significant part of* [its] *supervisory capacities to it*" despite its relatively small market share (credit unions make up less than 1 % of the financial sector).[89] As a result, the CC did not see the extension of the CNB's supervision of the sector to be a realistic alternative to the measure under review. The Court stated that without a significant increase in the personnel of the CNB

[84] Judgement no. Pl. ÚS 3/16, §79.
[85] Ibid, §80.
[86] Ibid, §84.
[87] Ibid.
[88] Ibid, §87.
[89] Ibid, §78.

and a correspondingly large increase in its budget, there would be no appreciable impact on the stabilization of the credit union sector, and therefore this alternative could not equally effectively fulfil the goal pursued by the legislator.[90]

Given that the petitioner omitted to mention any other alternative means, the CC only referred to the report evaluating the effects of the regulation, from which it follows that prior to adopting the contested amendment, the legislator had considered a number of parametric variants of strengthening the cooperative principle and had evaluated their relative advantages and disadvantages.[91]

> In the opinion of the Constitutional Court, the contested rule does not "step out of line" in any way, in the sense that the individual variants differ in both positive and negative consequences of application. At the same time, it is clear that the legislator also had the option of introducing the "one member equals one vote" rule, which should be perceived as a solution with a potentially more significant impact in the light of the property rights of "larger members" of credit unions. According to the Constitutional Court, a more economical solution, which would at the same time achieve the desired goal with the same efficiency - by strengthening the principle of membership - was not available.[92]

I have chosen this example because it is, in principle, symptomatic of cases in which the necessity test has thus far been defined as requiring that an alternative means must also be equally effective. The cases that were decided in the practice of the CC using this standard are all of a similar nature, consisting, in principle, of situations in which any alternative measures failed even to approach the same level of fulfilment of the objective being pursued. The afore-mentioned risk that this definition of the necessity test could make it redundant or that it could lead to its arbitrary application has therefore not yet been proven in the practice of the CC. However, as I pointed out above, the number of cases in which this definition of the necessity criterion has been applied is still so small that it defies any generalization, and it will be necessary to monitor future jurisprudence in order to either confirm or refute the validity of these objections. From the above discussion, however, we can conclude that this risk is already present, at least latently, in this definition of the necessity test.

5.2 Requirement that the Alternative Measure Be Capable of Fulfilling the Objective Pursued at Least to a Similar Extent

As was mentioned above, a similar but nonetheless distinct definition of the criterion of necessity has also appeared in recent jurisprudence of the CC. According to this definition, it is necessary to examine, "*whether there was no alternative to the contested infringement that would fulfil the objective to a similar extent and be less restrictive with*

[90] Judgement no. Pl. ÚS 3/16, §81.
[91] Ibid, §88.
[92] Ibid.

regard to the constitutionally guaranteed right in question".[93] This definition appears to refute the objections outlined above because it does not take into account the strict requirement of equal effectiveness in fulfilling a pursued legitimate goal. In the next section, we will examine how this particular definition of the necessity criterion is applied in the practice of the CC.

An excellent example in this context is Judgement no. II. ÚS 443/16 in which the CC ruled on the constitutional complaint of a graduate of the master's study program at the Jagiellonian University in Poland who received certification from the Ministry of Education stating that his education was equivalent to that provided in the Czech Republic. Despite this authorisation, however, the Czech Bar Association (CBA) refused to enrol him in the list of articling attorneys as it argued that his education did not correspond in content and scope to the general education in law that is provided at universities in the Czech Republic. The complainant had lost his case before the general courts, and he therefore brought the case before the CC.

As part of the review of the case, the CC concluded that the contested decisions had met the conditions of both legitimacy (the legitimate aim of the intervention in question was to ensure "*that legal practice be carried out by highly qualified persons who will ensure professional provision of legal services*"[94]) and also suitability. The central argument for the CC was that

> the attorney who employs an articling attorney […] is responsible as a supervisor for the articling attorney's legal internship leading to the acquisition of the knowledge and skills needed to practice law. The acquisition of this knowledge and skills is demonstrated by the articling attorney when they sit the bar exam […]. According to […] the Bar Act the attorney is liable [...] also for the damage caused to clients by an articling attorney they supervise. It is therefore primarily a matter of the attorney whom they employ as an articling attorney if this employee meets the prerequisites necessary for carrying out legal practice. According to the Constitutional Court, even from this point of view, it was not necessary for the CBA to intervene at the moment of registering the complainant in the list of articling attorneys in an effort to protect the qualification and professionalism of the legal services provided. The CBA does not lose control over the quality of the legal services provided, which it implements during the bar exams, as well as supervision over the further education of articling attorneys and lawyers, even after the possible registration of a graduate of a foreign faculty of law in the list of articling attorneys.[95]

The argument here was that the contested intervention had failed to meet the necessity test as there was an alternative measure enabling the achievement of the pursued legitimate goal "*to a similar extent*" which was also less restrictive from the point of view of the limited fundamental right.[96] In consequence, the Czech Bar Association

[93] See the case law cited above under footnote no. 57.
[94] Judgement no. II. ÚS 443/16, §43.
[95] Judgement no. II. ÚS 443/16, §48.
[96] Ibid, §49.

should have registered the applicant on the list of articling attorneys, permitted him to practice law under the responsibility of his supervisor in order to acquire the relevant knowledge and experience which could be demonstrated by sitting the bar exam.[97]

The application of the necessity test in this case suggests that the CC did not consider the strict requirement of equal effectiveness here; it was instead sufficient to assess whether the alternative means (practicing law under the responsibility of a supervisor and subsequently passing the bar exam) is capable of fulfilling the objective pursued to a similar extent as the measure under review (the refusal to enrol the applicant on the list of articling attorneys). However, it is quite obvious that the two measures are not equally effective; a flat-rate denial of registration in the list of articling attorneys would certainly be more consistent in ensuring that advocacy is carried out only by persons with sufficient qualifications to ensure the professional performance of advocacy, rather than allowing an articling attorney to practice law under supervision prior to taking the bar exam. However, such a flat-rate measure would also exclude those with sufficient expertise from gaining access to the legal profession.

5.3 Synthesis

Of the two modifications of the necessity test described above, I consider the latter method to be the more suitable approach because it explicitly requires that the alternative measure is capable of fulfilling the objective pursued at least to a similar extent as the reviewed measure. This definition thereby effectively avoids the previously discussed objection to the requirement of equal effectiveness, according to which an overly strict adherence to this requirement may render the necessity criterion redundant within the framework of the review, since it will not be capable of selecting anything at all and all questions will be decided under the balancing stage. At the same time, the strict requirement of equal effectiveness is susceptible to arbitrary application, and although I have stated above that this consequence has not yet manifested itself in the practice of the CC, I believe that it is latent in the demand for equal effectiveness of alternative measures and that it is therefore better to eliminate the possibility in advance.

By explicitly defining the requirement that alternative measures should fulfil the pursued legitimate goal to a similar extent at least to the reviewed measure, the CC successfully avoided this trap. This modification of the necessity test allows for a certain degree of flexibility and enables a comparison of the reviewed means with realistic available alternatives, in turn allowing the CC to make a considered assessment as to which option is the least restrictive to the limited fundamental right. This adheres to the spirit of the concept because, as is apparent from the discussion above, the strict requirement of equal efficiency is only a chimera; alternative measures will always differ (at least in some respects) and will never be able to fulfil the objective to the same extent. As we have seen, the judgement of the CC is necessarily a value-based and qualitative conclusion, standing as more of a rough estimate than a precise

[97] Ibid.

quantitative weighing. This enables the criterion of necessity to fulfil its actual purpose, that of leading the CC to consider in detail whether there are real alternatives to the measure under review and to compare their impacts in the sphere protected by the limited fundamental right.[98]

As a result, the criterion of necessity should not dictate the only correct solution to public authorities, nor should it lead the CC to practice undue self-restraint in relation to the considerations of the decision-making public authority; it should instead be used to identify irrational measures in order to prevent unnecessary concessions of basic rights.[99] Public authorities – especially legislative bodies – should be given a wide degree of discretion in terms of the objectives that they wish to pursue and the means by which they choose to achieve them. Within the scope of the necessity test, this means that it is primarily the task of the decision-making body to choose the degree to which it is necessary to fulfil the pursued legitimate goal and the measures appropriate suitable for achieving this. It is likely that this choice will be the subject of a political compromise.[100] However, it should be stressed that this discretion is not limitless. The task of the Court in examining the necessity criterion is therefore to assess whether there are alternative measures that are realistically able to fulfil the objective to at least a similar extent to that of the measure under review. And if such alternatives are identified, the measure under review should be the least restrictive in terms of limited rights in order to be considered constitutionally compliant.

Conclusion

In principle, we can discern three main ways of defining the necessity test in the case law of the CC. The first of these is the so-called traditional definition, which allows the use of only the measure which is least restrictive in relation to the affected basic rights and freedoms when several possible means are available. This definition of the criterion is associated with a potential risk of judicial activism, as any measures that are less restrictive with respect to the limited fundamental right would always be plausibly considered. This drawback led the CC to formulate and add new deferential standards of constitutional review into its repertoire and also to gradually modify the necessity test itself.

From 2015 onwards, the traditional definition of the necessity test gradually began to be replaced by two new approaches. Firstly, the CC attempted to identify alternatives to the challenged measure that would fulfil the objective to a similar extent and be less restrictive with regard to the constitutionally guaranteed right in question. Secondly, a less restrictive solution was sought that would also be able to achieve the objective with the same level of efficiency.

[98] BILCHITZ, D.: *Necessity and Proportionality*, p. 46.

[99] ALEXY, A.: *A Theory of Constitutional Rights*, p. 399. KUMM, M.: Alexy's Theory of Constitutional Rights and the Problem of Judicial Review. In: KLATT, M. (ed.): *Institutionalized Reason: The Jurisprudence of Robert Alexy*. New York: Oxford University Press, 2012, p. 209.

[100] RIVERS, J.: Proportionality and Variable Intensity of Review, pp. 199-200.

Although I consider both of these variants to be a step in the right direction, their shortcomings cannot be overlooked. The main issue here is the requirement of equal effectiveness of any alternative means in achieving the objective. Strictly speaking, this could render the necessity test redundant, as any alternative means of achieving the desired objective will always be somewhat different in principle. At the same time, it also opens the door the arbitrary application of this approach. The necessity test requires a certain degree of flexibility in order to be able to compare the available alternative means of achieving the same goal. Thus, in some cases, as was confirmed by the comparative analysis of this standard, judges could choose to make the requirement of equal effectiveness less strict if they wanted to strike down the contested measure. If, on the contrary, they want to maintain one measure, they could insist on the strict requirement of the same efficiency, thereby making the necessity a paper tiger.

However, the practice of the CC seems to have found a practical solution to this issue by linking the necessity test with the requirement that alternative measures should be able to fulfil the objective to at least a similar extent as the measure under review. In my opinion, this definition of the necessity test refutes both of the objections to the other formulations of this criterion (either too much activism in the case of the traditional definition of the necessity test, or too much restraint, or the possibility of the arbitrary application in the case of the requirement of equal effectiveness of alternative measures). This modified version of necessity allows for a certain degree of flexibility and thus also permits a comparison of the reviewed means with any available and realistic alternatives and ensures that the CC can perform an assessment as to which option is the least restrictive to the limited fundamental right. This also enables the necessity test to fulfil its purpose, that of leading the CC to carry out a detailed examination of any realistic alternatives to the reviewed measure which are capable of fulfilling the objective and also to compare their impacts in the sphere protected by the limited fundamental right.

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